

“United in diversity”: Some thoughts on the new motto of the enlarged Union¹

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1. EU-enlargement: a diversity-increasing adventure

"*Kindermund tut Wahrheit kund.*" This German saying tells us that children tend to have a feeling for the right view of reality, and the new EU motto confirms this thesis. Over 100 Conventioneers in Brussels decided at end of 2003 that the revamped and enlarged EU needs a motto and that it should be: "united in diversity".³ This proposal is not new. After a selection process from amongst over 2,000 proposals sent in by 80,000 schoolchildren in the EU member States, "*in varietate concordia*" was proposed in the EU Parliament on 4 May 2000 as the EU's future motto.⁴ It is hard to say whether the "fathers and mothers" of the new EU constitution really drew upon this proposal of their grandchildren's generation. But it is easy to say that the pupils had the right feeling when it comes to the future of Europe.

The first of May stands for an enormous "more". Ten more EU member States, 75 million more EU citizens, and the Union's physical size is extended by 738,000 square kilometres. But enlargement does not result in "more of the same". Quite to the contrary - Eastern enlargement is a process of diversification. It furnishes the Union with ten new EU languages, a plethora of new potential alliances between states all over Europe, ten hitherto rather unknown national cultures, and countless minority languages and cultures which will more than double the number of minority groups existing in the EU 15 so far!⁵ Through enlargement, the European Union will find itself in direct contact with new neighbours such as Russia, Ukraine or Byelorussia, which from a "Western" perspective used to be vaguely located in very distant places somewhere in "the East". From this point on, cultural horizons will have to be expanded, traditional stereotypes held up for critical assessment. The Union must get to know a more complete (and more complex) story of Europe's historic heritage - one that reflects the views on both sides of the former Iron Curtain. With May 2004, the two notions of "we" and "the others" are getting seriously reshuffled.

Enlargement and its diversity input can result in a dilution of what is often referred to as "the European identity" (some cynically hold that this is the true reason why the UK had sympathies for Eastern enlargement from the beginning, and why the US is such an ardent backer of Turkey's accession to the Union). On the other hand, the "diversity-impact" of Eastern enlargement also has the potential to result in a rise in interaction, creativity, innovation, mobility, motivation, and yes, in a new start towards a stronger continent, strengthening the European voice on this globe. It is submitted here that this fateful decision will hardly depend on the diversity issue *per se*. Diversity in the end might turn out to be mainly a catalyst: to the good if European politics and

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³ See Art. IV-0 of the "Draft treaty establishing a constitution for Europe", 18 July 2003, CONV 850/03, p.5, <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

⁴ See e.g. http://www.ouestfrance-ecole.com/accueil_detail.asp?idDOC=2138

⁵ See in this respect the "Bolzano/Bozen Declaration" - a set of EU-policy recommendations launched by an international group of experts on 1 May 2004. The proposals draw the lessons from the accession process and call on the Union to design its future policies *vis a vis* minorities as well as the future interplay between the international actors in the field of minority protection. For details and the full text see <http://www.eurac.edu/pecede>

economy will be successful in the EU 25; and to the bad if the enlarged Europe will suffer political or economic crises.

Nevertheless, it is interesting to take a closer look at the diversity management of the European Union as there seems something paradoxical to what we have said before. European enlargement in 2004 *unifies* the European West with the European East but produces thereby more *diversity*. Is this unification via diversification?

2. On the many (diverging) faces of diversity

As the attentive reader will have realised already, whether we find unification or diversification within the EU25 depends very much on the group of states we refer to. Eastern enlargement does provide for greater harmonisation and unification amongst the new member States, and it does bring the systems of the old member States closer to the new member States, both in political-cultural (extent of corruption, life-style etc.) as well as in legal-technical terms (consumer production norms, vehicle license plates etc.). Nevertheless, when comparing the overall degree of homogeneity of the EU25 with the EU15, we will note an increase in internal diversity.⁶ However, the notion of "diversity" remains vague, if not ambiguous. It seems almost impossible to establish an overarching "principle" that could convincingly cover all the different forms of "diversity" in EU law;⁷ diversity is a wild and chameleonic animal with thousands of heads that hardly can be kept imprisoned in the cage of one legal principle. Looking at diversity from the perspective of EU constitutional law, we might differentiate at least three important meanings which can be ascribed to it: the diversity of (national) identities, the diversity of (European) cultures and the diversity of (inner-EU) structures.

1. The diversity of EU structures Different groups of states differ in their readiness to further integrate in certain policy areas and not in others. In order to allow for such "*avantgards*" (Jacques Delors) or "*Gravitationszentren*" (Joschka Fischer), the treaties had to provide the legal means to what in political discourse has been described with catchwords such as "flexible integration", "*Integration der konzentrischen Kreise*" and the like. A dogma of strict symmetry between all member States should not prevent groups of states from integrating further in certain areas. The treaties of Amsterdam and Nice established "enhanced cooperation" as the legal shape for this political need, but the provisions have so far remained a sleeping beauty (or monster in others' eyes). With a view to enlargement, the draft constitutional treaty tries to render these provisions more clear and efficient.⁸ Most probably, the Europe of tomorrow will be characterised by asymmetric structures, "hills and valleys" of integrative density and diverse forms of integration amongst EU member States. One could even argue that new forms of "fading in" and "fading out" phenomena may result in sort of non-member-memberships to the Union.⁹ Enlargement will

⁶ And here diversity is understood in the broadest sense, ranging from economic performance, to the traditional cultures of the peoples to the value-foundation of the various political systems. Note that the view to the upcoming enlargement was one of the major reasons why the treaty of Amsterdam introduced the sanctioning procedure in Art. 7 EU - a provision which by some is seen as an additional instrument to preserve European "homogeneity". See Frank Schorkopf, Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Article 6 Abs. 1 und Article 7 EUV (2000).

⁷ See also Armin von Bogdandy, Europäische Prinzipienlehre, in Armin von Bogdandy (ed.), Europäisches Verfassungsrecht, Springer, Berlin 2002, pp. 163-203, at p. 196 and 197.

⁸ See e.g. Art I-43 draft constitutional treaty.

⁹ According to Art. 59 of the draft constitutional treaty withdrawals from the Union will (for the first time) be possible. The arrangements of any withdrawal and the future relationship have to be laid out in a special agreement concluded between the Union and the withdrawing states. According to Art. 56 the Union shall conclude "*specific agreements*" with its new neighbourhood. Moreover, the Stabilisation and Association process towards the Balkans might result - if not in full membership - in a sort of EEA II (the

therefore confront us with the challenge of how to ensure that the "ever closer Union"¹⁰ will not be accompanied by "ever looser unity".¹¹ In a structurally more diverse and enlarged Union, the principle of loyalty will be promoted from a legal wallflower to a constitutionally neuralgic provision which will have to be taken seriously.¹²

2. The exclusive diversity of national identities: Diversity can, secondly, refer to the variety of national identities existing within the EU. This obvious form of diversity corresponds very much to the constitutional skeleton of the European Union which guarantees that the various "*Herren der Verträge*" remain *de iure* co-dominant in the Union's political system.¹³

The variety of diverging national cultures and languages was not always and still is not an advantage for an efficient European integration process. There was, however, no choice other than making the best out of this situation by declaring that the very diversity of national cultures is something to be proud of, something which makes Europe so special. Cultural diversity has been characterised in countless political declarations and speeches as an overall constitutional value of the EU.¹⁴ Despite this notorious "appreciation" in official EU-speak, this notion of diversity remains defensive in nature. Areas such as language policies, abortion, marriage law, national traditions and customs or the like could be drawn into the gravitational field of the integration process and require protection against a "Brussels-driven" excess of harmonisation.¹⁵ This is the reason why the States introduced a provision in the treaty of Maastricht in 1992 obliging the Union to "*respect the national identities of its Member States*".¹⁶ This provision has been reinforced by the EU Charter of Fundamental Rights, which reads in its Art 22 that "[t]he Union shall respect cultural, religious and linguistic diversity",¹⁷ a duty that has become one of the Union's formal objectives.¹⁸

same might go for Turkey). Switzerland and the EFTA countries are further candidates for special relationships.

¹⁰ This traditional aim of the integration project is also to find in the new constitutional treaty, namely at its very beginning: "*The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.*"

¹¹ See Bruno de Witte, An untidy federation of nation-states, in W.T. Eijsbouts (ed.), *Bastard or monster - money, territory and the constitution of Europe*, Amsterdam, Van Hoogendorp Centre for European Constitutional Studies, 1998, pp.-90-100, at p. 98.

¹² See Art 10 EC and compare Art. 5 par. 2 of the draft constitutional treaty. See also Peter G. Xuereb, *The future of Europe: solidarity and constitutionalism. Towards a solidarity model*, in E.L.Review 27(2002), pp. 643-662, at p. 661 and 662 who argues that enlargement will mean further majoritarianism and that this should be better accompanied by "*a fuller articulation of solidarity and possibly by clauses [in the constitution] that reflect the new realities*". Such clauses and their application could guarantee amongst others "*cohesion in diversity*".

¹³ This makes it also misleading to talk of the member States as of "minorities" within the EU (even if they may account - such as is the case of Malta - for less than 0.1 per cent of the EU population). Compare, however, speeches by Romano Prodi where he equates the European Union to a "union of minorities" where no state may have the right to impose itself on others (see e.g. speech IP/02/88 delivered at the opening session of the European Convention, 28 February 2002).

¹⁴ The Court so far did not identify any sort of overarching constitutional value of "cultural diversity". Compare the various contributions in Francesco Palermo and Gabriel N. Toggenburg, *European Constitutional Values and Cultural Diversity*, Bozen/Bolzano, 2003, pp. 9-23, <http://www.eurac.edu/press/publications/studies/index.asp>

¹⁵ To take the case of abortion as an example: See the case C-159/90, Grogan, [1998] ECR 4685 and compare the protocol no. 7 on abortion in Malta attached to the accession treaty (see also the Polish declaration on public morality).

¹⁶ See Art. 6 EU. Compare Art. 5 of the draft constitutional treaty.

¹⁷ See Art II-22 of the constitutional treaty which incorporates the Charter in its Part II without touching it in substance. Note, however, that the preamble of the Charter has been slightly changed. This might be of relevance for the interpretation of the Charter-provisions as the preamble now reads: "*...the Charter will be interpreted ... with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter*". Despite the fact that in the drafting process of Art. 22 the phenomenon of minority languages and cultures has played a relevant role, the explanatory

Now, with enlargement the number of "national identities" nearly doubles and, moreover, the newcomers only recently regained their sovereignty and therefore might be especially eager to stress the issue of national identity (p)reservation. We can then expect that enlargement also will bring this form of diversity increasingly to the fore. And even here the principle of loyalty will have its role to play, namely the loyalty to the Union *vis-à-vis* its member States.

3. The inclusive diversity of cultures Diversity can, thirdly, be seen as referring to the diversity of cultures in a more inclusive sense, eventually transcending the (official) self-perception of the member States' identities. What stands at stake here is the diversity not *amongst* the member states, but *within* the individual EU member States.¹⁹ This perspective takes also into account minority cultures, regional identities, or migrant communities. The distinction between inclusive and exclusive reading of diversity might explain the apparent contradiction identified e.g. by Romano Prodi that "*Europe preaches diversity and respect of cultures, but among the Member States the goal sometimes appears to be to assimilate immigrants, rather than to cultivate, maintain and respect diversity*".²⁰

EU-competence in the area of culture is weak, and the internal composition of a member State is traditionally left entirely to the member States themselves. For decades the Union was said to be "region blind" and to adopt an "agnostic" stance *vis-à-vis* minorities. This monolithic perception of what a "member state" is and consists of seems to be eroding. The Union has learned to take members' regions into account, and to recognise and strengthen their European role. Moreover, the Union seems to be increasingly involved in the question of how "multicultural" a state should be. The EU's policies in the areas of anti-discrimination and its policy of integration *vis-à-vis* third country nationals seem to point in this direction.²¹ The constitutional treaty itself opens the door to the regional layer both in substance and in procedure.²² Moreover the draft treaty says in its Art. 2 that the EU founding values are values which are common to the member states "*in a society of pluralism*". And the upcoming IGC might even include the protection of minorities amongst these

memorandum refers only to Art 6 EU and Art. 151 EC without making reference to minority protection instruments. Compare endnote XXI.

¹⁸ Art. 3 par. 3 of the constitutional treaty (The Union's objectives) lists the following objective: "*The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.*" Complementary provisions guarantee for the preservation of the state's influence within the institutions such as e.g. Art. 23 which says that the decision establishing the rules of rotation of the Council Presidencies has taken "*into account European political and geographical balance and the diversity of Member States.*" In the area of culture the Union has the power to "*contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore*" just as has been before the case under Art. 151 EC.

¹⁹ See in detail on the question, whether this form of diversity is covered by the EC law notion of diversity Gabriel N. Toggenburg, "Unity in diversity": searching for the regional dimension in the context of a somewhat foggy constitutional credo, in Roberto Toniatti, Marco Dani and Francesco Palermo, An ever more complex Union. The regional variable as missing link in the European Constitution, Nomos 2004, forthcoming.

²⁰ Speech 03/517 given at New York, 4 November 2003.

²¹ Compare the following two crucial instruments: Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180, p. 22 and the Council Directive 2003/109 of 25 November 2003 on the status of long-term resident third-country nationals within the EU, OJ 2004 L 16, p. 44.

²² The treaty underlines that the national identities of the Member States encompass their "*inherent ... fundamental structures, political and constitutional, inclusive of regional and local self-government*". Art. 9 par. 3 establishes that the principle of subsidiarity refers (or, probably more correct, may refer) also to the regional level. Moreover the national Parliaments are assigned a relevant role in the supervision of the principle of subsidiarity (see the protocol on subsidiarity as attached to the constitutional treaty) and the Committee of the regions can bring actions before the European Court of Justice in order to defend the principle of diversity (see art. III-270).

EU founding values.²³ Against this background, the duty of the Union to protect diversity as laid down in Charter of Fundamental Rights was even interpreted as a true minority protection clause.²⁴

It was the process of enlargement itself that has brought the topic of minority protection to the European fore. The enlarged Union is not going to provide any harmonised model of multiculturalism, but it is very likely to add a European dimension to the internal diversity of member States.

3. One reply out of many: the "motto" of the new EU constitution

The proposed EU constitution drafted by the European Convention in Brussels during 2003 contains a list of all the "EU symbols" in Art. IV-1. The list recalls the known but not very prominent EU symbols such as Europe day and Beethoven's anthem. It also establishes - as already mentioned - an overall and official "motto" of the Union, the notion of "united in diversity".²⁵

What kind of diversity could this motto have in mind? The passionate and frequent usage of "unity" in state mottos seems to be a signal which is more directed to the state's internal sphere than to the other players in the field of international law. Unity in this context seems to invoke constitutional discipline and loyalty (between sub-national groups and entities).²⁶

The European Union's motto is interesting as it combines the concept of unity with the seemingly contrasting notion of diversity. However, the Union is not the first to use this combination as the motto in its constitution. Both South Africa and Indonesia have preceded the Union in taking "unity in diversity" as their constitutional motto, recognising the extraordinary degree of sub-national diversity in these states.²⁷ Such mottoes recognise diversity, and at same time - which even might be the more important message - warn against endangering the unity of the state. In this sub-national dimension the Indonesian and the South-African mottoes differ substantially from the EU's motto. The EU's motto seems rather to refer to entities with state character (i.e. the member states) and not to social or ethnic groups. It is here submitted that the new EU motto is thought to strengthen the above mentioned identity protection clause rather than to threaten the member states with a sort of multicultural EU vision. In this sense the EU motto is comparable to the US motto of "E pluribus unum" addressing the *modus integrandi* of states. However, when comparing the American "E pluribus unum" to the European "United in diversity" one should stress an

²³ see the proposal of the Italian Presidency in this respect: CIG 60/03 ADD 1, 9 December 2003, <http://ue.eu.int/igcpdf/en/03/cg00/cg00060-ad01.en03.pdf>

²⁴ E.U. Network of Independent Experts in Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002 (Luxembourg: Office for Official Publications of the E.C., 2003), Volume 1, at p. 175. See http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf. For a critical view in this respect see Bruno de Witte, The constitutional resources for an EU minority protection policy in Gabriel N. Toggenburg, Minority protection and the enlarged European Union: The way forward (working title), forthcoming 2004, Budapest, LGI Books.

²⁵ The preamble contains the following *passus*: "Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny, Convinced that, thus "united in its diversity", Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope".

²⁶ Note, however, that this is true not only for big states such as Nigeria ("Unity and Faith, Peace and Progress") but even for such a small state as Andorra ("Virtus, Unita, Fortior").

²⁷ The preamble of the South African constitution contains the motto in the Khoisan language of the /Xam people ("!ke e: /xarra //ke") and underlines thereby the linguistic dimension of this motto. The Indonesian coat of arms enshrines the old Javanese motto of "Bhinneka Tunggal Ika" which since 1945 is also part of the constitution (Art. 46 A).

important difference in sequence within the very wording. Whereas the US motto aims at an unity created from a diversity of states, the EU puts any further unity under the condition of a maintained diversity amongst the states. The new European motto seems therefore to foster mainly one of the forms of diversity mentioned above, namely the diversity of member states' identities.

4. United in diversity - a hopeless European paradox?

Unity and diversity are both equally prominent values positioned in daily EU political talk. However, the diversity element to the unity/diversity debate has so far played the weaker part in this EU-tandem. Clearly the strongest form of diversity is the one aimed at maintaining the national identities of the member States - which also seems to be the ambition of the new EU motto. However, *de facto* pressure will enhance forms of structural diversity within the EU, which can count on revamped provisions in the constitutional treaty. Moreover, a third form of diversity, at the sub-national level, is conquering the interest of European politics. An increasing amount of EU law regulates forms of this diversity, such as rights granted to certain third-country nationals. It may even be argued that EU law is set to incorporate a European standard of minority protection.

Of course, unity and diversity stand in a certain tension with each other. Nevertheless, the motto to be (ever more) united in (a nevertheless maintained) diversity is not a true paradox. Values and principles are not of a binary nature within a legal system, in the sense of being either valid or invalid. While contrasting norms are legal rules that must either be applied or not, values are applied in any event - even if they contradict other values. They are taken into consideration by evaluating their relative weight in concrete circumstances. The political unity/diversity debate does not evolve in a legal vacuum: the legal outcome of the debate in a particular case depends on the application of legal parameters such as the principle of proportionality or the principle of loyalty. But of course the outcome depends on the political circumstances and the "diversity culture" of our future Europe. How much diversity Europe can afford in the future will also depend on how reliable its unity will be. 2004 is an open moment in European history - our children will say what it means to be "united in diversity".