WRR

NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY

Europe: Coalescence in Diversity

Ernst Hirsch Ballin[1]

No panacea is available for the situation in which seven plagues have descended on the European Union: the banking crisis, the virtual collapse of the Greek government, the Ukraine crisis, the civil war in Syria, the refugee crisis, the effects of climate change, and the threat of a Brexit. The biblical story of the seven plagues that struck Egypt's Pharaoh was not a precursor to the threat assessments produced by the Dutch national counter-terrorism organisation (NCTV) but is an incentive to reflection providing the opportunity for fresh approaches. In order to make use of that opportunity, however, the Dutch Presidency of the Council of the European Union[2] need not follow in the footsteps of Moses, even though there is in fact much to be learned from Moses as a political leader.[3] A knowledge and understanding of past history are nevertheless useful, as is an analysis that succeeds in breaking away from stereotypical framing. The policy document on the Presidency that the government has presented to both houses of the Dutch parliament aims above all to keep the EU "on course"[4] and contribute to the growth of employment through sustainable growth, progress on the current "dossiers", and bridge building, but it does not explore any new routes.

But exploring new routes is in fact necessary. The plagues that have struck the European Union are causing confusion and disorientation. The pressure from what would seem to be the ultimate plague – a possible Brexit followed by further disintegration – can assist a truly forward-looking Dutch Presidency to help the EU towards development that is less determined by fears. "Brussels" is not a foreign power but the bilingual French-Dutch city where the European institutions are based and where many Dutch officials work on shared European legislation and policy. There are many differences of opinion about this, but the Netherlands is clearly located in Europe, at a crossroads between the countries that for centuries have competed for hegemony, and between which it has sought an equilibrium.[5] At key moments in history, the Netherlands has used that position to guide development of the international legal order.[6]

Productive pragmatism that became counterproductive

In the eyes of many politicians and commentators, this all points in the same direction: the EU should give up many of its functions, powers and pretensions, and the Member States should resume their former

Author

[1] . E.M.H. Hirsch Ballin is professor of Dutch and European constitutional law at Tilburg University and president of the T.M.C. Asser Institute for International and European Law. He is also a member of the Netherlands Scientific Council for Government Policy (WRR) and the Advisory Council on International Affairs. The author wishes to thank his colleague Dr Helen Staples-Oostrom (TiU) for suggestions regarding the free movement of persons. Translated by Balance, Maastricht.

Notes

[2] In the Council Presidency edition of "The State of the European Union", these plagues are referred to as – what else? – "challenges" (*Parliamentary Documents II* [*Kamerstukken II*] 2015/16, 34 166, 22).

[3] A. Wildavsky, *Moses as Political Leader*, Jerusalem/New York: Shalem Press 2005.

[4] *Parliamentary Documents II* 2015/16, 34166, 22, pp. 5 and 10.

[5] B. Simms, *Europe: The Struggle for Supremacy, 1453 to the Present*, London/New York: Allen Lane 2013.

[6] A. Eyffinger, *The 1899 Hague Peace Conference – "The Parliament of Man, the Federation of the World"*, Leiden: Brill 1999.

freedom of action. In their view, the decreasing public support for the EU is the writing on the wall. But are we really supposed to believe that 28 national governments acting on their own are better able to respond to international monetary issues, the expansion of Russia's sphere of influence in neighbouring countries, the civil wars in the Middle East, migration, and CO_2 emissions? Gloom about the European Union can be found everywhere, but contrary to what Europhiles fear and Europhobes hope, there are so far no plans to actually abolish it. The British PM David Cameron also has no desire to burden his country with the consequences of a Brexit. What he wants is greater flexibility.[7] In my view, a sensible response to his proposals can in fact even strengthen the EU rather than undermine it. The rejection of the European project apparent from all kinds of ballots and polls throughout the entire EU demands a convincing redefinition of its course and a willingness to strike out in new directions.

That rejection, incidentally, is not as recent as it may seem – which is all the more reason to explore new avenues. There ceased to be any broad enthusiasm a long time ago. The most recent occasion when concern was expressed in the Dutch House of Representatives regarding delay in the European project was back in in 1991, when – on what our country refers to as "black" Monday – Dutch proposals for a European Political Union with powers in the fields of external relations, justice, and policing were rejected. Those proposals had been tabled despite internal warnings of the rejection that could be expected, but they were in line with the prevailing attitudes among Dutch politicians at the time. The then parliamentary chairman of the Democrats 66 party, Hans van Mierlo, commented: "We must first of all clearly recognise that the draft as tabled here reflected, by and large, the feelings of the majority of this House about the Europe of the future, and that it is not inconceivable that substantial deviations would have been assessed critically here, even if the Presidency would have benefited."[8] That was during the six months when the Netherlands, as now, held the Presidency of the Council of the EU. There was then a reversion to an intermediate form, in which a predominantly intergovernmental European Union was set up as an annexe to the existing European Communities.

Since then, Dutch policy on Europe has been characterised by a generally productive pragmatism, which is usually practised by the other Member States too. That pragmatism has led – often after concessions in the form of exception clauses – to further steps in the process of European integration. This allowed the European integration process to continue, even after rejection of the Treaty establishing a Constitution for Europe in the French and Dutch referendums of 2005. Institutional consolidation was effectuated by means of an "amending treaty", the comprehensive and in many respects innovative Treaty of Lisbon.

This pattern of pragmatic compromises can be interpreted and experienced in various different ways. One can see it as confirmation of the inherent dynamism of the integration process, but also as a stealthy erosion of national powers masked by exception clauses. Both views seem to involve steps on the road to the creation of a European state with federal features: for the Europhiles a dream, and for the Europhobes a nightmare.

However, the treaties that were revised and recast in Amsterdam, Nice, and Lisbon (the Treaty on European Union and the Treaty on the Functioning of the European Union) can also be viewed differently, namely as typical products of carefully thought-out pragmatism, albeit with built-in ambiguity. The unity and equality of the participating Member States have been constantly confirmed in legal doctrine and in the rituals of European politics, even if they can no longer be fully achieved in practice. A common currency has been introduced, but only for those Member States that wished to have it and that met the budgetary criteria; an "area of freedom, security and justice" has been formed, but with an opt-out or opt-in for certain Member

[7] Letter of the Prime Minister to the President of the European Council, 10 November 2015, www.gov.uk/government/publications/eu-reform-pms-letter-to-presidentof-the-european-council-donald-tusk.
[8] *Parliamentary Proceedings II* [*Handelingen II*], 8 October 1991, p. 7-333.

States; border controls have been shifted to the outside borders, but without provisions for maritime border areas, which are impossible to control effectively; a common foreign and security policy has been introduced, but Member States that wished to position themselves as "neutral" outside NATO could remain so; all Central and Eastern European states that had adapted their legislation were admitted as Member States, although with little thought being given to whether they were stable and well governed constitutional states; and the Charter of Fundamental Rights of the European Union – already proclaimed in 2000 – became binding in 2009 as a component of the treaties, although two Member States were allowed to stipulate that a court cannot rule that the legislation or administrative actions of those Member States is or are contrary to the Charter.[9]

In the 1990s, there was discussion of whether "deepening" or "widening" of the Union and the Communities should take precedence.[10] Answering that question was avoided and basically amounted to an attempt to do both. Strained enforcement of institutional unity meant that differentiation happened anyway, taking the form of opt-outs, opt-ins, and enhanced cooperation (partly outside the relevant TEU provisions, namely in supplementary agreements, such as the Prüm Convention, and sometimes also with non-Member States). The advice in 1994 of the then chairman and the foreign affairs spokesman of the CDU parliamentary group in the Bundestag (Wolfgang Schäuble and Karl Lamers) was to make different forms of membership possible;[11] it was not accepted at the time, even though, according to Schäuble, that was what things came down to in actual practice.[12]

Thus pragmatism ultimately became counterproductive. That a structural ambiguity had to be accepted indicates that continuous territorial expansion with new Member States was not really compatible with the maintenance of an eroding unity in the *acquis*. The conspicuous inequalities in application and enforcement of the EU's standards and principles can easily be used to nourish anti-European sentiments. Although possible virtually across the board, majority decisions (by a qualified majority) are preceded by so many negotiations that the results are flawed. The Common European Asylum System has allowed a gap to remain regarding the crucial matter of the quality of the reception conditions, including in the revised Reception Directive of 2013 (2013/33/EU). The recent Council Decision of 22 September 2015 ((EU) 2015/1601) establishing provisional measures in the area of international protection for the benefit of Italy and Greece is being challenged by a number of outvoted Eastern European Member States. On other controversial policies too, such as monetary policy, widening and deepening can no longer be reconciled through the hitherto practised pragmatism.

Variety of public tasks

As we have seen, the idea that the European Union is on its way to becoming an actual state is not a new one. Attempts in the early 1950s – based on what was then a powerful European movement throughout Western Europe – to form a defence community and a political community were unsuccessful, however. What did offer prospects was the creation of "Communities" with a community legal order. A start was made in 1952 with the European Coal and Steel Community (ECSC). The 1955 Messina Conference, at which the Netherlands played an important role,[13] led to a broadening of this sectoral concept into other policy fields and to the formation of a common market based on the free movement of people, goods, services, and capital. The European

[9] Protocol No. 30 to the Lisbon Treaty on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.
[10] S. Blockmans & S. Prechal (eds.), *Reconciling the Deepening and Widening of the European Union*, The Hague: T.M.C. Asser Press 2007.
[11] W. Schäuble & K. Lamers, *Überlegungen zur europäischen Politik,* CDU-CSU parliamentary group 1 September 1994, www.cducsu.de/upload/schaeublelamers94.pdf.
[12] W. Schäuble, *Mitten im Leben,* Munich: Bertelsmann 2000, pp. 134-135.
[13] A. Joustra, "Grondleggers van de Europese Unie: Hoe dankzij een Nederlandse minister op Sicilië de basis voor de EU is gelegd", in: *Europa: Nederland en de macht en onmacht van de Europese Unie. Zo werkt Brussel*. Amsterdam: Elsevier 2006, pp. 17-21.

Communities, integrated by the Lisbon Treaty to form the European Union, received an institutional structure under public law with powers of legislation, administration and justice, and with its own constitutional order. But does that make it a kind of state, or is it on the way to becoming one? There are certainly arguments for answering that question in the affirmative,[14] but the sources of their political legitimacy – more than those of states – were and still are merely functional, in other words related to public tasks in particular sectors.[15]

The creation of the first of these communities, the ECSC, is an obvious example. Beneath the surface of the national boundaries as shown in atlases, common interests demanded common legislation and policy, namely on regulating exploitation of the coal seams on which the coal and steel industry depended. This geological area – stretching from Alsace and the Saar to the Ruhr, to South Limburg and the Borinage – had been the bone of contention between France and Germany in three devastating wars. This time, however, instead of administration by occupiers, a High Authority (the forerunner of the European Commission) was set up to administer this communal area. It was communal not because a decision had been taken to communitise it but because the realities on the ground, or rather under the ground, required it. Step by step, other areas of common interest were included in this communitisation: agriculture, nuclear energy, competition, trade, labour, and services.

That is why the European Community was – and the European Union is – not a kind of state that creates a legal order but a communal legal order called into being by treaty.[16] In order to function, that legal order requires communal institutions, and it must offer legal protection to persons bound by it – currently citizens of the European Union – in particular non-discrimination in the use of the freedoms of movement. That is the core of the constitution – which is not synonymous with a "Basic Law"!) – of the European Union. The EU is "a union based on the rule of law" (ECJ EU ECLI:EU:C:2015:650, para. 60 (cf. ECLI: EU: C: 2013: 518, para. 66).

This has important implications for the nature of its political legitimacy. Peter Lindseth has shown that the powers conferred on the Communities are far more like those of an "administrative state", i.e. of public authority – so here not that of a state – to regulate social and economic processes without the direct democratic legitimacy and possibilities for intervention associated with politically controversial matters : "European public law has attempted to translate the identifying feature of postwar administrative governance – the institutional separation of regulatory power from democratic and constitutional legitimation – into a workable supranational form." [17]

For specific sectors, the community legal order thus played the role of a modern "administrative state", so that in those fields a common market could develop within appropriate legal frameworks. In the first three or four decades, this specific legitimacy of legislation and policy was supported by broad consensus on the principles of the regulated market economy, combining the idea of the social state subject to the rule of law with "Ordo-Liberalism",[18] and acceptable to the main currents in Western European politics. The social security system based on cooperative models made it possible to give solidarity a post-national form with citizenship – rather than an ethnic or national identity – as the basis. But that consensus gradually evaporated in the final decade of the twentieth century, when controversial areas of policy – such as fiscal policy, migration, and the labour market – were included, and the EU found itself dealing with an altered political environment: the American-inspired preference for a deregulated market economy, the diversification of political cultures and styles due to the rapid enlargement of the EU in Central and Eastern Europe, and the geopolitical instability

[14] J.-C. Piris, *The Constitution For Europe: A Legal Analysis*, Cambridge/New York: Cambridge University Press 2006, p. 192.
[15] "Functionalism" as a theory about the nature of the European integration process has in effect associated itself with European idealism. See Pete, "Between the 'Real' and the 'Right': Explorations Along the Institutional-Constitutional Frontier", in: M. Adams, E.M.H. Hirsch Ballin & A.C.M. Meuwese (eds.), *Constitutionalism and the Rule of Law Bridging Idealism and Realism*, Cambridge/New York: Cambridge University Press 2016 (forthcoming).
[16] So stated in the *Van Gend en Loos* ruling by the ECJ EU (5 February 1963, ECLI:EU:C:63:1), in which the ECJ found that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals."
[17] P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State*, Oxford/New York: Oxford University Press 2010, p. 27.
[18] E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union*, Baden-Baden: Nomos 2006.

resulting from power vacuums around the EU, especially in the Caucasus region and on the southern and eastern shores of the Mediterranean. The French "*non!*" to the referendum on the Treaty establishing a Constitution[19] for Europe – with a former French President chairing the body that drafted it – followed the French unions' fierce opposition to the neoliberal first version of the Services Directive (the "Bolkestein Directive").[20] The reason for that opposition was that the directive would enable the lower levels of protection in the new Member States to infiltrate the highly protective French variant of the welfare state. Widening the Union had had so many consequences for the political content of deepening it that the supporting consensus of the preceding decades disintegrated.

Taking unity in diversity seriously

In this period – that of the past two decades – during which attempts were made to combine widening and deepening, the European Union, according to the official discourse, remained a unity. However, the scope of application of the standards of primary and secondary EU law – pointed out above and already described many times – displays all kinds of aberrant patterns of territorial validity. Despite the single – with some variations[21] – institutional structure applying to all the Member States, the rights and obligations of membership have been differentiated as regards various matters, whilst the common legal framework is also partly in force for some non-Member States, such as Switzerland, Norway, Iceland, and the European mini-states. This differentiation is only partly the result of deliberate differentiation in connection with differences in the social or economic relations within the Member States. Rather, it involves compromises concluded – after fruitless attempts to establish uniformity – in the form of a power to derogate, such as the famous opt-outs and opt-ins.

That does not of itself mean that differentiation has been taken too far. There are also examples of tensions that have arisen precisely because of a lack of differentiation. For Greece, it seemed important that its citizens too could travel without border controls to other EU Member States (although the significance of this is much less than for states with a land border with other Schengen states, which was not the case for Greece). Greece, however, was overburdened by being entrusted with the task of guarding a common external border of the EU, in the same way as it has been overburdened – by itself and also by the partners – by accepting the single currency.

One cannot maintain that these tensions are quite simply the consequence of accepting unity in diversity. The extent and form of unity need to be attuned to the desired diversity. However, a discrepancy between pretention and realisation causes frustrations, and impairs the respect that public bodies and officials need to have. Seen in this way, the current malaise in public support for the European project is unsurprising. The fact that the scope of European legislation and policies differs according to the matter concerned and the level of enforcement in each country can be misused in all kinds of ways. It also detracts from the ability of European politicians to approach voters with a consistent programme. In fact, they do not even attempt to do so, given that lists of candidates for the European Parliament are still national. Greece's having overburdened itself in its desire to adopt the euro has become a huge problem for the whole Eurozone, and something similar applies to the Council's Decision of 13 December 1999 (1999/848/EC) on full application of the Schengen *acquis* in Greece.

---

[19] The Dutch word *Grondwet*, i.e. "Basic Law", is part of the unfortunate Dutch title of the treaty [*Verdrag tot vaststelling van een Grondwet voor Europa*], as a translation of the terms "constitution" and "*Verfassung*", which are not specifically connected with states. The official German name [*Vertrag über eine Verfassung für Europa*] correctly did not use the word *Grundgesetz* (i.e. "Basic Law").

[20] Cf. the report drawn up for the French Senate "Que penser de la directive 'Bolkestein'?", *Rapport d'information n° 206 (2004-2005) de M. Denis Badré, Mme Marie-Thérèse Hermange, MM. Robert Bret et Serge Lagauche, fait au nom de la délégation pour l'Union européenne, déposé le 18 février 2005*, www.senat.fr/rap/r04-206/r04-206_mono.html#toc158.

[21] See F. Fabbrini, E.M.H. Hirsch Ballin & J. Somsen (eds.), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart 2015.

Britain's proposals

The proposals that the UK government has now addressed to the other Member States reflect discontent with faltering diversity, both institutional and policy-related. Those four key proposals are[22]:

- freedom of action for the non-euro Member States vis-à-vis those in the Eurozone;
- strengthening of the competitiveness of the EU through deregulation;
- abandonment of the obligation to work towards an "ever closer union";
- combating of abuse of intra-EU migration and a waiting period of four years for entitlement to social security benefits.

In the Presidency edition of "The State of the European Union", the Dutch government has devoted a passage to the letter from Prime Minister Cameron and the expected British referendum. According to the government, "it is strategically important for the UK to remain a member of the EU. This calls for a constructive dialogue leading to an outcome which must ultimately benefit all the Member States and the EU as a whole". That passage also shows where the government draws a line: "With over 500 million citizens and more than 25 million businesses that depend on good governance by governments, our Union stands or falls by mutual equality before the law and legal certainty."[23] The prohibition on discrimination based on nationality is in fact a core principle of European law. That does not mean that every subject of legislation in each Member State must be the same, nor does this impede some Member States from going further in harmonisation than others, as long as the legislation in all the Member States does not discriminate between EU citizens.

The relationship between the United Kingdom and the European Communities or the European Union has been marked by a great deal of discontent, both before and after the UK's accession. British expectations regarding European integration have down through the years focused above all on the benefits of a common market, but not – or far less – on political unity, either external or as regards internal market regulation. That aloofness came from two sides. Charles de Gaulle, French President from 1959 to 1969, delayed the UK's accession, believing that that country was insufficiently Europe-oriented. The Netherlands, by contrast, promoted British accession, but at the same time advocated a supranationalism that was unacceptable specifically to the United Kingdom. According to Mathieu Segers, that inconsistent Dutch position, conveyed especially by the Dutch Foreign Minister, Joseph Luns, struggled with a credibility problem.[24]

When the UK did eventually join the club in 1973 – after a lot of legal headaches because of the "Sovereignty of Parliament" – it meant a major increase in the economic and political weight of the EC internationally. British membership remained characterised, however, by political ambiguity. As soon as the UK joined, it was allowed special arrangements because of its links to the Commonwealth, later – when Margaret Thatcher insisted that she wanted her "money back" – a reduced contribution to the EU budget, then – at the request of John Major in Maastricht in 1991 – an opt-out on the social chapter (which was later cancelled), and various special arrangements regarding cooperation between the police and judicial authorities. This raises the question of whether enough is not enough, given that the British government is demanding that the other Member States accept some further concessions so that it can advise voters – in a referendum that it is calling itself – to vote against a British withdrawal (a "Brexit"). A sober response would be to say that the UK's now-still-EU citizens need to decide for themselves whether they want to put the economic benefits – emphasised by their own business sector – at risk.

However, the European Council has not yet slammed the door – rightly so, because if the UK drifts away on a kind of transatlantic reverse Gulf Stream, it will harm Europe and the chances of a stabilising international political role. The conclusions of the meeting of the European Council on 17 and 18 December

---

[22] See in this connection F. de Witte, *Cameron's EU reforms: political feasibility and legal implications* (LSE Law Policy Briefing 2015-11), http://papers.ssrn.com/sol3/papers. cfm?abstract_id=2694695.

[23] *Parliamentary Documents II* 2015/16, 34166, 22, p. 5.

[24] M. Segers, *Reis naar het continent. Nederland en de Europese integratie, 1950 tot heden*, Amsterdam: Bert Bakker 2013, p. 183.

2015 state: "Following today's substantive and constructive debate, the members of the European Council agreed to work closely together to find mutually satisfactory solutions in all the four areas at the European Council meeting on 18-19 February 2016."[25] Instead of pursuing an irritated negotiation process, the Member States would be well advised to ask themselves whether the continuing British discontent does not point to something that is important for all of us, namely that "one size fits all" membership of the EU is unsuitable, in any case not outside a manageable group of like-minded states.

The first point raised by Prime Minister Cameron pinpoints a problem that is inherent to the lack of institutional frameworks for a European Union that is differentiated in certain factual and essential aspects. The Member States that belong to the Eurogroup – because they jointly have a qualified majority – can push through legislation for the entire EU, which could be detrimental to the UK's important financial sector ("the City"). Mechanisms were already designed in 2013 to prevent that, namely by requiring a majority among both the Member States that have adopted the euro and those that have not.[26] Such a solution would be a step towards the institutional "processing" of the actual differentiation that exists.

The second British proposal would appear to be in line with the European Commission's efforts to bring about deregulation and "better legislation", but the enthusiastic reference to the TTIP and other intercontinental free trade agreements shows that this is above all a political preference – one rejected by many on the European continent – for a different, more neoliberal form of economic order. New compromises are of course conceivable, but they, in turn, will be politically controversial in other Member States.

The third proposal is to a large extent politically symbolic. In the UK, but sometimes also in the Netherlands, the idea has taken hold that the passage in the preamble to the TFEU, which was then included in the TEU, referring to "an ever closer union" is a commitment to constantly reinforce the European Union. What is involved is the preamble to the 1957 EEC Treaty – since retained down through the years – which expressed the determination of the signatories to establish the foundations of an ever closer association (or concord) – in the Dutch text *verbond* – between the peoples of Europe. This therefore referred to the relationship between the peoples of Europe who had so long been opposed to one another. That preamble – whose German text refers, for example, to an ever closer *Zusammenschluß* [association] between those peoples – does not mean an obligation to conclude increasingly far-reaching treaties.

When the EEC Treaty was signed in 1954, there was not yet any official English text. Such a text was only produced in 1972 – prior to the UK's accession – with the translation then being "an ever closer union". That phrase therefore dates from long before the formation of the European Union in 1992. The meaning has, however, been "lost in translation". The phrase has since taken on a political meaning of its own, and has become a stumbling block. It would seem politically rational to remove it, because an apparent concession on the wording of the preamble will cost less effort than offering lessons in history. A protocol could then explain this and could provide British politicians with the legally valid assurance that no obligation arises from it to conclude treaties that reinforce the Union.

The fourth British proposal is the most complicated one, and also the most important one for the other Member States. By "immigration", David Cameron is referring above all to "arrivals from inside the EU" and "the abuse of free movement". One of the issues he has raised, namely the greater possibility for non-British EU citizens to form a family with a citizen of a third country, has also given rise to discussion in the Netherlands and to initiatives to limit abuse.[27] However, restricting someone's right to participate in the free movement of persons because he or she has a non-EU spouse would obviously conflict with the principle of non-discrimination and also with the constitutional protection of married and family life.

A more complicated matter is how one should assess Britain's proposal for a waiting period of no fewer than

---

[25] CO EUR 13 CONCL 5, point 20, http://data.consilium.europa.eu/doc/document/ST-28-2015-INIT/nl/pdf.
[26] M. Emerson, *Cameron's "renegotiations" (or Russian roulette) with the EU – An interim assessment* (CEPS Working Document No. 413/September 2015), p. 4.
[27] *Parliamentary Documents II* 2008/09, 23490, 523, pp. 18-19

four years before EU citizens can access British social security benefits.[28] For other Member States, certainly those whose citizens make great use of the free movement of persons in order to work in the UK, that will be unacceptable. It is not, incidentally, the case that EU citizens can in fact choose the Member State in which they will receive benefit. Pursuant to Article 14 of Directive 2004/38/EC on the free movement of citizens, the right of residence enshrined in that directive may be terminated, in the case of the short-term right of residence (for three months, Article 6), if the person concerned becomes an unreasonable burden on the social assistance system of the host Member State and, in the case of the five-year right of residence (Article 7), if that person no longer complies with the conditions. For persons who are economically inactive and for students, Article 7(1)(b) imposes a requirement concerning means of subsistence. Article 24 of the directive enshrines the principle of equal treatment as regards social security. In its ruling of 15 September 2015 in the *Alimanovic* case (C 67-14, ECLI:EU:C:2015:597), the European Court of Justice extended its restrictive line regarding social security benefits for economically inactive EU citizens to job seekers.[29] The Dutch Aliens Act Implementation Guidelines contain a "sliding assistance scale" in which the duration of a person's residence is set off against the duration and extent of his/her reliance on benefit under the Work and Social Assistance Act/Participation Act and the extent to which he or she has made use of social relief.

But creating social insecurity for migrant, active EU workers would overstep the mark politically and legally. Articles 18, 21, and 45 of the TFEU protect the social security of EU citizens in other Member States. More detailed rules on social security and social protection require unanimity (Article 21(3)). There are certainly options within that framework for limiting benefit tourism, but not for the long-term exclusion from social security of people working in another Member State.

Realistic differentiation

Apart from the final point, each part of Prime Minister Cameron's letter can receive a constructive response that will specifically enable him – or in fact not enable him – to ensure that the referendum keeps the UK in the EU. His proposals need to tell us more, however, and the EU and the Dutch Presidency would do well to recognise that. There is good reason why he states that his letter concerns a wish for greater "flexibility". Maintaining an institutional unit made up of 28 Member States while the legal and political reality displays so much diversity does indeed contain within it the seeds of constantly new problems. As Giandomenico Majone points out at the end of his book on Europe after the monetary crisis, the old models which take the state as the point of reference are no longer sufficient: "What is needed today is something richer and at the same time more flexible than a simple linear extrapolation of the traditional, nation state model."[30]

The productive pragmatism of the past few decades appears to have reached its limits now that the needs for Europeanisation of policy areas are structurally divergent between the various Member States. The same meeting of the European Council which responded "constructively" to Mr Cameron's letter also set out the lines "for the completion of economic and monetary union". The question is therefore whether – instead of piecemeal accommodation of British proposals and those of other Member States that will follow in their wake – it is not better to take the choice of unity and diversity seriously and to abandon the unrealistic pretence of a single Union with a single type of membership. The proposals by Messrs Schäuble and Lamers in 1994 are still relevant in this regard: one of their key words was also *Flexibilität*.

---

[28] See in this regard E. Guild et al. (eds.), *Social Benefits and Migration: A Contested Relationship and the Policy Challenge in the EU*, CEPS, 2013.

[29] See the note by P.E. Minderhoud in *JV* 2015/344.

[30] G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge/New York: Cambridge University Press 2014, p. 322.

Flexibility can vary according to the public tasks and the actual situation to which they relate. A choice could be made that – in a more structured form than the "enhanced cooperation" pursuant to Article 20 TEU – would enable Member States with a sufficiently cohesive socio-economic system to form a community with shared legislation.[31] In this way, a community – a new one – could develop within the European Union that would no longer burden the other Member States with requirements that are difficult for them to implement, but which would achieve the unity of socio-economic policy necessary for improved functioning of the EMU. The benefits of a strong "heartland" could then be combined with the freedom of action – and therefore the autonomous strength – of other nuclei. It is true that this would affect the dogma that – after transition periods – Member States should all be subject to the same regime, but why is that dogma any better – and why *must* it be better – than ordered diversity? Constitutional history includes numerous examples of asymmetric public-law associations in which one of the components plays a leading role.

Other policies impose yet other requirements. The Schengen Area is facing obvious – but inevitable – weaknesses at its external borders because no account was taken in the Mediterranean area of geographic and demographic realities, as an effective Schengen Area would need to do. In controlling the borders, geographical and sociogeographical factors can be decisive, as we already see with the applicability of the Schengen arrangements to the whole of Scandinavia and Switzerland; for non-adjacent countries this is of less importance. The reception and actual applicability of the free movement of persons, goods, services, and capital within the three states of the European Economic Area that are not EU Member States is already a – camouflaged – form of differentiated membership. It is also important for a more flexible approach to membership of the European Union to allow for a less strained approach to the possible membership of Turkey if – of course – democracy and the rule of law are sufficiently guaranteed in that country.

All the Member States, not excluding the UK, have an interest in ensuring that the EU maintains and develops its international political weight. The German minister Wolfgang Schäuble understood that clearly when he pointed out in an interview (published on 27 December 2015) that both development cooperation and European defence need to be strengthened and allocated more resources, with European armed forces as a long-term goal.[32] The principle of non-discrimination and respect for human rights, and other democratic and constitutional principles, would then be an enforceable requirement for all members, one more effective than at present. EU citizenship gives legal expression to both.

No public-law superstructure

An "ever closer union" is therefore not a public-law superstructure. At the beginning of 2016, the Dutch Presidency finds itself facing many complex tasks. If the European Union seems to be an obese body of otherworldly and selfish bureaucrats – and their supporters an arrogant elite – it is difficult for citizens to believe that their interests are being represented effectively. Politicians who do seem to speak their language – not only in the linguistic sense but also the language of dissatisfaction and alienation – can then easily gain support. Is it possible to alter the narrative of the European Union so that its legislation and policies are more easily recognised as services to society? Can that be done in a way that does not reinforce the sentiment that "we" – in each Member State and region – form a collectivity that must protect itself against outsiders, a fortress instead of a connecting open society?

All this is of course a matter of substance and of communication about that substance. After all, it remains a fact that we are Europeans; whether we like it or not, being Dutch means being European. Some pessimists

[31] The "differentiated integration" recommended by the Advisory Council on International Affairs in its opinion of October 2015, no. 98, may be a step in that direction.
[32] www.bundesfinanzministerium.de/Content/DE/Interviews/2015/2015-12-28bams.html?view=renderPrint

like to suggest that the EU will never achieve political legitimacy because we do not have a common European language. (Poor Switzerland, with its four official languages!) But that view is worse than a misconception: it is a misunderstanding of European history with all its interaction, trade and cultural exchanges, and the dissemination of ideas thanks to people's ability to understand one another and to translate between different languages.

The task currently facing us is to reconstruct democratic legitimacy in such a way that it genuinely responds to the needs of our times, to the seven plagues with which I began this article. This demands, in the first place, a focus on tasks, and only then on institutions, insofar as they serve the general interest.[33] It should not mean proposing unnecessary changes in the institutional structure, but a sober reassessment can also involve questions about the merits of the traditional dogmatic preference for institutionally uniform membership. Discussion should not rule out in advance allowing more differences, either in the extent of the bonds between the Member States or in the territorial extent of the EU. National parliaments have their role, of course, but yellow and orange cards – or even red cards – are not in themselves useful answers to serious questions. It is only green cards – for European or national policy, for hybrid forms thereof, or even for governance together with other actors – that can also benefit the general interest. They can also involve decisions to shift the emphasis in legislation and policy to subnational and transnational regions.[34]

More closely interwoven

The Member States of the European Union should therefore loosen their grip on one another so as to create scope for unity of policy where that can be pursued convincingly. A jointly perceived necessity has always been the basis for any public commonwealth. Free movement of persons in the exercise of their profession or business, and also to study, is valued, but benefit tourism and erosion of the quality of employment terms both meet with resistance.

We need to retranslate the Dutch word *verbond*, taking into account the European identity of interwoven cultures connected by translation,[35] and we need to state with absolute clarity that the future of the European Union is not a matter of extending EU powers as such, but of realigning legislation and policy with the needs of the peoples of Europe nowadays. European legislation and policy are not an instrument for obtaining benefits for "our own" people – the Dutch, the British, the Poles – at the expense of other peoples, but an attempt to do justice to the fact that we have to share our continent with one another as a place to live in dignity.

This article, originally published in Nederlands Juristenblad 1 (2016) offers an elaboration of the final remarks of Ernst Hirsch Ballin, council member of the Netherlands Scientific Council for Government Policy after the annual Lecture of 2016.

Link to the article (in Dutch) http://njb.nl/magazines/njb-1-(2016).18751.lynkx

[33] This is the approach that the WRR intends adopting in its project regarding public tasks within the European Union. See the WRR's *Programme*, http://test6.wrr.nl/fileadmin/nl/werkprogramma/WRR-werkprogramma.pdf

[34] E.M.H. Hirsch Ballin, *De wereld in de regio* (speech at the opening of the academic year on 1 September 2014), Tilburg: Tilburg University 2014; https://pure.uvt.nl/portal/files/4493852/933cbce9_a7d8_4581_b16e_b924e67a3890_speech_opening_academisch_jaar_hirsch_ballin.pdf.

[35] Umberto Eco, *La ricerca della lingua perfetta nella cultura europea*, Rome/Bari, 1993, p. 371.