Diversity Management in European Countries

Part I. Challenges

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Introduction

Whether it is an opportunity for enrichment or a risk of disintegration, diversity is a major challenge for governments. A challenge which is all the more important, since diversity is and has for a long time been an absolutely unavoidable factor in the development of modern societies for at least two reasons. The first is historic and old, while the other is political and more dependent on circumstances. Our societies and those of European countries in particular, are complex and democratic societies.

Complex societies

Since the time of Durkheim and Spencer, there has been general scholarly agreement that complex societies are based on a dual mechanism of differentiation and integration of social groups. The State was born out of the increasing division of labour within society as the necessary instrument of cohesion for societies, which would otherwise be at risk of dissolution and self-destruction.\(^1\) The State, which originally operated according to relatively simple plans that reflected the relative simplicity of the societies it was called upon to manage, has not always been able to adjust to the changes that occurred, and are still occurring, in societies such as ours. Our societies are facing a variety of problems, including the demands of globalization, which force States to increase policy formulation frameworks; the information explosion, which, while strengthening the influence of the mass media, is increasing the number and diversity of interest groups and the number of non-governmental actors involved in governance; different sectoral interests, as reflected by the increase in the number of technical ministries that often behave more like representatives than the protectors of the interests they are responsible for; increased budgetary constraints, triggering the transfer of operational tasks to decentralized bodies in order to ensure better control over such tasks. It has thus been observed in recent years that “the State’s role has evolved from one of dominant actor to that of strategic facilitator (…)”. The outcome is a gap, which has not always been bridged, between this new function imposed by the complexity of modern society and the structure of the State.

Democratic societies

Moreover, the above-mentioned gap is further widened by the fact that diversity is not just the almost automatic product of historical modernization but is also the consequence of the political choice made by democratic societies. In such societies, pluralism, and consequently diversity, are at the heart of the functioning of the political and administrative systems that are a priori supposed to accommodate a variety of interests and, consequently, to respect the particularities inherent therein. The consistency of public policy is necessarily affected by it, not that one should conceive of the slightest incompatibility between the system’s unity and the variety of interests or categories, but because the system must be designed in such a way as to accept such pluralism and get it to produce the most beneficial impact for the functioning of the social group as a whole: “good governance is more about managing contradictions than avoiding them”. It therefore implies “strengthening the capacity of policy formulation systems to balance and

\(^1\) On the formation of the administrative machinery, see G. Timsit, L’administration, in M. Grawitz and J. Leca (editors), Traité de science politique, vol.2, Les régimes politiques contemporaines, P.U.F. 1985, p. 446 and ss.
harmonize divergent pressures”. But, on this point, the fact that we are dealing with European countries with profoundly democratic societies makes the problem of diversity management a little more complicated. Indeed, a feature of these societies is that they are pluralistic – in other words, they are concerned about every individual’s freedom – while at the same time being committed to the equality of all. The result of this is vacillation and a two-fold debate. There is vacillation between an egalitarian and a liberal conception of diversity management by the public service. Should the liberal conception of society be given preference and should emphasis be put on preserving the distinctive individual characteristics of the social group? Or should priority be given to equality and to ensuring the uniform management of all members of the community without making any distinctions among them, even if it means toning down such diversity to the point of erasing it forever? Such vacillation – because in democratic societies it can only be vacillation and not two choices, which would be mutually exclusive – has spawned debates on the problem of managing diversity in the public service in Europe. The first debate concerns the recognition of diversity: what kinds of diversity can be recognized and accepted in democratic societies? Not all diversity can be recognized; some kinds, it is said, should not even be recognized. For example, can we agree, without threatening the very foundations of a democratic society, to recognize the existence as such of races or ethnic groups among which the State, with a view to correcting inequalities, would introduce differences of treatment, differences which would be tantamount to discrimination? However, were such discrimination to be possible and necessary, to what extent and how would it be implemented? And subject to what caveats? The second debate flows naturally from the debate on the recognition of diversity. Once the diversity of persons, groups or categories that make up the social group has been accepted, the problem of how to treat such diversity arises. What public policies should we use to manage diversity and what principles should they be founded on to enable the administration to remain the faithful and reliable instrument of the democratic societies it has the responsibility for managing? The recognition and treatment of diversity – the challenges and strategies designed to meet them – are the two basic issues that all European countries must needs face as they seek to manage diversity, especially within their public services.

I. The challenge of recognizing diversity

Recognizing diversity is a major challenge inherent in the nature of European societies, clearly democratic entities that, over and above any other considerations, are societies. In other words, they are social groups with an identity that they must preserve in order to exist. That raises questions of the increasingly complex technical, religious, cultural, social and linguistic identity of these societies. This complexity prohibits the uniform and undifferentiated management of society and, while it accepts the demand for freedom, autonomy and universality at the very heart of the idea of democracy, it can, neither overlook the demands for the unity of the social group to be managed, nor the need to preserve equality among citizens who are members of the same community. European societies today may have greater difficulty in meeting this challenge because they cannot address the new demands and constraints arising from the recognition of diversity with archaic tools or with the very unrefined means available to them that they still use too often to that end.
1. **Increased criteria for the recognition of diversity**

Criteria for the recognition of diversity have increased. The complexity and democratization of societies have led to the need for the public service to take into account and be responsible for new kinds of diversity.

No doubt European countries probably never intended to manage their societies in a completely uniform manner. They never systematically ignored all the heterogeneous elements that make up society. Perhaps, however, in these countries, some types of diversity might from the outset have appeared more “natural”, more profoundly representative of nature, more objective, and therefore beyond any suspicion as to their democratic legitimacy. On the other hand, other kinds of diversity, concerning persons and what some may view as the very essence of human nature – religion, language, ethnic or racial origin – were accepted and recognized much later because of the questions that they were likely to raise in that regard.

a. Territorial diversity and diversity of interests have always been accepted in all European countries. In any case, they were recognized in those countries a long time ago and are accorded differentiated treatment without the legitimacy of such special treatment ever really being called into question. Such differentiated treatment has even been strengthened recently. Indeed, we note, with respect to **territorial diversity** and the emergence and rise in importance of what has been called the intermediate or median level of government, that what was formerly considered – prior to the Second World War – as a negative element or a threat to the nation-state, is now hailed by the nation-state as an instrument of democracy and as a means of guaranteeing the legitimacy of the welfare-state.²

Two factors seem to have contributed to this. The first factor was the establishment and development of the European Union, especially its Committee of the Regions. The establishment of community institutions thus helped to reinforce and promote, if not encourage, as in Ireland, which did not have any regional level, the establishment of regional structures. These structures, which are managed more or less autonomously, have either increased in number or been strengthened, with a view to either increasing the direct influence of national States on the Union, facilitating cooperation with the intermediate structures of other European States, or emphasizing the role of these intermediate structures in national decision making with respect to community issues. Apparently, another reason why other European countries developed these intermediate structures is the Federal Republic of Germany and its economic and political success. It was thus noted that, while after 1945, one of the main reasons for the creation of a federal structure in Germany was the determination to prevent the rebirth of a strong central State, “the success of the post-war German Federal State has been a source of inspiration not only for separatist political groups wishing to break away from the nation-state, but also for those who are concerned about the excessive responsibilities of States with centralized power.”³ All European countries now have public authorities at the intermediate level that constitutes “an essential part of their administrative systems.”⁴ Thus, there are regions in France, Italy or

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³ Eod. Loc.
⁴ Ibid. p. 419
Belgium, Länder in Germany and Austria, autonomous communities in Spain, communities in Belgium, counties in the Scandinavian countries and the United Kingdom, and provinces in the Netherlands, not to mention the other intermediate levels below the above-mentioned levels, such as the departments in France. As a result, we are witnessing a proliferation of sub-national authorities with varying degrees of autonomy from the central authority. The autonomous intermediate body may either be under a non-federal state (where autonomy is therefore relatively restricted) – Denmark, Sweden, the Netherlands, France are examples of this, although they are all countries where increased decentralization efforts have been undertaken or completed (in France only since 1982...), or, at the other end of the spectrum, under a federal state (in Austria, Belgium and Germany, the federal state has only such powers as have been expressly conferred on it), or it may be under a state with a hybrid system like Spain – a “quasi-federal state5” – or Italy – a “regional6” State - , where the communities and regions not only have extended powers but also where – and this is the case in Spain7 - the distribution of powers between the State and the autonomous communities is not uniformly regulated by the Constitution but is regulated in accordance with a system that provides for two lists of powers8 and gives the autonomous communities the right to choose between them – which permits considerable disparity in the nature and scope of the powers and jurisdiction of different communities – whose diversity is thus safeguarded and organized.

b. European countries acknowledged quite a long time ago the need for the community and public service to take the diversity of interests into account. This was probably heavily influenced by the social ideas that became widespread after the end of the Second World War9. Thus, a tripartite system of representation involving the Government and its social partners was established in France immediately after 1945. The system has played a major role, at least with respect to principles, in the functioning and management of its public enterprises and

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5 Ibid. p. 429
6 Eod. loc.
7 On Spain, see A.Bar-Cendon, Le niveau intermédiaire d’administration en Espagne, in T Larsson et al., op.cit., p. 135 and following.
8 The system and extent of powers of the communities result from combining two series of articles of the Constitution. The first series, articles 143 and 151, concerns accession to autonomy. Article 143 concerns a basic criterion, which requires that initiatives with respect to the autonomy process be taken by the government organs of the provinces concerned and by two thirds of the communes the population of which represents at least the majority of the electorate of each province. The other article, 151, spells out a special more demanding criterion which not only requires that any initiative with respect to autonomy be taken by the government organs of the provinces concerned and by three quarters of the communes of each of the provinces concerned, representing at least the majority of the electorate of each of them, but also requires that the absolute majority of each province should ratify this initiative by referendum. The second series of articles concerns the powers conferred on the State and the communities. Article 148 lists the matters and powers that may generally be conferred on all the autonomous communities and article 149 lists the exclusive matters and powers of the State, which, in practice, gives the communities enormous freedom of action. The Constitution authorizes the communities that followed the stricter and more legitimate avenue to autonomy stipulated under article 153 to accede automatically to the maximum powers conferred by article 149 in addition to those allowed under article 148, while the communities established in accordance with article 143 may only accede to the powers provided for by article 148 owing to the fact that the basic criterion has less legitimacy (A. Bar-Cendon, loc. cit. p. 146-147).
9 However, in a country like Denmark, the social partnership experience may well date from a much earlier period, the September agreement” of 1899, the country’s first collective bargaining agreement. The tradition of cooperation between the Government, unions and employers’ organizations thus initiated was extended and renewed by the 1987 Job Pact and institutionalized through the establishment of a National Labour Council and 13 Regional Labour Councils where trade unions and employers’ organizations are represented.
establishments as well as in their development. However, it has perhaps played a smaller role in the Government’s general policy with respect to the public service. The so-called policy of consultation, which began to gain ground in the 1960s/1970s, and whose principle has not been abandoned since, is now one of the key elements on which the participation of categories and interests outside the State in the functioning of the French civil service is based. This policy was also introduced to varying degrees into other countries, including Denmark and the Netherlands. However, in the latter, it is now viewed as being rigid, belonging to the “old school” of representation of interests, too corporatist and exclusive, aloof from the much-needed dialogue with categories of stakeholders and partners that pluralist societies cannot afford to ignore, such as women, older persons, the unemployed, minorities, consumers, environmental movements and other social groups. Therefore, all European countries seem to have adopted, as preferred methods of government, representation of users’ associations on negotiating bodies, the establishment of extensive and open consultation procedures through committees or commissions set up under various sectors of government policy, such as labour law, health and hygiene at work (Denmark), or even institutionalized consultation of interested parties through the tramite de audiencia procedure pursuant to a constitutional obligation, as is the case of Spain. These trends clearly stem from a need for transparency and for greater reliability in the quality and adaptation of regulations to citizens, transparency and reliability that have enhanced and given even greater legitimacy, if at all possible, to the recognition of diversity of interests.

c. It is especially in the area of the diversity of persons that the most spectacular changes have occurred in the different European countries, changes enshrined and framed in two core texts: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the recent Charter of Fundamental Rights of the European Union. Although these two texts have neither the same geographic coverage nor the same legal scope – the Charter is restricted to the countries of the European Union and is not binding – they both have considerable practical and symbolic value as guarantees or proof of common European values. Thus, article 14 of the Convention provides that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” – making this article a provision that prohibits not just any distinction, but any discrimination or arbitrary difference of treatment in the exercise of the rights and freedoms protected by the Convention. With the exception of an additional criterion (“association with a national minority”), the criteria, 12 in all, are the same as those set out in the Universal Declaration of Human Rights, not to mention the generic reference to “other status” different from those included in the Universal Declaration of Human Rights. The European Charter also enshrines the principle of non-discrimination in its article 21. The scope of this principle is considerably expanded with its inclusion in a chapter entitled “Equality”, which is preceded by an article 20 on equality before the law: - “everyone is equal before the law” - and strengthened by article 23 on equality between men and women. Moreover, the list of grounds

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10 OECD PUMA, Consultation and Communication, Occasional Papers, No. 17, 1997, p. 8
11 Note sur les évolutions récentes dans la gestion publique en France, Mise a jour 1998, p. 1
12 OECD Regulatory Reform in Denmark, 2000, p. 142-143
13 OECD Regulatory Reform in Spain, 2000, p. 33
14 Article 21 of the Charter: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”
for non-discrimination is expanded from 12 to 17 (the generic reference to “other status” disappears). This, together with the reference to the prohibition of any discrimination, means that the Charter implicitly acknowledges that non-arbitrary distinctions (distinctions that therefore cannot be considered as “discrimination”) based on any one of the 17 grounds listed in article 21, would be legal. That considerably increases the possibilities and legitimacy of the differences that the 1950 Convention had acknowledged. Moreover, the Charter explicitly recognizes, twice, the existence of diversity. First, article 22 provides that “the Union shall respect cultural, religious and linguistic diversity.” Secondly, article 23, on equality between men and women, provides in its second paragraph that “the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” The effect of this is not only to recognize gender-based diversity in status (under-representation in employment or work) but also to allow corrective measures to be taken. This contains at least the seeds of considerable change in European thinking on diversity and the place that it must be accorded in the legal and political systems of various European countries. Today, we are thus witnessing three trends. Henceforth, diversity clearly constitutes one aspect of the principle of equality, the other aspect of the principle of non-discrimination, which thus entitles individuals to demand the right to be different and to be, in their difference, equal to any other individuals, who are themselves different. Moreover, many more differences are recognized. We noted that the number of criteria for special treatment has increased considerably. In terms of gender equality, there is even an emerging recognition - with, however, only a limited basis in the Charter - of the right to compensation for inequalities resulting from the existence of such diversity. If such a trend were to be carried to its logical conclusion, there would be a shift from an “old style” model of basic consultation/representation of sketchily defined categories of interests and persons to a new model of adjustment/compensation based on the accurate evaluation of any given situation.

What is certain is that, today, the State in the European countries, is still not quite prepared for this transition.

2. Archaic tools for the management of diversity

The State is in no way ready for this transition. Therein lies the challenge facing European countries. They have tools that are totally unsuitable for coping with the increased demands in the area of diversity management. Both the administrative structures and legal techniques they use are obsolete.

a. The diagnosis has long been given on the administrative structures. Everything that needed to be said about the monolithic nature of these structures was said a long time ago. Despite the reforms they have undergone and efforts that have been undertaken to modernize them, these administrative structures still continue to function mainly on the basis of an old model - the basis of their design - steeped in a tradition of chain of command and under which autocratic bureaucracies are treated in a uniform manner. This approach has two consequences. The first has to do with the uniform functioning of the administrative machinery, while the second concerns its opaqueness. On the first point, we have been able to show, with respect to a country like France (which in this regard is a sort of archetype), how, in the public service in particular, the inevitable consequence of the essential uniformity of administrative structures is the rejection
or denial of any differentiation. Indeed, it is assumed that, because the structures are uniform, those who are tasked with their operation are treated equally. Thus, “equal treatment aptly describes the way they function as well as the collective attitude of public servants and their representatives. This is hardly surprising, given the deep attachment of the French to equality and their willingness to sacrifice part of their freedom for this equality. Tocqueville demonstrated this eloquently. Of course, we do not reject the need for equal treatment, which ensures that officials are protected from discrimination provided that it is not exacerbated, as it very often is, to the point of degenerating into egalitarianism. Owing to the concern to ensure equal treatment, there is little progress in instituting a merit-based system because of the fear that the same yardstick would be used in Perpignan and Besançon to take decisions; the practice of awarding bonuses based on individual performance is little used because of the fear that such differentiation would not be based on sufficiently objective criteria; promotion is based, to the extent possible, on age, which is the most neutral and verifiable criterion; if possible, transfers are based on a scale, thus eliminating the human fallibility factor.”

Nor should we be surprised, in another area, at the resistance to territorial decentralization especially if, as is the case in France with the questions raised today with respect to the status of Corsica, the proposed decentralization measures are part of a system that would not be uniformly applicable to all the decentralized communities. We also note how fiercely and for how long the supporters of the principle of equality – in France as well as in many other European countries - have opposed the introduction of measures aimed at better implementing the principle of equality between men and women and, in so doing, introducing quotas to reserve jobs in the public service or places on lists of candidates for political elections for women.

The opaqueness of administrative structures, the characteristic of autocratic bureaucracies, is as much an obstacle as their uniformity in efforts to take into account and manage diversity. The administrative culture of many continental European countries, especially those with Roman and Germanic traditions, is steeped in legalism – and is loath to make room in principle for the involvement in the drafting of laws of elements other than those that are authorized by the Constitution to do so. Indeed, it is only by chance, and never as a natural reflex, and in a kind of demonstration of goodwill that the public service opens up to consultations. The public service still has to overcome what it perceives as the obstacle created by the fact that, since its legitimacy is founded on the law, in other words on the will of the people, it does not have to seek legitimacy elsewhere. It even has the impression that it would undermine such legitimacy by opening itself up to consultations with groups or factions that risk compromising the nature and expression of its legitimacy. However, if one wants the public service to be able to take the different types of diversity into account and translate them into reality, then it must be able to know what the concerns of those over whose behaviour it is going to exercise control are.

b. On this point also it should be noted that the administrative techniques are considerably outmoded. The dominant model used to manage and control the activities of citizens remains what has been called the model of the “State as regulator” which has the following features: it is a State with direct, mandatory and uniform regulations. This model was really adapted when the industrialized democracies of the modern era were established. At that time, it was the most reliable means of managing the activities for which the public service was responsible in

15 M. Pochard, Quel avenir pour la fonction publique? Actualité juridique-droit administratif, 2000, No. 1, p. 9
implementation of the decisions, and under the authority, of the sovereign. The application of the law meant both that the law was applied – there can be no sovereign power other than a power that acts on its own volition – and that it was uniformly imposed: the broad scope and universality of the law in themselves contain the principle of equality. A breach of the principle of equality was necessarily illegal, since the law is by definition the reflection of a general desire for equality.17 Uniform treatment under the law therefore appears to be inherent in the very nature of the law. This overly rigid position became untenable in the face of the increasing complexity of societies and the need to take into account therein all the different kinds of diversity. This has resulted in practices which, although designed to address the lack of democracy in how regulations are elaborated have, under the guise of consulting interested groups, been replaced as a result of pressure and the lobbying of interest groups. Yet, as a study by OECD notes, “(...) Lobbying is perhaps an inevitable consequence of an open decision-making process. It does however create potential policy imbalances, as well-resourced professional lobbyists dominate policy discussion and pursue influence through private channels such as close relationships with influential politicians and officials”18. In the final analysis, and as OECD again notes, it seems that “involving the public in policy is not a panacea.”19

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18 OECD PUMA, *Consultation and Communication*, op.cit.,p.16