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The "Common Constitutional Traditions" and the Integration of the EU

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A spectre is haunting Europe: Anti-Europeanism. The resounding 'no' from the French and Dutch referendums on the European constitution is already negatively weighing on current debate and – what is decidedly worse – not only on action to further European political integration, but also on the type of integration the constitution may bring. Recent developments demand that we drastically cool our previous optimism concerning the thrust in an increasing European integration[1], imagined as a new political entity capable of taking its place on the international stage. In addition, the extremely unfavourable political climate has been worsened by the failure of the Heads of State and Government Summit in Brussels on June 17 and 18, 2005, marred by a crisis that seems to have rocked the very foundations of the EU.

However, despite the fact that at the political level, European integration has – to say the least – suffered a serious blow, the question of Europe's legal integration remains firmly on the agenda even within the minimalistic, Blairite version of the EU that seems to prevail. And this for two reasons: Firstly, the EU is functional to the security demands expressed by the single market; secondly, and as a direct consequence, European legal integration remains pertinent on account of: 1) the huge body of European norms and regulations that already exist; 2) the litigation they trigger; and 3) the issues their application generates in terms of concrete cases in the member States. Indeed on the legal level, European integration is implicitly sanctioned by Article 6.2 of the EU Treaty: "The Union shall respect fundamental rights, as… they result from the constitutional traditions common to the Member States, as general principles of Community law". These terms are reiterated in the Preamble, cl. 5 of the Charter of Fundamental Rights of the EU, and in arts.- I-9.3 and II-112.4 of the Treaty establishing a Constitution for Europe of December 16, 2004.

Given the current political context marked by the rise of (economic) national individualisms, it would appear highly unlikely that legal integration will come from any (political) project to develop a real European (private) law system[2]. Any integration that

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[1] Enthusiasts see Habermas 2000; following the negative responses of the French and Dutch referenda, however, see Habermas 2005. For an example of optimism among Italian authors, see Palombella 2004, 2005a, 2005b: In agreement with Joseph Weiler, Palombella holds that a European constitution already exists regardless of any ratification of the constitutional Treaty.

[2] See the debate on the so-called "common core" in Bussani and Mattei 2000, 2003; Van Hoecke and Ost 2000.

may be achieved will probably – and perhaps exclusively – be delivered by the work and collaboration of the national and European courts, and – in this last instance – by the European Court of Justice (ECJ). From this standpoint, the scholarly debate on European integration would be best served by quasi erasing the discussion on the European Constitutional Treaty and returning to focus on the Charter of Fundamental Human Rights. And so, on several counts this situation calls to mind the famous affirmation of Justus H. von Kirchmann (1938) that "three words corrected by the lawmaker are enough to make numerous library sections worthless."

The Nice Charter of Fundamental Rights seems destined to be the subject of renewed attention. Although technically a document without normative value, it is however of enormous symbolic value, potentially a crucial reference point for the judgements of the courts, in particular, the ECJ. In fact, art. 6.2 of the TEU has recognised the notion of "common constitutional traditions" (CCTs), and in this way it legitimates the Court both as creator of the notion and as an active lawmaker. Thus the Charter may be correctly considered the "source of cognition" of the normative content of the CCTs (Pastore 2003, 202). As a consequence, it is the "instrument interpreting" the "sources of inspiration" that sustain the Court in its function of "giving a concrete content to the general principles that constitute the direct normative source of the EU's fundamental rights" (Pastore 2003, 201).

1. *The EU as a Multicultural Society*

Before considering the question of the role that the CCTs might play in the (legal) integration of the EU, I have to clarify briefly the kind of society we are referring to when we think of European society. This will also provide a theoretical framework for the concept of the integration that is appropriate to this society.

European society may be considered a multicultural or pluralist society (Belvisi 2004a, 2004b)[3]. The term "multicultural society" indicates a society in which diversity obtains, a society whose population is culturally not homogeneous but pluralist. Although this type of society is conflictual in nature, it can nonetheless still be defined as peaceful to the extent that political, social and cultural conflicts are managed through the channels provided for by democratic political institutions and by the legal system of each country. One of the conditions that make such "peaceful conflictual co-existence" possible is the mutual respect shown by members of society towards each other and their diverse cultures[4].

Therefore talking about a "multicultural society" means taking culture seriously, acknowledging its importance and profound significance – not only for us, but for every member of human kind – as man's very human nature, setting him apart from other animals (Gehlen 1990, 64-65).

If the question of integration is to be broached in an appropriate sociological manner, defining European society as multicultural, implies taking seriously the "fact of

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[3] In doing so I make no claim of originality. The definition of society as pluralist is in fact implicit in the official documents. See Charter of Fundamental Rights of the EU, Preamble, cl. 3, and arts. 21.1 and 22; Treaty establishing a Constitution for Europe, Preamble, cl. 3 and 4, and especially art. I.2: "The Union is founded on … the rights of persons belonging to minorities… in a society in which pluralism, non-discrimination, tolerance… prevail."

[4] Naturally, culture does not exhaust all the structural features of a multicultural society, not even in the light of the immigration phenomenon: see Belvisi 2000b, 139-141.

pluralism", i.e., pluralism of values, norms and law: in a word, cultural pluralism. Multicultural society is a society of differences. As a result, in the argument that follows, not only is pluralism sociologically relevant, it is also a principle of normative relevance for political theory. In fact, today we may define as "liberal," a society underpinned by a democratic, constitutional political system that undertakes to guarantee pluralism[5] and keep the conflicts that inevitably arise in a society of this kind within the boundaries of the legal system. In this sense we may say that the cultural notion of "pluralism" equates the sociological one of "social complexity." Consequently, any theory dealing with the integration of a multicultural society must describe social unity as preserving the fact of pluralism, in other words, does not make recourse in the last instance to any value oriented device (like, e.g., the Rawlsian "overlapping consensus," or the Habermasian "constitutional patriotism"[6]) which is deemed able by itself to produce basic socio-cultural homogeneity. Rather – and this is the theoretical challenge – integration should keep society "united in its diversity."[7]

2. *Social Integration as a Matter of Inclusion*

Given this premise, it is appropriate to ask how we should understand integration in Europes' pluralist society. From an empirically founded, theoretical perspective no single value system today can claim to enjoy the unchallenged consensus needed to achieve successful social cohesion.

Today we are no longer convinced by the organic functionalist type of social integration proposed by sociologists like Emile Durkheim or Talcott Parsons, nor by the neo-idealist legal theory of Rudolf Smend. Theirs being a form of thick integration designed to create a strongly homogeneous society, cemented by shared value assumptions[8] fuelling a collective consciousness which in turn was the basis of social solidarity (Durkheim), or the interiorising of culture transformed into a latent social structure (Parsons) or again, the State-community that was an existential experience (Smend). Within this theoretical context, "integration" is tantamount to "social order" and hence to the idea of a society where conflict is a pathological phenomenon, the antithesis of social aggregation.

Despite this, new attempts are continuously being made to reduce society's complexity by introducing solutions based on either a single principle or closely linked sets of efficient causes: such as, rights, or "constitutional patriotism" (Habermas) to consolidate democracy, the community to recompose a divided society. Surprisingly this type of solution enjoys quite some success among the social scholars.

It is clear that the problems facing a pluralist and multicultural society – which by definition is a conflicting society – require a very different approach to integration, one

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[5] On pluralism as a liberal principle, see Zanetti 2004; and Zanetti 2003, ch.5. In this context it is clear that the Schmittian political paradigm of friend/ enemy does not fit.

[6] The intellectual mechanism triggered by pluralism is that whereby only a certain amount of diversity is tolerated: that which does not clash with our own conception. A fine example is Böckenförde (1997, 50), who acknowledges "cultural multiplicity" that however has a "common cultural and spiritual fundament [gemeinsame geistig-kulturelle Grundlage] in the Christian religion, Rationalismus, the Enlightenment and unspecified "forms of civil society".

[7] Treaty establishing a Constitution for Europe, Preamble, cl. 5; see also art. I-1.3: "The motto of the Union shall be: United in diversity"; and finally Charter of Fundamental Rights of the EU, Preamble, cl. 3, and art. 22.

[8] A similar axiological conception is argued also by Grimm (1995, 297) to deny the possibility of a European constitution.

that eschews the model which proposes universalistic values since these demand homogenisation and assimilation. In general terms, a complex society can only hold together if it retains its multiplicity.[9]

Furthermore, although fundamental rights are commonly seen as a key means to integration, they are cast into question by the very universal claims they make. As fundamental rights guarantee equality before the law to all, they can retain their integration potential only if they consistently uphold and legitimate the right to difference,[10] and especially the rights of minority groups.[11] In this case we shall have a universalism that generates particularistic claims of recognition.[12] All this has direct consequences for the question of integration, i.e., social unity.

With regard to a modern legal system, social unity cannot be achieved by channelling the rules of behaviour towards conformity with a series of supposedly generally consented values, but rather by including as legal a much wider range of behaviours that may even be deemed "unorthodox" or incompatible with our "customary" institutional practices.[13] Due to the absolute and unreconcilable multiplicity of values that make up a pluralist and multicultural society, the solution envisaged should not so much be social integration but social inclusion.

With this conceptual shift, the whole issue of social cohesion can no longer carry its traditional normative weight as a set of common values. Social cohesion and its achievement are shifted to a cognitive level recognizing the plurality of values. Social unity is now conceived in new way: The traditional concept of a social body grounding in an officially recognized set of shared core values (the "political community") gives way now to the concept of a society in which there exist diverse ambits of liberties that are justified on cultural bases. Conceived in this way, social inclusion is achieved by learning that one can act in different ways to "our own."

And so a substantive issue (common value-oriented) becomes a procedural (cultural diversity-oriented) issue.[14] This ample inclusion could be achieved by following a cognitive and pragmatic principle of social cohesion that has its roots in tolerance. In a pluralist society, this could be a form of tolerance that allows us to let others do what we –

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[9] At a general level, social integration is clearly not achieved within one single sphere of activity such as the economic, educational, or inter-personal fields, etc. Integration of an individual in society is the result of action of various systems and institutions that impinge upon an individual's sphere. Within this overall phenomenon, however, my specific interest is the cultural aspect of the process of integration: An aspect that characterizes a multi-cultural society and which, as a general rule, I consider from the specific view point of the contribution afforded by fundamental rights.

[10] This right derives, for example, by combining the two principles included in art. 3, par. 1 of the It. Const. regarding equal social dignity and the prohibition of discrimination on the basis of sex, race, language, religion, political opinions, personal and social conditions. These are the two principles that underpin the concept of "formal equality." See also arts. 1 (human dignity), 20 (equality before the law) and 21 (non-discrimination) of the Nice Charter.

[11] See, for example, the constitutions of the "new" German *Länder* on the question of autochthonous minorities: art. 25, par. 1 Const. of Brandenburg; art. 18, Const. of Mecklenburg-Vorpommern; art. 37, par. 1 Const. of Sachsen-Anhalt; art. 5, par. 2 Const. of Schleswig-Holstein. The Constitution of Sachsen also expressly guarantees the rights of national and ethnic minorities so that they may "preserve their identity" and "cultivate their language, religion, culture and tradition" (art. 5, par. 2). Following on from this, art. 5, par. 3 contains a clause on respect for "the interests of foreign minorities, whose members are legally resident in the Land." On this, see Langenfeld 1998; and Denninger 1994, 110-112.

[12] Similarly Walzer (1991, 134): Rights to freedom "may be considered universal values, but […] they have very specific implications."

[13] For a more in-depth consideration, using the example of the Islamic marriage, see Belvisi 2003b.

[14] Réaume (1993, 256-257) speaks of a "*culture-sensitive adjudication*."

at least in theory – would not do. This being on the condition that such different behaviours and lifestyles do not jeopardise human dignity and therefore respect the universalistic principle of not harming unconsenting third parties.[15]

As Will Kymlickla (1995) points out, inclusion that guarantees difference makes it possible for the individual to identify himself with, and recognise himself in that society whose law allows behaviour in accordance with the rules of the individual's culture[16].

Such reformulation of the legal meaning of tolerance is grounded in the principles of mutual recognition and respect. According to Habermas (2002, 178), both are principles of "egalitarian individualism," that is the only reasonable morals that may be considered "strictly universalistic," and constitute the normative foundation of a liberal social order like that of European society.

But mutual recognition and respect can be generated even in the absence of shared values or common and universal reasons.[17] In contrast to the theories of Habermas and Rawls, consensus and understanding are neither prerequisites, nor outcomes necessary to communication or dialogue. What is necessary is an agreement on the communication procedure and a common preference for not resorting to force,[18] i.e., it is necessary to keep one's word, mutual tolerance and negotiated decision-taking.[19]

Of course, the outcomes of this approach will neither be full rational understanding nor consensus and even less, truth – for, to achieve these there must an idealistic understanding of pluralist society as a community. If one accepts the consequences of pluralism however, it would seem more realistic to exploit these very "productive misunderstandings" (N. Luhmann) arising during the "improbable communication" (Luhmann 1981)[20] that takes place among "moral strangers" (Engelhardt 1986).[21]

It is doubtlessly true that life in a civil society could not exist if its members did not have something in common they were ready to defend. In a multicultural society we must be prepared to bear the cost of learning the above-mentioned form of tolerance: This is our common, symbiotic munus, i.e., the price we have to pay in order to live together.

3. *Integration through Constitution and Law*

Before dealing with the integration value of the "common constitutional traditions" according to the general thesis outlined above, I will briefly deal with the question of so-

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[15] As Facchi (2001, 102-104) clearly underlines, in the event of practices (like female genital mutilation) considered by Westerners as harmful and therefore, to be eradicated in the application of the "harm principle:" According to Mill, the principle cannot be enforced abstractly, but must consider the actual people involved and the context.

[16] Kymlicka, 1995, 306-309, 327-328, and 330-331. See also Raz, 1998, 203-204; and Zanetti, 2002, 51-56.

[17] See Raz 2001, ch. 2 and 4.

[18] Heller 1992b, 427-428, for whom, however, the essential prerequisite is a "certain degree of social homogeneity", or – more exactly -, that "such homogeneity (has to be) *believed and accepted...* [In other words, there has to be] a *belief* in a common ground for discussion" (italics mine).

[19] Cf. Tully 1995, 131-139; and Bohman 1996, 83-89.

[20] Dialogue and negotiation in an attempt to reach an agreement can in fact be achieved on the basis of "misunderstandings."

[21] The concept of "moral stranger" identifies people in pluralist societies who interact and communicate, but are often extraneous to the culture of their interlocutors. They are "moral" individuals since they are responsible people and since the communication that passes between them takes place on the basis of *mutual recognition* and *respect*.

cial integration at the level of the constitution, since the role that the former may play in this issue depends on the contribution made by the latter. Moreover, my paper deals exclusively with that part of the constitution containing a catalogue of fundamental rights,[22] since it is with these that the CCTs mentioned in Art. 6.2 of the TEU are concerned. My argument rests on an analytical and stipulative (or, perhaps, better: ideal-typical) distinction between principles and values.

For many reasons that have to do with the philosophical nature of the crisis and the transformation of value-oriented conceptions (like, for example, ideology, politics, morals and religion) in contemporary pluralist society, a material concept of integration, i.e., founded on values, appears totally inadequate, since these values no longer enjoy absolute, unquestioned validity.[23] This traditional (and intuitive) concept of integration goes back to the origins of social philosophy and was a bedrock concept of sociology. In particular it was subscribed to by scholars who, paradoxically, at the turn of the 20th century witnessed the disintegration of the very notion of a homogeneous society (the best example is Emile Durkheim), a state of affairs that led Nietzsche to affirm the "death of god." From a legal-sociological viewpoint, rather than the neo-Parsonian position of Habermas (1992, ch. 2, par. 3), what is interesting in this framework is Rudolf Smend's "doctrine of integration." Developed at the end of the 1920s, Smend's theory rests on a precise philosophy and neo-Hegelian social conception – that of Theodor Litt (1926)[24] – of a close connection between individual and community. It exerted – and still exerts, more or less overtly – enormous influence on European constitutionalists (or at least on German and Italian constitutionalists). Smend's doctrine is interesting from the socio-philosophical standpoint since it shows that social and political integration through values contained in the constitution is possible only in a homogeneous society: Here members of the "political community" – upheld by the communicative actions among citizens – are able to experience together (Miterleben) the same life situations by virtue of their cultural, and hence normative, commonality, a factor that allows them to acknowledge the life of the State as an ethical whole.[25] More recently, Niklas Luhmann has convincingly demonstrated how, in a complex society, generalised sharing of life experiences (Erlebnisse: Luhmann 1974, ch. 2 and 4; 1984, ch. 2-3) or the preferences that underpin the social objectification of values (Luhmann 1993) is no longer possible. This is true of course, not in the restricted terms of a few circumscribed interactions concerning the individual, but proves correct at the general social level: Clearly, I doubtless share certain important life experiences with my relatives, but these may well be incom-

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[22] "…of the various parts of the constitution… fundamental rights… are the most appropriate to link it with social integration": Grimm 2004, 14. Although acknowledging this, the author does not deal in any depth in his paper with the integrative role of the rights. Reading the text, it is somewhat disconcerting to think that Grimm was a German Federal Constitutional Court Judge: The passage cited is part of the only (short) paragraph to mention fundamental rights in a 15 page paper on the (eventual) role of the (European) constitution as a tool for integration. Given his previous declarations (Grimm 1995), it comes as no surprise, indeed lends weight to his view that the fundamental rights contained in the constitutional treaty in no way foster integration (Grimm 2004,14). What is surprising is that Grimm considers the constitution simply as a "set (*Inbegriff*) of higher ranking norms", whose aim is "the institution and exercise of [a lawful] political power" ibid, 2-4, *passim*). In a word, Grimm seems to view the constitution, almost akin to the absolutist conception, as the mere organisation of public power. Eighty years before Grimm's paper, Heller (1992a, 285) had defined "rights to freedoms" as a "constant element of the first written constitutions", i.e., in the modern sense of the term.

[23] A hard case is made by Luhmann 1993; as to its intriguing jurisprudential solution see Brugger 2002.

[24] On Litt's conception based on the dialectic phenomenology of culture, see Belvisi 2000a, 57-68.

[25] For more in-depth reading, see Belvisi 2000a, 48-57.

prehensible to the person sitting next to me at work, or standing behind me in the queue at the bank or in the rival team's stand at the football stadium.

During the same period in which Smend was developing his constitutional doctrine of integration within the pluralist society of Weimar Germany, Hermann Heller, claimed that democratic society would not hold together unless it had a minimal social homogeneity necessary to bring about that socio-psychological condition that leads to the creation of a consciousness and sense of "Us." This feeling of being part of a collective entity binds and keeps together individuals despite the opposing interests and conflicts that run through society: It makes possible that relative "conformity (Angeglichenheit), or adaptation to the social conscience" that brings about the "will of the community" (Heller 1992b, 428).

On the other hand however, Heller underlines that the "ontology" of the modern European era has become completely secularised, and in consequence is today located entirely in the "here and now" (Diesseits). Indeed, it has even lost spiritual characteristics such as a common language, culture and history that at the beginning of society's secularisation had been important factors for integration (Angleichung): "The spirit of our times… in truth, always and only acknowledges the naturalist sphere of realty." The universe of values is no longer relevant for the question of integration, being reduced to a "by-product, an impotent ideology and fiction." Today, the elements that allow individuals to recognise others as one of their kind belong to the sphere of being, of pure existence: One's "economic, sexual, or racial ways of being" are increasingly decisive also for social homogeneity (Heller 1992b, 429).

In short, with Heller we have learned that today the problem of integration no longer centres around the evaluative issue of whether individuals and social groups identify with or recognise themselves in the constitution and the political system of a given society, thereby legitimating these. Before committing themselves, people pose the (pragmatic) question of the "acceptance" of that political and constitutional system. It follows that they will identify and recognise themselves in the legal-constitutional order that permits them to live their own life styles which if necessary may be adjusted according to the fundamental principles underlying that same order.

On this count, as it is always beneficial to stand on the shoulders of the classical writers to get a wider view, let me take the teachings of Georg Simmel. Within his "value-free" conception, Simmel describes the integrative role of law, intersecting the objective perspective characterised by the legal system, with the subjective perspective of the social actor. That is the individual who, while a constitutive element of society is at the same time inevitably a potentially and existentially destructive force of that social order.[26]

According to the Simmelian principle whereby "general rules of behaviour are of necessity negative in nature" (Simmel 1989, 359-362): "The more general a norm is and the more it applies to increasingly wider social circles, the less the fact of following it serves to qualify the individual and the less importance it has for that individual; violating that norm, on the contrary, usually produces particularly strong and notable consequences" (Simmel 1989, 361). Thus, whilst such norms – such as principles and constitutional rules, but also laws, especially criminal laws – lay down the indispensable conditions for social unity (integration), only the compliance with the concrete rules of everyday life – customs, traditions, practices that impinge more closely on the individual, and better understood and more followed by her – determines the way in which so-

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[26] For greater details on this and the following, see Belvisi 2003a, 85-88.

ciety really is. It is these norms that determine the actual running of social life and mark the existence of the individual: In most instances, what counts is not the abstract observance of the law not to kill or discriminate against others, but my behaviour on a bus, in a café, among family or at work.

From Simmel we can take the consideration that, in the same way as we comply with the norms of the criminal code, our compliance with the "principles" (that vis-à-vis third parties may be interpreted as limits or prohibitions to action, i.e., understood as norms of negation) is equally necessary if society is to stay united: It is necessary to respect the freedom and dignity of others, not discriminate against them etc. If this were not the case, there would be the danger of an authoritarian political system, civil war, revolt by minorities or a sort of Hobbesian war of everyone being against everybody. Otherwise, the prohibitions that underpin the (constitutional) principles do not immediately lay down any particular positive behaviours, but rather, like exclusive general norms, open up the sphere of allowed action.[27] Moreover, complying with the principles lays only the minimum (necessary but – in fact – insufficient) basis for social co-existence. It does not structure co-existence in any definitive way. Rather, co-existence is organised and regulated through a multitude of institutions and specific rules that fairly closely discipline individual spheres of life whose forms are shared by particular social circles and groups.

Also values are usually conceived as elements of the normative universe and are able to orient, motivate and guide action: These too can be considered "reasons for action" (J. Raz). However, as Max Weber (1982, 507-508) has shown, values by their very nature are bound to carry on a "mortal struggle" for affirmation and supremacy: As such they are potential generators of conflict. However, in the "normality of everyday life" it is very unlikely they will force us to take "ultimate decisions." Thus, given their conflictual nature, in a pluralist context we need to defuse the potential for political strife inherent in a polytheistic value system by adopting a pluralism of principles. Polytheism inevitably sets the scene for intractable conflict among values – there no longer being the supreme value, many values are vying for supremacy. None is able to impose its "tyranny" (Schmitt 1967), however: "Neutralised" and treated as principles, they have to settle for a "milder" coexistence, especially to make that coexistence possible.[28]

The scenario set by the pluralism of principles fit well with a society, where lifestyles, behavioural patterns and institutions are in possible conflict with one another, but not in such a way that the principles they are referred to struggle for supremacy. Principles are pragmatic and co-operative by nature, oriented to resolving conflict, balancing interests and reaching judgements based on fairness.[29] In the event of conflict, adherence to principles will not lead to the outright and abrogation of the rules of everyday life, but rather should lead to correct those rules and adjust their application in a manner

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[27] Simmel (1989, 361), in fact, points out that the opposite of that which is forbidden is not that which is ordered, but – apart from things expressly prohibited – that which is permitted.

[28] Zagrebelsky (1992, 9, 11-12), defines the constitution as a "common pact in which everyone may recognize himself (and in order to do so, is willing to forego something of her/his own and acknowledge something of others)", containing "principles that rise above particular interests and allow everyone to live together": In this way, the constitution is the "condition making collective life possible" and a compromise among fundamental principles, none of which is conceivable as absolute.

[29] In this regard, the classical distinction should be borne in mind between "conflicts of value" and "conflicts of interest" that have many points in common with the subject of this paper.

compatible with the principles.[30] This being especially appropriate, since principles are indeterminate and give no specific indication as to how action should be conducted. On the contrary, the norms of everyday life flow from institutions that establish and give certainty as to how action is to be conducted, are not however, refractory to change.[31]

In other words, in a pluralist society, (constitutional) principles provide a framework for conflict, and are conceived as "reflexive" law (Teubner 1982, 1987), responsive and therefore susceptible – to put it in Weberian terms – of "comprehensive" application, aiming at negotiation (or compromise)[32]: I would even go as far as to say, that they are susceptible of an application oriented to the principle of reasonableness.

On the contrary, if fundamental rights are understood as values, the constitutions that contain them can be conceived as an "order to integrate" (Integrationsgebot: Katzenberger 2002). Their aim is material integration and cultural assimilation, both of which undermine the grounds of pluralism. As far as this last principle is concerned, the constitution cannot be understood in Habermas' terms as a citizens' "identity card,"[33] or as "normative self-understanding of ourselves" (Habermas 2000)[34]: It is more appropriate to see it as a document that takes into account and consolidates principles. Conceived of as principles, rights constitute an "integration offer" and provide the "moral strangers" (Engelhardt) living in a pluralist society with the possibility of identifying and having a sense of belonging within that society.

The situation may seem paradoxical: The safeguard of cultural pluralism cannot be entrusted on cultural elements – values –, since these are the product of one culture. The solution must be placed on a neutral level of abstraction vis-à-vis culture. As both the product and foundation of a culture, principles are flexible instrument of integration. From this viewpoint, principles have a universal validity, not because they can lay claim to universal acceptance, but because, in the same way as norms, they can be imposed by law, or better: They can be realised with the instruments of law. In this Habermas is right: Principles are (and ought to be) valid for everyone while values are valid only for those who share them (Habermas 1992, 311, 312).[35]

Principles are "values" of a particular type. They can be applied, balanced and corrected pragmatically as the case in hand requires. Their axiological content is not rigid. Their pragmatic character lies in the fact that they are universal principles also because they have to manifest their claim to be valid, respected and applied in every case in which they are implicated. At the same time however, they are particular in terms of the way they are applied in concrete cases, and in relation to conflict and balancing with other principles.[36] Finally, values are an ultimate, unquestioned foundation of discourse

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[30] Rodotà (1992, 161): "The law … tends to set itself up as the *rule* making cultures and values *compatible* rather than the *rule* assigning definitive *prevalence* and imposing just one of the positions in the field"; similarly, Preuß 1994, 117-120.

[31] I gave an example based on the Islamic marriage in Belvisi 2003b. For a detailed review of institutional change in a pluralist society from the practical-philosophical perspective, see Zanetti 2004, ch.1 and 3.

[32] Kelsen (1981, 98, 142) holds that in a democracy, laws must be the fruit of compromise between Parliamentary majorities and minorities. All the more reason – I say – for the principle of compromise to apply to the interpretation and application of the law.

[33] For European citizens see Habermas 1996, 2001; see also Spadaro 2001, 629.

[34] As values, fundamental rights represent "a symbolic order expressing identity and the form of life of a particular community founded on law": Habermas 1992, 312.

[35] On the values of a pluralist society, in particular, their genesis, universal character, validity and the respect we owe them, see Raz 2001.

[36] For human rights, see Viola 1998.

and narrative, whilst principles have to be sustained by argument, like the justification they themselves provide. Values are a question of faith, and about absolute good and justice, while principles are a question of prudentia, wisdom and fairness. Values and principles fit in well with Weber's distinction of "ethics of intention" (values), and "ethics of responsibility" (principles).[37]

In a pluralist society, while what unites does not necessarily bind (as the so-called heritage of common values does), it allows people to live their diversities, maintain their particular features (see Domenichelli 2002, 11), and see their lifestyles respected, since culture constitutes a relevant element. Now, however, respect for culture and the set of norms deriving from culture may only be practised within the limits specified by the constitution. In the context of the EU, the integration function both on the legal and social levels, is assured by the Charter of Fundamental Rights[38] and by the "constitutional traditions common to the Member States," as "sources of inspiration" (Pastore 2003) and of cognition of fundamental rights "as general principles of Community law."

4. *Common Constitutional Traditions*

Defining the nature of the EU from the political and legal stance is not a simple task. An earlier and fascinating proposal comes from Günter Hirsch, for whom the European Community (today the EU) should be understood as a kind of autopoietic legal system: "Its true essence [is that of] just a legal community. Law is – so to say – the matter from which the Community was produced and at the same time is the matter that it in turn produces ... if the Community were be divested of the treaties that constitute it, it would cease to be. In short: There can be no European integration without the legal community; there can be no legal community without legal unity; there can be no legal unity without central jurisdiction" (Hirsch 2001, 82).[39] The most important and direct implication of this proposal is the central role assigned to the ECJ in the process of European integration, which is to interpret and improve Community law and which is possible through the CCTs.

Both the most negative and the most benign analyses agree on the fact that the notion of "CCTs" is an ex novo creation, "invented" by the ECJ.[40] It appeared for the first time in the decision in the Internationale Handelsgesellschaft Case (11/70 [1970]), and has subsequently been confirmed by the case law of the Court concerning the safeguard of human rights. Finally, it was definitively recognised and included in art. 6.2 of the TEU (as mentioned at the beginning).

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[37] From the philosophical-normative viewpoint, La Torre 2000 talks of the rights changing from values into principles: I am not sure, however, whether the author shares my interpretation of his thought.

[38] On the integration role of the Charter, see Belvisi 2004a and 2004b; Luther 2001.

[39] This concept is doubtless compatible with the theses whereby the EU does not need a constitution since it already has the constitutive treaties: see Weiler 2003.

[40] This goes from the accusation that the concept is an "a*rcana imperii*" (Olgiati 2005) to the criticism of adopting "rhetoric of tradition" and a common heritage on which to base the "mythical construction of the *Euroepan spirit*" (Williams 2004, 142ff.); opponents recognise that the notion refers appropriately with a concept and legal practices that are in turn *traditional* (Pastore 2003; Ruggeri 2003), although they recognise the issues this raises; see also Chessa 2001, 119-126; Cartabia 2005, 17-19.

I think that the most critical interpreters lose sight of the fact that the concept is much more than a mere legal fiction, since it represents a sort of "Phoenician tale,"[41] i.e., a creative lie: A false narration of the origin and order of things that brings an awareness of the virtual state of things and, in so doing, provides a justification too. To appreciate fully the fact that we are dealing with such a tale, we should ask ourselves: "What function within the legal system does the higher jurisdiction essentially carry out?" The answer is: "Its function is to integrate – and, at the supranational level, harmonise – the legal system and improve the law." And again: "How can this task be carried out if we remain within the boundaries of the need for legal security?" "By referring to the (interpretation of the) general principles of the legal system, and in so doing, by referring to the legal culture." Seen in the European context of fundamental rights, the arcane nature of the CCTs becomes clear.

I could almost claim that in fact, the notion of "CCTs" was a forced choice and that the ECJ was obliged to find a way to legitimate its action to safeguard rights, in the absence of any Charter of Fundamental Rights enjoying cogent normative value to resort to.[42] And it has to be acknowledged that no other concept would have succeeded as well as the notion of CCTs!

The formulation includes two terms – "traditions" and "common" – that already prima facie have considerable self-justifying power. The notion of "tradition," like concepts such as norm, right or institution, has the capacity to add value to the significance of what it evokes: "Tradition" describes normatively that which has been "tradito" or handed down over time, and hence persists, this has value per se and is to be respected, observed, reiterated. This intuitive sense of the concept, one that is almost subliminal, concerns only one first aspect of its significance: a static significance, from which Max Weber started to construct an ideal type of social action. However, there is also a dynamic aspect of tradition, that has been worked out within the hermeneutic thought: On this view we can never know the most ancient tradition since this has not come down to us. If this is true, then the most ancient tradition is in fact that which teaches us that traditions change, may be subject to criticism and be modified (Zanetti 2004, 72; Pastore 2003, 186-187, 195).

By tying its activity of interpretation and reconstruction to the CC traditions, the ECJ thus links its case law to the past, directing it to ensure respect for the principle of legal security and stare decisis. At the same time however, the Court does not preclude the possibility of acting in an evolutionary perspective, however reassuring, providing that this has a continuity with the past, with positive law and with the constitutional principles.

Even if these elements place the CCTs in a positive light, we cannot conceal the fact that the picture becomes less clear as soon as the notion is taken seriously: It is "inappropriate" to take CCTs seriously since it must not be forgotten that the real nature of the concept is functional and legitimising. One thing is in fact clear: The CCTs were not worked out by the Court after careful comparative studies (Cozzolino 2002): Rather they were freely conceived of as needed.[43] If taken seriously, i.e., beyond the "rhetoric

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[41] For a famous example see Plato's *Republic*, 415a-c.

[42] The European Convention on Human Rights is not part of Community law and through it the European Court of Human Rights in Strasburg exercises its jurisdiction.

[43] In effect, problems arise around the interpretation of rights by the Court. We know that the ECJ draws out fundamental rights in their application of case law and that this leads to conflicts with the constitutional courts of the

of tradition" and from the point of view of the effective common character of the constitutional traditions, it then becomes immediately obvious that these are – as it were – a dying breed. If taken seriously, constitutional traditions are immediately shown up as not common.[44] For instance, it will transpire that among Member States there is no convergence between rule of law and State of law (i.e., Rechtsstaat: Ogorek 2005), nor a common meaning for the principle of the division of powers (Schieren 2002). And these are questions directly connected with the protection of human rights. Moreover in the debate on the scope of the term "common," it was noted that there is a tendency to limit the sphere of its meaning. As a result we have gone from attempts to seek a real commonality of constitutional traditions, to considering as common those traditions present in the majority of the constitutions of the Member States, or in a certain number of constitutions, or even to consider as "common" a particularly relevant constitutional tradition present, however, in only one Member State. The principle of "inviolable human dignity" is a case in point, only found in the German constitutional tradition (Jones 2004).

Therefore, if in the end it is recognised the CCTs "themselves" are a "source of inspiration" for Community law (Pastore 2003, 201), one can once again appreciate the sense behind the "Phoenician tale": The CCTs are no more than "European" traditions (Ruggeri 2003, 115), developed by the ECJ on the basis of an undoubtedly complex hermeneutic process which the national constitutional tradition have (and must have) influenced (see Cartabia 2005, 18) directly or indirectly, at the beginning or at the end of the process and in different ways at different times.

Having established that the true source of the CCTs is the ECJ in its function to integrate and harmonise the European legal system, the question of social inclusion within the EU can now be broached once more. If correctly understood in the light of the dramatic backdrop of the 20th Century (which prompted the founding of the EC-EU, as Cesare Pinelli (2004) rightly maintains), the CCTs have the "virtue of transforming," or Europeanising the different national concepts of the meaning of fundamental rights (Jones 2004,169-180). In this way fundamental rights-and-values will be transformed into principles that can and must be developed by the ECJ, going beyond controversy over the true essence of a particular right according to a particular national legal tradition (Jones 2004, 181-183, 186-187).

The work on the CCTs is a preparatory step towards producing European legal principles: In this sense the notion of CCTs is that of a device to develop uniform framework principles at a European level. These principles can offer integration and allow the inclusion of EU residents despite their social and cultural differences. This integration

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Member States in virtue of the principle of the supremacy of Community law over national law (see Cartabia 2005). The conflict has to do with the awareness both of the fact that the ECJ uses the comparative tool as and when it needs to for its judgements, and of the different extension that rights have in the European sphere – even making recourse to the catalogue of the Charter – with respect to the wider safeguard provided for by national fundamental rights. The instruments to tackle these conflicts are, on the one hand, the doctrine of "counterlimits" (Cartabia 2005, 3-5, 9-10, 13-15, 20; Palermo 2005, 182-185; Ruggeri 2003, 107-114; Chessa 2001, 123-126), and on the other, recourse to national constitutional traditions to identify their content and apply the legal provisions – including the decisions of the ECJ – that refer to these and that must be applied within the State (Cartabia 2005, 17-21; Ruggeri 2003, 110-116).

[44] This does not immediately mean that absolutely no "common traditions" exist, nor does it espouse the frankly pessimistic view that "the only legal-political experience Europe has in common [is] that of *Raison d'Etat*": Olgiati 2005. On the contrary, I agree with the demand to place the search for common traditions on a historical level rather than on that of "bad rhetoric" centred on identity: see Pinelli 2004. In this paper, I deliberately avoid making critical remarks on the so-called "European identity" even if the discourse on the traditions naturally tends to include the question of identity.

model based on tolerance can be achieved if the ECJ is able to combine CCTs with the principle of human dignity, embraced not as a communitarian concept, but in the "liberal" sense, as respect for individual freedom of choice and prohibiting discrimination.

In other words, the case law of the Court will be able to promote social inclusion especially if it bears in mind, and takes seriously the EU motto: "United in diversity," which for the time being is relegated to the Treaty of the Constitution of Europe, now consigned to a European political limbo.

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