EUROPEAN CONSTITUTIONAL VALUES AND CULTURAL DIVERSITY

FRANCESCO PALERMO
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1. The discussion on "European values": system-imanent but most prominent in recent years

Values are highly topical in the context of European integration. Not so many years ago one could have speculated whether *Fin-de siecle*-Europe will be no more a vehicle for its traditional values, but a mere end in itself which risks loosing any deeper *raison d'etre*.[1] However, it was the end of the last and the beginning of the new century which saw the Union submersed in an omnipresent debate of unprecedented intensity on its underlying values, on ways to control the observance of these values and on the Union's constitutional identity in general.

When searching for the factors which brought this traditionally quite quiet thematic soup to boil one might identify at least a quadriga of catalysts: the drafting of a Charter of Fundamental Rights in 2000, the so-called Austrian crisis in the same year, the turmoil on the landscape of international politics after

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1 See J.H.H. Weiler, Fin-de-siecle Europe: do the new clothes have an emperor?, in J.H.H.Weiler, The constitution of Europe, 1999, Cambridge University Press, pp. 238-263, at pp.258-261.

September 11 in the year to follow and, finally, during 2003, the work of the European Convention drafting the new constitutional treaty of the European Union. This "valueising" quadriga covers the whole spectrum ranging from a more legal search for a specific catalogue of fundamental "rights" (within the Convention drafting the Charter), a broader constitutional process of self-identification covering also the Union's political objectives, its scope, and its identity (within the Convention drafting the constitutional treaty), finally a question obviously oscillating between law and politics, namely how to react if a member state supposedly infringes (supposed) European values (as has happened in the course of the Austrian crisis) and, last but not least, the highly political search for the stance of the European Union in a new value debate at the global level (induced by the terrorist attacks and their effects on the transatlantic partnership and the relationship between "the" - no more monolithic - West and the (even less monolithic) Islamic world)).[2]

But, of course, the value debate in Europe cannot be confined to these prominent and recent fora. Rather every political system produces on a permanent basis debates on values and tries to provide solutions for conflicts between them.[3] These frictions and asymmetries call for replies by the Courts as well as by the arena of politics. The unique establishment of political accession criteria in the course of eastern enlargement shows how a value such as ~~e.g.~~ the "*respect for and the protection of minorities*" is raised by the political scene but left in sequence for further "digestion" to the legal system.[4] In other cases the question of common values arises when having to fill new European legislative competence areas with concrete political content. This is happening e.g. in the

[2] An illustrative example for this new insecurity serves an article in Der Spiegel: "Der Glaube der Ungläubigen. Welche Werte hat der Westen?, in: Der Spiegel 52/2001.

[3] For the phenomenon of multiculturalism see in this volume the contribution C. Piciocchi, Europe faces cultural diversity: towards a European multicultural model?, who argues that the latter provides a forced auto-definition to the single states.

[4] Minority protection is a "Copenhagen criteria" but was not included - in contrast to all the other political criteria of Copenhagen - in the list of Art. 6 EU as established by the Treaty of Amsterdam. See on this e.g. B. de Witte, Law versus Politics, European University Institute RSC No. 2000/4 or G. Toggenburg, A rough orientation through a delicate relationship, in European integration online papers (http://eiop.or.at/eiop/texte/2000-016a.htm).

framework of the EU immigration policy.[5] Other debates again evolve within the framework of supposed or *de iure* existing frictions between certain policy areas and the common-market driven "skeleton" of the European Union. The "trade linkage problem" in the area of culture[6] or the situation of the EU cinema policy[7] serve as good examples in this respect. Last but not least it would be short-sighted to limit a meta-debate on the value discourse to the EU system as the latter is significantly influenced by other regional systems such as the Council of Europe or the OSCE as well as by the national systems themselves.[8] The *fora* and contexts hosting the European value debate are therefore countless – some, like the European Convention in Brussels, prominently exposed to the light of public attention, others, like a local Court room, hidden in silent corners of the political system.

2. The notion of "European values": foundational values, European ideas and common legal principles

Due to the fact that the "value debate" gained in the last years a prominent position in public discourse, the notion of "European values" became epidemic in usage. Taking deliberately the risk of oversimplifying it is here submitted that discussions circulating around this foggy notion are usually based on one of the following three different pre-perceptions of what "European values" refer to. Firstly, European values are often referred to as the political *movens* underlying the European Communities (in the following: foundational values). Secondly the term "European values" arises regularly in the debates on the "European

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5 See in this volume the contribution by M. Bia, Towards an EU immigration Policy: Between Emerging Supranational Principles and National Concerns.

6 See in this volume the contribution by R. Neuwirth, The "Cultural Industries": A clash of Basic Values? A comparative Study of the EU and the NAFTA in the Light of the WTO, contribution in this volume.

7 See in this volume the contribution by A. Herold, Between Art and Commerce: Constitutional Contradictions within the Framework of the EU Film Policy.

8 It is therefore not only legitimate but strictly necessary to focus in the area of minority rights also and especially on the developments in the Council of Europe. Compare in this respect in this volume the contribution by K. Henrard, The Protection of the Roma: the European Convention of Human Rights at the Rescue of a Controversial Case of Cultural Diversity?

identity".[9] In this context one refers to different more ideological or antroposophic stances as "European values" (in the following: European ideas). These European ideas try to sketch a hidden ideological agenda or a common cultural backbone of Europe and its integration process and try to draw the profile of a specific European identity. Thirdly the term "European values" labels the legal *acquis communautaire* surrounding concepts such as respect for human rights and fundamental freedoms, liberty, democracy or the rule of law. Since Maastricht these "*common principles*" (in the following: common legal principles) are enshrined in the treaties, namely in Article 6 EU (former Art. F TEU). The latter circle of values is nowadays the most prominently positioned value-reference in the treaty. However the treaty speaks in this internal dimension not of "values" but of "principles". "Value" was a notion reserved to the realm of the Union's external relations.[10] The currently proposed constitutional treaty does however make use of the term "values" not only in the preamble but also in the provsion on the common legal principles, namely its Art. II-2 ("The Union's values").

It is a commonplace that the Community began mainly as an economic "Community of interest" and developed only slowly towards a political "Community of values". However it is also obvious that the Preamble and Art 2 of the treaty establishing the European Community invoked already in 1956 (at least) a trinity of values. These **foundational values** consist, firstly, in creating a political area of freedom and international peace (as opposed to the experiences made in the two World Wars), secondly, in producing welfare in an area of market economies (as opposed to the command economies under Communism then reigning in all of Eastern Europe) and, thirdly, maintaining a project which

9 Just see as an prominent example the "Charter of European identity" adopted by the Congress of Europa-Union in 1995 (the working group elaborating the Charter has been inspired by the speech to the European Parliament by Vaclav Havel on March 8th, 1994). It says: "...Fundamental European values are based on tolerance, humanity and fraternity. Building on its historical roots in classical antiquity and Christianity, Europe further developed these values during the course of the Renaissance, the Humanist movement, and the Enlightenment, which led in turn to the development of democracy, the recognition of fundamental and human rights, and the rule of law..." See online http://www.eurplace.org/diba/citta/cartaci.html

10 Art. 11 par. 1 EU establishes as an objective of its foreign policy to "safeguard the common values" (see also Art. 27a par. 1 EU).

produces an ever higher degree of integration (as opposed to the experienced results of nationalism and isolationism) and thereby an "*ever closer Union*".[11] The foundational values are political in nature but also boil down to concrete treaty obligations (a fact which is especially obvious in the case of the EU's commitment to the market economy).

The **European ideas**, on the contrary, point to commitments and convictions which hardly can be nailed down in legal terms or identified in treaty provisions. Their legal value is weak and even the political consensus underlying them is shaky. It remains difficult to define what is "European" and what not. This despite the fact that Europe was in historical terms the only continent which was defined by its inhabitants and not by any (imperialistic) external influence.[12] The normative doubts underlying the European ideas do however not abate in their practical importance as show e.g. certain subcutaneous elements in the discussion surrounding the accession of Turkey.[13] An illustrative example for the drawing of a European identity through European ideas is the perception of Europe as a community built on the three mountains of the *Akropolis*, the *Capitol* and *Golgotha*, standing respectively for the Greek cultural heritage, the Roman legal system and Christianity.[14] Others stress that the Union builds on the remembrance and rejection of *shoa*, fascism and nazism as *lieux de memoire* of European integration.[15] Others again focus on the ideals of the Enlightment. Both importance as well as descriptive limits of the European ideas could be very well

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11 Art 2 TEC read as follows: "The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it".
The preamble of the Treaty states that the founding fathers were committed to "strengthen peace and liberty" by "pooling their resources" and they call "upon the other peoples of Europe who share their ideal to join in their efforts".

12 See W. Köpke, Was ist Europa, wer Europäer?, in Das gemeinsame Haus Europa (edited by the Museum für Völkerkunde Hamburg), 1999, pp. 18-29, at p. 18.

13 Or consider the specific connotations a (far) right wing party in German or Austria (in difference to lets say Belgium) encounters at European level: an asymmetric effect of the anti-nazism as lieux de memoire of European integration.

14 This concise metaphor seems to stem from the former German president Theodor Heuss. See for further elaboration H. Graf Huyn, Drei Hügel: Das Fundament Europas, in Grundwerte Europas, Stocker Verlag, Graz, 1994, p. 21.

15 W. Schmale, Geschichte Europas, Wien, Böhlau Verlag, 2000, p. 287.

detected in the role e.g. the notion of "Christian values" in general and "god" in particular played in the work of the Conventions drafting the Charter of fundamental rights[16] and the constitutional treaty[17] respectively. Once one of the strongest unifying forces in Europe,[18] churches and Christianity nowadays encounter difficulties in building an all-embracing ideological mirror of the European reality.

The notion of European values as **common legal principles** is, legally speaking, the most relevant notion and lends itself therefore to be focused on when talking about "constitutional values". These values not only express a common conviction of the Union but they also establish prominent guard rails for

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16 The preamble of the Charter starts saying that "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice...". See OJ 2000, No. C 364, 18. December 2000, at p. 8. Note that (only) the German wording puts more emphasis on the religious dimension by using the phrasing "Bewußtsein ihres geistig-religiösen und sittlichen Erbes". Stronger formulations such as "religious heritage" were objected by laical states such as France. See M. Triebel. Kirche und Religion in der Grundrechtecharta der EU, NomoK@non-Webdokument, par. 12.

17 The latter contains now – despite several efforts in that direction – no direct reference to god or to Christianity. The proposed preamble does though mention "the values underlying humanism: equality of persons, freedom, respect for reason" and continues "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law; Believing that reunited Europe intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world...". Moreover the preamble invokes the responsibility "towards future generations and the Earth".

18 Just think that the Christian Church not only provided medieval Europe with a uniform religion, but also with a uniform language, form of writing, educational system etc. See e.g. A. Angenendt, Die religiösen Wurzeln Europas, in Das gemeinsame Haus Europa (edited by the Museum für Völkerkunde Hamburg), 1999, pp. 481 – 488.

EU secondary law as well as for the member states' legislative and administrative behaviour when acting in the realm of EC law. The original Community Treaties contained no provisions relating to basic human rights and other sorts of legal values which are widely considered to be of practical and symbolic importance in modern, liberal, and democratic political systems.[19] This purely economic and utilitarian approach, which was due to the failure (and hence felt unfeasibility) of establishing a political European Union at the earlier stages of European integration, was then counterbalanced by the jurisdiction of the European Court of Justice. Inspired by the constitutional traditions common to the member states, the Court e.g. held that "*fundamental human rights (are) enshrined in the general principles of Community law*".[20] In the late Seventies and Eighties this set of "European values" was more and more referred to also in declarations issued by the institutions of the European Community.[21] Especially the Parliament was active in pressing towards the inclusion of a sort of value orientated provision in the Treaties.[22] In 1978 even the European Council confirmed in its Declaration of Copenhagen that human rights and democracy are "*essential elements of membership of the European Communities*".[23] Finally, between the accession of the young, still fragile, post-dictatorial democracies of Greece (1981) and Portugal and Spain (1987) the Single European Act included a reference to the principles of democracy and human rights as common principles all Parties are attached to.[24] In 1992, against the background of the end of the Cold War, the fall of the Berlin wall and the announcing accession of a dozen of fresh post-dictatorial democracies the Maastricht Treaty established the

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19 See P. Craig and G. de Burca, EU Law, Oxford University Press, 2. ed., 1998, at pp. 296-298.

20 First in the case Stauder (ECJ, Case 29/69 Stauder v. City of Ulm, 1969, E.C.R 419, para 7 at p. 425. See on this saga B. de Witte, The past and future role of the European Court of Justice in the protection of human rights, in P. Alston (ed), The EU and Human Rights, Oxford, OUP, 1999, pp. 859-897.

21 See A. Verhoeven, How democratic need European members be? Some thoughts after Amsterdam, in Eur. L. Rev., 1998, pp. 217-234.

22 See e.g. 1979 OJ C 39, p. 47

23 Bull. E.C. 3-1978, p. 5

24 The Preamble of the Single European Act stated that the Parties are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the convention for the protection of human rights and fundamental freedoms and the European social charter, notably freedom, equality and social justice", see Official Journal No. L 169 , 29/06/1987 p. 0002.

"*principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*" as principles "*which are common to the member states*" (then Art. F par.2 TEU, now Art. 6 par. 1 EU). Furthermore also the Union is required to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, "*as general principles of Community law" (*Art. 6 par.2 EU). These legal principles are nowadays referred to as the constitutional principles of the European Union.[25]

3. Community(ies) of values: the quest for homogeneity

Communities identify themselves through their common features such as shared values. This resulting social cohesion is in need of a certain (even if modest) degree of homogeneity which these communities aim to preserve. Their success to fulfil this aim will also depend on the legal means at their disposal in order to control such homogeneity. European ideas, foundational values and legal common principles differ regarding the respective mechanisms available in order to maintain such "homogeneity".[26]

Consensus on common **European ideas** is very much left to silent political influences rather than to legal control. Variations in the stance towards

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[25] See e.g. Th. Kingreen and A. Puttler, in C. Callies and A. Ruffert (eds.), Kommentar zum EU-Vertrag und EG-Vertrag, Luchterhand, Neuwied 1999, Art.6, par.1, p. 52.

[26] I am speaking in the course of this article of "homogeneity" in a very wide sense and am thereby not presupposing that there would be something like a "principle" of homogeneity in EU constitutional law – a presupposition which has been rightly refused (see A. von Bogdandy, Europäische Prinzipienlehre, Europäisches Verfassungsrecht, Springer 2003, pp. 149-203, at p. 190). The notion of „homogeneity" has developed especially in the German literature on the mechanism contained in Art. 7 EU (see esp. F. Schorkopf, Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Artikel 6 Abs. 1 und Artikel 7 EUV, 2000). This usage has encountered also criticism (see Schmitt von Sydow, Liberté, démocratie, droits fundamentaux et Etat de droit: analyse de manquement aux principes de l'Union, Revue de Droit de l'Union Européenne, 2001, pp. 285-325, at p. 288 and 289). However, looking at the Art. 7 mechanism as mean of "homogeneity control" does not imply to qualify the Union as a federal state. See in this respect e.g. M. Zuleeg, Die föderativen Grundsätze der Europäischen Union, Neue Juristische Wochenschrift, 39 (2000), pp. 2846-2851) who speaks of a „Verfassungsaufsicht" and „Gemeinschaftsaufsicht" in the context of Art. 7 EU.

European ideas are definitively below the threshold of any legal mechanism of control and are to be seen as autarcic expressions of the member states' "Europa- und Weltanschauung".

A sort of "homogeneity"-control in the community of values based on the **foundational values** could on the contrary build on clear legal obligations and instruments in the economic field. The "*principle of an open market economy with free competition*"[27] is embedded in numberless specific duties and corresponding "fundamental" rights such as the right to free movement in the Treaty-*corpus*. The observance of these duties is severely controlled by the Commission and the Court. This rigid system contributed also to the fulfilment of the political aims of welfare, peace and an ever closer Union, confirming thereby the thesis of functionalism and extracting from the warning saying that "if goods do not cross borders, soldiers will" the positive wisdom, that mobility of goods and services provide also for mobility of ideas and identities and produce thereby tolerance, closeness and peace as side-effects. By establishing the principles of direct effect and supremacy of EC law the ECJ moreover prepared a secure highway for the principles of the Common market, keeping thereby the integration process also on the track of another foundational commitment, namely the one to establish an "*ever closer Union*".[28]

The community based on the **common legal principle** was not only in substance initiated by the Court, it was also the Court who provided a rough control over the respect *vis a vis* these values: in the beginning only *vis a vis* the Community and then – to a certain degree - also *vis a vis* the member states. Protecting fundamental rights in the member states the Court soon found itself knocking also at the "*fundamental boundaries*"[29] of the Communities'

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27 Art. 4 par. 1 EC.

28 This third foundational value has been labelled by Weiler as "ideal of supranationalism", see J.H.H. Weiler, loc. cit., at p. 246 or by Toniatti as "principio di integrazione", see R. Toniatti, La carta e i "valori superiori" dell'ordinamento comunitario, in R. Toniatti (ed.), Diritto, diritti, giurisdizione, Padova 2002, pp. 7-29, at p. 22.

29 Compare J.J.Weiler, Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of Human Rights in the European legal space, in J.J.Weiler, op.cit., pp. 102-129.

competences, of the member states' sovereinity and thereby also at the limits of such a "homogeneity control" itself. This control vis a vis the member states (the situation is slightly different for applicant states)[30] remained therefore piecemeal and subsidiary. The treaty of Maastricht, however, took up the substance of the Court's case law on the common legal principles and enshrined them in primary law (then Art. F par. 2 TEU). The treaty of Amsterdam introduced then a procedure providing political control at European level complementing thereby the Court's evolution in standards setting with a revolution in standards control (Art. 7 EU). Before Amsterdam it was unclear whether and under which circumstances the European Commission could have brought an action against a member state e.g. on the basis that the latter was violating the unwritten principle of democracy.[31] With Amsterdam it became possible for the Council to react on a political level to the "*existence of a serious and persistent breach by a member state of principles mentioned in Article 6 (1)*" by suspending certain rights deriving from EU membership, including even the voting rights in the Council (Art. 7 EU). After the experiences of the Austrian crisis[32] the Intergovernmental Conference leading to the treaty of

[30] Note that the content of fundamental values standard used in the framework of "political conditionality" of eastern enlargement covered also areas outside the scope of the EU's internal competence such as minority rights, children rights or prison conditions establishing thereby a "double standard". The aim should be to strike a middle way between the two extremes: the detailed and overall monitoring vis a vis candidate states and the piecemeal and very subsidiary control vis a vis the member states. Compare B. de Witte and G.N.Toggenburg, Human rights and EU-membership, in St. Peers and A. Ward (eds.), The EU and Human Rights (working title, forthcoming).

[31] See J.A. Frowein, The European Community and the requirement of a republican form of a government, in Michigan Law Association (cur.), Erich Stein, Baden-Baden, Nomos, 1987, pp. 173-184 (at 180) who says in this regard: "Can one go so far as to include an obligation concerning the constitutional principles of a free democracy in the unwritten part of the EEC constitution? Some doubts remain." From a procedural point of view it was suggested to use - in order to stay within the Community system (and hence avoid an escape into international law) - to apply the mechanism of Artt. 296-298 EC (former Artt. 223-225 TEC). See J.A. Frowein, The European Community and the requirement of a republican form of a government, in Michigan Law Association (ed.), Erich Stein, Baden-Baden, Nomos, 1987, pp. 173-184 (pp. 181 and 182).

[32] See e.g. M. Merlingen, C. Mudde, U. Sedelmeier, Constitutional Politics and the "Embedded Aquis Communautaire": The Case of the EU Fourteen Against the Austrian Government, in Constitutionalism Web-Papers, http://www.qub.ac.uk/ies (Con WEB No. 4/2000). The reactions of the 14 took place on the parquet of international law and risked thereby infringing EC law as the latter sets limits to such bilateral

Nice fine-tuned this mechanism of European control so that the treaty provides now even a possibility for the Union to react when facing "*a clear risk of a serious breach*" by a member state of the the principles of article 6 (Art. 7 par. 1 EU).[33] The existence of such a mechanism for homogeneity-control does however cannot ignore the fact that there remain many doubts on the coverage of these shared values underlying the member states' systems. Taking the current EU presidency, namely Italy, as an example one might raise the question whether an open, independent and diverse system of public media is a basic feature all member states should be equipped with or whether this important element of a functioning democracy is something left entirely to the states discretion.[34]

4. The case of (cultural) diversity

Saying all this we can conclude that the Union is influenced and characterised by various circles of values such as founding values, European ideas and common legal principles. The degree of the respective underlying consensus in the European societies regarding these values differs. What also differs are the means to control the respect of these values. Even in the more dense area of common legal principles the respective "homogeneity" remains piecemeal. Under the light of the debate on values the European Union is best described as an Union which, politically speaking, lacks an overall cosensus on values and, legally speaking, is characterised by a plurality of constitutional players and various constitutional values at various constitutional levels. The value debate is thereby characterised by a considerable degree of diversity.

But besides describing the nature of the debate on values, diversity could be refered to as being one of these values itself. Those elements in EU

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sanctions. See e.g. P. Cramer and Pal Wrange, The Haider Affair, Law and European Integration, in Europarättslig Tidskrift (2000), pp. 28-60.

33 See in detail on this mechanism F. Schorkopf, Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Artikel 6 Abs. 1 und Artikel 7 EUV, 2000 or Schmitt von Sydow, Liberté, démocratie, droits fundamentaux et Etat de droit: analyse de manquement aux principes de l'Union, Revue de Droit de l'Union Européenne, 2001, p. 285.

34 Compare Chr. Palme, Das Berlusconi-Regime im Lichte des EU-Rechts, in: Blätter für deutsche und internationale Politik, 04(2003), p. 456.

constitutional law which aim at the preservation of national autonomies and identities and which foster the polycentric and horizontal characteristics of the Union have been attempted to be sketched as an expression of an overall principle of diversity. Such elements are e.g. the principle of subsidiarity, the principle of enumerated powers, the treaty revision procedure in Art. 48 EU (which builds on the consensus of the member states), the institutional asset of the Union (just think of the strong role of the Council and the pluralistic structure of the Parliament) and the like. But as can be seen from these examples diversity is in this context rather seen as structural mechanism and muh less as a substantial value. Moreover diversity is here traditionally subsumed to refer to diversity between the member states only – ignoring thereby the question where to locate diversity within the member states in the European debate on values. It is subsumed here that such an approach to "diversity" does indeed not need recourse to any compelling original EU principle or value of diversity.[35] The debate might open though a completely different conceptual box if one accepts also an inclusive reading of diversity refering to diversity not *between* but *within* the member states.

The treaty of Maastricht introduced two general, transversal identity/ diversity clauses: a clause on "identity preservation" in Art. 6 par.1 EU and a sort of "cultural diversity impact clause" in Art. 151 par. 4 EC. The first one states that "*The Union shall respect the national identities of its member states*" and the second one establishes (in the title on culture) a general obligation of the Community to "*take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures*". Both stand for a certain "sensitization" of the Treaties *vis a vis* identities at national and diversity at European level. This diversity-commitment has been confirmed by the Charter of Fundamental Rights which reads in its Art. 22 that "*[t]he Union shall respect cultural, religious and linguistic diversity*".

[35] See in this sense A. von Bogdandy, op.cit., p. 197.

Is all this then meant only to protect (and, if necessary promote) the diversity *between* the member states? Such an exclusive (or defensive) reading builds on a state centred view and equates "diversity" with the possibility of the states to resist any tendency of European harmonization which could alter their identity and their autonomy to define whether, how and to what degree they want to be internally "diverse".

An alternative perception would look at diversity as plurality *within* the member states. European diversity and a consensus on the latter would then include the replies to the question, whether, where and how to accommodate intra-state diversity. This inclusive (or offensive) view on diversity goes far beyond identity based perceptions, needs and concerns of the member states themselves. Politically speaking this reading of diversity might be perceived as the opening of a Pandora's box as the diversity/ uniformity sluice which traditionally lies in the firm hand of the member states gets to certain degree under a condominium of the Union and the member states.

The new constitutional treaty does not really provide a reply to the question whether the Union is heading for an inclusive/ offensive reading of diversity. The introduction of "Unity in diversity" not only as part of the preamble[36], but also as an official motto and symbol of the Union is of no substantial help in this regard.[37] Rather what has here been solemnly put on a high pedestal seems to be not much more than a cosmetic combination of two already existing and interacting constitutional principles, namely the "Wesensgehaltsgarantie" as contained in Art. Par. 3 EU and the principle of loyal co-operation as contained in Art. 10 EC. Nevertheless the twining of these two principles in a formalized,

[36] "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,". See CONV 820/ 1/ 03 REV 1, p. 5 and 6.

[37] See Art IV 0 of the constitutional treaty as proposed in CONV 820/ 1/ 03 REV. In the last hours of the European Convention the motto found its way into this prominent provision proposed by the last Convention document. This article lists under "[t]he symbols of the Union" the European flag, the anthem of van Beethoven and says in par. 3 - shortly before mentioning the common currency and the Europe day - that "[t]he motto of the Union shall be: United in diversity".

i.e. constitutionally verbalized "symbol" is insofar useful and important as it underlines the ongoing and symbiotic tightrope walk between integration and autonomy seeking thereby to provide proper space to both European dedication as well as national (p)reservation.

What remains to be seen is whether "European dedication" will confront the states with perceptions of diversity which no more lie in their exclusive hands. Already now one can identify modest tendencies in this direction. The Charter refers also to the protection of diversity within member states when prohibiting e.g. discrimination on the base of language or the membership of a national minority group. The race directive provides (not only but especially) third country nationals with a far reaching set of rights enabling them thereby to better integrate with their host societies (i.e. the member states).[38] Also Article 151 EC allows for the protection and (to a certain degree) promotion of diversity within member states, fostering e.g. minorities or regional cultures.[39] It remains furthermore to be seen how the EU is going to react to the phenomenon of immigration and whether the latter will have an impact on the perception of "European citizenship(s)".[40] Last but not least the way in which the European Union is going to legally prescribe the social integration of "its"[41] third country nationals[42] will show whether the states will remain the only masters of the

[38] See e.g. G. Toggenburg, The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe, European Yearbook on Minority Issues 2002, Kluwer Law International), pp. 231-244.

[39] See in detail G.N.Toggenburg, "Unity in diversity": searching for the regional dimension in the context of a someway foggy constitutional credo, in: R. Toniatti, M. Dani and F. Palermo, An ever more complex Union - the regional variable as missing link in the European Constitution" (forthcoming, 2003 Nomos).

[40] Compare e.g. C. Wihtol de Wenten, Europe: The new Melting Pot?, in J. W. Dacyl and Ch. Westin (eds.), Governance of cultural diversity, CEIFO publications No. 84, Edsbruk 2000, pp. 37-61.

[41] Are the TCN a "Community minority"? Or – much more far reaching – are all subnational ethnic groups living in the EU territory in the meantime minorities "of" (instead of merely "in") the Union? See for reflection on these questions G.N.Toggenburg, Minorities / the European Union: is the missing link an "of" or a "within"?, Journal of European Integration, forthcoming, 2003.

[42] See esp. the Commission proposal for a Council Directive concerning the status of third-country nationals who are long-term residents COM/ 2001/ 0127 final - CNS 2001/ 0074, in Official Journal C 240 E, 28. August 2001, pp. 79 – 87 and, recently, the Communication from the Commission to the Council, the European Parliament, the

national diversity/unity sluices. Countless political declarations (as e.g. the Laeken declaration)[43] and even some legal documents (as the adapted value provision in the constitutional treaty)[44] at EU level paint the picture of a Union calling for tolerant, diverse and pluralistic societies in the member states. Legally speaking all this can hardly justify to speak already of a constitutional value of the EU which could prescribe the substance of the "to-be-diversity" in Europe. One should however not forget that the "value-prescription" is a two way process within the Union.[45] Art. 6 EU speaks of principles "common to the member states" and therefore originating at state level. But it remains to be seen what the "inverted prescription", namely the Union's reply to and interpretation of these common values, will mean for diversity at member state level.[46]

European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, 3 June 2003, COM/2003/0336 final.

[43] "..Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law....": from the Laeken declaration "on the future of the European Union", European Council, December 2001.

[44] The current wording of Art. 6 par. 1 EU has been complemented with the following passus: "in a society of pluralism, tolerance, justice, solidarity and non-discrimination"!

[45] See R. Toniatti, La carta e i "valori superiori", loc. cit., at p. 23 speaks of "una sorta di inversione di direzione della prescrittività".

[46] See on the nature of this constitutional dialogue in a new "integrated constitutional space" the contribution in this volume by F. Palermo, Integration of Constitutional Values in the European Union – An Epilogue.

Europe Faces Cultural Diversity: Towards a European Multicultural Model?

Cinzia Piciocchi*

Summary: 1. Introduction. - 2. Member states and the European Union face cultural diversity. Does multiculturalism define us? - 3. Concluding remarks.

1. Introduction

In the context of the European Union, we tend to speak of cultural diversity as a value and, more specifically, as a constitutional value. But what does that mean?

The current debates focus on terms like "cultural diversity", "cultural identity", "cultural pluralism", "multiculturalism", etc. Amidst the huge number of scholarly contributions surrounding these topics, it is difficult to single out a clear sole definition of cultural diversity, even if one only considers it from a legal perspective.

The wide and increasing use of these terms shows evidence of an issue that comes out of contemporary social fragmentation and that urges a legal discipline of the coexistence of different cultures.

This is a question which involves the European Union and the member states at the same time. The legal framework of the member states has to cope with infra-state cultural diversities claiming legal recognition. And the European Union is based, from its very origin, on the cultural diversity of its member states. We will delve further into both these statements.

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This paper takes a precise starting point: the mutual dialogue between legal systems and cultural diversity shapes the emerging common core of fundamental constitutional values of member states and of the European Union as well. Moreover, this process, if observed at State level, gives some useful hints in defining and understanding the scope of the "European cultural diversity".

We will try to understand to which dimension this concept (cultural diversity) can be referred to and how the dialogues taking place between legal systems and cultural diversity interact with the constitutional frameworks of member states and of the EU.

Art. 22 of the Charter of Fundamental Rights of the European Union reads as follows: «The Union shall respect cultural, religious and linguistic diversity.»

At the core of this kind of diversity (and of the other notions – multiculturalism, etc. – as well) the term "culture" requires further and more precise definition.

The legal perspective helpfully draws the boundaries of these concepts, as many legal texts refer to "cultural rights" and to "culture" as a source of rights. However, a few examples clarify that, even from only the legal point of view, definitions still pose a problem and difficulties persist.

Culture as education is one of the notions used in legal texts. This proves true, for example, in the «Universal Declaration of Human Rights»,[47] in the «International Convention on the Elimination of All Forms of Racial Discrimination»[48] and in the «International Covenant on Economic, Social and Cultural Rights».[49] As a consequence, cultural rights, if considered in these legal contexts, are linked to education.

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47 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, whose art.27 provides that «Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits».

48 International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. See for example art. 5 l. (e) «Economic, social and cultural rights, in particular: (...) (v) The right to education and training; (vi) The right to equal participation in cultural activities».

49 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. See for example art. 13 and 15 (right to education and to take part in cultural life).

From another point of view, however, the definition of culture can be related to national identity. In the «Cultural Charter of Africa», for example, besides the concept of culture as education, culture as national identity emerges as well, as a «factor of unity and an effective weapon for genuine liberty».[50]

In addition, in the «Mexico City Declaration on Cultural Policies» culture is a wide concept, which originates from different intertwining definitions («Culture and Democracy», «Cultural Heritage», «Artistic and intellectual Creation and Art Education»). These overlapping concepts are based on a fundamental assumption: «Cultural identity and cultural diversity are inseparable».[51]

Finally, in November 2001 the 31st Session of UNESCO's General Conference adopted the «Universal declaration on Cultural Diversity» in Paris.[52] The

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[50] Cultural Charter for Africa, http://www.dfa.gov.za/for-relations/multilateral/treaties/culture.htm
Article 4: «The African States recognize that African cultural diversity is the expression of the same identity; a factor of unity and an effective weapon for genuine liberty, effective responsibility and full sovereignty of the people.». Article 5: «The assertion of national identity must not be at the cost of impoverishing or subjecting various cultures within the State».

[51] Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies Mexico City, 26 July - 6 August 1982, http://www.unesco.org/culture/laws/mexico/html_eng/page1.shtml
Art. 4: «All cultures form part of the common heritage of mankind. The cultural identity of a people is renewed and enriched through contact with the traditions and values of others. Culture is dialogue, the exchange of ideas and experience and the appreciation of other values and traditions; it withers and dies in isolation.». Art. 5: «The universal cannot be postulated in the abstract by any single culture: it emerges from the experience of all the world's peoples as each affirms its own identity. Cultural identity and cultural diversity are inseparable».

[52] Session of UNESCO's General Conference adopted a Universal declaration on Cultural Diversity in Paris, 2 November 2001, see http://www.unesco.org/culture/pluralism/diversity/html_eng/index_en.shtml
«Article 2 – From cultural diversity to cultural pluralism
In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Un-dissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.
Article 4 – Human rights as guarantees of cultural diversity
The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No

Declaration is based on the idea that cultural diversity is «as necessary for the human race as bio-diversity in the natural realm» as stated by the Director-General Koïchiro Matsuura (and in art. 1 of the text).[53] It provides a broad, comprehensive notion of culture, taking as starting point the definition of cultural pluralism as the «policy expression» of «the reality of cultural diversity», i.e. the instrument of coexistence of cultural diversities. The amplitude of "culture" in this text derives from the fact that its respect is «inseparable from respect for human dignity». The interpretation of what is human dignity varies, however, in different legal systems.[54]

The «Project Concerning a Declaration of Cultural Rights» presented by the *Group of Fribourg* to the UNESCO General Conference in 1996, took in fact the same slant on this matter. Actually, it defined «culture», «cultural identity» and «cultural community» in very broad terms (e.g. the term "culture" applies to the «values, beliefs, languages, arts and sciences, traditions, institutions and ways of life by means of which individuals or groups express the meanings they give to their life and development»).[55]

The same heterogeneity emerges from the European legal context.

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one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope».

53 See Unesco press: http://www.unesco.org/bpi/eng/unescopress/2001/01-120e.shtml.

54 See for example B. Edelman, La dignité un concept nouveau, Rec. Dalloz, 1997, Chroniques, 185.

55 Project Concerning a declaration of Cultural Rights of the Group of Fribourg, in collaboration with UNESCO, The Council of Europe, and the Swiss National Commission, presented at The General Conference of the UNESCO September 4, 1996 http://207.21.242.176/as/events/pdf.d/UNESCO%20Fribourg.pdf

«Article 1. Definitions

For the purposes of this Declaration,

a. the term "culture" applies to the values, beliefs, languages, arts and sciences, traditions, institutions and ways of life by means of which individuals or groups express the meanings they give to their life and development.

b. the term "cultural identity" applies to all cultural references through which individuals or groups define and express themselves and by which they wish to be recognized; cultural identity embraces the liberties inherent to human dignity and brings together, in a permanent process, cultural diversity, the particular and the universal, memory and aspiration.

c. a "cultural community" is a group of persons who share those cultural references that comprise a common cultural identity, and which they wish to preserve and develop, as essential to their human dignity, in the respect of human rights.»

The Council of Europe, for example, adopted a «Declaration on cultural Diversity» in 2000. It gives another definition of cultural diversity.[56] The Declaration desires – so the Council - , from the «common heritage» of the Council of Europe: «democracy, human rights and the rule of law».[57] But it does not make reference to education, or to people's rights and identity. On the other hand, it refers to the economic field, more specifically to «cultural and audiovisual policies».

This brief analysis will consider two main issues. First, states have to cope with cultural diversities which challenge traditional definitions (such as the definition of minority). Looking at these new challenging issues from the states' perspective, the features of cultural identity and diversity, which are (or – as we'll see – are supposed to be) basic to the EU, will emerge. Secondly, from the dialogue between States and new cultures, we will pick up some elements that might be useful with regard to the EU constitutional framework.

2. Member states and the European Union face cultural diversity. Does multiculturalism define us?

The subject of this book shapes further the boundaries of our perspective on cultural diversity. The book not only looks at the topic from a legal point of view, but, more specifically, addresses costitutional values.

From a constitutional perspective, both the EU and the member states have to cope with cultural diversity and cultural identities. It is a kind of mutual and continuous dialogue between states and EU, which shapes an emerging European common core.

This dialogue changes the working tools of legal scholars, since it interferes with the legal categories we are accustomed to and tells us something about the influence of cultural diversity on the states' and the EU's legal (and, more specifically, constitutional) framework.

When legal scholars speak of diversity, they refer to a specific legal concept, which is mainly that of «minorities». However, today this concept is challenged

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[56] Declaration on cultural Diversity, Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers' Deputies, http://cm.coe.int/ta/decl/2000/2000dec2.htm

[57] See Council of Europe, The Council of Europe declaration on Cultural Diversity, Strasbourg, September 2001, p. 5.

by the one of «new minorities», i.e. additional groups claiming the legal acknowledgment of their cultural diversity; an increasing phenomenon that poses the question of defining identities. Some "separated groups", for example, claim special rights in order to pursue their separation from their legal environment. And legal systems, in some cases do grant them an exemption from the observance of the law.[58] Being based on religion, these groups are clearly perceived as cultural identities and the constitutional protection of religious liberty is the legal basis for their recognition.[59]

This perception lacks with regard to some other groups as, for example, the so-called life-style groups.[60] Sometimes they obtain some specific rights (e.g. homosexuals' rights). But again there may be problems of definition.

Let's take the case of an "undisputed life-style group" like vegetarians. They might be defined as a "weak identity", since it turns out to be based on a "personal philosophy", rather than on a constitutionally protected freedom like religion. Legal systems are reluctant to grant them cultural rights, because of the difficulty to qualify vegetarianism as an identity feature. But eventually, vegetarians' rights tend to emerge in specific contexts, for example in prisons where a weak identity feature (nourishment) seems to become stronger.[61]

Therefore, in order to shape the features of this "legal relevance", maybe we should abandon the idea of general definitions. They do not fit into the legal framework of diveristy, as the legal importance of cultural identities seems to change with regard to the different contexts they are considered in. The upshot of my analysis is that it is increasingly difficult to speak in terms of general legal categories. Legal frameworks mirror social fragmentation. In this sense new

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[58] See some US cases of "cultural exemption" from the law: Wisconsin v. Yoder 406 US 208 (1972), Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y., 1977), Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984), State v. Swartzentruber 170 Mich. App. 682. In Europe, see for example in Germany the exemption that granted to Muslim butchers the right to slaughter animals according to Islamic religious ritual, see 1 BvR 1783/99 of 15.01.2002 (=BVerfGE 104,337) and BvR 2284/95 of 18.01.2002.

[59] In Wisconsin v. Yoder, for example, the Supreme Court denies the relevance of a "way of life" which is not based on religious grounds: «A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular consideration; to have the protection of the Religion Clauses, the claims must be rooted in religious belief», cit. supra.

[60] See W. Kymlicka, Multicultural Citizenship, Oxford, 1995.

[61] See for example A. Ogden and P. Rebein, Do Prison Inmates Have a Right to Vegetarian Meals?, in http://www.vrg.org/journal/vj2001mar/2001marprison.htm

identities change the working tools of legal scholars and general definitions split up into several aspects, becoming **"**functional definitions**"**. Let's take as an example homosexual couples claiming family rights. There are several consequences of being a "family" and maybe, splitting these consequences into different aspects (economic consequences, filial consequences, housing consequences, etc.), would facilitate the dialogue with this cultural diversity.

Another challenge to legal categories derives from the different cultures of immigrants.[62] The increasing number of immigrants flowing towards Europe, placing itself in the global stream of immigration, forces one to take into consideration cultural practices the legal systems never had to deal with before. From this perspective, a foulard on the head of a Muslim schoolgirl can provoke Courts' decisions and scholars' debates.[63] There are different reasons for this phenomenon. On the one hand, the scarce knowledge of these new cultures leads to a difficult assessment of which features (grooming, education, religious behaviour, etc.) are expression of values which clash with the Western legal tradition and which simply mirror a different culture.

On the other hand there is something else to consider. Our legal rules are based on the (idea of the) existence of a majority culture: a common language, religion, habit, with restricted exceptions mainly territorially circumscribed, at least where languages are concerned. This base is a common cultural ground of shared values that did not need to be defined. The dialogue with a culture whose shared cultural assumptions are different compels our legal systems to define themselves. They have to clarify which are the "cultural shadows" of their legal rules and which of these are fundamental principles. They compel us to admit to the claim that legal rules are neutral is sometimes true only with regard to a culture which, in spite of being the majority, was taken as representing a whole.

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62 See R. Toniatti, Minorities and Protected Minorities: Constitutional Models Compared, in T. Bonazzi e M. Dunne eds., Citizenship and rights in Multicultural Societies, Keele University Press, 1995.

63 We refer to the French case called affaire des foulards see G. Koubi, Conditions de l'expression des croyances religieuses par les élèves dans les établissements d'enseignement scolaire (à propos du port du foulard islamique), in Rec. Dalloz, Jurisprudence, 1993, 108 ; G. Koubi, Exclusion définitive d'élèves d'un collège ayant refusé d'ôter leur foulard islamique pour participer au cours d'éducation physique, in Rec. Dalloz, Jurisprudence, 1995, p. 365; B. Stirn, Les libertès en questions, Paris, 1996, pp. 104 ss; R. Schwartz, Commissaire du gouvernement, Les limités à la liberté d'expression religieuse des éléves dans les collèges et lycées, in Rec. Dalloz, Jurisprudence, 2000, p. 251

While, with regard to the strengthening perception of "new cultures", they prove to be based on a cultural paradigm overwhelming what is culturally different.

Just take the example we mentioned. The French *affaire des foulards* seemed to clash against the *principe de laïcité* and its main consequence was that this (shared) principle had to be defined. Or consider another French case, regarding the choice of the day of holiday. This might be perceived as a neutral rule. On the contrary, the Jewish students claiming the right to stay at home on Saturday instead of Sunday, proved this rule to be based on the idea of one shared religion.[64]

Therefore, not only multicultural dialogue defines the legal boundaries of cultural diversity, but it forces the definition of cultural assumptions which lie behind the legal rules, just as much as it forces an awareness of them. In this sense multiculturalism defines us. The result of this defining activity might and hopefully will be the shaping of a new emerging common core of constitutional values.

On the other hand, at EC level "cultural" is an adjective mainly referred to member states' historical and artistic heritage and to linguistic diversity.[65]

Moreover, "culture" is sometimes synonymous to national identity, (as it might be in art. 22 of the Charter of Fundamental Rights of the European Union), i.e. the States' founding ethic and ideological (constitutional) principles, as defined in some ECJ leading cases.[66]

As American sociological and legal scholars had to shift from the "melting pot" to the "cultural pluralism" perspective, in the European Union cultural

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64 See for example the two judgments of the *Conseil d'État*, 14 avril 1995, *Consistoire central des israélites de France et autres* and *M. Koen*, both in *Rec. Dalloz Jur.*, 1995, p. 481.

65 See for example G.Sp. Karydis, Le juge communautaire et la préservation de l'identité culturelle nationale, in Rev. Trim. de droit européen, 1994, p. 551 ss. See also Article 149 (ex Article 126) TEC : «1.The Community shall contribute to the development of quality education by encouraging cooperation between member states and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the member states for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.»

66 See e.g. Society for the Protection of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685, [1991] 2 C.M.L.R. 849 (1991).

diversity is a starting point.[67] This would be the main difference between American and European (possible) multicultural models. But still it is not defined as to which degree this diversity is referred to. This is a basic issue, whose answer defines the common core of constitutional value the EU cannot depart from.

While multiculturalism is generally related to the dialogue with something outside, the main idea of Europe seems to be (again): multiculturalism defines us. A cultural pluralism which the European Union is (proud to be) based on and which seems to come out of the European legal framework.

The recent Declaration on the Future of the European Union reaffirms the respect for «others' languages, cultures and traditions».[68] Moreover, not only does the Charter of Fundamental Rights of the EU claim «cultural diversity» as a basic value (even if we still do not know what art. 22 is referred to). The more "sensitive" fields are respected as well. Concepts like «family», «conscientious objection» and the «right of parents to ensure the education and teaching of their children» are respected by the European law, but only «in accordance with the national laws governing the exercise of such freedoms and rights». They are not defined at European level. The States will provide the legal definition of a family.[69]

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67 See A.M. Schlesinger, Disuniting of America: Reflections on a multicultural Society, New York, W.W. Norton 1991 and P. Hansen, The Cultural Short-cut: A Road to Exclusion? Notes on Identity Politics in the European Union, in J. Gundara and S. Jacobs (eds.), Intercultural Europe - Diversity and Social Policy, Burlington, Ashgate Publishing Company, 2000, p. 101: «Probing into how this discourse manifests itself in EU cultural policy, we can see that Union identity "in the making" does not appeal to a cultural homogeneity that would break with recognized national and regional cultures. In this sense, reflecting the views of the Economic and Social Committee (...), there have been no attempts to create an "all-embracing" "melting-pot" in the European Union».

68 Laeken Declaration - adopted on the 14th December 2001 - «Europe's new role in a globalised world. Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law». See http://europa.eu.int/futurum/documents/contrib/cont001201_en.pdf

69 "Article 9 Right to marry and right to found a family: This shall be guaranteed in accordance with the national laws governing the exercise of these rights.
Article 10 Freedom of thought, conscience and religion: 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion

The European Court of Justice seems to be cautious in these "sensitive fields" too, as it happened in some well-known cases like Grant and Grogan.[70] Some doctrines interpret this prudence as part of the subsidiarity principle, as a self-restraint due to the respect of cultural identity.[71]

The European multicultural model seems to be well described in these terms. A common core of constitutional values that respects cultural diversity and where cultural diversity is a basic value by itself.

Otherwise, there still seems to be uncertainty with regard to what extent diversity can be tolerated. There are sensitive fields at European level as well. One of these is exemplary, i.e. bioethics. It is exemplary because it shows the difficulties of respecting States' cultural diversities, in fields where they toughly clash. Just to take one example, I will consider the case of the English *Human Fertilisation and Embryology (Research Purposes) Regulations 2001*. Under certain conditions, these Regulations allowed the so-called therapeutic cloning, a new medical research technique which implies ethical questions because of the use of human embryos. It was attacked as being unethical. I am not referring to the lawsuit brought by an English pro-life alliance, which had a more pragmatic

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or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 14 Right to education: 1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right."

See C. Casonato, La Carta dei diritti fondamentali dell'Unione Europea: tra conferme, novità e contraddizioni, in R. Toniatti, Diritto, diritti, giurisdizione**.** La Carta dei diritti fondamentali dell'Unione Europea, Padova, 2002, p.99.

70 See Society for the Protection of Unborn Children Ir. Ltd. v. Grogan, cit. supra n. 20 and Case C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd (No 03/98: 12 February 1998).

71 See M. Dani, La Carta dei diritti fondamentali dell'Unione Europea e il principio di sussidiarietà, in R. Toniatti, op. cit. supra, n. 23, p.179. Moreover, in Ireland a referendum led to the social changes someone had wished in Grogan: «The X case was followed by another constitutional referendum in 1992 which allowed Irish women to travel abroad for abortions and to receive information on abortion facilities abroad but which again banned abortion in Ireland» in http://www.dailytelegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F03%2F08%2Fwabor08.xml

attitude than an ideological one, since it denounced the possible loophole of the law which could allow reproductive and not only therapeutic cloning.

The "ideological attack" came surprisingly from the European Parliament which, on September 7th 2000, voted a resolution asking the UK to reconsider its law.[72] What is more surprising is that it considered that «"therapeutic cloning", which involves the creation of human embryos solely for research purposes, poses a profound ethical dilemma, irreversibly crosses a boundary in research norms and is contrary to public policy as adopted by the European Union».

The concept of «public policy» as adopted in this context is one of the paradigms which explain to what extent it is possible to speak in terms of cultural diversity in the EU. Moreover, these "borderline fields" are the litmus test of cultural pluralism, claimed as being the corner stone of the EU legal framework.

The attempts to define a European bioethic have to handle the same hurdles. For example, in the recent Council of Europe's *Oviedo Convention on Biomedicine*, the same difficulties in reaching shared general definitions emerge. Again, some cultural paradigms seem to be overwhelming. In spite of a "defensive attitude" which could protect individuals in some fields (e.g. genetic discrimination), where a common European action might be useful, there is an attempt to impose a sole definition of what is "ethically orthodox" for Europe as a whole.[73]

3. Concluding remarks

It seems that even at the European level a cultural shadow of legal rules is emerging, notwithstanding the rethorical statements affirming the value of

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[72] Resolution on Human Cloning, European Parliament, 1998 O.J. (C 34) 164 (Jan. 15, 1998) B5-0710, 0751, 0753 and 0764/ 2000: «Having regard to the proposal by the United Kingdom Government to permit medical research using embryos created by cell nuclear replacement (so-called "therapeutic cloning"), (...). Considers that "therapeutic cloning", which involves the creation of human embryos solely for research purposes, poses a profound ethical dilemma, irreversibly crosses a boundary in research norms and is contrary to public policy as adopted by the European Union».

[73] Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, ETS no.164. See C. Piciocchi, La Convenzione di Oviedo sui diritti dell'uomo e la biomedicina: verso una bioetica europea?, in Diritto pubblico comparato ed europeo, 2001, III, 1301.

cultural pluralism. The respect of the latter principle would accept that what is considered unethical in some countries, might be ethically acceptable in others (like in the mentioned case of the U.K.), and viceversa.

It does not mean that we are moving towards a complete cultural relativism, but that we might accept a different perception of the common core of European values. A new emerging common core, which includes cultural diversity as a (shared) value.

As an outcome, the emerging "European multiculturalism" will compel legal systems to define their cultural shadows (defining does not mean denying). This might be the first step towards an easier dialogue between different cultures and the legal systems, a dialogue which consider pluralism as a constitutional value.

Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns

Maria Teresa Bia*

Summary: 1. Introduction. - 2. Towards an EU immigration policy. - 3. Immigration and asylum policy in two EU systems: The cases of Germany and Italy. - 3.1. Work-related immigration. Premise. - 3.1.1. Germany. – 3.1.2. Italy. - 3.2. Family reunification. - 3.3. Asylum seekers. Premise. - 3.3.1. Germany. - 3.3.2. Italy. - 4. Conclusion.

1. Introduction

While for the past two centuries the countries of western Europe have tended to be countries of emigration rather than immigration, since the mid 1960s there has instead been a considerable increase in immigration towards the EU.[1]

This shift occurred for a number of political, historical and economic reasons, such as the increase in labour shortages, which began in the wake of post-war reconstruction and which induced some European countries to open up their frontiers to foreign workers, or the political changes in Eastern and Central Europe that created an unprecedented influx of immigrants from the former communist countries to the geographically closest EU countries.

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1 For an overview of recent developments in migration flows to Europe, see K. Bulent, Europe en évolution; les fluxes migratoires au 20ème siècle (Strasbourg: Council of Europe Pub., 2002) and J. Barrou L'Europe terre d'immigration: fluzes migratoires et intégration (Grenoble : Presse Universitaire de Grenoble, 2001). Demographic aspects of the newly born emigration flows to Western Europe are discussed in Political and demographic aspects of Emigration Flows to Europe (Strasbourg: Council of Europe, 1993).

Faced with this new situation, national policies and strategies to manage immigration flows had to change. However, these policies and strategies differ greatly from country to country depending on the specific kind of immigration each country attracts and the way in which the political-constitutional values underpinning the social consensus conceive of the idea of the integration of foreigners. These values are influenced by both historical and economic factors and by the geographical collocation of every state.

Nevertheless, despite these different national views, the recent history of the European Union signals the inception of a path towards a common migration and asylum policy. Given the gradual evolution of the European Economic Community into the more cohesive European Union, which is beginning to be perceived as a 'host country' in its own right by non EU- nationals, there is a clear need to adopt a European approach to immigration.

Essential, however, for the effective adoption of a supranational immigration and asylum policy is the achievement of a balance, at the EU level, between the motivations driving European action in these areas and the interests of the member states, i.e. that the latters' particular cultural as well as political views with regard to these matters be represented in the European regulations. The intention of this paper is to look into this question. In doing so, we will first review the steps the Union is making towards the Europeanisation of migration and asylum policies, and the way this process is supported or even opposed by member states. We will then make a comparative analysis of the state of play of migration regulations and policies in two EU countries, namely Italy and Germany. This comparative analysis – which takes Italy and Germany as an example of the dynamics of constitutional-cultural diversity within the Union-, is aimed at showing how immigration policy is differently perceived in two EU states and to what extent two EU national systems fit into the European approach to immigration.

Italy and Germany have been chosen for the following reasons. Germany has, in the last decade of the 20th century, emerged as the "principal magnet society in the Western hemisphere:"[2] In order to deal with this position as *Einwanderungsland*, Germany is in the midst of a difficult political debate about

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2 Straubhaar, T. "New Immigration Needs a NEMP (New Immigration Policy)", HWWA Discussion Paper/ 95.

the reform of the existing immigration laws.[3] For its part Italy has just approved a controversial bill amending the immigration system.[4]

2. Towards an EU immigration policy

Given that immigration and asylum are matters where fundamental aspects of the sovereignty of states are in question, the founding Treaties of the European Communities did not provide for any rule aimed at promoting supranational authority in these areas.

By 1993, the achievement of the free movement of persons within the European Single Market, together with a real increase in migratory pressures upon the Community, raised the need for a common EU policy to complement national policies, which were proving inadequate to deal efficiently with immigration in an area without borders.

Hence, first considered as matters of 'common interest' by the Treaty of Maastricht, with the Amsterdam Treaty immigration and asylum have become a full Community responsibility. This Treaty inserted a new Title IV into the EC Treaty dealing with visa, asylum and immigration, under which the measures to be adopted to develop a common approach to immigration and asylum are spelt out[5]. It should be stressed, however, that Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an application procedure in one of the member states by a third-country national[6]; Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers[7]; Council Decision 2002/463/EC adopting an action programme for administrative co-operation in the fields of

3 After having charged an Independent Commission with the task of drafting a report on immigration (Zuwanderung gestalen, Integration fördern), on the 7th of November 2001 Germany approved the first draft of a legislative proposal amending existing Laws on immigration and asylum. Detailed information on the new bill are available at www.eng.bmi.bund.de

4 Law of 30 July, 2002, drawn up by Reforms Minister Umberto Bossi and Deputy Prime Minister Gianfranco Fini. In G.U. n. 199/2002.

5 On the fundamental change of approach to immigration and asylum after Amsterdam see, in particular, Petite, M. "The Treaty of Amsterdam", Jean Monnet Paper n. 2/98 and Marinho, C. Asylum, Immigration and Schengen after Amsterdam: a frst Assessment, (Maastricht: EIPA, 2000).

6 In OJ 2003, L 050

7 In OJ 2003, L 031

external borders, visas, asylum and immigration[8]; Council Directive 2001/55/CE on temporary protection of displaced persons[9], and Decision 2000/596/EC[10], establishing the ERF, are the only measures to have been adopted so far to give substance to the formal communitarisation of immigration and asylum policies. And, the adoption of these measures occurred because, given that "cases of mass influx of displaced persons have become more and more substantial in Europe in recent years"[11], and given that this phenomenon as well as matters related to repatriates cannot be adequately addressed by individual states, as the national responses to the conflict in former Yugoslavia clearly showed, temporary protection and asylum came about as areas in which the need for supranational action emerged clearly.

On the contrary, the European framework for immigration via family reunification and for work purposes is highly fragmented.

The modest legislative progress in shaping a supranational immigration system does not depend, however, on an *inertia* of the European institutions. As the table that follows shows, a number of proposals have, in fact, already been submitted by the Commission to harmonise national provisions on immigration.

Proposed legislation on immigration and asylum reported on the basis of the known distinction between the three main channels of legal immigration, namely immigration via family reunification, economic-driven immigration and admission for humanitarian reasons

Family Reunification	*Economic-driven immigration*	*Humanitarian Reasons*
Ref. Amended Proposal for a Council Directive on the	*Ref. COM/2001/386 final on the conditions of entry*	*A number of secondary legislation measures and*

8 In OJ 2002, L 161
9 In OJ 2001, L 121/12
10 In OJ 2000, L 252
11 See point 2 of the Preamble of Council Directive 2001/55/EC.

right to family reunification *COM (2002) 225 final*	*and residence of third* *country nationals for paid* *employment and self-* *employed economic* *activities*	*proposals touching on* *all aspects of immigration* *for humanitarian reasons* *have been approved or* *tabled by the Commission*
By and large this proposal *is both in harmony* *with international* *Conventions on the right* *to family reunification* *and respectful of different* *national views concerning* *the definition of the 'family* *group'*	*The objective of the* *Proposal is to lay down* *common principles and* *rules concerning the entry* *and residence of foreigners* *for economic purposes*	*The EU approach to* *this matter is informed by* *the need to accomodate the rights of those claiming protection vis-à-vis the legitimate national concern* *to prevent crime and illegal* *immigration*
In spite of this,	*Although disclosing a*	*Ref., Council Regulation*

COM (2002)225 met with strong opposition by some EU member states. Therefore, its adoption has been blocked at the level of the Council.	*clear commitment to take in due (and equal) cosideration the rights of workers and the economic conditions of the host country, the proposal has not yet been approved*	*(EC) 343/2003; Council Directive 2003/9/EC; Council Decision 2002/463/EC; Council Directive 2001/55/CE; Decision 2000/596/EC*

The Community's difficulty in adopting the measures necessary for adopting a common action in immigration and asylum has to do with the tensions between the member states over dealing with these policies. As has clearly been pointed out by the European Commission, "the thrust of discussions in the Council on a number of individual legislative proposals concerning immigration reveals a continuing determination by member states to ensure that any common policies should involve the least possible adjustment to each one's existing approaches."[12] This leads to the paradoxical result that although discussions are being undertaken at the supranational level to sustain the emerging EU authority in immigration and asylum, as long as the EU lacks binding legal instruments in this area, member states will keep on constructing their own policies "with mainly national considerations in mind and without reference to the European context".[13]

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12 COM (2001) 628, Communication from the Commission to the Council and European Parliament. Biannual Update of the scoreboard to review progress on the creation of an Area of Freedom, Security and Justice in the European Union (Second half of 2001).

13 Ibid.

3. Immigration and asylum policy in two EU systems: The cases of Germany and Italy

Premise: a) Germany

While for the past fifty years the official discourse in Germany was that the country had not immigrants, now, that 9 per cent of the population are non – nationals, it has been recognised that "the guiding principle and standard that applied for many decades, namely that Germany is not a country of immigration has become untenable".[14] In particular, a rapid increase in the number of individuals seeking asylum as well as the initiative launched by the Schröder Government in early 2000 to address a labor shortage in the information technology industry, have moved the topic of immigration to the centre of public debate and have generated problematic political discussions about the adoption of the 'first' comprehensive German bill on immigration. Presented by the Federal Minister of Interior Mr Otto Schily on 2001, the so-called German Act to Control and Restrict Immigration and Regulate the Residence and Foreigners, otherwise known as Immigration Act, is aimed at improving Germany's economic competitiveness while controlling immigration and regulating the stay of foreigners as well as their integration. It also places a new and controversial emphasis on work-related immigration, which, given the need by the German economy to fill skill shortage areas, is highly supported.

However, because of the sensitive political issues it is concerned with, Germany's new Immigration Act, which had been due to come into force on January 2003, has not yet been approved. Rather, its legality has been challenged before the German Constitutional Court that nullified it on December 18, 2002.

b) Italy

Until very recently Italy was a country of emigration. Only in the last 20 years has Italy, as a result of the exodus of large numbers of displaced persons from nearby zones of conflict (e.g. former Yugoslavia), found itself attracting

[14] See the document 'Structuring Immigration-Fostering Integration' – Report by the Independent Commission on Migration to Germany established in 2001 by the German Federal Ministry of the Interior. Internet source: http://www.eng.bmi.bund.de

unprecedented and unexpected flows of foreigners asking to enter the country.[15] This has led to the proliferation of laws and legislative proposals on the management of immigration, the latest of which is Law 189/ 2002, which since its adoption and earliest implementation has evoked strong criticism because of the way in which it addresses politically sensitive questions.

In the following, after briefly presenting the way in which the new German and Italian bills regulate the three categories of legal immigration, namely the cases of immigration for humanitarian reasons, via family reunion and work-related immigration, we will then see whether or not they comply with the European principles.

3.1. Work-related immigration. Premise.

Immigration for economic purposes is a very sensitive issue, largely because of its impact on crucial aspects of the host-country social structures, particularly the domestic labor situation. Consequently, it has always been subjected to changing policy considerations according to the needs of national markets.

Notwithstanding the above considerations, the recent liberalisation of the free movement of workers within the framework of the European Union has made it necessary to define common basic rules on the admission of economic migrants. Deciding, however, on a common approach to this matter is particularly controversial, and the Commission's proposal on economic immigration, namely COM(2001)386 final[16], has not yet been adopted.

In it, to offer member states a reasonable common ground for negotiating the basic rules for a supranational approach to immigration for economic purposes, the principle that a post can only be filled with a third-country worker after a thorough assessment of the domestic labour market situation is asserted.[17] On the basis of this guideline, common, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid-employment and self-employed economic activities are laid down. They

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15 For an in depth analysis of the Italian experience of immigration, see Commarata, A. and Todino, Ma. The Italian Experience of Immigration Policy: Making Up for the Emergency, in Korella G.D. and Twomey P.M., "Towards a European Immigration Policy: Current Situation- Perspectives". (Bruxelles: European Interuniversitary Press, 1993).

16 In O 2001, 121/ 12.

17 Ibid.

include the introduction of a single national application procedure leading to the issuing of one combining title, encompassing both residence and work permit within one administrative act, in order to simplify and harmonise the diverging rules currently applicable in the member states.[18] The rights conferred on a 'residence-permit worker' are then listed under the proposal.[19] By and large, the *rationale* behind the Community principles on the treatment of foreigner workers is to encourage their integration into the host country. In this vein, a detailed set of provisions is provided for to govern the right to carry out an economic activity and to remain in a EU state after having been employed there and the right to equality of conditions of employment on the same basis as workers of the host state.

It should be emphasised that most of the directive's provisions which dictate minimum standards on the treatment of workers' immigration are accompanied by clauses which allow the member states to derogate the common standards where national exigencies call for different rules to be applied. Nonetheless, the directive has not yet been approved by the Council.

3.1.1. Germany

Based on the co-ordination of information on labour migration between the foreign authorities, employment authorities and national representations abroad, the German draft law basically extends the possibility for highly skilled foreign workers to enter the country. The opening of the German labour market to foreigners is promoted as being necessary not only for reasons of pluralistic integration, but also, and more pragmatically, to respond the needs of the internal economy. A system based on selection criteria, such as age, sex and professional skills is proposed to deal with the recruitment of temporary labour migrants as well as permanent migrants and new possibilities for highly qualified workers and a rational regulation of the immigration of self-employed people are introduced.[20] Moreover, according to its supporters the new German immigration bill would impact on the cultural as well as political way of conceiving of work-related immigration. In the first place it would replace decades of *ad hoc*

18 Ibid.
19 Ibid.
20 See, supra III.

practices with a legislation which considers foreign workers as 'immigrants' rather than 'guests'. Secondly, it would launch a comprehensive policy of integration of immigrants which is intended to be based on the development of foreigners' language skills as well as on the promotion of their participation in the national cultural and social life.[21] At this aim, the establishment of a new structure, namely the FOMR, is foreseen in view to provide the necessary institutional support to immigrants.[22]

Thus, as far as foreign workers' immigration is concerned, the new German bill is in line with the EU guidelines, which, on the one hand, promote the opening of the European frontiers to non-EU workers, and, on the other, require that while respecting the exigencies of their national labour marker, the member states should ensure that the workers admitted enjoy the same rights and responsibilities as EU nationals.

3.1.2. Italy

Unlike the German draft law, the new Italian Act on Immigration discloses a general commitment to restrict the legal preconditions for admission of non-EU workers. In the first place, provided that in Italy admission for economic reasons is based on the issuing of a work permit by the national Authorities, Article 5 of the new bill amends this system by making the residence permit dependent on a combined employment and residence contract, with the consequence that the work permit cannot last longer than the contract itself and, as a general rule, no more than nine months for seasonal workers; no more than one year for temporary workers and no more than two years for non-temporary workers.[23]

The norms prescribed by Article 5 of Law 189/02 do not comply with the European framework for work permit procedures, according to which not only work permits in all member states should be valid for three years, but also the need for more flexible measures on the administrative procedures leading to the issuing of those permits is called for.

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21 Ibid.
22 Ibid.
23 Article 5 of Law 189/2002.

In addition, if we consider that new conditions and limitations concerning the entry for work purposes are provided for under Law 189/02[24], which states that immigrants who lose their job can sign up with the employment office for a maximum of six months, after which their residence permit is to be withdrawn if they have not found other employment, Italy is clearly orientated towards closing its doors to foreign workers.

3.2. Family reunification

Since the establishment of the Ad hoc Group on Immigration in 1991[25], the harmonisation of legal provisions concerning the right to family reunification has been discussed intensively by the European Ministers responsible for immigration affairs. As a result of these discussions, a number of legislative proposals and draft resolutions laying down the guidelines and principles for a common European policy on the right to family reunion have been proposed. At present, COM/2001/225 is the latest legislative 'product' of this supranational dialogue on admission of foreigners for family reunion. At the heart of this proposal is the affirmation of the principle of the unity of the family, wich, according to the proposal, should be preserved since separate living, during a long period of time, of parents and children or partners for life may have severe pshycological and social consequences for those involved, which can negatively influence the integration and interaction of immigrants in the society of the state where they live. This, especially where the interests of young children are at stake.

That said, based on the internationally accepted concept of family reunification, which is considered a necessary way of making family life possible, COM/2001/225 states that to ensure protection to the family and the preservation or formation of family life, which, in turn, helps to create the socio-cultural stability facilitating the integration of third country nationals in the member states a right to family reunification should be established and

[24] The general principles informing the Italian approach to work-related immigration are spelled out in Article 3 of Law 189/2002. In turn, detailed provisions regulating the right to entry and stay Italy for work purposes are laid down under Articles 5, 6, 8, 9, 12,13 of the above.mentioned law.

[25] The setting-up of the 1991 ad hoc Group on Immigration came as a corollary of the broader Euro-policy project to achieve the abolishment of the internal European borders.

recognised and the practical conditions for the exercise of that right should be determined on the basis of common criteria. Hence a crucial rule concerning the harmonisation of national provisions concerning the definition of the components of the 'family' to whom the right to family reunification applies was provided for under the orginal version of Article 4 of the proposal, according to which:

'the family includes the applicant's spouse, or unmarried partner (if the legislation of the member state concerned treats the situation of unmarried couples as corresponding to that of married couple); the minor children of the applicant; its spouse or unmarried partner; the relatives in ascending line of the applicant; spouse or unmarried partner; children of the applicant; his spouse or unmarried partner being of full age who are objectively unable to satisfy their needs by reason of their state of health.'.[26]

Given the diversity in national legislation concerning those enjoying the right to family reunification, the above-referred norm has been significantly amended. In particular, there is now a possibility but not an obligation to allow the entry and residence beyond the spouse and minor children.[27] Notwithstanding this and fact that within the broader context of the proposal the objective to lay down common principles applicable in all member states is counterbalanced by the statement that it is possible for national governments to refuse to allow the entry and residence of family members on grounds of public policy, domestic security or public health, COM/ 2001225 met with strong opposition from some EU member countries. Therefore, its adoption has been blocked at the level of the Council of Ministers.

Having focused on the principal EU principles on the right to family reunion, it should be stressed that these principles are exactly the crucial points differentiating the national and supranational approaches to immigration via family reunion.

While, as we have noted, according to COM/ 2001/ 225, the member states should authorise –among the others - the entry and residence of the minor children of the applicant and of his spouse or unmarried partner, and even adult children, who are objectively unable to care for themselves for reasons of their

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[26] See the original version of this Article, provided for as it was under the previous EC proposal on the right to family reunification, namely COM/ 2000/ 0624.

[27] Article 4 COM/ 2001/ 225

state of health, with the new German bill the age limit of children who are allowed to follow their parents as immigrants has been lowered from 16 to 14. In turn, under the new Italian Immigration Act, the right to family reunion is substantially limited to the spouse and depending minor children.[28] In the light of this, it can be argued that while the Community proposal privileges protecting the unity of the family, the German and Italian regulations are instead oriented to privilege national interests by restricting immigration.

3.3. Asylum seekers. Premise.

Asylum is the area in which the supranational effort to take the steps necessary to remedy the fragmentation of national laws is more significant. But the provisions adopted at the EU level do not suffice on their own to overcome the fragmentation of the European 'asylum system' since most member states keep on adopting individual - and often conflicting - measures on this matter. For obvious reasons of coherency and unity, this resistance on the part of member states to harmonise national legislation has problematic consequences on the way in which migratory flows are managed throughout Europe.

However, in order to gain a sound understanding of the national sensitivities undermining the path towards a common asylum system, we would do well to explore the reasons behind the diversity of national approaches to this matter.

3.3.1. Germany

Admission for humanitarian reasons is the issue where the German approach to immigration has mostly been informed by principles which have grown within, and because of, the very uniqueness of the country's national historical-constitutional developments. In 1949, after the second world war and the collapse of the Nationalist Socialist Regime, asylum was included in the German Constitution as a fundamental right[29] and Germany had one of the most open policies towards those asking to enter the national frontiers for humanitarian protection. However, over the years this way of managing the asylum system has

[28] Article 23 Law 189/02

[29] See Article 16 of the Basic Law for the Federal Republic of Germany - Grundgesetz, GG – (Ref. Version promulgated on the 23rd of May 1949 and published in the Federal Law Gazette (first issue) dated 23 May 1949).

not been without its problems in terms of the country's capacity to control immigration. Confronted with the pressures of an ever increasing number of people asking admission to Germany and at the aim of safeguarding the right to protection of those who suffer political and humanitarian prosecution while discouraging manifestly unfounded applications for asylum, in 1992 the Government adopted the Act on the Re-organisation of Asylum Procedures[30], shortly followed by the Act to Amend the Basic Law on asylum[31]. With the entry into force of these amendments, the principles of the 'safe third state' and 'safe country of origin' were introduced. In practice, these principles imply that a foreigner may not invoke the basic right to asylum if he has entered Germany from a safe third state. Likewise, entitlement to ask for asylum protection was excluded for those who were not victims of state prosecution.

In addition, a comprehensive set of norms setting out the categories of manifestly undounded applications to be rejected by means of an accelerated asylum procedure were set forth under Section 30, para. 3, n.1 to 6 of the Asylum Procedure Act.

That said, with the new bill of 2001, the right to asylum for those who claim persecution by non-state actors, as well as for women claiming persecution on the basis of their gender, is finally recognised. However, as far as procedural guarantees are concerned, the German draft legislation accelerates asylum procedure but does not offer adequate guarantees about the decision-making process, and the rule according to which people coming from a 'third safe-country' are not afforded the right to apply for asylum is carefully maintained. As for this point, it should be noted that given that Germany considers all neighbour countries as safe, this rule has *de facto* allowed Germany to close its doors to many applications for asylum, which have been deviated to other EU countries.

3.3.2. Italy

Over the last decade, the number of refugees and immigrants arriving on the Italian coasts and wishing to exercise their right to asylum has increased

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30 The German Act on the Reorganisation of Asylum Procedures of 26 July 1992, in Federal Law Gazette I, p.1126.

31 The German Act to Amend the Basic Law of 30 June 1993, in Federal Law Gazette I, p. 1002.

dramatically. This, together with a very particular Italian problem, that is, how to deal with the large number of illegal immigrants already in the country, has made the political debate over the humanitarian protection of refugees and asylum-seekers particularly problematic, with the consequence that discussions on asylum risk being confused with other emotional issues, such as ethnicity or the safeguarding of national identity. The new Italian legislation on immigration and asylum reflects these difficulties undeprinning the socio-political debate on the so-called cases of 'forced immigration'. The focal points of the reform can be summarised as follows: 1. asylum seekers awaiting decision on their application will be detected in special sections in 'centres for temporary protection'; 2. asylum-seekers awaiting decision on their case will no longer be given a provisional permit; 3. the right of appeal against decisions on asylum cases is significantly eroded; 4. a quicker procedure for expelling immigrants who are suspected of having proposed a manifestly unfounded application is introduced.[32]

4. Conclusion

On the basis of the above-discussion, the following conclusions can be drawn:

1. only if they are in line with national concerns, (e.g. the German policy on economic-driven immigration) national laws do follow the EU approach to immigration. Otherwise, national provisions do not refer to the supranational context (e.g. the way both the German and the Italian bills deal with immigration via family reunification);

2. common rules have been adopted at the level of the EU only when pragmatic pressures have called for supranational action to cope with situations not otherwise addressable by single states (e.g. Directive 2001/55/CE and Decision 2000/596/EC);

3. however, the ever increasing pressures of migration flows upon the Community now require a comprehensive supranational approach to immigration in substitution for the up-to-date pragmatic responses to particular pressures. However, if the adoption of common measures is still blocked at the level of the Council of Ministers, this means that discussions need further to be carried out to

[32] Articles 31 and 32 of Law 189/2002

figure out national concerns thereby reaching consensus on the objectives to be followed. The protection of the Roma: the European Convention of Human Rights at the Rescue of a controversial case of cultural diversity?

The Protection of the Roma: the European Convention of Human Rights at the Rescue of a Controversial Case of Cultural Diversity?

Kristin Henrard*

Summary: 1. Introduction. - 2. Cultural diversity (cultural rights) and factual background on the situation of the Roma. - a. Cultural diversity (cultural rights). - b. Factual background on the Roma. - 3. The protection for the Roma and their separate identity at the level of individual Human Rights. - a. The protection of physical integrity. - b. The equality principle. - c. The right to education. - d. Language rights. - e. The right to an own way of life. - 4. Conclusion.

1. Introduction

The particular predicament of the Roma all over the world, but also in most European countries, is well documented. Problems of pervasive discrimination in several areas of life, especially regarding access to employment, education, health care and housing, go hand in hand with numerous instances of racial violence, and mistreatment by the police. All these negative factors for the overall living conditions of the Roma can mainly be attributed to negative perceptions about the Roma identity, their own way of life, values and traditions.

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Notwithstanding the fact that the Roma are generally acknowledged to constitute a minority, which would invite an investigation of possible avenues of protection for the Roma on the basis of minority rights, this chapter will be focused on the extent to which individual human rights provide protection for Roma.

A brief 'preliminary' section concerning the meaning of the concepts 'cultural diversity' and 'cultural rights', justifying the exact scope of this article, and a succinct factual description of the situation of the Roma, is followed by an analysis of the way in which individual human rights contribute to the protection of the Roma and their own way of life. In view of the excellent reputation of human rights protection under the European Convention on Human Rights, this second part will be constructed around the latter treaty and the jurisprudence of the European Court of Human Rights.

Two preliminary issues that are elaborated upon are the equality principle and more specifically the prohibition of discrimination, as well as the protection of the right to life and physical integrity. When studying the degree to which Roma's cultural rights are protected, the focus will be on the right to one's own way of life, the use of one's own language in the public sphere and the right to education, including access to education and the right to mother tongue education. In several regards, important developments can be gleaned from the jurisprudence of the European Court of Human Rights, even though not always in cases concerning Roma. Nevertheless, this case law is of obvious relevance for Roma in view of the principles they contain. In any event, it is equally obvious that there is still ample scope for improvement.

2. Cultural diversity (cultural rights) and factual background on the situation of the Roma

a. Cultural diversity (cultural rights)

When speaking in terms of cultural diversity, it is always advisable to give an indication about the meaning of the concept culture and cultural rights. A narrow and a broad, anthropological meaning of the concept of culture can be distinguished. Whereas the first mainly concerns the highest intellectual achievements of humans, like philosophy, literature etc., the second is much

wider and includes aspects of one's own, separate way of life such as food, clothing, housing, the learning of family values and the like.[1] Arguably, language is a component of culture, and this can also be put forward regarding religion. An enumeration of cultural rights confirms the broad scope of culture and its intrinsic relation to the identity of minorities. Cultural rights definitely tend to include the right to education,[2] which is crucial for minorities in view of its socialization function, while access to and adequate coverage in the media can also be added to the list of important issues concerning the reproduction of a certain culture.[3]

As already indicated in the introduction, this article will mainly address the protection of the own way of life of the Roma, rights pertaining to language use and education more generally. When mentioning the own way of life of the Roma, one thinks immediately of living in caravans and often, but not necessarily any more, an itinerary life style. Regarding the right to education, severe problems exist as regards *de facto* access to education, especially the higher echelons of education, while education in the/a Roma language is also relevant. The problems regarding the use of the/a Roma language in the public domain might come less to the forefront but they definitely belong to the realm of cultural rights and are an issue that should not be overlooked.

Notwithstanding the focus on cultural diversity and the protection of cultural rights**,** it seems appropriate and even necessary to first consider some so-called 'preliminary' issues. Indeed, certain rights do not qualify as cultural rights but are nevertheless rights that can play a central role regarding the enumerated cultural rights or that can be considered as pre-eminent rights that need to be

1 L.V. Prott, 'Cultural Rights as Peoples' Rights' in J. Crawford (ed.), *The Rights of Peoples*, Oxford, Clarendon Press, 1988, 94. See also J. Donnelly, 'Human Rights, Individual Rights and Collective Rights' in J. Berting et al (eds.), *Human Rights in a Pluralist World: Individuals and Collectivities*, Middleburg, Roosevelt Study Center, 1990, 55.

2 Y. Dinstein, 'Cultural Rights', *Israel YB. H. R.* 1979, 58; L.V. Prott, 'Cultural Rights as Peoples' Rights in International Law', 96-97; V. van Dyke, 'The Cultural Rights of Peoples', *Universal Human Rights* 1980, 13; C.H. Williams, 'The Cultural Rights of Minorities: Recognition and Implementation' in J. Plichtova (ed.), Minorities in Politics: Cultural and Language Rights, Bratislava, Czechoslovac Committee of the European Cultural Foundation, 1992, 112.

3 C.H. Williams, 'The Cultural Righs of Minorities: Recognition and Implementation', 111-113.

guaranteed to be able to enjoy these cultural rights. In general when one discusses the position of Roma, the focus is on their overall disadvantaged, vulnerable position, and the related systemic prejudice against them, which translates into multiple manifestations of racial violence and systemic discrimination. This obviously colors their lives and influences the way they exercise their cultural rights and can live their own way of life.

The most important of the so-called 'preliminary rights' are the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. The right to life is undoubtedly the natural first right that should be guaranteed to individuals as it is a necessary condition for the enjoyment of the other fundamental rights and freedoms. Members of minorities have by definition a vulnerable position in society, in view of their numerical minority position and non-dominant position. They tend to be almost natural victims of these offences so arguably, their vulnerability amplifies the need for an effective protection of the (overall) physical integrity of the persons involved.[4]

Because of the special importance of the effective protection of the rights at issue, it is crucial that they are considered absolute or quasi absolute rights in view of the very limited scope of legitimate limitations, derogations and exceptions.

As will be elaborated infra, it is well known that the Roma are often victims of police mistreatment, which even results in deaths in custody. Furthermore, Roma tend to be the target of more pervasive problems of racial violence, also at the hand of private individuals. In the latter respect, the question arises to what extent the state has positive state obligations to prevent infringements of the right to life at the hand of private parties or in other words how wide the indirect horizontal applicability of human rights reaches.

Secondly, another kind of preliminary right of crucial relevance for Roma concerns the prohibition of discrimination. Indeed, the Roma are often subject to pervasive, systematic discrimination in many countries in Europe, both east and west. Equality or equal treatment are justifiably said to be key issues in relation to the protection of Roma. Furthermore, the absence of discrimination

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4 See also R. Stavenhagen, 'Human Rights and Peoples' Rights – the question of minorities', *N.J.H.R.* 1987, 21.

is arguably a prerequisite to the full enjoyment of cultural rights as it determines the actual scope for the accommodation of the Roma.

Also here protection against private acts of discrimination, including violent manifestations of prejudice by private persons, and the required state activities in this respect are very important. Furthermore, as will be developed infra, issues of indirect discrimination are crucial, especially regarding the separate, own way of life of the Roma, in relation to, for example, general town planning regulations. An awareness of indirect discrimination already implies a certain openness towards substantive equality, which would be further enhanced by the grant of 'special' measures, at least special protection, for Roma, in view of their particularly disadvantaged position.

b. Factual background on the Roma

An extensive coverage of the Roma, information on their own language, culture, religion and way of life (including a nomadic life style), their early roots, their arrival in Europe in the 14th Century, the development of the policy of the authorities in their regard and the ensuing situation for the Roma as regards their social-economic situation, education, discrimination and ethnic violence, has been done elsewhere[5] and does not need to be repeated here. It suffices to indicate here the generally miserable living conditions of the Roma, due to their weak economic position and difficult access to employment. Furthermore, several obstacles to schooling of Roma children can be pointed out, which are all related to a hostile school environment to pupils with a different social and cultural background.[6]

As ECRI points out in the preamble to its General Policy Recommendation no 3, entitled Combating racism and intolerance against Roma/Gypsies, 'Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of racism which is deeply rooted in society, and target of sometimes violent

5 M. Rooker, *The International Supervision of Protection of Romany People in Europe,* Nijmegen University Press, 2002, 9-17, 53-66. See also P. Bakker & M. Rooker, The Political Status of the Romani Language in Europe, Working Papers of the Office of the High Commissioner on National Minorities, website HCNM, 3-7.

6 See also Report of the OSCE High Commissioner on National Minorities (to the Human Dimension Section of the OSCE Review Conference), Vienna, 22 September 1999, RC.GAL/2/99; Report on the Situation of Roma and Sinti in the OSCE Area, 2000.

demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened' and 'the persisting prejudices against Roma/Gypsies lead to discrimination against them in many fields of social and economic life, and that such discrimination is a major factor in the process of social exclusion affecting many Roma/Gypsies'.[7] Indeed, although general xenophobia may exist, the Roma still suffer special vilification. It should furthermore be noted that although there are serious concerns that Roma tend to suffer persecution in several European states, special measures are apparently taken to preclude Roma in particular to have access to a substantive refugee determination.[8]

3. The protection for the Roma and their separate identity at the level of individual Human Rights

As will be demonstrated in the following paragraphs, several developments have taken place in the general human rights framework, and more specifically in terms of the European Convention on Human Rights (ECHR), which have potential to improve the protection of Roma and their separate identity at the level of individual human rights. Nevertheless, it has to be acknowledged that so far the progress has been mainly one of theoretical principle, as the actual application to the facts has remained restrictive. At the same time it should be acknowledged that certain critical remarks can be made concerning the admissibility hurdles present in many cases brought before it by Roma. The most problematic of these hurdles is obviously the finding by the European Court of Human Rights that a case is manifestly ill founded[9] because there is no reason to depart from the conclusions reached by the national authorities as they are better situated to evaluate the applicant's complaints or because the minimum

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7 See also J.Whooley, 'Inequality and the Struggle for Roma Rights', ERRC (website), 1999.

8 See the Advocacy piece, 'Migration, Asylum and Roma Rights Policy: a 3-part Basis for Good Governance', *Roma Rights* nr 2 of 2002, ERRC website.

9 See in this respect the difference between the same case before the Committee against the Elimination of all forms of Racial Discrimination and before the ECHR: the former considered it admissible (par 6.5) but then concluded to the non violation because of the condemnation of the alleged perpetrator (par 10) with the decision of non admissibility by the ECHR to the same facts because the claim would be manifestly ill founded (Lacko v Slovakia, CERD/C/59/D/11/1998 and Lacko v Slovakia, application no 47237/99 on the respective websites).

level of severity for article 3 is not reached (concerning cases of alleged excessive police violence). The reasoning of the Court in these instances furthermore arguably departs from its own jurisprudence as regards the need for the Strasbourg organs to re-examine the facts when there are disagreements in domestic courts about them or as regards injuries sustained when in police custody (e.g. *Ribitsch*[10] and *Tomasi*[11]).[12]

a. The protection of physical integrity

Concerning the preliminary issues identified above, namely the protection of physical integrity and the equality principle, one can point to significant developments or at least developments with a great deal of potential.[13] Although these developments have been extensively covered elsewhere,[14] it seems appropriate to take up the broad lines here. The complaints before the ECHR mostly concern torture, inhuman and degrading treatment, also during detention, and discrimination, while the related acts tend to stem from prejudice against Roma because of their own, separate way of life, culture etc, hence the relevance to treat them briefly here.

Whereas until now most Roma cases against Hungary have not been successful, several cases of police violence against Roma have led to condemnations of Bulgaria. Recently the ECHR has confirmed its case law of *Assenov*[15] *and Velikova*[16] *in Anguelova*[17]. The Court concluded to multiple violations in the latter case, which concerned the death of Anguelova's son after ill-treatment in police custody. The Court did not only establish a violation of article 2 because a person died in police custody while being healthy before and

10 Ribitsch v Austria, 4 December 1995, www.dhcour.coe.fr.
11 Tomasi v France, Eur. Ct. H. R., 27 August 1992, www.dhcour.coe.fr.
12 See also L. Farkas, 'Knocking at the Gate: the ECHR and Hungarian Roma', ERRC website, 2000.
13 No cases of racially inspired violence have come before the HRC or the CERD.
14 Inter alia F. Benoit-Rohmer, 'Observations: A propos de l' autorité d'un 'précédent' en matière de protection des droits des minorités', Rev. Trim. Dr. h. 2001, 905-915; M. Rooker, *The International Supervision of Protection of Romany People in Europe*, 140-142, 172-178.
15 Assenov v Bulgaria, Eur. Ct. H. R., 28 October 1998, www.dhcour.coe.fr.
16 Velikova v Bulgaria, Eur. Ct. H.R., 18 May 2000, www. dhcour.coe.fr.
17 Anguelova v Bulgaria, Eur. Ct. H. R., 13 June 2002, www.dhcour.coe.fr.

the state being unable to provide a plausible explanation (par 110-121), but also of article 2 because the investigation into the death of that person was not sufficiently objective and thorough (par 145), and of article 3 because the injuries to the person's body 'were indicative of inhuman treatment beyond the threshold of severity under article 3' (par 149), while the 'unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in article 5' (par 154). This line of jurisprudence seems to indicate a growing acknowledgement of the vulnerable position of Roma and the related stricter stance of the ECHR towards action (or inaction) by the state authorities.[18]

b. The equality principle

A second important development concerning the protection of Roma on the basis of individual human rights pertains to recent jurisprudence of the ECHR as regards the equality principle. Whereas the ECHR has been rather conservative in ruling on racial discrimination, one can point to certain case law exposing at least a special attention and concern for manifestations of racially inspired actions and violence (e.g. *Jersild v Denmark*[19]). The Commission's decision in the *Asian Africans cases* in the late 60s has not been followed by explicit statements by the Court's majority which identified race as a suspect class in its non-discrimination jurisprudence. Nevertheless, the growing concern in member states, as reflected in the EU's race directive (directive 2000/43 EC) and as in states worldwide, to eradicate racial discrimination might very well lead the ECHR also to take a more explicit stance in this respect. The adoption on 4

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18 Note that in *Cyprus v Turkey*, the original complaint before the European Commission on Human Rights comprised complaints about the discriminatory treatment of Romany people which would amount to a violation of article 3. However, the Commission held the complaint inadmissible in this respect as being manifestly ill founded and hence it did not feature in the merit stage before the ECHR.
On the other hand, reference should definitely be made to *Conka v Belgium* (5 February 2002) in which the ECHR found for the first time a violation of article 4 of protocol 7 as related to the collective expulsion of a group of Roma. The Court here seemed to give enhanced protection to the Roma in view of their extra vulnerable position in society. See also L. Farkas, 'Knocking at the Gate: The ECHR and Hungarian Roma', ERRC website, 3; G. J. Garland, 'Case note: Conka v Belgium – Inroads into Fortress Europe?', ERRC website; E. Guild, 'The Borders of Legal Orders: Challenging Exclusion of Foreigners', ERRC website, Roma Rights nr 2 of 2002.

19 Jersild v Denmark, Eur. Ct. H. R., 23 September 1994, www.dhcour.coe.fr.

November 2000 of the 12th Additional Protocol to the ECHR, which introduced a general, autonomous prohibition of discrimination, should also be highlighted. Notwithstanding the slow ratification process (by end of May 2003 only 4) which will delay its coming into force, the positive expectations about its impact on the overall equality jurisprudence of the ECHR are rather high. The developments regarding the Court's heightened awareness of and concern for the treatment of minorities and of Roma more specifically, discussed infra, will hopefully lead the Court to further reorient its jurisprudence towards uncovering and recognizing also less obvious forms of racial and ethnic discrimination with which Roma are confronted.[20] In this respect, the Court could for example in the future accept more easily complaints of discrimination in relation to complaints of violations of article 3 because of mistreatment by police officers (in contrast to its position so far, e.g. *Anguelova v Bulgaria*).[21]

There have in any event been important developments in ECHR's article 14 jurisprudence, which reveal an openness towards substantive equality, as contrasted with mere formal equality.[22] First of all, it should be highlighted that the Court recently accepted in theory allegations of indirect discrimination. As the latter are focused on norms and practices with disparate impact on certain groups, and as indirect discrimination often occurs on the basis of race/ethnic origin, the principled stances in *Kelly v UK*[23] and *Mc Shane v UK*[24] are important. An even more important development has manifested itself in *Thlimmenos v Greece*[25] as the Court indicates here for the first time that states are obliged to adopt differential measures concerning persons who find themselves in significantly different situations: 'the right not to be discriminated against in the

20 See also E. Sebok, 'The Hunt for Race Discrimination in the European Court', website ERRC, 1-2.

21 See also M. Rooker, *The International Supervision of Protection of Romany People in Europe,* 140-142.

22 The Human Rights Committee has from the beginning manifested a focus on substantive equality in its views on the prohibition of discrimination, as is also reflected in its General Comment 18 on non-discrimination, heiwww.unige.ch/humanats/gencomm/hrcom22.htm. See also the articles 1(4) and 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination and the concomitant views of the CERD.

23 Kelly v UK, Eur. Ct. H.R., 4 May 2001, www.dhcour.coe.fr.

24 Mc Shane v UK, Eur. Ct. H. R., 28 May 2002, www.dhcour.coe.fr.

25 Thlimmenos v Greece, Eur. Ct. H. R., 6 March 2000, www.dhcour.coe.fr.

enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (§ 44). This opening towards substantive equality,[26] arguably extends the changing approach concerning indirect discrimination, and tends to augur well for the determination of state obligations to take special measures for their minority populations generally and the Roma more specifically, that take their specific characteristics and needs into account.[27]

c. The right to education

A first human right with clear connotations to cultural diversity is the right to education.[28] Notwithstanding the fact that education has been identified as a specific problem area for Roma, there is hardly any case law to be found on this topic, none at all actually at the websites of the Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination. Nevertheless, on 18 April 2000 a complaint was filed with the ECHR against the Czech Republic because of the systematic racial discrimination in Czech schools where Romany children tended to get relayed to special schools for retarded children, while the majority of them are not mentally deficient. This would amount to degrading treatment under article 3, the denial of the right to education as well as discrimination in the enjoyment of the right to education (in terms of article 2 of the second additional protocol and article 14). The case is still pending but its outcome will reveal the degree of protection individual human rights offer against these widespread anti-Roma practices in several Eastern European countries. The remaining claims concerning Roma's and their right to education were directed against the United Kingdom. In all these cases, the complaint pertaining to education was related to the fundamental problem of the inability for Romany travelers to find a caravan site or plot of land to settle down on. The question of language in education, which is also relevant for Roma, will be discussed infra.

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26 See also J.H. Gerards, 'Noot bij het Thlimmenos arrest van het EHRM', *European Human Rights Cases* 2000, 45-46.

27 Ibid, 3.

28 See M. Rooker, *The International Supervision of Protection of Romany People in Europe,* 241-243.

d. Language rights

Secondly, one could have regard to the extent to which individual human rights guarantee language rights that contribute to the accommodation of linguistic diversity, and hence also protect and promote the use of the Roma language, to some extent. In view of the fact that there is no Roma specific case law in this respect, it seems appropriate to merely give a quick summary here of a more extensive study[29]. The degree to which the ECHR accommodates the wishes and needs of (members of) linguistic minorities is minimal. Not only does the convention contain hardly any explicit language rights, but these are also interpreted restrictively while the Court has been in general reluctant to deduce meaningful language rights from other provisions like the articles 8-10. The protection is indeed explicitly limited to the implications of the non-discrimination principle, which is only one of the pillars of a full-blown system of minority protection – the second being special measures aimed at protecting and promoting the separate identity of minorities. However, the recent movements in the jurisprudence revealing a greater awareness of and concern for minority needs might influence also this jurisprudence, as was already to some extent visible in the paragraphs on the right to education in the *Cyprus v Turkey case* of 10 May 2001 (par 277-278).

The Court seems indeed to be moving away from its rigid stance with respect to the protection of mother tongue education visible in the *Belgian Linguistics case*[30] of 1968 in its *Cyprus v Turkey* judgment.[31] In the latter case the Court notes that 'children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the TRNC ever since the decision of the Turkish-Cypriot authorities to abolish it'.[32] Although the Court at first seems to repeat its stance that the provision on the

29 See K. Henrard, 'Devising an Adequate System of Minority Protection in the Area of Language Rights' to be published by Palgrave in a book on Linguistic Diversity in 2003, 17 p.

30 For a critical analysis of the Belgian linguistics case see *inter alia* K. Henrard, *Devising an Adequate System of Minority Protection* .., 119-121; C. Hillgruber & M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities,* Köln, Verlag Wissenschaft und Politik, 1994, 25-31.

31 European Court on Human Rights, Cyprus v Turkey, www.echr.coe.int, 10 May 2001.

32 Cyprus v Turkey, par. 277.

right to education 'does not specify the language in which education must be conducted in order that the right to education be respected',[33] it does conclude that 'the failure of the TRNC authorities to make continuing provision for [Greek-language schooling] at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue'.[34] Because the children had already received their primary schooling through the Greek medium of instruction, '[t]he authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language'.[35] Consequently, it seems that because the authorities assumed responsibility for the provision of Greek-language primary schooling, they have the obligation to do the same for the secondary school level.

Even though this reasoning does not rely explicitly on the importance of mother tongue education for the cognitive development of the students and related substantive equality considerations, and although it does not read into the article on the right to education a right to mother tongue education, it clearly attaches more weight to the parents' convictions about the benefits of a certain medium of instruction and should thus be welcomed. It is to be hoped that in subsequent jurisprudence the European Court on Human Rights will further elaborate and enhance the protection of mother tongue education for minorities.

e. The right to an own way of life

Finally, there has been a significant shift in the jurisprudence in terms of article 8 ECHR, in the sense that the Court finally acknowledged the right to an own way of life in *Chapman v UK*[36], a case concerning Roma's difficulties to station their caravans. The Court explicitly departed from its previous case law in *Buckley v UK*[37] and in the process made some potentially far reaching statements

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33 *Ibid.*
34 *Ibid*, par. 278.
35 *Ibid.*
36 Chapman v UK, Grand Chamber of Eur. Ct. H. R., 18 January 2001, www.dhcour.coe.fr.
37 Buckley v UK, Eur. Ct. H. R., 25 September 1996, www.dhcour.coe.fr.

concerning minority protection more generally, denoting a more favorable stance to the special needs of minorities.[38]

The (now extinct) European Commission on Human Rights had already held in 1983, in a case concerning the Lap minority in Norway, that although the ECHR does not guarantee any specific rights for members of minorities, they can rely on article 8 ECHR since that would imply a right to a traditional way of life as part of private life, family life or home.[39] However, the Commission underlined immediately that this right would not be absolute and is subordinate to more important public interests. *In casu* the interference would be proportional to the legitimate aim and hence the Commission decided that the application was manifestly ill founded and thus inadmissible.[40] Consequently, the Court did not have a chance to pronounce itself on the matter in this case. However, this was different in at least one of the several cases concerning Roma it was confronted with (prior to Chapman).

Buckley v UK dealt also with Roma's difficulties to station their caravan as a result of a combination of national regulations, and hence with interferences with their traditional lifestyle. The Commission declared this complaint admissible under article 8 in respect of and the right to respect for privacy, and the right to respect for family life and the right to respect for home. However, the Court limited its assessment to the latter right as it would be unnecessary to assess whether this case would also deal with the right to respect for one's private and family life.[41] The Court thus chose not to pronounce itself on the possibility suggested by the Commission in the case regarding the Lap minority, that article 8 would imply a right to a traditional way of life. In view of the fact that the Commission had declared the case admissible as regards the three rights explicitly mentioned in article 8, the Court could have combined these three

38 L. Farkas, 'Knocking at the Gate: The ECHR and Hungarian Roma', ERRC website, 3; E. Sebok, 'The Hunt for Race Discrimination', ERRC website, 2. For an extensive discussion of the implications of Chapman, see F. Benoit-Rohmer, 'Observations: A Propos de l'autorité d'un precedent en matière de protection des droits des minorities', Rev. Trim. Dr. h. 2001, 905-915.

39 G. and E. v Norway, Eur. Comm. H. R., Application No 9278/81, 3 October 1983, *D.R.* 35, 35-36.

40 Ibid, 36.

41 Buckley v UK, par 55.

rights to deduce the right to respect for one's own, distinct way of life.[42] It was furthermore striking that the Court limited its evaluation completely to the individual right of Ms. Buckley to respect for her home on the one hand and the interests of society that the planning regulations would be respected on the other hand.[43] This attitude arguably reflects a positive predisposition towards the state and its interests by ignoring the issue that transcends the individual case of Ms Buckley, which concerns the Roma minority as a group and implies indirect discrimination. In the end, the Court concluded that article 8 was not violated *in casu*. However, two judges expressed in their dissent the wish that the Court would be more focused on achieving full equality of rights via special measures for the Roma minority.[44]

In *Chapman v UK*, the Grand Chamber of the European Court of Human Rights, sets the stage for a significant development concerning minority protection in two respects, while still leaving crucial problems as to the actual restrictive assessment of the facts. The first positive development is that the Court for the first time recognizes that article 8 ECHR indeed enshrines a protection for the traditional life of a minority group.[45] Secondly, the Court remarks, while emphasizing the particularly vulnerable position of Roma, that article 8 also entails positive obligations for the state in this respect:

> '*although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. ... the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at decisions in*

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42 K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, 103. O. de Schutter, 'Observations: Le droit au mode de vie tsigane devant la Cour europeenne des droits de l`homme: droits culturels, droits des minorites, discrimination positive', *Rev. Trim. dr. h.* 1997, 76-77.

43 Buckley v UK, paras 64-85.

44 The dissent of Judges Lohmus and Pettiti is given immediately after the majority judgment (website ECHR).

45 Buckley v UK, par 73.

particular cases. To this extent there is thus a positive obligation imposed on the Contracting states by virtue of Article 8 to facilitate the gypsy way of life'.[emphasis added][46]

It should furthermore be highlighted that the Court, in its assessment whether the interference was in line with the conditions of paragraph 2 and hence proportional to the legitimate aim, explicitly took into account the 'emerging international consensus amongst the Contracting states of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle (see... in particular the Framework Convention for the Protection of Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community'[47]. The establishment of some kind of European common standard tends to limit the margin of appreciation left to the states and thus leads to stricter scrutiny by the Court, which *in casu* would be favorable towards a more pronounced minority protection. The explicit reference to the Framework Convention is furthermore in itself important as this might announce that the Court will take the provisions of that Convention more generally into account when interpreting the rights enshrined in the ECHR, which would surely strengthen the minority protection regime in terms of the latter.

Nevertheless, the Court immediately adds that it is not persuaded that the consensus is sufficiently concrete to derive specific rules on the kind of action which is expected from the states in any particular situation[48]. More specifically, it would be impossible to interpret article 8 to involve a far reaching positive obligation of general social policy, such as providing sufficient number of adequate housing and camping facilities for the Roma[49]. This analysis obviously entails a balancing act which seems to reduce the actual, immediate contribution towards an enhanced minority protection flowing from the reference to minority rights provisions and emerging common European standard.

46 Buckley v UK, par 96.
47 Chapman v UK, Eur. Ct. H. R., par. 93.
48 Chapman v UK, Eur. Ct. H. R., par. 94.
49 Chapman v UK, Eur. Ct. H. R., par. 98.

Even though the actual outcome of the case was not that Roma friendly due to the minimal supervision exercised by the Court,[50] the fact that there was a significant dissent (seven of the seventeen judges of the Grand Chamber), concluding to a violation of article 8 in the circumstances, criticizing the majority to be too careful and reserved, indicates a clear potential for further, more positive developments pro minority protection generally.[51]

The related complaint in terms of article 14 cum article 8 should also be mentioned as it puts a gloss on the *Thlimmenos* case discussed above. The claim was also formulated in terms of a failure to make a distinction between qualitatively different situations because the general laws and policies did not take into account the special needs of the Roma flowing from their tradition to lead a non sedentary life, traveling in caravans. The majority of the Court referred explicitly to the *Thlimmenos* reasoning but found that there was an objective and reasonable justification for the absence of this differential treatment. To establish that the proportionality principle was fulfilled the reasoning in terms of legitimate limitations to article 8 was referred to[52]. Consequently the application to the facts of the *Thlimmenos* rational remains limited, in line with the overall still predominantly favorable attitude towards states and their justifications.[53] The dissenting judges arguably disagreed as they underlined that the authorities had failed to take the specific circumstances and needs of Roma into account in the application of the planning regulations, which also logically follows their analysis in terms of article 8. Also here, the considerable dissent does carry potential for alterations in the jurisprudence in the not too distant future.

4. Conclusion

It is generally known that the Roma encounter severe problems, most of which are related to the perceptions about their separate identity and way of life.

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50 For a critical assessment of the problems as regards the kind of supervision exercised by the Court, see F. Benoit-Rohmer, 'Observations: A propos de l'autorité d'un precedent en matière de protection des droits de l`homme', 911-913.

51 Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Staznicka, Lorenzen, Fischbach and Casadevall. See also E. Sebok, 'The Hunt for Race Discrimination', 2-3.

52 Chapman v UK, Eur. Ct. H.R., par. 129.

53 See also K.Henrard, *Devising an Adequate System of Minority Protection* ..., 144.

Their exclusion and discrimination concerning access to employment, education and health care often lead to deplorable living conditions. Furthermore, severe prejudice against the Roma identity in the wider society is reflected in and worsened by the media, which only aggravates the situation and compounds the multiple instances of racially inspired violence against Roma. This article assesses to what extent individual human rights contribute to the protection and promotion of this highly controversial case of cultural diversity.

It should be acknowledged that although as it stands individual human rights provide an important but insufficient protection for the Roma and their own identity, several developments with considerable potential can be identified. Not only does the jurisprudence of the ECHR reflect an increasing concern about acts of discrimination and outright violence against Roma, but there is also an explicit recognition of the right to a traditional way of life in terms of article 8 ECHR. *Thlimmenos* demonstrates furthermore an important openness towards substantive equality, of special relevance for minorities, including Roma. It is to be hoped that these new theoretical stances will also lead to a more rigorous scrutiny of the facts in concrete cases, thus also enhancing the actual protection for the Roma.

For the time being, the Roma remain a most controversial case of cultural diversity in Europe, as elsewhere.

Between Art and Commerce: Constitutional Contradictions within the Framework of the EU Film Policy

Anna Herold*

"Par ailleurs, le cinéma est une industrie."
André Malraux[1]

Summary: 1. Introduction. - 2. EU Film Policy: market integration v. cultural diversity promotion. - 2.1 The legal basis for the EU competence on audiovisuals. - 2.2. The vagaries of the Commission action on Film Policy. - 2.2.1. Policy objectives through the eyes of the Commission Working Paper. - 2.2.2. Continued confusion in the Commission action. - 3. EU policy v. national cultural sovereignty. - 3.1. State aid law and films: EU v. national competence. - 3.2. The case of film aid schemes. - 4. Conclusion: towards a sustainable EU Film Policy.

1. Introduction

It is common knowledge that today European cinema in particular and the whole audiovisual sector in general are suffering from structural weaknesses and are dominated by non-European works, mainly from the USA. In view of both the cultural and economic importance of the sector, it is no wonder that the issue

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1 A. Malraux, Esquisse d'une psychologie du cinéma (Paris: Gallimard, 1946).

has attracted a great deal of attention at the European Union (EU)[2] level, resulting in the birth of a so-called audiovisual policy. Since the early 1980s, within the framework of this policy, the EU has conceptualised audiovisuals as a means of creating a new space of identity that should coincide with the political and economic space of the Union. The EU actions are manifold and include both negative and positive integration tools: from guidelines for control of state aid to the film sector, to financial support schemes as Media Plus[3] and the European Investment Bank's i2i initiative[4] and a (highly controversial) quota regime as provided by the Television Without Frontiers Directive.[5]

Within the audiovisual sector, the promotion of European feature films has a distinctive importance because of their potential in terms of commercial exploitation and employment. "*Le désir du cinéma*" cannot be explained, however, exclusively by economic reasons. Cinema carries a strong symbolic message and thus has an enormous influence on the development of other means of communication. It represents a diplomatic and political vector on the global geopolitical arena. Participation in prestigious international film festivals and nominations for film awards boost the position of states in the international market and also enhance their self-esteem in terms of cultural impact.

The many facets involved in film-making explain the rising interest expressed recently by nearly all the EU's institutions: the European Commission[6], the

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2 For the purpose of this paper, I will refer to the term "European Union". "European Union" and "EU" will be used interchangeably, depending on the context. The term "Community" will be used only in connection with reference to the EC Treaty or EC law.

3 The MEDIA plus programme (2001-2005) aims at strengthening the competitiveness of the European audiovisual industry with a series of support measures dealing with the training of professionals, development of production projects, distribution and promotion of cinematographic works and audiovisual programmes.

4 The European Investment Bank's Innovation 2000 Initiative - Audiovisual offers the European film and audiovisual industry a range of financial products and budgetary aid instruments in four crucial areas: training, development, distribution and finance.

5 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23, as amended by the European Parliament and Council Directive 97/36/EC of 30 June 1997, OJ 1997 L 202/60.

6 Communication on certain legal aspects relating to cinematographic and other audiovisual works, 26 September 2001, COM (2001) 534 final.

European Parliament[7] and the Council.[8] However, because of its strong cultural implications, the film sector does not lend itself easily to the trends towards uniformity, which are inherent in the process of economic integration. This conflict is clearly seen in the relationship between national cinematographic legislation seeking to protect national, constitutionally grounded cultural, identities and the value of free market philosophy pursued within the European economic integration process, granted a constitutional rank in the EC Treaty.

In other words, there seems to be a contradiction between national measures, which often seek to correct the workings of the market, on the one hand, and the efforts to establish a free market for audiovisual goods and services on the European level, on the other. This competence conflict between EU and the member states in their role as promoters of cultural diversity will be referred to below as the "vertical dimension" of constitutional contradictions within the European film policy framework.

The situation has been additionally complicated after Maastricht by the introduction of Article 151 into the EC Treaty, which recognises protection of cultural values as one of the constitutional tasks of the Community. As a result, the policy in the film sector at the European level is characterised by another profound contradiction, that between the economic objectives of market integration and the obligation to preserve cultural diversity, both constitutionalised within the EU legal order. This contradiction will be described below as the "horizontal dimension" of the conflict in question.

The aim of this paper is to investigate these tensions within the constitutional framework of the European Union and of its Member states. In order to gain a more comprehensive picture, in section II of this paper, after a short overview of the development of the EU audiovisual competence, I will investigate the constitutional contradiction within the film policy on the European level itself (horizontal aspect). Subsequently, in section III, the conflict between the existing EU policy measures and national cultural sovereignty will be examined

7 Resolution on achieving better circulation of European films in the internal market and the candidate countries, 16 October 2001, 2001/2342 (INI).

8 Council resolution on national aid to the film and audiovisual industries, 12 February 2001, OJ 2001 C 73/02, and Council resolution on the development of audiovisual sector, 21 January 2002, OJ 2002 C 32/04.

(vertical aspect). This approach will make it possible to identify the main weaknesses of the existing and envisaged EU film policy framework and draw conclusions (section IV) for the feasibility of a sustainable film policy in the European constitutional context.

2. EU Film Policy: market integration v. cultural diversity promotion

2.1 The legal basis for the EU competence on audiovisuals

The EU audiovisual policy attempts to combine the "dual" nature of the sector by improving its competitive capability, while at the same time taking account of its cultural dimension. The legal basis for such a "mixed" policy is not easy to define precisely. It would seem that audiovisual issues have little relevance within the EU context: there are no specific provisions in the European Treaties on audiovisual policy as such; and there was no mention of audiovisual matters until the introduction of a title on culture into the EC Treaty, where the notion of "audiovisual sector", however, appears in a subordinate, exemplifying role. Among the powers included explicitly within the EU competence, there are no express powers in the audiovisual field.

Yet, the audiovisual sector has been to a great extent affected by the European integration, which led to emergence of an independent policy. The underlying reason for this lies in the very nature of the sector. It is generally acknowledged that audiovisual works, especially feature films, are not just any goods, but intellectual, creative works, requiring at the same time a financial investment. Since it appears virtually impossible to draw a clear dividing line between economy and culture, EU law fully applies to cultural goods and activities, including films and other audiovisual works as well as cinematographic and audiovisual services. What is more, according to the European Court of Justice, as a general rule, the EC Treaty applies without exception to all gainful activities whether of economic, cultural or social nature.[9] As a result, the establishment of the internal market has fully involved the audiovisual sector.

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[9] L. Hancher, T. Ottervanger, P. J. Slot, EC state Aids (London: Sweet and Maxwell, 1999), at 78.

It is therefore argued that, apart from several substantive policy areas, the Community has been, in fact, attributed a number of functional powers,[10] which are defined in terms of an objective to be achieved, which is, in this context, to create a common market for audiovisual goods and services and ensure its smooth operation. The cultural dimension of EC law (evidently relevant in the film sector) has been, hence, primarily about the consequences of the common market freedoms for cultural activities. The EU, however, if it wishes to take any action in the audiovisual sector, has only a fragmentary legal basis at its disposal, giving rise to a selective approach in the field.

The Maastricht Treaty provided, by introducing a title on culture (Article 151 EC Treaty), at least partially, "constitutional" resources to deal with the "dual" phenomenon of the audiovisual sector, and, more generally, to strike the balance between the economic and cultural sphere, between economic integration and cultural specificity. As a result, since Maastricht, the EC Treaty has spelt out constitutionally the responsibility of the EU to safeguard and promote cultural and linguistic diversity. However, the formulation of Article 151 has additionally complicated the situation since it gives rise to many questions, the main one being: how should cultural values be considered when they appear to collide with other, and more immediately compelling, objectives of the European Union, as economic growth or market integration?[11] The inclusion of provisions on culture into the EC Treaty cannot eliminate the tension that exists between the free market approach and the cultural diversity promotion approach towards the audiovisual sector within the EU legal order.[12]

2.2. The vagaries of the Commission action on Film Policy

2.2.1. Policy objectives through the eyes of the Commission Working Paper

The unresolved tensions between trade and culture in the EU context are mirrored in the European Commission initiatives with respect to the film sector. In particular, the recent Commission's Staff Working Paper on certain legal

[10] B. de Witte, 'The Cultural Dimension of Community Law', in the Collected Courses of the Academy of European Law, EUI Florence (The Hague: Martins Nijhoff, 1993), 233, at 272.

[11] Ibid, at 292.

[12] Cf. C. Tongue, 'Television and Film production: Europe Fights Back', 13th European TV and Film Forum, Dublin, 8-10 November 2001.

aspects relating to cinematographic and other audiovisual works indicates that "the aim of the present document is to launch a debate on a number of legal issues related to the European audiovisual sector, and, in particular, to highlight those aspects which could impact on the development of a competitive cinema industry in Europe. This concerns notably barriers to the circulation of European audiovisual works and barriers to the provision between member states of filmmaking services, which would hinder the promotion of cultural diversity and prevent the sector from taking full advantage of the benefits of the Internal Market".[13] In this way, the Working Paper, while envisaging as a final objective of the European audiovisual policy "cultural diversity, both within and between the member states", perceives barriers to the circulation of European audiovisual works and barriers to the provision of filmmaking services between the Member states as the main obstacles to the achievement of such a diversity.

It can be argued that, given the above, the Working Paper creates an amalgam of two objectives: the establishment of an internal market for the audiovisual sector, on the one hand, and the promotion of cultural diversity, on the other. In fact, these objectives are not necessarily compatible with each other. The first of them, the realisation of the common market, is a classical economic objective, achieved usually by such measures as economies of scale, standardisation and industrial normalisation, whereas the other, the promotion of cultural diversity, is an objective of a qualitative nature aiming at the pluralism of supply.[14] In sum, the document seems to overlook the horizontal dimension of the contradiction between art and culture within the film sector.

Furthermore, the position of the Commission in the Working Paper appears to be in contradiction with concepts developed in previous documents, notably in the Communication on principles and guidelines for the Community's audiovisual policy in the digital age. In the Communication, the Commission clearly stated that "preserving Europe's cultural diversity means, amongst other things, promoting the production and circulation of quality audiovisual content which reflects European cultural and linguistic identities. In fact, when it is available,

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13 Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, 11 April 2001, SEC (2001) 619, at 3.

14 Cf. Response of CICCE, EUROCINEMA, FIAD et al. to the Commission Staff Working Paper, Brussels, 11 July 2001, www.europa.eu.int/comm/avpolicy/regul/cine1_en.htm, at 6.

European television audiences show a clear preference for audiovisual content in their own language and which reflects their own cultures and concerns: the challenge is therefore to ensure that programming of this nature – which is usually more expensive than imported material - continues to be available".[15]

One sees, then, that the Commission is well aware of the fact that the creation of a common market for audiovisual products and services will not ensure cultural pluralism within the European market, and it admits that a more proactive policy in favour of production and circulation of quality audiovisual content is necessary in order to achieve the objective of cultural diversity promotion. In the same vein, the Commission has, indeed, declared several times that the ultimate goal of the EU audiovisual policy is to promote cultural diversity, both within and between the Member states.[16]

In conclusion, the Working Paper exemplifies the Commission's rather unbalanced approach to film policy since, in spite of lipservice to the rhetoric of cultural diversity, it underpins market integration without taking into due account the "dual" nature of films.

2.2.2. Continued confusion in the Commission action

The frequent use of the concept of "cultural diversity" notwithstanding, the Commission seems to underestimate in practice the importance of the cultural dimension. In fact, this general "amnesia" appears to be a permanent feature of the Commission's approach to the audiovisual market.

Firstly, the question arises as to the means and instruments – which are not envisaged in more detail by the Commission's documents – which would allow the implementation of cultural diversity and real action in this field. The inertia of the Commission concerning the work on pluralism in the media sector,[17] abandoned since late nineties, clearly demonstrates how ambivalent the

15 Communication: Principles and guidelines for the Community's audiovisual policy in the digital age, 14 December 1999, COM (1999) 657 final, at 11.

16 Cf. for example: Communication: Audiovisual Policy. Next Steps, 14 July 1998, COM (1998) 446 final, at 2; see also the Working Paper in question, supra, n. 13, at 4.

17 Green Paper on pluralism and media concentration in the internal market, 23 December 1992, COM (1992) 480 final and Communication on the follow-up to the consultation process relating to the Green Paper on 'Pluralism and media concentration in the internal market - an assessment of the need for Community action' COM(1994) 353.

Commission is as far as effective promotion of cultural diversity is concerned. This inactivity evidently clashes with the fact that this objective has been given primary attention by many Commission's documents on the matter. At the same time, this position is quite understandable in view of the lack of the member states' political will to regulate the sensitive issue of media ownership. In this context, it is interesting to look at the recent European Parliament's initiatives on media concentration, urging the Commission to launch consultations on the media pluralism issue.[18]

Secondly, as indicated above, the Commission seems to apply a model of classical economic analysis to the audiovisual sector, which ignores, to some extent, the problematic of culture and artistic creation. This use of a market model as a foundation for EU audiovisual policy can be seen in various recent Commission's documents. To trace the origin of this approach, one should go back to the Bangemann Report on Information Society from 1994,[19] where the Commission purported a spontaneous concept of cultural diversity and affirmed that as long as the products are available to the consumers, the opportunities to express freely the cultural and linguistic diversity within Europe will multiply. In the language of the Bangemann Report: "once products can be easily accessible to consumers, there will be more opportunities for expression of the multiplicity of cultures and languages in which Europe abounds". In this "free flow of information" concept, there seems to be little space left for an intervention on the part of the EU in the audiovisual sector within the internal market. Rather, the Commission contents itself with letting the free marts of trade take their course and realise automatically the goal of cultural diversity.

In truth, the application of such a classical internal market approach to the audiovisual sector poses serious problems. In fact, it is generally acknowledged, also by the Commission itself, that the action of public authorities is necessary to ensure cultural diversity, thus ruling out the option which favours the free market above all. Such an action is needed to stimulate film production and, consequently, maintain the pluralism of cultural supply.

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18 European Parliament, Resolution on media concentration, P5_TA-PROV(2002)0554, texts adopted at the sitting of Wednesday, 20 November 2002.

19 High-Level Group [chairman, M. Bangemann], Europe and the Global Information Society: Recommendations to the European Council of 26 May 1994, Brussels, 1994, at 7.

As a conclusion, the Commission's perplexed action is comprehensible in the light of the fact that realising cultural diversity, while respecting the fundamental economic integration goal, is, indeed, problematic. It should be acknowledged that these two objectives are, to an extent, incompatible. This contradiction seems to be ignored by the European institutions, and their policy in the field has not spelt out clearly whether there is any hierarchy or relationship between them. As demonstrated above, the existing regulation and support mechanisms attempt to combine, but very often seem to confuse cultural and economic objectives. Therefore, it seems that the EU instruments in the field remain rather poorly adapted to the *problématique* arising in the field of cinema, or, more generally, the audiovisual industries.

3. EU policy v. national cultural sovereignty

The inherent contradiction within the framework of the European film policy itself is additionally exacerbated by the profound constitutional conflict between European policy measures affecting the cinema sector and national cultural policy considerations, both having a constitutional basis. This tension is especially visible in the competition field and clearly demonstrates how controversial the vertical power sharing continues to be within the European Union.

The debate on the relationship between European competition law and national cultural competencies has been inspired by the German *Länder*, which, in the federal system, are entrusted with cultural prerogatives. It is precisely in the field of cultural and media policy, the last bastions of their genuine competence, that the Member states try to defend their positions against the extensive enforcement of European competition law.[20] The film sector represents an ideal case to argue that the EU competition rules and their "sweeping" enforcement by the Commission, which very often gains substantially constitutional significance within the Union, do not fully recognise the peculiar situation of the European film industry and do not do justice to the specific nature of the medium of film.

[20] Cf. J. Schwarze, 'Medienfreiheit und Medienvielfalt im europaeischen Gemeinschaftsrecht', Zeitschrift fuer Urheber- und Medienrecht (2000) 779, at 800.

3.1. State aid law and films: EU v. national competence

The friction between the European Commission's competition practice and the Member states' desire to preserve national cultural policies is clearly illustrated by the controversy over the Commission's competence to check film aid schemes.

In general, state aid is incompatible with the EU common market, insofar as it affects trade between member states and by favouring certain undertakings or productions, distorts or threatens to distort the competition. Therefore, it is, in principle, prohibited by European law, namely by Article 87 (1) EC Treaty.[21] However, given the fact that culture is, and will most probably remain, a matter of competence of the Member states, it is tempting to conclude that the Commission, by checking the compatibility of national film funding systems with EU state aid rules is exceeding the limits of its competence.[22]

On the other hand, since the preservation of undistorted competition seems to be of fundamental significance within the constitutional landscape of the European Union, denying the Commission competence to check the compatibility of film support schemes with EU state aid law would run against the aims and constitutional order of the Union. Therefore, it does not seem possible to exclude certain cultural activities *a priori* from the scope of application of Article 87 (1) EC Treaty.[23] This has been confirmed by a number of ECJ judgements concerning cultural aids,[24] and there has been no attempt so far to contest the EU competence on the matter.

Nevertheless, it remains true that the European Commission has two contradictory constitutional tasks in this context: apart from the responsibility of preserving undistorted competition (Article 2 EC Treaty), it is obliged, according to Article 151 EC Treaty, to take into account the cultural diversity of the

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21 Cf. in the context of audiovisuals M. Dony, 'Les aides à l'audiovisuel à la lumière du Traité de Maastricht', in C. Doutrelepont (ed.), L'actualité du droit de l´audiovisuel européen (Bruxelles: Bruylant, 1996).

22 So K. Schaefer, J. Kreile, S. Gerlach, 'Nationale Filmfoerderung: Einfluss und Grenzen des europäischen Rechts', Zeitschrift fuer Urheber- und Medienrecht (2002) 182, at 184.

23 Cf. P. J. Slot, 'state Aids in the Cultural Sector', Europäisches Wirtschaftsrecht nach Maastricht, Bonn, 10 January 1994 (Bonn: Rheinische Friedrich-Wilhelms-Universität, 1994).

24 Cf. e.g. Case T-49/ 93 SIDE v. Commission, [1995] ECR, II-2501 and the recent case dated 28 February 2002, T-155/ 98 SIDE v. Commission, ECR, II-01179.

Member states in all its actions. The Treaty does not spell out in any way what the constitutional status of Article 2 is relative to Article 151 EC Treaty, and whether there is any hierarchy between these two, at least to some extent, contradictory objectives.

It becomes clear then that the aim of Article 151 EC Treaty, which sought to contain the expansion of EU activity in the cultural field and establish the proper division of roles between Member states and the EU in the field of culture, has not been properly achieved. As a consequence, the relationship between the national cultural sovereignty and the EU competition competence remains highly controversial.

3.2. The case of film aid schemes

The topicality of this conflict has been shown recently in the controversies arising from the Guidelines established by the Commission on control of state aid granted to the cinema sector, officially announced in the recent Cinema Communication.[25] This has formalised the Commission's practice of gradually putting in place a *de facto* cap on admissible public support for film production. The heated discussion on the potential limitative effect of the Guidelines shows how policy considerations related to trade and competition do affect traditional national cultural priorities and measures in a way which is far beyond cultural policy.

Indicative in this context is the following European Parliament's Report on the Commission Cinema Communication,[26] where it is clearly stated that any re-examination of the Commission's position on film state aid control should lead to increased flexibility rather than a stricter application of EU state aid rules, and genuine consideration of the cultural and industrial needs of the cinematographic and audiovisual sector. The Parliament, on its part, considers that the Commission is refusing to take the specific nature of the sector's industrial dimension into account. It suggests that the Treaty, when putting forward a purely cultural solution, is not flexible enough to deal with the

25 Supra, n. 6.

26 Report on the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works, 5 June 2002 [Rapporteur: L. Vander Taelen], COM (2001) 534 – C5-0078/ 2002 – 2002/ 2035(COS).

unavoidably "dual" nature of the sector. In the context of the revision of the Commission's Guidelines, it proposes that they ought to be relaxed rather than strengthened in view of the fact that the EU audiovisual industry is far from being competitive internally and externally. This reasoning, based on the premise of industrial justification for national film policy, further exacerbates the existing conflicts within the EU policy framework.

In view of the above, it will be interesting to see whether the application of the Guidelines will be regarded as taking into consideration sufficiently Member states interests' in preserving their arrangements to support film industries. The actual vertical constitutional conflict between EU policy and national cultural competence remains, however, unresolved and can provoke further controversies in the context of film.

4. Conclusion: towards a sustainable EU Film Policy

The EU film policy evolves between creativity and market, inherently wedged between art and commerce. The action of the European Commission in the field of cinema mediates constantly between the forces of the free market and the values of cultural diversity. As a consequence, it is a source of profound tensions coming to the fore on two levels: horizontal and vertical.

On the horizontal level, the European Commission attempts to pursue in its policy simultaneously the establishment of a common market for films and preservation of cultural pluralism of the audiovisual content, which appear by definition not reconcilable. This compromise satisfies neither the proponents of cultural exception nor the commercial actors. Whereas the first regret the very often hypocritical affirmation of cultural diversity and the excessive impact of the market on the film sector, the others criticise the inconsistent and protectionist character of such a policy. Neither the Treaty provisions nor the EU policy documents provide an appropriate remedy to strike a real balance between cultural specificity and economic integration aims.

As far as the vertical aspect is concerned, the EU power sharing landscape is characterised by a competence conflict between the Commission competition policy and national cultural prerogatives in the field of film policy. Article 151 EC Treaty has had little success in guiding towards a proper division of cultural competence between the Union and the Member states.

The relationship between cultural values (both on the European and national level) and more manifest and compelling EU objectives of market integration

remains and will most probably remain highly contentious in the context of film policy. Nevertheless, in order to clarify priorities and establish a clearer basis for the EU film policy, some general suggestions for a future, more sustainable, policy in the field can be put forward.

Paraphrasing the famous statement of André Malraux: "par ailleurs, le cinéma est une industrie"[27], it is a truism to say that cinema is above all a cultural artefact, a means of cultural expression and creation, which dimension cannot be dispensed with when conceiving a global policy strategy in favour of the European cinema. The European Union arguably seems to realise this and admits that the creation of a common market cannot guarantee in itself a pluralism of cultural content. Provided that the more proactive action on the part of the EU is genuinely endorsed, it seems, however, necessary to formulate ways and means which would enable this institution to truly fulfil its constitutional responsibility to safeguard and promote cultural diversity. If this obligation is truly a substantial element of the EU constitutional order, the lack of action on the Commission's part to achieve this constitutionally grounded objective could theoretically lead to failure to act proceedings before the European Court of Justice. Therefore, it seems logical that the Commission should envisage a more precise definition of its own tasks, which it subsequently has to fulfil.

It can be suggested that a more successful European integration of culture through actions favouring cultural industries *lato sensu* would require a revision of the Treaty in a manner which would entail a series of means and instruments non-existent at present and which would permit the perceived "cultural deficit" to be compensated for in the course of EU initiatives.

In the existing framework, it can be suggested that the EU policy should be supportive of the national efforts to promote the audiovisual production and should aim at greater consistency between cultural and competition policy objectives and harmony between measures taken on European, national and regional levels. Such an approach would be perfectly in line with the subsidiarity principle. These aims can be facilitated by the fact that the ECJ jurisprudence relevant in this context[28] suggests that it will not take a restrictive view on

27 supra, n. 1.

28 Cf. Cases C-288/89 Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media, [1991] ECR, I-4007, C-353/89 Commission v.

national cultural policies. The Commission seems so far to have followed an equally lenient attitude in the application of Article 87 EC Treaty;[29] the introduction of specific Guidelines for the sector should be interpreted as an attempt to provide legal certainty rather than to restrict admissible national support to the sector. Pursuing this tolerant approach in its decisions and implementing the EU programmes in the field, the Commission may well remove the worries of proponents of national cultural objectives and really contribute "to the flowering of the cultures of the Member states".

In the long-term perspective, however, an explicit definition of competencies of the EU in the audiovisual field from the constitutional point of view would seem necessary.[30] This would prevent the EU institutions from taking, on the basis of relatively vague and apparently unrelated Treaty provisions, like general competition rules, far-reaching decisions with profound constitutional implications and therefore incising on national cultural policies. In this way, the vertical constitutional problems could be remedied.

Furthermore, a clarification of the priorities within the framework of the EU audiovisual and film policy itself and the establishment of their clear hierarchy, in order to alleviate constitutional dilemmas in the horizontal dimension, would lead to its increased legitimacy and efficiency.

Netherlands, [1991] ECR I-4069 and C-148/91 Veronica Omroep Organisatie v. Commissariaat voor de Media, [1993] ECR, I-487; as well as C-23/93 TV10 v. Commisariaat voor de Media, [1994] ECR I-4795 and C-6/98 ARD v. PRO Sieben Media AG, [1999] ECR I-7599, all concerning broadcasting.

29 Cf. numerous exemptions for the national film support schemes granted by the European Commission: e.g. Decision N 3/98 France; Decision NN 49/97 and N 357/99, Ireland; Decision N 782/2001 and N 701/2001, Germany; decision N 698/2001, Spain.

30 So Schwarze, supra, n. 20, at 800.

The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in Light of the WTO

Rostam J. Neuwirth*

Summary: 1. Introduction. -2. The constitutionalisation of culture and trade: "Attempting the impossible"? - 2.1. The strange case of clture and tade: dichotomy, quandary or synergy? - 2.2. The legal idea. - 3. The cultural industries: "The key to the fields"? - 3.1. NAFTA, the EU and the WTO: three normative approaches. - 3.2. The legal norm. - 4. The case law experience: "Not to be reproduced"?. - 4.1. A comparative approach: "The same or not the same: That is the question?' - 4.2. The legal decision. - 5. Conclusion.

1. Introduction

The concept of the cultural industries and the position they hold in the present international political and economic world order can be contemplated through three paintings by the Belgian painter *René* (*François Ghislain*) *Magritte* (1898-1967). It is no mere coincidence that *Magritte* was able to grasp so well the principal features of the cultural industries, since it was during his lifetime and, particularly, during the period in which he created these paintings that the concept itself was coined in the light of political turmoil and new technological innovations.[1] Moreover, a surrealist work of art may in fact in the moment of its

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1 Compare Walter Benjamin's essay "the Work of Art in the Age of Mechanical Reproduction" (1936); W. Benjamin, "Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit" in R. Tiedemann, H. Schweppenhäuser, eds., Walter Benjamin – Gesammelte Schriften vol I, 2nd ed. (Frankfurt a. M.: Suhrkamp, 1978) 436; and see

creation be "over-realistic" and therefore eventually requires the time factor to close the gap between the mind's idea, the creative process and its final material manifestation in reality. The titles of the relevant paintings are "Attempting the Impossible" (1928), "the Key to the Fields" (1936) and "Not to Be Reproduced" (1937).

In this chronological order, their titles and visual content may be used to illustrate some of the principal stages in the evolution of the concept of the cultural industries. The first stage began as an idea and was subsequently formulated as the concept of "culture industry" (*Kulturindustrie*).[2] Then, once the concept was coined, it was subject to discussions in various scientific fields, ranging from sociology to political economy and economics.[3] In the provisionally final stage, it became enshrined for the first time in a text of international (trade) law, the 1988 Canada-US Free Trade Agreement ('CUSFTA').[4] Since then the concept has continued to raise important legal questions in the context of several economic integration projects.

Again taken in this chronological order the paintings are also a means to ponder on the dynamics underlying the process of the formation of law. For the realisation of law (*Rechtsverwirklichung*), the way in which a law becomes formulated and then eventually applied to a great variety of facts, follows a similar procedure. The nature of this process is often exemplified by three major logical steps. Not impossible *per se* but perhaps impossible to put into words, the first step takes place in the mind and consists of the formulation of a legal idea (*Rechtsidee*). Then, as a second step, the idea becomes transformed into a legal norm (*Rechtsnorm*) which, finally, is applied to real facts usually taking various

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the chapter on the cultural industries in Th. W. Adorno, M. Horkheimer, Dialectic of Enlightenment (New York: Verso, 1997) 120.

2 See Th. W. Adorno, The Culture Industry (London: Routledge, 1991) at 98.

3 See *e.g.* the diverse contributions in UNESCO, Cultural Industries: A challenge for the future of culture (Paris: UNESCO, 1982); N. Garnham, Capitalism and Communication: Global Culture and the Economics of Information (London: SAGE, 1990); and for the field of economics D. Throsby, Economics and Culture (Cambridge: Cambridge University Press, 2001); F. Benhamou, L'économie de la culture (Paris: La Découverte, 2001).

4 Canada-United states Free Trade Agreement, done at Ottawa, December 22, 1987 and January 2, 1988, and done at Washington, D.C. and Palm Springs, December 23, 1987 and January 2, 1988, 27 I.L.M. 281.

forms of a legal decision (*Rechtsentscheidung*).[5] This logical line of legal reasoning is called the legal syllogism.[6]

This kind of reasoning, however, is difficult to apply to the cultural industries. This difficulty is due to the concept's character of an oxymoron, *i.e.* a figure of speech (or a word) in which apparently contradictory terms appear in conjunction. Originally, John Sinclair writes, the concept was designed to

> *set up a critical contrast between the exploitative, repetitive mode of industrial mass production under capitalism and the associations of transformative power and aesthetico-moral transcendence that the concept of culture carried in the 1940s, when it still meant "high" culture.*[7]

Today, this contrast takes more the form of a conflict between cultural and commercial (or economic) values and interests. In the case of the cultural industries these values and interests clash because of their dual nature.[8] Therefore, the present, and even more so the future, treatment of the cultural industries in the context of various political and economic integration projects is unsatisfactory, and continues to pose a serious conceptual challenge.

Keeping in mind these three logical steps, the present analysis tries to cast some light on the cultural industries in the context of both North American and European integration projects as well as the parallel process of global integration under the aegis of the World Trade Organization (WTO). Part one departs from

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5 See A. Kaufmann, Analogie und "Natur der Sache", 2nd ed. (Heidelberg: R. v. Decker, C.F. Müller, 1982) at 13.

6 A syllogism consists of two, one major and one minor, premises, whose successful subsumption is followed by a conclusion; see B. Winters, "Logic and Legitimacy: The Uses of Constitutional Argument" (1998) 48 Case W. Res. 263.

7 J. Sinclair, "Culture and Trade: Some Theoretical and Practical Considerations" in E.G. McAnany, K.T. Wilkinson, eds, Mass Media and Free Trade: NAFTA and the Cultural Industries (Austin: University of Texas Press, 1996) 30 at 30.

8 See e.g. T. Knight, "The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals" (1999) 57 U.T. Fac. L. Rev. 165, Council Resolution of 8 February on fixed book prices in homogenous cross border linguistic areas, [1997] O.J. L 042, 17/02/1999, p. 3, Council Decision of 22 September 1997 on cross-border fixed book prices in European linguistic areas, [1997] O.J. L 305/02, 07/10/1997, p. 2 and Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on Certain Legal Aspects Relating to cinematographic and other audiovisual works [2001] COM (2001) 534 mainly at 3.

the level of ideas describing the general background of the cultural industries, which is rooted in the mysterious relation between culture and trade as part of the wider "trade linkage debate". Here, the goal is to clarify their mutual relation on the basis of three examples. Part two follows the understanding of the dual nature inherent in the cultural industries as being the key to the fields forming the broader culture and trade debate and outlines the principal normative approaches found in the European Union (EU), the North American Free Trade Agreement (NAFTA) and the WTO. Based on these norms, part three compares the case law as it was produced first in the European and later in the North American context. The comparison is made to help to evaluate the general impact of the different norms discussed. Finally, the concluding remarks offer some suggestions with regard to the future treatment of the cultural industries in the global context, the foundations of which are currently being laid in the course of negotiations for a new trade liberalisation round, launched at the 4th WTO Ministerial Conference held between the 9-14 November 2001 in *Doha*, *Qatar* (The Doha Round).

2. The constitutionalisation of culture and trade: "Attempting the impossible"?

2.1. The strange case of culture and trade: dichotomy, quandary, or synergy?

The oxymoronic clash between "culture" and "industry" finds its equivalent in the juxtaposition of the two broader, but at least equally elastic, concepts of culture and trade. From early human history until today, the conceptualisation of culture and trade has posed considerable difficulties. These difficulties persist on the present international trade agenda, both globally and regionally, where the concept of culture has been, and continues to be perceived as being principally incompatible with the values of free trade. Among other concepts that are deemed incompatible with free trade, such as the environment, development, human rights or social and labour standards, culture is arguably the most dynamic as well as comprehensive, and hence the most difficult, concept to outline in the "trade linkage debate".

From this observation it derives that any effort to formulate a proper major premise for the treatment of the cultural industries in integration projects, and notably those of NAFTA, the EU and the WTO, must begin with an attempt to clarify their mutual standing. As the title suggests, while this task is perhaps not

"impossible", it is definitely not easy, as the following examples show. The difficulty is to a large extent due to the extreme fluidity of ideas and their constant change in history. With the ideas the mutual interaction between culture and trade can change from one of dichotomy, across quandary, to eventually one of synergy.

a) Dichotomy: The Roman example

The first example of ideas about the relation between the concepts of culture and trade is one of their mutual exclusiveness. It is found in a part of the legal writings of the Roman jurist *Gaius* (130-180 AD). In the second book of his *Institutiones*, he distinguishes things which are either subject to private dominion or not subject to private dominion.[9] The distinctions made by *Gaius* form the basic reference to what in later writings became known as the category of "things which cannot be the object of exchange or of any legal commercial transaction" (*res extra commercium* or *res quarum commercium non est*). This classification referred especially to the right to buy and sell reciprocally. Things falling under this category were thus excluded from commercial transactions. Particularly the things subject to divine dominion (*res divini iuris*) can be compared to the concept of cultural property.[10] In a wider sense this classification also represents an approach to culture in the realm of international trade law, particularly the spirit underlying the approach chosen by the drafters of the 1948 General Agreement on Tariffs and Trade (GATT).[11]

b) Quandary: The present state of affairs

The term "quandary" probably highlights best the perception of the present state of play in the interaction between culture and trade on the regional as well as global level. The present challenge is exemplified in the UNESCO publication on Culture, Trade and Globalization, published in the year 2000. The booklet acknowledges the enormous significance of both culture and trade, but when it

9 See E. Poste, Gaii Institutionum Iuris Civilis Commentarii Quatuor or Elements of Roman Law by Gaius (Oxford: Clarendon Press, 1871) at 130 et seq.

10 Res divini iuris included sacred things (res sacrae), religious things (res religiosae), and sanctified things (res sanctae); see M. Kaser, Römisches Privatrecht, 15th ed. (München: C.H. Beck, 1989) at 90-1.

11 General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187 (entry into force 1 January 1948).

comes to their combined consideration, such as in the case of the cultural industries (cultural goods and services), it draws a rather ambiguous image:

> *The issue of 'culture and trade' has now acquired prime strategic significance. Cultural goods and services convey and construct cultural values, produce and reproduce cultural identity and contribute to social cohesion; at the same time they constitute a key free factor of production in the new knowledge economy. This makes negotiations in the cultural field extremely controversial and difficult. As several experts point out, no other industry has generated so much debate on the political, economic and institutional limits of the regional and global integration processes or their legitimacy. When culture is put on the table, it often prompts complex discussions on the relationship between the economic and non-economic value of things, that is, the value attributed to those things that do not have an assigned price (such as identity, beauty, or the meaning of life).*[12]

The causes for the present quandary concerning the cultural industries are to a large extent found in the foundations of the present international trading regime itself. These foundations were laid with the adoption of the GATT. It is noteworthy that the GATT resumed the work of the League of Nations (1920-1946) building on various efforts as well as failures coming from experiences gained during the latter's existence. These rules have been, however, subject to considerable changes in the course of eight subsequent negotiation rounds, which in 1995 culminated in the creation of the WTO. Nevertheless, although the scope of the WTO expanded into many new areas, the rules governing the issue of culture remained by and large the same.

c) Synergy: The constitutionalisation debate

Largely due to the absence of a relevant legal source in the search for a third example that sketches the contours of a potentially harmonious and mutually enriching relationship between culture and trade, it is necessary to refer to the product of another artist's mind. Such a possible account for a synergic relation between culture and trade is given by *Stefan Zweig* (1881-1940) in his poetic record of history titled "*Sternstunden der Menschheit*" ("Decisive Moments in

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[12] UNESCO, Culture, Trade and Globalization: Questions and Answers (Paris: UNESCO, 2000) at 9.

History") first published in 1927. A contemporary of *Magritte*, his account of human history has lost nothing of its relevance. In fact, the foreword to the fourteen "decisive moments" contrasts, as an allusion to the dichotomy between culture and trade, an artist's artistic or cultural endeavour with one dedicated to more insignificant and mundane things. From this initial dichotomy, he proceeds to a more dynamic view, which reveals an eventual causal link, a possible synergy, hidden under a deeper layer, between the rare decisive moments and the constant efforts of millions of people. He wrote:

> *No artist is unceasingly an artist during the entire twenty-four hours of his daily life; every substantial, lasting success that he achieves always comes into being only in those few rare moments of inspiration. Similarly, history, in which we admire the greatest poet and actor of all time, is by no means ceaselessly creative. Even this "mysterious workshop of God," as Goethe reverently called history, a vast number of insignificant and mundane things occur. Even here, as everywhere in art and life, the sublime, unforgettable moments are rare. Usually, as an annalist history indifferently and persistently does nothing but add link to link in that enormous chain that stretches through the millennia, adding fact to fact, for all excitements needs time for preparation, and every real event must undergo development. Millions of people within a nation are always necessary for one genius to come into being; millions of idle human hours must always pass before a truly historical, decisive moment in history makes its appearance.*[13]

Interpreted for the context of the present analysis, his observation hints at a possible, but perhaps undetected, linkage between culture and trade. Probably the linkage has still not been duly excavated from its hidden place because it is either so obvious as to be invisible, or else too deeply embedded in the centre of life so that a human being must step back and engage in the difficult endeavour of a critical self-reflection in order to bring it to the surface. Nonetheless, *Zweig's* observations are echoed in those of trade lawyers who, due to the development of trade law and practices through customs and usages, advocate

[13] St. Zweig, Decisive Moments in History: Twelve Historical Miniatures (Riverside: Ariadne Press, 1999) at 5.

the universal history of cultures (*universelle Kulturgeschichte*) as the richest source enhancing the understanding of trade.[14]

2.2. The legal idea

Each of the three examples is situated in a different historical context. *Stefan Zweig's* statement is exceptional because its aim – as compared to the two other examples – is not to regulate or describe the necessities of the respective epoch but instead to give a literary explanation of the natural forces working behind the evolution of mankind. Thus it is the idea about a possible link between culture and trade that plays a significant role in the life of an individual and a nation alike, an idea which deserves further thought in the light of present problems and developments in the international arena. The idea that it is possible to derive synergy effects from a link between culture and trade must be taken seriously and must be made part of present day legal considerations. An important impetus comes from the ongoing constitutionalisation debate in trade law as well as in law generally that begins to occupy the WTO and the EU and, perhaps only indirectly – by way of the WTO –, also NAFTA.[15]

3. The cultural industries: "The key to the fields"?

3.1. NAFTA, the EU and the WTO: three normative approaches

From the idea of a harmonious relation between issues pertaining to the fields of culture and trade comes the question of how best to deal with trade and non-trade subjects. In light of the foregoing examples and also the present tendency for the organisation of societies, including cultural and economic aspects, to increase in complexity, the need for a regulatory approach that allows for synergy effects between the traditionally separate fields of culture and trade increases. For the realm of the WTO, *Debra P. Steger* has recently expressed a similar idea by stating that the question is not whether the WTO should or should

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[14] See e.g. L. Goldschmidt, Handbuch des Handelsrechts, 2nd ed., (Stuttgart, Verlag Ferdinand von Enke, 1875) at 6, 10 and see also K. Schmidt, Handelsrecht, 4th ed., (Köln: Carl Heymanns Verlag, 1994) at 36, 40 et seq.

[15] See e.g. J.H.H. Weiler, ed., The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade (Oxford: Oxford University Press, 2000); G. De Búrca, J. Scott, eds., The EU and the WTO: Legal and Constitutional Issues (Oxford: Hart, 2001).

not deal with the "trade and ..." subjects but instead "how should these so-called nontrade subjects be dealt with within the WTO system?".[16] This challenge, however, depends largely on the conditions governing the organisation of the international legal order as a whole, particularly concerning the role played by various public and private international actors and their horizontal as well as vertical interaction.

In the endeavour to free synergies between culture and trade, the key concept leading to the field of the trade and culture conundrum is provided by the notion of the cultural industries. Due to their dual nature as an oxymoron, the cultural industries pose an interesting intellectual as much as practical challenge to the existing normative frameworks and their organisational structures. A challenge which is met differently in the context of the NAFTA, the EU and the WTO.

a) NAFTA

By virtue of Article 2106 and Annex 2106, NAFTA incorporates the provisions relevant for the cultural industries from its predecessor, the CUSFTA, which contained the first authentic legal definition of the cultural industries. Article 2107 NAFTA defines the cultural industries as persons engaged in any activities involving the publication, distribution or sale of books, magazines, periodicals or newspapers, film or video recordings, audio or video music recordings and broadcasting.

The provisions in NAFTA have the effect that they exempt the cultural industries from the terms of the agreement covering mainly the free flow of goods and services. The general exemption, however, is subject to four exceptions.[17] There exists a major problem in determining the actual value of the exemption of the cultural industries which goes back to divergent interpretations of its wording by the two parties. The discord applies mainly to the right for each country to respond to the introduction of new measures

16 D.B. Steger, "The Boundaries of the WTO: Afterword: The "Trade and ..." Conundrum – A Commentary" (2002) 96 A.J.I.L. 135.

17 Compare Articles 401, 1607 par. 4, 2006, and 2007 CUSFTA; see also J.R. Johnson, J.S. Schachter, The Free Trade Agreement: A Comprehensive Guide (Aurora: Canada Law Book, 1988) at 141 and J.R. Johnson, The North American Free Trade Agreement: A Comprehensive Guide (Aurora: Canada Law Book, 1994) at 470-472.

affecting trade to the cultural industries as laid down in article 2005 paragraph 2 CUSFTA ("Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph 1"). According to the Canadian reading of the relevant articles, the US right to retaliate is limited to measures inconsistent with the CUSFTA and not NAFTA and therefore restricted to the sector of the cultural industries.[18] The United states, on the other hand, sees its right to retaliate as unlimited. In fact, there remains considerable room for uncertainty in the procedure, functioning and scope of the exemption, which seems unlikely to change in the near future.[19]

b) The European Union

In the case of the EU, the time period between the creation of the European Economic Community and the entry into force of the Treaty on the European Union (TEU) was characterised by the absence of an express legal basis for cultural considerations and actions. The sole indication for a possible derogation from the principles enshrined in the Treaty is found in Article 36 (now 30) TEC which concerns measures to protect "national treasures possessing artistic, historic or archaeological value". Within the scope of this provision fall mainly objects pertaining to cultural property. It should be noted that the wording used in Article 36 is identical with the provision in Article XX lit. f. GATT, which is also incorporated by way of reference into NAFTA (Article 2101). The change, however, came with the entry into force of the TEU on November 1, 1993, which by virtue of Article 128 (now 151) ECT introduced a provision on culture into Community law. Paragraph 1 lays down the Community's obligation to "contribute to the flowering of the cultures of the member states while respecting their national and regional diversity". Paragraph 2 emphasises the subsidiary role of the Community in the field of culture, and in recital 4 it refers

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[18] See K. Acheson, Ch. Maule, International Agreements and the Cultural Industries (Ottawa: Centre for Trade Policy and Law, 1996) at 7-9 and J.R. Johnson, J.S. Schachter, The Free Trade Agreement: A Comprehensive Guide (Aurora: Canada Law Book, 1988) at 145-147.

[19] See e.g. the quote from B. Appleton, Navigating NAFTA: A concise user's guide to the North American Free Trade Agreement (Scarborough: Carswell, 1994) at 191, reproduced in K. Acheson, Ch. Maule, International Agreements and the Cultural Industries (Ottawa: Centre for Trade Policy and Law, 1996) at 9, see generally, D. Browne, The Culture/Trade Quandary: Canada's Policy Options (Ottawa: Centre for Trade Policy and Law, 1998).

specifically to the field of artistic and literary creation, including the audiovisual sector. Paragraph 3 calls for both the Community's and member states' enhanced international cooperation with third countries as well as international organisations. A key role is played by paragraph 4, which contains a cross-section clause that requires the Community to take cultural aspects into account in its action under other provisions of this Treaty. Paragraph 5 contains provisions of a procedural character (unanimity voting).

c) The World Trade Organization

In the framework of the WTO, provisions containing a reference to culture are virtually non-existent. The most relevant provision is Article IV GATT, which under certain conditions exempts cinematographic films from the rules on the free trade in goods, and notably those on quantitative restrictions, by allowing parties to the agreement to adopt screen quotas for cinematographic films. Despite the provision's limited scope there are reasons to argue for its evolutionary interpretation. These reasons are found in the technological state of play at the time of its drafting, which happened long before the advent of transnational broadcasting via satellite when cinema was the most important mass medium. Furthermore, in the light of the later evolution following the adoption of the GATT until the creation of the WTO system as a "single package", the provision can be seen as having evolved together with the context. This would mean that either the provision is interpreted as comprising the new media, particularly given the ongoing tendency of convergence, or it calls for its amendment or even the negotiation of a separate agreement dealing with cultural matters under the WTO system.

Another provision with a possible link to culture is found in Article XX lit. a. and f. GATT. This article enumerates exceptions to the established principles of the underlying trade regime for measures "necessary to protect public morals" (lit. a.) and for measures "imposed for the protection of national treasures of artistic, historic or archaeological value" (lit. f.). The exact wording of the two exceptions does not suggest a direct applicability to the cultural industries and a possible link could only be established through the use of extensive interpretation methods.

For services it is true that they have been included in the WTO Agreement by virtue of the General Agreement on Services (GATS). In its present form GATS does not feature any general exemption for the cultural industries but equally

under certain conditions leaves untouched existing legislation restricting the freedom to provide services for the sectors covered by the cultural industries.[20] Additionally, for further liberalisation, particularly for the application of the national treatment principle, it requires the parties' positive commitment in specific sectors.[21] It is interesting to note that with regard to the cultural industries neither Canada nor the European Union have inscribed the audiovisual sector in the schedules of commitment for national treatment.[22]

3.2. The legal norm

This brief glance at the most relevant norms reveals great disparities in their approach to the sectors of the cultural industries: First, the Canadian Government has chosen to protect certain cultural goods and services by way of an exemption in its trading relations with the partners in the free trade area created by NAFTA. The EU – after long years of negative integration carried out mainly by the ECJ – has gone further and decided to deal with culture by way of positive integration between its member states, albeit with limited room for action. The WTO is the most fragmented in character with no particular reference to either the cultural industries or culture. In fact, in more than half a century, the only directly related provision has remained in a kind of embryonic state as compared to the neighbouring provisions of GATT 1947 which have developed into separate agreements.

4. The case law experience: "Not to be reproduced"?

4.1. A comparative approach: "The same or not the same: That is the question?"

Walking in Florence (Italy), one may ask oneself whether the replica David statue placed on *Piazza Signoria* or the one on *Piazza Michelangelo* are really like the original housed in the *Galleria dell'Accademia*? *Leonardo Da Vinci's* response would probably have been "no", given his definition of an artistic work as "a

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20 Article II par. 2 GATS.
21 Part III GATS.
22 See K. Acheson, C. Maule, International Agreements and the Cultural Industries (Ottawa: Centre for Trade Policy and Law, 1996) at 4.

work of a creative act which can neither be repeated, nor copied".[23] A similar answer was given by *Walter Benjamin* in his article "*L'Œuvre d'art à l'époque de sa reproduction mécanisée*" ("The work of Art in the Age of Mechanical Reproduction") published in 1936, despite his distinction between the process of imitation and that of mechanical reproduction.[24] While the imitation of manmade artefacts for educational as well as commercial purposes was frequent in history, *Benjamin* believes that the mechanical reproduction of a piece of art results in the loss of its authenticity due to the shattering of the time-space relationship, the destruction of its aura, the deprivation of its embeddedness in a tradition, the separation of the functional basis of a work of art, and its service to (religious) rites and cults.[25]

The clash of culture and trade (or commerce) in these sectors is found in the dual nature inherent in various goods or services pertaining to the cultural industries. From an economic perspective, these sectors rely on mechanical, and increasingly digital, production methods, which enable them to provide an almost endless number of such goods and services. These goods and services are characterised, on the one hand, by a great risk due to initial high production costs, and, on the other hand, by extremely low reproduction and even lower distribution costs. It is notably the risk based on the unknown consumer demand and the potential of huge sums in revenues from the possibility of cheap audience-maximisation that are some of the major economic characteristics attributed to the cultural industries. At the same time, however, these goods and services are also prone to become transmitters of cultural values in the form of symbols and may also have a considerable impact on combined individual and collective human behaviour. It is particularly the facility with which these goods and services can be reproduced that causes the changes in the individual to finally express themselves on the collective level. Whence the importance conferred upon the cultural industries for concepts such as cultural cohesion or identity. Unfortunately, their influence is also considerable in the case of war

23 Quoted in St.E. Nahlik, "La protection internationale des biens culturels en cas de conflit armé" (1967) 120 Rec. des Cours 60 at 69.

24 Benjamin, supra note 1.

25 "What is aura actually? A strange weave of space and time: the unique appearance or semblance of distance, no matter how close the objet may be"; ibid. at 438, 440, 441.

and ethnic conflicts, as has been reported for the Rwanda genocide.[26] The cultural relevance inherent in these goods and services is recognised also in numerous legal instruments, such as the *International Convention Concerning the Use of Broadcasting in the Cause of Peace* (1936)[27], the *Beirut* (1948)[28] and the *Florence Agreement* (1950)[29].

The dual nature of cultural goods and services is worth analysing, using case law from the EU and NAFTA/WTO.[30] The selected cases occurred in the print media sector, more specifically in the field of newspapers and periodicals. The print media sector is of particular interest because it constitutes the oldest sector of the cultural industries dating back to *Johann Gutenberg's* invention and as such is the point of departure in the long evolution and ongoing trend of convergence of the cultural industries.

a) The European Union: Commission of the EC v French Republic

Some time before the discussed provision on culture was introduced into Community law by virtue of Article 128 (now 151) TEC, the Commission twice seized the European Court of Justice to decide upon the matter of newspapers and journals in France.[31] In both cases the Court established that France had failed to fulfil its obligations under the Treaty, notably the prohibition of "quantitative restrictions on imports and measures having equivalent effect" (Art 30 [now 28] TEC). In the first case the relevant measures were contained in the

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26 See e.g. N. Chomsky, Media Control: The Spectacular Achievements of Propaganda (New York: Seven Stories Press, 1997) and W.A. Schabas, "Hate Speech in Rwanda: The Road to Genocide" (2000) 46 McGill L.J. 141.

27 International Convention concerning the Use of Broadcasting in the Cause of Peace, signed in Geneva, September 23, 1936, 186 L.N.T.S. 301 (entry into force 2 April 1938).

28 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, adopted by the General Conference at its third session, Beirut, 10 December 1948, 197 U.N.T.S. 3.

29 Agreement on the Importation of Educational, Scientific and Cultural Materials, with Annexes A, B, C, D and E and Protocol annexed, U.N.T.S. 1734, signed in Florence, 17 June 1950 (entry into force May 21, 1953) and extended in scope, by the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, Nairobi 1976.

30 Note that the mixed implication of NAFTA and the WTO is due to the particularity of the NAFTA dispute settlement system exists a choice for complainants to settle disputes in either forum, the NAFTA or the WTO (Article 2005 par. 1 NAFTA.).

31 Case 269/83, Commission of the European Communities v French Republic [1984] ECR 843 and Case 18/84, Commission of the European Communities v French Republic [1985] ECR 1339.

Code des Postes et Télécommunications which provided for a preferential 'press-rate' for newspapers and periodicals. Its Art. D. 21 stipulated that newspapers and periodicals printed abroad were generally exempted from the preferential treatment and subject to fees of ordinary printed matter. Only where publications qualified as 'French publications', *i.e.* when the chief editor was of French nationality and was resident in France, when the home country also granted similar treatment to French publications (reciprocity) or when the foreign publications were posted France, were they granted the same preferential treatment.

Long before court proceedings were instigated the French Government defended its policy by arguing that the relevant provisions did not "fall within the prohibitions of article 30 and that it was furthermore questionable whether that article was at all applicable to products which served as vehicles of political, social and cultural information and hence could not be equated with goods".[32] In the judgment, the Court dismissed latter arguments by the French Government, notably that the reduced postal rate is irrelevant for the consumer choice, that the provision is not discriminatory because of the reciprocity clause as well as the possibility to post 'foreign' publications on French territory.

The second case concerned Article 39bis of the French *Code général des impôts*, which accorded certain tax advantages to undertakings publishing either a newspaper or fortnightly journal devoted mainly to political affairs. The contested advantages consisted in the authorisation to establish, by means of charge against taxable profits, a tax-free reserve for the purchase of assets needed in order to run the newspaper or to deduct from taxable profits any expenditure incurred for that purpose. In 1980 Article 39bis was changed by Article 80 of the *Loi de finances* (Finance Law), which excluded from the said benefits newspapers by publishers which they print abroad.

In its defence, the French Government put forward three principal arguments: First, it argued that printing is a service and not a good, which means that Article 30 is not applicable. In its legal reasoning the Court relied on the mention of publications in the Common Customs Tariff (CCT) and in turn stated

[32] Case 269/ 83, Commission of the European Communities v French Republic [1984] ECR 843 at 838.

the sole applicability of Article 30. Based on the Commission's concern, which was not about the choice of a potential reader but about the "options available to newspaper publishers with regard to the production of their publications", the Court also dismissed the arguments that the fact that a publication is printed in France rather than another member state cannot influence the choice of a potential reader and that, failing earlier notification, the tax provision is part of an aid scheme in favour of the newspaper industry. For these reasons the Court declared that the contested tax provision of French law encourages newspaper publishers to have publications printed in France rather than other member states. Therefore, the tax provision can be qualified as a measure having an effect equivalent to a quantitative restriction in the meaning of Article 30, and consequently results in the failure of the French Republic to fulfil its obligations under the Treaty.

In the aftermath of the two cases, France amended the contested legislation and brought it in line with the judgment.[33]

b) NAFTA and the WTO

In *Certain Measures Concerning Periodicals*[34] the United states contested three Canadian measures concerning the periodical industry. The first measure concerned Tariff Code 9958, the effect of which was the prohibition of the importation into Canada of certain periodicals, namely special editions, including a split-run or regional edition, that contain an advertisement that is primarily directed at a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin. Not included in the regime were catalogues, newspapers, or

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[33] See the new Art. D 21 of the Code des postes, et des télécommuncations as amended by Décret n° 85-1156 du 29 octobre 1985 art. 1 Journal Officiel du 6 novembre 1985 which reads now: "Les journaux et écrits périodiques étrangers sont soumis au tarif des plis non urgents ou au tarif des imprimés selon leur destination. Toutefois cette disposition ne s'applique pas aux publications des pays de la Communauté économique européenne instituée par le traité de Rome qui bénéficient du tarif préférentiel de presse dans les mêmes conditions que les publications françaises"; and Code général des impôts (CGI) Article 39bis 1bis Cbis: "Les entreprises de presse ne bénéficient pas du régime prévu aux 1 bis A et 1 bis A bis pour la partie des publications qu'elles impriment hors d'un état membre de la Communauté européenne".

[34] See Canada – Certain Measures Concerning Periodicals (Complaint by the United states) (1997), WTO Doc. WT/DS31/R (Panel Report), and Canada – Certain Measures Concerning Periodicals (Complaint by the United states) (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report).

periodicals. The principal aim pursued by the regime was the "encouragement, promotion or development of the fine arts, letters, scholarship or religion".[35] The second measure was the Excise Tax which provided for the imposition, levy and collection, in respect of each split-run edition of a periodical, a tax equal to 80 percent of the value of all the advertisements contained in the split-run edition. It defined a split-run edition as an edition of an issue of a periodical in which more than 20 percent of the editorial material is the same as a comparable edition and which contains an advertisement that does not appear in identical form in all the excluded editions. Finally, the last measure concerned the Canadian system of funded and commercial postal rates, which was mainly designed to supplement the foregoing measures.

In its findings, the panel, and later the Appellate Body, followed the US claims and held the contested measures to be in violation of the free trade principles, notably the provisions on the elimination of quantitative restrictions and the national treatment principle enshrined in the GATT, and asked Canada to comply with these findings. With regard to the "funded rate scheme", the violation of the obligations laid down in the GATT were only established after the Appellate Body's report. In the meantime, Canada complied with the Appellate Body's recommendations by introducing the controversial *Bill C-55: An Act Respecting Advertising Services supplied by Foreign Periodical Publishers*.[36] Despite the new act, there remains significant doubt as to whether Bill C-55 is in conformity with Canadian international trade law obligations.[37]

4.2. The legal decision

This brief survey of cases in the context of the EU and NAFTA reveals a striking similarity not only in their factual aspects but also in the legal responses. In the latter case, the involvement of a "higher" level, namely the invocation of the global and multilateral WTO dispute settlement, brings in a further aspect. In all the cases, the "key to the fields" is provided by the relevant norms in place that

35 Ibid. at 2.

36 See Bill C-55: An Act Respecting Advertising Services supplied by Foreign Periodical Publishers, S.C. 1999, c.23.

37 See e.g. Y.A. Naqvi, "Bill C-55 and International Trade Law: A Mismatch" (1999/2000) 31 Ottawa L. Rev. 323.

determine the specific treatment of the cultural industries in general, and periodicals in particular. These norms advocate the free movement of goods across national borders, mainly through principles of national treatment and most-favoured nations. At the same time, they are confronted with the difficulty of drawing a line between goods and services in the production chain. The norms vary particularly with respect to culture, or more precisely the way they define the relation of culture as well as cultural issues to the principles of free trade. Last but not least, the fact that the cases are set at relatively similar normative stages in the process of economic integration but at different times underlines the dynamic nature of the development of legal rules.[38] The same dynamism appears in the fact that the EU has in the meantime amended its legal framework with regard to culture.

5. Conclusion

From a comparative perspective, this examination of the legal framework of the EU, NAFTA and the WTO has revealed an interesting regularity. The regularity consists, as visualised by *Magritte*, first and foremost in the identical process that underlies both the transformation of ideas into reality and the formation of legal norms. Comparable to a hermetic system, the EU, NAFTA and WTO not only influence each other but also struggle with identical problems and challenges with respect to culture and the cultural industries. Nevertheless, the overall structure, and resulting from that also the normative approach to the cultural industries, varies greatly within each of them. This is due to a great variety of determinants, such as the number of member states, or signatory parties, legal culture, the historical background and the initial motives behind their creation. Equally important is the current state of play in the process of economic integration measured against the background of five principal steps on the ladder of economic integration.

Moreover, there is a striking similarity in the legal responses given to the cases concerning the cultural industries that arose in the WTO, NAFTA and the

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[38] For the progressive development of economic integration, see B. Balassa, The Theory of Economic Integration (London: George Allen, Unwin Ltd, 1962) at 2-3 (classifying the principal stages as ranging from (international) cooperation, free-trade area, customs union, common market, economic union, to complete economic, i.e. political integration).

EU at different times. The similarity is even more striking given the different legal framework applied to them. The difference, however, becomes manifest on the next level, *i.e.* that of its reception and implementation. France has changed its conflicting legislation following the ECJ's judgement and amended the relevant provisions so that they comply with the recommendations set forth in the judgment. Canada, on the other hand, has amended its legislation only by changing the legal approach but has left the policy objectives practically unaltered.

As a last remark, summarising the above, I believe that the key question in the context of the treatment of the clash between culture and trade values, as encompassed in the concept of the cultural industries, within an economic integration project lies in the process fuelled by a constant interaction between the actual legal framework in place and the ideas about its improvement over time. The importance of this element, as reflected in the intention of the parties combined with the availability of instruments, is shown in the need to complement the gap that was created by the removal of barriers to trade (negative integration) through legislative measures (positive integration). For the WTO during the *Doha Round* negotiations this means that as long as the WTO through its parties to the Agreement does not wish to engage in closer international cooperation going beyond the existing regime covering the free movement of goods and, to a lesser extent services, sufficient room must be left for cultural differences. This is necessary for technological innovations with cultural implications, as it is the case with the cultural industries. If, on the other hand, the will exists for closer integration and instruments are made available for the WTO institutions to serve as a safety net substituting for the loss of protective (legislative) measures at the national level, the room for the parties' national cultural space can be gradually reduced. Once this point has been attained, the need for national restrictions diminishes, whereas the need for a constitutional framework as a guarantee for coherence between the great diversity of its component parts continues to increase.

Integration of Constitutional Values in the European Union – An Epilogue

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Summary: 1. General framework. – 2. Ideological underpinnings and constitutional choices. - 3. The integrated constitutional space. – 3.1. The concept. – 3.2. How to achieve it? Two examples. – 4. Concluding remarks.

1. General framework

This book has the ambitious task to sketch a tentative list of features stemming from the common European constitutional values in the field of cultural diversity. In other words, starting from a series of complex elements, our task is to prove, whether behind a certain set of (legal and political) rules there is a common set of constitutional values, that the rules are aimed to protect and to implement.

In particular, the analysis is based on two pillars:

1) On the one hand we are investigating the values *per se* by means of their legally and politically visible consequences. Starting from the explicit provisions of the treaties clearly incorporating common constitutional values (e.g. art. 6 and 7 TEU) as well as concrete experience in this regard (e.g. the "Austrian crisis" 2000), we shall try to identify some of the constitutional (and pre-constitutional) values the member states allegedly have in common and above all their incorporation into concrete provisions. The Charter of Fundamental Rights of the EU is just one of the many possible examples. The final aim of this part is

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to argue, whether or not, as well as to what extent and by what means, Europe is facing a process of normative harmonization also where constitutional values are concerned.

2) On the other hand the multifold concept of diversity represents one of the most fascinating examples of how to combine unity and diversity. Paradoxically, the sole unitarian element in the cultural filed could be considered the cultural diversity (both national and regional – see art. 151 TEC). But is it really so? Or is the cultural field (in the broader meaning of the term) also witnessing a silent process of harmonization, maybe based on new instruments? What are the institutions of multiculturalism and to what extent are they influencing European constitutional law and/or are influenced by it?

2. Ideological underpinnings and constitutional choices

Constitutions and power structures are the consequence of ideological underpinnings as well as political preconditions concerning the fundamental goals of the social community to be organized. Some legal doctrine (especially in Italy, Spain and, to a lesser extent, Germany) identifies a specific term to describe the constitutional rules aimed at making the ideological project underpinned by the constitution concrete.[1] Those rules make clear the relationship between public power and individual freedom, the correspondence between the goals of the legal system and the organization of public powers that have to implement them.

In other words, the legal/constitutional system is not only what it is, but also what it ought to be. It is the way of being (the *Weltanschauung*) of the State, thus affecting the concrete exercise of public powers. Thus, the liberal-democratic State is a State that must be liberal-democratic, the welfare State is a State that must pay due attention to the social problems, the communist State is a State that ought to be communist, etc.

Having regard to its intimate goals, what kind of polity is the EU? And what consequences derive for the member states from their membership to the EU? Is

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[1] Italian: forma di Stato, Spanish: forma de Estado/forma del poder, German: Staatsform but also many other terms that are considered to be equivalent: Baugesetze (in Austria), Grundlagen der verfassungsmäßigen Ordnung (K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, Heidelberg, 1995, p. 55), etc.

this process ideologically (and thus legally) neutral, or does it have consequences which are relevant in constitutional terms?

In fact, the legal system of the EU/EC does not explicitly provide for the supremacy of EC law over domestic law (although it has now become an unquestioned part of the *acquis* and it is guaranteed by both the European and the domestic jurisdictions), nor does it impose a homogeneity clause where the forms of government of the member states are concerned. Nevertheless, it is well known that European integration has deeply modified both the structural values and the organizational structures of the member states. To take a simple example, if one considers the "economic constitutions" of countries like Italy or Portugal: the constitutional provisions allowed in both cases for a very open (and vague) economic setting, reaching from a classic market economy to a very centralized, quasi-socialist economy (e.g. social function of the private property, art. 42 Italian constitution).[2]

What are – if there are some – the ought-to-be-duties of the member states of the EU? In the only case that had to be decided concretely (application by Morocco), the request was rejected on the basis of very formal arguments (geography: only a "European" country can be member of the EU, and this criterion has now been formalized in art. 49 TEU).[3] But now art. 49 also imposes additional, value-related criteria, in respect, for example, to the principles laid down in article 6.1 TEU ("liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states"). Moreover, art. 7 TEU establishes a procedure (based on very political assumptions..)[4] for the case of "a serious and persistent breach by a

[2] See e.g. J.J. Gomes Canotilho, Direito contitucional e teoria da constituição, Coimbra, Almedina, 1999, p. 203 and C. Lavagna, Costituzione e socialismo, Bologna 1977.

[3] Notably, also the geographical criterion could not be determinant. Recently, for example, some politicians (including the German federal President Rau and even the Italian Presidency of the European Council in 2003) advocated the admission of Israel to the EU as a means to resolve the Mid-East problems. Moreover, the future membership of Russia is being discussed too.

[4] Demonstrated by the fact that in the only case that has happened until now, the Austrian crisis of 2000, this mechanism has not been put into force. On the Austrian crisis see in particular P. Pernthaler, P. Hilpold, Sanktionen als Instrument der Politikkontrolle – der Fall Österreich, in: Integration 2/2000, p. 105 and G. Toggenburg, La crisi austriaca: delicate equilibrismi sospesi tra molte dimensioni, in: Diritto pubblico comparato ed europeo, 2001-II, p. 734.

member state of principles mentioned in article 6.1". Art. 4.1 and 93 TEC contain relevant prescriptions in the economic field, like "the adoption of an economic policy which is based on the close coordination of member states' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition" (art. 4.1 TEC).[5] Many other examples are possible.[6]

It is thus rather intuitive that the membership to the EU imposes several prescriptions in terms of how a state ought to be. What is still missing, however, is the analysis of the influence of those prescriptions on the constitutional "ought to be" of the member states. If it is well known that the Treaties are the "constitutional charter" of the EC/EU[7] and they have a "spirit" from which the fundamental principles of the system derive,[8] it is also evident that there are structural differences between the States: e.g. the coexistence of monarchies and republics, between systems recognizing the existence of a national Church (Greece and the UK), etc. On the other hand, what kind of influence do the member states exercise on the very nature of the EU?

So what kind of polity ought the EU to be? And, accordingly, what kind of State ought the member state to be? Is there a constitutional core common to both the constitutional levels that constitute the EU's constitutional space? And finally, what does this common core consist of and how is it realized from the legal point of view?

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5 Legally this means that "a different economic constitution is not possible": G. Nicolaysen, Europäisches Wirtschaftsrecht, Baden Baden, 1996, vol. II, p. 320. See also C. Vedder, Art. O, in: E. Grabitz, M. Hilf (Hrsg.), Kommentar zur Europäischen Union, München 1998, at 16.

6 Even though the question of their legal enforceability can pose some big difficulties, article 1 TEU imposes "consistency and solidarity", the Preamble makes many references to social and political rights (see also art. 136 TEC), art. 10 TEC establishes the principle of "fair cooperation", etc. See also art. 11.2 TEU (loyalty in foreign policy), art. 19 TEU (coordination of member states' action in international organizations and at international conferences) art. 43 TEU and 11 TEC on closer cooperation, art. 104 and following (prohibition of "excessive government deficit"), guarantees for the fundamental freedoms of the TEC (art. 23 and following TEC) etc. All this without mentioning the relevant prescriptive elements stemming from the secondary law, such as the Stability Pact (Regulation no. 1466/97 and Regulation no. 1467/97) as well as from the case law.

7 ECJ, 23-4-1986, Parti ecologiste "Les Verts" vs. European Parliament, case 294/83, ECR 1986, p. 1339.

8 ECJ, 5-2-1963, Van Gend en Loos, case 26/62, ECR 1963, p. 3.

3. The integrated constitutional space

3.1. The concept

No definite answer can be be given to the aforementioned questions. However, the point I would like to raise here is whether the process of integration is by itself creating a new type of State or polity, including both the EU and the member states as a single integrated constitutional space.

In other words, it is quite evident that the EU could not exist without the States that constitute it, but also the contrary is now true. One of the established underpinnings of the member states is their permanent condition of membership.[9] This applies at the highest degree to the membership to the EU, but at an embryonic stage also to the membership to other spheres of the geo-juridical areas of Europe (the Council of Europe and the OSCE).[10]

In general terms, in the context of European integration every State must rely on the others and on the Union. This implies the establishment of common principles that do not reach the same effectiveness of the common constitutional traditions (and are thus not immediately enforceable by the courts) but are of great importance in shaping the relations between member states and the Union: something which is inbetween soft law and constitutional traditions common to the member states. The integration creates a bundle of reciprocal influences that, in spite of not being directly justiciable by a court and thus not immediately binding, have enormous legal relevance.

Also in fields where States retain the exclusive power (like in the cases we will mention: language policy and territorial settings), the constitutional nature of each State and its policies are very much determined by their integration with other member states and by their membership to the Union.[11] On the other hand, the States (acting together) guarantee that the Union respects the

9 A. Manzella, Lo Stato «comunitario» in Quaderni costituzionali, 2/2003, p. 273.

10 The concept of three "geo-juridical" areas in Europe (EU/EC, Council of Europe and OSCE) has been developed by R. Toniatti, Los derechos del pluralismo cultural en la nueva Europa, in Revista vasca de administración pública, (RVAP) 58 (II), 2000, p. 22.

11 B. de Witte, Les implications constitutionnelles, pour un Etat, de la participation à un processus d'íntégration régionale, in E.H. Hondius (ed.), Netherlands Reports to the Fifteenth International Congress of Comparative Law - Rapports néerlandais pour le quinzième congrès international de droit comparé - Bristol 1998, Antwerpen/Groningen, Intersentia, 1998, p. 379.

constitutional values which they imposed on it and to which they subordinated themselves by becoming Members of the Union. In this process, thus, no federal big bang[12] occurs, but a continuous mutual influence is constantly in place.

This phenomenon of "voluntary obedience" or "non binding-binding constitutional law", based on the reciprocal influence between the member states and the Union, is similar to what Weiler calls "constitutional tolerance":[13] The very existence of the new constitutional law deriving from the interaction between EU and member states is based on the reciprocal acceptance, on the voluntary willingness to integrate States (and, through them, their citizens) into a larger constitutional, State-like space, which is not only the EU, but the constitutional sum of the EU and the fifteen member states.

It seems appropriate to call the product of these new kinds of constitutional relations (between member states and EU/EC, mostly based on "non binding-binding" elements or constitutional tolerance), "integrated State"[14] or to speak of "integrated statehood". More precisely, avoiding the long lasting debate on the essential elements of sovereignty and statehood, the term to be used shall be "integrated polity" or "integrated constitutional space". This new concept is grounded on the consideration that European integration is not merely a sum of the constitutional spheres of both the States and the Union, but also a third level is evolving from the integration of both of them: the constitutional sphere of integration, which emerges from the mutual contacts and influences and is shaped by the reciprocal acceptance of the non-binding-binding nature of their respective behavior.

The constitutional reality of the integrated constitutional space radically changes the traditional system of the sources of law, and challenges the theory of the division of powers between EU and member states, as it becomes clearer from two examples.

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[12] This term is used by R. Toniatti, Federalismo e potere costituente, in Proceedings of the Conference "Regionalismo e federalismo in Europa", Trento, 1997, p. 171. It refers to the entrance into force of the federal constitution, that transforms the original sovereignty of the States into mere autonomy.

[13] J.H.H. Weiler, Federalism and Constitutionalism: Europe's Sonderweg, Jean Monnet Working Paper no 10/2000 (http://www.jeanmonnetprogram.org/papers/index.html).

[14] This term is used also (but not explained in its meaning) by F. Rubio Llorente, Constitutionalism in the "Integrated" States of Europe, Jean Monnet Working Paper no. 5/1998 (http://www.jeanmonnetprogram.org/papers/index.html).

3.2. How to achieve it? Two examples

1) Linguistic pluralism

Language belongs traditionally to the realm of nation States, and a deferential attitude towards States' prerogatives in the sphere of language is clearly enshrined in the European treaties. The reason is a simple syllogism: language is something that belongs to people; people is the intimate base of national identity; therefore language is the core of national identity, that the EU "respects" (article 6.3 TEU). Thus the States decide, the EU recognizes and respects, and cannot even change its role because this would imply a change in its constitutional nature, which can be modified only by the States acting unanimously. The influence of the Union in the language sphere is limited to its own organization, and also in this field the States retain a veto right (art. 290 TEC). From a legalistic/formalistic point of view, the Community level shall simply surrender to the exclusive State competence in the language field.

It is therefore at member state's level that the legal identification and protection of language(s) and language diversity is determined, whereas the role of the Union is limited to the presumption of cultural and linguistic diversity (art. 22 of the Charter of fundamental rights of the EU), to the recognition of the choice made by each member state regarding its national identity (art. 6.3 TEU) and, where possible, to «contribute to the flowering of cultures of the member states, while respecting their national and regional diversity» (art. 151.1 TEC).

Consequently, only the member states can represent the different cultural/linguistic communities which (must) constitute Europe, and the linguistic pluralism of the Union coincides with the linguistic pluralism of the States, including of course the sub-national level (like in Finland, Spain, Italy and, to some extent, Austria and even Great Britain). The European (cultural and) linguistic pluralism is determined by the free choice of each member state regarding (internal) linguistic and cultural pluralism, and is the sum of the identities (culturally and linguistically plural or not) of all member states.

What are the consequences of the theory of the integrated constitutionalism applied to linguistic pluralism? Given that linguistic pluralism cannot be imposed on the States by formal rules of the Community, can this occur by means of the integrated nature of (Member) States and Community?

Having regard to article 290 TEC and to article 8 of regulation no. 1/1958[15], the compromise between the double reciprocal imposition within the integrated emerges. «Linguistic pluralism within the EU does not go beyond a mere interstate pluralism. However – taking into account the domestic rules on language of each member state and thus confirming that language regulation still remains within the realm of member states – the linguistic pluralism of the EU could also comprise the infra-state linguistic pluralism. At least on the base of the text [of article 8] and of the reference to State rules contained in it, it does not seem that the official status of all languages must be referred *only* to the State and to *all* the State's territory (like in the case of Belgium). On the contrary, it seems that linguistic pluralism can (even though it does not necessarily) also be a territorial or minority pluralism (as it could be in the case of Finland, Italy or Spain)».[16]

In addition, within the integrated constitutional space, the "constitutional elements" stemming from other (less integrated) geo-juridical areas, like the Council of Europe and the OSCE, are of paramount importance in the issue of language.[17] Simplifying, it can be said that what cannot be "imposed" by the EU concerning linguistic pluralism of the States, is increasingly "recommended" by the Council of Europe and by the OSCE, then slowly ratified and implemented by the States and by this means it becomes part of the integrated space and thus also of the constitutional law of the EU.

2) Territorial pluralism

A clarifying analogy can be seen with the emergence of territorial pluralism in Europe: For a long time, the EC/EU was considered to be "blind" where the internal territorial setting out of the member states was concerned but, also due to the role played by some crucial acts of the Council of Europe (like in particular the Madrid Outline Convention on Trans-frontier Co-operation between

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15 «If a member state has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law».

16 R. Toniatti, Los derechos del pluralismo cultural, note 10, p. 44.

17 See in particular the Council of Europe's instruments which have a decisive influence on the internal linguistic pluralism of the States, like the European Charter of Regional and Minority Languages, the European Framework Convention on the Protection of National Minorities, etc. and of course the case law of the European Court of Human Rights.

Territorial Communities or Authorities of 1980), the recognition of Regions at Community level emerged more and more, and became enshrined in the Treaty (art. 263-265), recognized by the jurisprudence[18] and addressed by the legislation.[19]

Territorial pluralism is one of the characteristic features of the institutional structure of the EU. Traditionally, different approaches towards territorial arrangements are followed by the member states of the EU, reaching from federal States (Belgium, Germany, Austria) to "regional" systems (Spain, Italy, the UK), to unitarian models (France[20] and smaller States like The Netherlands, Denmark, etc.). However, these categories are presently challenged by profound processes of transformation, causing a decreasing significance of the distinction, which, however, remains relevant in some residual cases.[21] The influence of the process of European integration in changing these concepts and merging them into the new paradigm of multilevel governance is generally perceived. This process is also influencing the candidate countries,[22] in such a way that it can be argued that multilevel governance is already part of the *acquis communautaire*.

The non-binding-binding paradigm, here, seems to be the NUTS model: Although the Commission has never directly influenced the process of regionalization in the accession countries, limiting its role to implicit advice, all countries gave themselves a regional structure in view of the EU structural policy. Main goal has been the establishment of self-managing local authorities and the formation of NUTS-compatible regions, as required for structural funds'

18 Cf. in particular CFI, judgment of 15 June 1999, case T-288/97, Friuli-Venezia Giulia v. Commission, ECR p. 1871 and judgment of 15 December 1999, cases T-132/96 and T-143/96, Freistaat Sachsen and Volkswagen AG and Volkswagen Sachsen GmbH v. Commission, ECR, p. 3663, when the Court recognized an autonomous locus standi for Regions. See further M. Dani, Regions' Standing Before EU Courts, in R. Toniatti, M. Dani, F. Palermo (eds.), An Ever More Complex Union, Baden Baden, Nomos, to be published 2003.

19 See in particular the whole regional policy of the EU.

20 At least until the constitutional reform of March 28th 2003, which deeply changed the French territorial structure.

21 See Italian constitutional Court, judgment no. 106/2002, in which the court declared that the regions cannot name their assemblies "parliament", being this noun reserved to the only sovereign assembly, the national parliament.

22 See M. Brusis, Between EU Requirements, Competitive Politics and National Traditions: Re-creating Regions in the Accession Countries of Central and Eastern Europe, in Governance, vol. 15 (2002), no. 4, p. 544.

objective 1 eligibility. In general, all the candidate countries have adopted a NUTS classification for the respective national territory, agreed with the European Commission and Eurostat.

4. Concluding remarks

It can be concluded that the "integrated State" is not a State that can freely decide, without considering the existence of the other constitutional levels, upon issues which are affected by different layers of governance, even if they formally fall into its exclusive sphere of power. States are still the masters of competence fields like language and territorial arrangements for themselves and within the EU, but they are so insofar as they are integrated. Linguistic and territorial pluralism is thus more and more a constitutional consequence of the integrated nature of the member states, which the Union first contributes to influence, and then imposes on itself to respect.

What are the values that the integrated constitutionalism imposes to both the member states and the Union?

It can be argued that they are basically the same values that limit the integration (territorial, cultural and institutional pluralism, rule of law, protection of fundamental rights, etc.). These elements can be considered as the common core of the integrated constitutional space, in which bi-directional ideological prescription takes place: ideological prescription of the member states vis-a-vis the EU and ideological prescription of the EU vis-a-vis the member states, in a circular process of reciprocal value-driven integration.

This core of principles (ideological underpinnings of the integrated constitutional space) is at the same time a prescription and a limitation, because its contents cannot be unilaterally amended by any of the constitutional spheres of the integrated space, but "only" permanently influenced by each of them.