

Approfondimenti

EU and cultural diversity: a glance at cultural diversity as a constitutional feature in the EU

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The growing importance of cultural diversity as a value per se drives scholars to try to understand where this value can be placed in the European constitutional order. Thus, the main issue of this contribution is to try to answer the question whether we should consider cultural diversity as a permanent feature within the EU constitutional order.

Firstly, it should be noted that both the structural and normative paradigm of the protection of cultural diversity can be easily found in the Treaty¹. From the merely formal point of view it is possible to find a direct reference to the (protection and promotion) of cultural diversity in Article 151 EC Treaty. This provision defines the main objectives of Community action in the cultural field and expressly mentions the goal of contributing ‘to the flowering of the cultures of the Member States, while respecting their national and regional diversity’. The Article stresses the need to comply with fundamental concepts: maintenance of cultural diversity while respecting the principle of subsidiarity, supplementing the action of Member States and promoting common heritage. Moreover para. 4 seems particularly relevant for the purposes of this short review: as a matter of fact it establishes that the Community shall take cultural aspects into account in its action under other provisions of the Treaty. This provision can be defined as a general clause of consistency for cultural aspects with relevant reference to the respect and promotion of cultural diversity, added by the Amsterdam Treaty². Nurturing culture is a genuinely horizontal factor in the development of the

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¹ It could be useful to recall ECJ, 23-4-1986, case 294/83, *Parti ecologiste “Les Verts”*, ECR, 1339, where the court defined the European Community as ‘a community based on the rule of law, inasmuch as neither its member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the *basic constitutional charter, the Treaty*’ (at 23). Besides the treaties, in the last two decades there has been a spill-over of constitutional documents, adopted at an ever closer time distance: from the Single European Act (1986) to the treaties of Maastricht (1992), Amsterdam (1997) and Nice (2000), the Charter of fundamental rights of the EU (2000) and the Treaty establishing a Constitution for Europe (2004).

² See W. Maurus, ‘The “culture clause” in article 151, par. 4 TCE and its implications for the policies of the European Union’, in E. Banús, B. Elío (eds), *Actas del VI Congreso “Cultura Europea”-Pamplona, 25-28 octubre 2000*, (Thomson Aranzadi, 2001), 721. See also C. BROSSAT, *La Culture européenne: définitions et enjeux*, Bruylant, Bruxelles, 199

EU and is indicative of the fundamental character of cultural protection³. Some scholars have emphasised that this article represents an (implicit) statement of artistic and cultural freedoms, as well as of the general freedom of expression; therefore they should be regarded, together with the free access of all citizens to culture, as fundamental rights within the EU constitutional order.⁴ *A fortiori*, the inclusion of the (protection and promotion of) cultural diversity among EU values should not be doubted, having regard to article 22 of the Charter of Fundamental Rights adopted at the Nice European Summit of December 2000 (hereinafter Nice Charter), now forming part II of the Constitutional Treaty. Though formally a non-binding document, this Charter was immediately perceived as the most authoritative restatement in the field of fundamental rights and it impacts the practice of judges and institutions⁵. The Nice Charter contains norms concerning cultural rights (freedom of expression, arts, religion)⁶ as well as the explicit pivotal mention⁶ of cultural diversity in the Preamble and in Article 22. This Article reads as follows: ‘The Union shall respect cultural, religious and linguistic diversity’. It can be conceived as a specification of the principle of non discrimination provided in Article 21⁷ and as a positive obligation to protect minorities (stressing their cultural diversity). Additionally considering the European hard and soft law, looking at the ‘material constitution’, or, in other words at the totality of fundamental principles which make up the legal order of the EU polity⁸, then cultural diversity should be undoubtedly considered as a core (normative) value of the European constitutional order⁹. Cultural diversity does feature significantly in many statements: so the importance of this principle clearly seems to emerge from its own substantial backlash, which, at the same time reveals the very approach to the value of cultural diversity.¹⁰

³ See *amplius* M. Ross, ‘Cultural Protection: a matter of union citizenship or human rights?’, in N.N. Neuwal, A. Rosas, *The European Union and human rights*, (Martinus Nijhoff Publishers, 1997) 235.

⁴ S. Owen-Vandersluis, *Ethics and Cultural Policy in a Global Economy*, (Palgrave MacMillan, 2003), 161

⁵ See *inter alia* R. Bifulco, M. Cartabia, A. Celotto (eds), *L’Europa dei diritti*, (Il Mulino, 2001). A. Manzella, *Dal mercato ai diritti*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodota’, *Riscrivere i diritti in Europa*, (Il Mulino, 2001), 29. A. Celotto, ‘Giudici nazionali e Carta di Nizza: disapplicazione o interpretazione conforme?’, (2006) 3 *Questione Giustizia*, 503. See also case TFI T-377/00, *Philip Morris International INC and others*, ECR II-2003, 1.

⁶ See Art. 11, 12, 13, 25 of the Nice Charter.

⁷ See A. Celotto, ‘Articoli 21-22’, in R. Bifulco, M. Cartabia, A. Celotto (eds), *L’Europa dei diritti*, (Il Mulino, 2001), 171.

⁸ G. Zagrebelsky, *Diritto Costituzionale*, vol. I, (UTET, 1998), 26 says that: ‘la costituzione materiale dipende dai rapporti di potere che vengono concretamente a realizzarsi, mentre la costituzione formale dipende dalla sua forma ... : la costituzione materiale stabilizza ma non è stabilizzata; la costituzione formale aspira ad una funzione stabilizzatrice ed è a sua volta stabilizzata in conseguenze della sua forma. ...il rapporto tra costituzione formale e costituzione materiale non è di opposizione: esso è invece in primo luogo un rapporto di derivazione’. On the concept see M. Dogliani, *Introduzione al diritto costituzionale* (Il Mulino, 1997); C. Mortati, *La costituzione materiale* (Giuffrè, 1940).

⁹ See also C. Piciocchi, ‘Europe Faces Cultural Diversity: Towards a European Multicultural Model?’, in F. Palermo, G. N. Toggenburg (eds), *European Constitutional Values and Cultural Diversity*, (EURAC, 2003), 25.

¹⁰ *Ie* “Council Resolution on the Promotion of Linguistic Diversity and Language Learning in the Framework of the Implementation of the Objectives of the European Year of Languages 2001”, of 14th February 2002, The commission Action Plan COM (2003) 449, the White Paper ‘Teaching and Learning’ COM (1995)590, the communication A New Framework Strategy for Multilingualism, COM (2005)596 final. The proposal for the European Year on Intercultural dialogue COM (2005)467 final. See J.C. Barbato, ‘La diversité culturelle: élément de l’identité de l’Union Européenne

Moreover it is very well known that the consolidation of European law as a constitutionally higher law with direct effect within the European legal space, through the European Court of Justice (ECJ) 'rulings', underpins the developing of the (now largely accepted even still very problematic) concept of constitutionalism¹¹ beyond the State¹². Furthermore such a consolidation implied the search for the very constitutional identity of Europe. This identity should be found in all those shared values which define the meaning of 'being European'. If we look at the common Member States and Community efforts in the UNESCO seat, during the negotiation of the abovementioned Convention on the protection and the promotion of the diversity of cultural expression, we should say that cultural diversity is a very shared value. It is worth recalling that this UNESCO Convention, adopted in Paris on 20 October 2005¹³, is intended to fill a legal *lacuna* by establishing a series of rights and obligations, at both national and international levels with a view to the real protection and promotion of cultural diversity¹⁴. Generally speaking this Convention tries to introduce (maybe paradoxically) a shared (and common) standard of protection and promotion of cultural diversity which should affect, from the merely factual point of view, both the human rights policy and the economic one. The two years of work which led to the final text saw complex and complicated negotiations in which the EU (and China) played a very relevant role. From the EU side, in accordance with Article 300 EC, both the Commission and the Member States participated in these negotiations, showing a strong commitment to safeguard cultural diversity and *de facto*

en matière d'actions culturelles extérieures dans la perspective de l'Union élargie', in J. Andriantsimbazovina, c. Geslot (eds), *Les Communautés et l'Union européennes face aux défis de l'élargissement*, (La documentation Française, 2002), 299.

¹¹ Constitutionalism can be defined as the ideology advocating the constitution as the privileged means for the protection of individual freedoms from the abuses perpetrated in the exercise of public powers. See G. de Vergottini, *Diritto costituzionale comparato*, I (CEDAM, 2004), 117.

¹² J.H.H. Weiler, *The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999); J.H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, (Cambridge University Press 2003); F. Palermo, R. Toniatti (eds), *Il processo di costituzionalizzazione dell'Unione Europea*, (Ed. Università di Trento, 2004); F. Palermo, *La forma di Stato dell'Unione Europea*. (CEDAM, 2005); M. Poiars Maduro, 'The importance of being called constitution: constitutional authority and the authority of constitutionalism', (2005) 2-3 *International Journal of Constitutional Law*, 332.

¹³ Following two work phases, a project of the Convention was presented to the General Conference of the UNESCO in October 2005. Pursuant to the 32nd C/Resolution of October 2003, a multi-stage approach had been chosen, consisting of a preliminary phase of drawing up a text project by fifteen experts and a second phase of intergovernmental negotiations. The first intergovernmental session was held from 20 to 24 September 2004, the second in February 2005, and the third from 25 May to 4 June. The Convention was finally adopted by the 33rd General Conference with 148 countries voting in favour, 4 abstentions and the rejection of Israel and the United States (Regarding the US rejection see G. F. Will, 'Dimitted Nod to "Diversity"', in www.washingtonpost.com. A. Riding, 'U.S. Stands Alone on UNESCO Cultural Issue', in www.nytimes.com).

¹⁴ Up to now the UNESCO Convention has been ratified by Canada, which played a very leading role during all the elaboration and negotiation process, by Bolivia, Burkina Faso, Djibouti, Madagascar, Mauritius, Mexico, Monaco. It is going to be ratified by France (L. n. 2006-792, 5 July 2006, in JO 6 Juillet 2006, 10116). Romania, Croatia, Belarus also deposited their approval. This UNESCO Convention is going to be ratified by the European Union, under the articles 89, 133, 151, 181 and 181a in conjunction with Article 300 of the Treaty establishing the European Community (hereinafter EC Treaty) as a legal basis. In accordance with its Article 29, this Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.

recognising its importance in the human rights field.¹⁵ Moreover this supranational negotiating practice could lead to consider that the protection of cultural diversity is an imperative value also able to deeply influence the EU internal configuration and to de-structure (re-structure) the form of cultural competences, just in order to respond to it. If (the promotion and protection of) cultural diversity can be seen as a condition for a balanced and mutually enforcing relationship between European competence and national sovereignty, it can be said with certain foreseeability that it will not only be up to the Member States but, above all, up to the EU to transform and develop a keen “differences policy”. It is of course too early and this is not the right place to analyse the implications of such a Convention (even considering the almost definite accession by all the Member States together with the EC), but it seems that this Convention definitively (empirically) makes the principle of protection and promotion of cultural diversity sacred within the EU internal order.

Again it is to highlight that the objectives of the UNESCO Convention are defined as consistent with the ones of the European Union policies and in line with Article 151 (in particular with para. 4 of this provision). Nevertheless this Convention seems much more than ‘consistent’ with the Treaty. In the Memorandum presented by the Commission in December 2005 it is clearly stated that ‘diversity is the dominant reality and has been enriched by the recent historic enlargement’¹⁶. Moreover the European efforts during the negotiation coincide with a substantial erosion of Member States competence in cultural matters¹⁷ and are more than the recognition of a need for a legal (normative) definition of cultural diversity in the international context. They should be seen as

¹⁵ As a matter of fact, in its Communication of 27 August 2003, and subsequently in the Recommendation to the Council of September 2004, the Commission itself highlighted the need for Community participation in the negotiations to preserve its *acquis* and competences as well as to assert its own interests. Therefore it should be stressed that the Treaty and the consistent case law of the European Court of Justice (ECJ) make it compulsory for the European Community to ensure the unity of its representation in international organizations, even where shared competences are involved. The ECJ affirmed that in cases in which “mixed agreements” are negotiated, it is necessary to establish a close collaboration between the Member States and the Community, especially during the negotiations. This is with a view to achieving unity in the international representation of the European Union through the joint participation (also operating in the fields covered by domestic competences) of the Community and the Member States. See ECJ case C-471/98, *Commission v. Belgium “Open Skies”*, [2002] ECR, I-9681. In particular, the Court formulated a true parallel between internal and external competences—in other words, the Community can conclude an agreement not only where explicitly expected from the EC Treaty, but also in reference to matters for which “common rules” have been adopted. See ECJ Opinion 1/94, *WTO Opinion* [1994] ECR I-5967, paragraphs 107-108. The aim of such a Convention undoubtedly relates to cultural matters, an area in which (in light of Article 151 EC) the Community does not possess harmonisation powers and which remains primarily within the competence of individual Member States. However, as highlighted by the European Commission from the very beginning, many of this Convention’s provisions affect well-established parts of the *acquis communautaire* (eg rules on competition, common commercial policy, development cooperation under Art. 177 to 181 EC).

¹⁶ Explanatory Memorandum in the Proposal for a Council Decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Brussels, 21.12.2005, COM(2005), 678 final, 2005/0268 (CNS), presented by the European Commission.

¹⁷ See S. Weatherill, ‘Finding Space for Closer Co-operation in the field of Culture’, in G. De Burca, J. Scott (eds), *Constitutional Change in the EU*, (Hart publishing, 2000), 237. B. de Witte, ‘The Cultural Dimension of Community Law’, in 4 (1995) *Collected Courses of the Academy of European Law*, 229-299. S. Laporta, ‘Verso l’integrazione comunitaria: la cultura nella strategia dell’Unione Europea’, in 1(2001)*Diritto dell’ economia*, 237

the very evidence of the consolidation of cultural diversity not simply as a core feature but as a very normative value in the EU constitutional order, or in other words as a guiding principle¹⁸. As we can infer from the European *motto*, the idea of unity through diversity is itself the defining feature of the Community. Therefore the European action in the UNESCO seat clearly shows how the value of cultural diversity is intrinsic to the EU.

In other words, Europe will also stand under an international obligation to essentially ensure that which is already a structural feature inside their boundaries, and (above all) to act in the international scene according to this principle. In this light cultural diversity ensures paradoxically, a deeper cultural (and at the same time, legal) integration within the EU constitutional framework¹⁹.

¹⁸ See Explanatory Memorandum in the Proposal for a Council Decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Brussels, 21.12.2005, COM(2005), 678 final, 2005/0268 (CNS), presented by the European Commission.

¹⁹ See also C. Picocchi, 'La prescrittività culturale degli ordinamenti giuridici', in F. Palermo, R. Toniatti (eds), *Il processo di costituzionalizzazione dell'Unione Europea*, (Ed. Università di Trento, 2004).