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REFERENCES TO GOD AND THE
CHRISTIAN TRADITION IN THE
TREATY ESTABLISHING
A CONSTITUTION FOR EUROPE:
AN EXAMINATION OF THE
BACKGROUND

The paper offers a survey of the debate on the introduction, in the Preamble of the Treaty establishing a Constitution for Europe, of references to God and Europe's Christian tradition. It examines the question of European identity and values which motivates these proposals in relation to (1) the nature of the EU as an essentially political construction; (2) the issue of human rights in the EU; (3) the protection of cultural and religious diversity within the EU. The study shows that the confessionalization of Europe promoted by strong churches on the Continent, which are legitimate actors of civil society, betray a failure to understand the logic of the European construction. To the extent to which they represent an attempt to secure a privileged position with respect to other religious or non-religious actors, they run against the functional principles and values of the Union.

The requests to insert a
reference to God and Europe's
Christian tradition in the Treaty
establishing a Constitution for
Europe

References to the identity and values of the European construction have been made in all treaties of the European Communities and, subsequently, of the European Union. The standard conception is worded in Art. 6 of the Treaty on European Union, which states that the EU is founded "on the principles of

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liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". In other words, European values are political values. If there is a serious breach of these values by a member state, a decision on suspending its membership rights may be made. The cultures of the European peoples represent the background against which the EU functions as a political construction. The principle of "unity in diversity", which is the motto widely recognized as describing the idea of the Union, promotes both the diversity of its cultures and the common cultural heritage (see Art. 151 of the Treaty establishing the European Community).

The EU enlargement process and, particularly, the preparation and elaboration of the Treaty establishing a Constitution for Europe (also known as the European Constitution) generated diverging interpretations with respect to the question of European values. Gradually, the debates on the subject became more radical. There was also sufficient time to involve actors outside the European institutions: the elaboration of the Constitution started as a new debate on the future of Europe through the decision at the Laeken European Council in December 2001, while the final draft of the Constitution was presented in June 2004. The external pressure, along with other factors, led to a genuine political battle within the EU with respect to the inclusion in the Constitution's Preamble of specific cultural values. Furthermore, the failure of the ratification of the European Constitution – signed in October 2004 by representatives of the then 25 member states of the European Union, and rejected by French and Dutch voters in May and June 2005 – left open the issue of the reference to cultural values in the EU's basic law. Eventually, the European Council meeting of June 2007 decided to start negotiations on what became the Treaty of Lisbon (or Reform Treaty and, more recently, the Treaty on the Functioning of the European Union), designed to amend the Treaty of European Union (Maastricht) and the Treaty establishing the European Community (Rome). Signed on 13 December 2007 in the Portuguese capital, the treaty has not yet been ratified by all EU member states. This offers another opportunity to continue the debates on the values which the Union is grounded upon.

This study deals exclusively with the question of including in the European Constitution a reference to Europe's Christian tradition. The initial draft of the Constitution, presented on 18 July 2003, set forth in its Preamble values such as those "underlying humanism: equality of persons, freedom, respect for reason". It added a reference to "drawing inspiration from the cultural, religious and humanist inheritance of Europe". In other words, the reference to religion was in terms of the inspiration drawn from the religious inheritance.

Important actors of the European project desired, however, an explicit reference to God in order to lend an additional confessional dimension to the Union. The Irish President, Mary McAleese, addressed the European Parliament expressing Ireland's support for this idea "if we can

reach a consensus on an adequate wording”.¹ The Vatican was particularly active. Pope John Paul II pleaded many times for a reference to God in the European Constitution.² During the first session of the enlarged Union at the beginning of May in Strasbourg, Italy, Poland, Lithuania, Slovakia, Portugal, Czech Republic and Malta stated that they see it as a priority to include the Christian tradition in the preamble.³ At the Intergovernmental Conference session on Monday, the 24th of May, France, the Scandinavian countries and Belgium once again resisted this idea.⁴ France was the leading state rejecting of a reference to Christianity in the Constitution.

The debate over principles was aimed at lending relevance to “Europe’s religious values” in the European project, something which the simple reference to the inspiration drawn from the historical religious inheritance did not do. It turned into a specific amendment introduced on 13 November 2002 by MEP Elmar Brok and other members of the group representing the European People’s Party (EPP) to the Convention (Jozsef Szajer, Erwin Teufel, René van der Linden, Frantisek Kroupa, John Cushman, Teresa Almeida Garrett, Peter Altmaier, Jan Fgel, Piia Noora Kauppi, Hanja Mau-Weggen, Reinhard Rack, Joachim Würmeling). They proposed an “important structural amendment” which included the following paragraph: “(2) To start the Constitution with the Charter would stress that the Union is a ‘Union of values’. It would reflect the fundamental respect of the Union for human dignity (which would figure prominently as Article 1 of the Constitution) and thereby give the best possible evidence of the Christian origins of European civilization. It should be recalled that the Constitutions of Finland, the Netherlands, Portugal, and Germany also start with Fundamental Rights (the latter did so after the historic experience of a barbaric and inhuman regime which had come to power under a Constitution which had placed the Fundamental Rights Chapter in an Annex to the Constitution of Weimar...)”⁵

Greece took part in the debate and its stance reflected the position of the influential Greek Orthodox Church. At the time, no other countries with an Orthodox majority were members of the Union. Yet the procedures made it possible for outsider voices to be heard. One of these belonged to the Romanian Orthodox Church (ROC). In October 2003, the ROC announced its support for the amendment introduced by the group represented by MEP Brok. As the decision not to include it in the Preamble or the body of the Constitutional Treaty had already been made on 7 February 2003, the ROC thought of a compromise solution.⁶ The amendment should have been worded instead: “The member states and the citizens of the European Union ... [are] aware of their history and the universal and indivisible values of human dignity, freedom, equality, and solidarity, and well as of the *preponderantly* Christian heritage.” (our emphasis)

One should also note the arguments which accompanied the proposal. First, that the population of Europe is mostly Christian, and Europe has Christian roots and a strong Christian identity. Secondly, that the idea of a united Europe was first proposed by Christian Democratic politicians such as Adenauer, Monet, De Gasperi and Spaak, who envisaged the establishing of an economic community with the further goal of creating a cultural and political community grounded on Christianity first and foremost, and secondly on Greek and Latin culture. Thirdly, the ROC argued, Christian morals, based on the tradition of the prophets and the Gospels, as well as the social work of the churches, instilled in civil society the ideals of respect for human dignity, equality of all men before God, the freedom of persons and peoples, social justice, the caring for the poor, the elderly, the sick and the aliens. There are, in today's Europe, many Christians who, though they no longer practice their religion or have quit the Church, still preserve the humanist ideals inspired by the Judeo-Christian heritage, albeit in a secularized form.

Fourthly, it was argued that for centuries European culture in all its diversity – from literature, the arts, and music to the names of places and streets – has been inspired by the Bible and by Christian spirituality, Christian holidays, the saints of the Church, Christian clergy and laity, by great missionaries such as St. Augustin in England, St. Bonifacius in Germany, Saints Cyril and Methodius for the Slavic peoples, by reformers such as Luther or Calvin, by Christian musicians such as Beethoven and Christian artists such as Michaelangelo etc.

Finally, the Romanian Orthodox Church added to these arguments its own condescendingly nationalist vision as expressed in the Statement of Religious Denominations in Support of Romania's Accession to the European Union (2000). In that document the ROC presented itself as the representative of the views of Romanians and as tolerant of the other faiths practiced on the territory of Romania:⁷

The Romanian people emerged as a Christian people. Romanian Christianity, which is Apostolic in origin, was a fundamental element of spiritual and cultural progress and unity. Romanian Orthodoxy is the only Latin Orthodoxy, and acts therefore as a bridge between the West and the East, as His Holiness Pope John Paul II observed during his visit to Romania. From a religious point of view, Romania is a miniaturized Europe where the faithful of the Orthodox Church, the Catholic Church and the followers of other Christian faiths and beliefs live together.

In preserving its own spiritual identity as modeled over the course of history alongside other European nations, the Romanian contribution will enhance

the value of the European spiritual and cultural heritage.

The amendment proposed by MEP Brok and his colleagues was eventually unsuccessful. The Preamble reflected the debates which preceded it by slightly changing the word order: “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal idea of the inviolable and inalienable rights of the human persons, freedom, democracy, equality and the rule of law.” Yet the debate on the reference to European Christianity did not stop at the point reached in October 2004 after the failure of the Constitutional Treaty.

Indeed, during subsequent years it continued with similar urgency. One of the sensitive points was the question of Turkey’s accession. Turkish Prime Minister Recep Tayyip Erdogan was quoted in an Ankara press release on 13 December 2004 saying: “The European Union (EU) must admit Turkey in order to show that it is not opposed to Islam and it is not a Christian Club”.⁸ Somewhat paradoxically, an appeal in essentially political terms was made before the European Parliament on 16 January 2008, during the European Year of Intercultural Dialogue 2008, by the Grand Mufti of Syria, the first religious leader who was offered the opportunity to express himself. He noted that although religion had given culture its moral values, “it is we who build civilization”, arguing that “we must create states on a civil basis” rather than a religious one.⁹

In 2005, French Foreign Minister Michel Barnier expressed, on different occasions, the view of most French politicians: the EU had to remain a secular construction irrespective of its different traditions and religions. On the other hand, the Polish ruling Law and Justice Party expressed, in its political program of 2005, its satisfaction with the failure of the Constitutional Treaty. The latter allegedly denied “the role of Christianity in shaping the moral and cultural face of our continent ..., it introduced a specific anti-Christian censure of the European constitutional practice.”¹⁰

Representatives of the Catholic Church have been among the most prominent actors in the debates on European identity. In an address to the members of the European People’s Party of 30 March 2006 Pope Benedict XVI said that “By valuing its Christian roots, Europe will be able to give a secure direction to the choices of its citizens and peoples, it will strengthen their awareness of belonging to a common civilization and it will nourish the commitment of all to address the challenges of the present for the sake of a better future. I therefore appreciate your Group’s recognition of Europe’s Christian heritage, which offers valuable ethical guidelines in the search for a social model that responds adequately to the demands of an already globalized economy and to demographic changes, assuring growth and employment, protection of the family, equal opportunities for education of the young and solicitude for the poor.”¹¹

The declaration published in March 2007 by which the German bishops marked the 50th anniversary of the signing of the Treaties of Rome stated that an European Constitution must include a reference to God, “to the Judaic-Christian tradition of Europe and to its long-lasting effectiveness”. Because the “fact that European politics is basically synonymous with this view of man is the true Christian heritage of Europe” it is appropriate that a fundamental European text should include a reference to the Judeo-Christian tradition of Europe.¹²

On the other hand, the Alliance of Liberals and Democrats for Europe, the third largest political group in the European Parliament, has constantly promoted the idea of the EU as a political community “based not on religion or faith, but on mutual respect for common democratic and fundamental values.”¹³

Debating the European Constitution: the European society model and the voice of the churches

The extensive debate on the European Constitution, both within and without the Convention, represented an exceptional example of an exercise in democracy. During the days of constitutional effervescence in 2000-2004, non-governmental actors were present alongside member states.¹⁴ Organized European civil society – bringing together European social movements and other recognized social forces – made ample use of the formal means of communication with the European Convention as well as of informal channels.

It is worth noting that, as the European Constitution was finalized in 2004, most member state governments were right-wing in ideological orientation. The Intergovernmental Conference¹⁵ was dominated by this position. This generated a certain sympathy for conservative ideas, but also added additional momentum to the actions of the European social left, with its privileged relations with civil society.¹⁶

The involvement of European civil society in the constitutional project was a leitmotif of the European Convention. A *Futurum* site was built for citizens, associations, and organizations who wished to follow the debate on the future of Europe. The pressures of the various actors, among which the churches, was also legitimated by the prestige within the EU of the European social model, according to which in Europe society leads the market and the state.¹⁷ In this sense, the European identity which was the focus of arguments delivered from the lectern or exchanged in the halls of the European Convention was, as Manuel Castells noted, an identity-project, in other words the expression of a struggle to impose alternative ways of thinking about the European construction.¹⁸

As a matter of fact, civil society's willingness during 2000-2004 to involve itself in defining the European model was hardly something new. Indeed, it was as old as the Communities themselves. After all, the ideal of

European unification was the progeny of European civil society and was only later adopted by European political forces.¹⁹ The Hague congress of 1948, which brought together Europeanist citizens' associations and laid the basis of European integration, thus leading to the creation of the Council of Europe and the European Communities, is more than a simple historical correspondent of the new millennium's European Convention.²⁰

Under such circumstances, the churches had an ideal case for legitimating their role. They pointed to their part in defining the ethos which had led to the new balance of market and society and, eventually, to the elimination or diminution of the negative, perverse effects of the market. The Vatican's emphasis on notions of economic and social cohesion and solidarity dovetailed with the thinking of people such as Alain Touraine, whose political vision was left-wing and secular²¹ and who theorized the involvement of the EU in the development of social liberal policies, recognizing the importance of liberal economic policies as well as of social solidarity measures.²² The churches' criticism of the market and their positions in favor of the people were also in tune with the ideas of Lionel Jospin, the French prime minister at the time of the Laeken European Council in December 2001. To Jospin, Europe was more than a market. It was the embodiment of a society model which emerged as the product of history and which was undergoing an evolution strengthened by links stronger even than those bringing together European peoples.²³

Consequently, the background of the debates made it possible for the churches to claim that, after 50 years during which the sectorial construction of Europe had been a task assumed by governments, it was high time for civil society to take back its initial leadership role. Widely shared objectives, such as bringing the citizens closer to European institutions or situating the former at the center of the European construction, were turned into precious capital for the Vatican and for the organizations created by Protestant and Orthodox churches. The latter obtained a certain recognition in their relations with the European Convention by legitimating their actions, somewhat ironically, in terms of the essentially secular idea of achieving a real political union, and thus "giving back" to the civil society its role as a protagonist of European integration.

Some arguments for the introduction of references to God and Europe's Christian tradition

The wide-ranging civic and political debate on the introduction or rejection of references to God and Europe's Christian tradition also extended into an academic discussion. An overview of the positions in this respect shows that the number of distinct arguments has been relatively small.

Some standard reasons for the introduction of such references were given by Marián Kuna (2004): (a) because the constitution preamble reference has descriptive and normative functions, and because the descriptive function is only a simple proclamation about the state of affairs [God and Christian values are sources of the European cultural and political identity] which is so generally accepted it is almost nonsensical or foolish to question it; (b) it is unfair not to mention God and Christian values in the constitution, while the reference to the Enlightenment rationalist humanism has been implicitly included in the preamble; (c) it is a sign of good manners to provide to a significant number of people in Europe for whom Christianity and God provide them with guidance an appropriate, i.e. also constitutional, recognition that regards their way of life with genuine respect.²⁴

Such arguments must face a number of challenges:

- (a) The separation between the descriptive and normative dimensions of the constitutional preamble is artificial and contrary to the logic of this type of legal instrument. The preamble is a repository of values. It has an effective function in the construal of the articles. This is especially relevant in the case of international instruments, whose contents will be substantially enriched through jurisprudence. The relation between the preamble values and the contents of the norms is apparent in the development of the European Convention on Human Rights. In many ECHR cases the Court's decision had to be read in relation to the Convention's Preamble.²⁵ Sometimes the significance of the sources in the interpretation of articles was determinative to such an extent that an Explanatory Report had to be adopted – the case of the Framework Convention for the Protection of National Minorities of the Council of Europe.
- (b) The implicit reference to Enlightenment rationalist humanism in the European Constitution does not reflect the particularity of this philosophical perspective, but the fact that, like democracy and the rule of law, it nourishes the organizational logic of the community. The tradition of humanism, learning and social progress is not part of the Preamble because it constitutes a corpus of ideas which enjoys more sympathy as compared with other worldviews or conceptions in European history, but because its nature is meta-ideological. Since the goal of the constitution is the political construction of the community, and its condition is the commitment to human rights, constitutionalism is inherently an instrument of modernity and rationalism.²⁶
- (c) One goal of the European Constitution is the recognition of and the genuine respect for the life for all the citizens of Europe: Christians, agnostics, Buddhists, Jews, Muslims a.s.o. Turning a community-specific view into a constitutional value would conflict with the views of others. The “recognition and respect” towards people's ways of life

offers a good reason precisely to avoid introducing into the preamble of the Constitution confessional references, whether to Christians, Jews or Muslims. The fact that Christians are a religious majority in Europe it hardly an argument, since one of the purposes of a Constitution is to prevent majority rule from turning into the tyranny of the majority.²⁷

Boari and Gherghina argue that the reference to Christianity should be supported because, by ensuring a spiritual identity for the Continent it also guarantees the latter's cohesion: "Personally, we consider that New Europe will find it hard, if not impossible, to survive and configure a strong identity, able to compete and surpass particular identities, that dominate today, without a solid spiritual identity".²⁸ They decry the exclusion of the Judeo-Christian spiritual inheritance in the prologue to the Lisbon treaty and then in the constitutional treaty itself, calling it "at least an uninspired decision on the road to the new European identity".²⁹ While admitting that religion can truly be a dividing factor, they nonetheless follow Hans Kung³⁰ in arguing that religion fulfils functions that nothing else can replace, including an extraordinary force in the achievement of a community's solidarity and cohesion.

Such a view clashes with empirical evidence on the question of whether the Christian identity was, due to its "spiritual" nature, an essential factor in the unity and solidarity of Europe. The same seems to be the case today. Despite the many ecumenical projects, the dogmatic differences among Catholicism, Protestantism and Orthodoxy remain a source for emphasizing the particular and, occasionally, also for animosity. As a matter of fact, the excellent relations between the Romanian Orthodox Church and the Mufti in Romania, especially when seen side by side with the frequent clashes between the former and the Greek-rite Catholic Church, offer a telling sign that the solidarity and cohesion thesis is simply artificial.

The EU values and the nature of the European political community

The project of inserting references to God and the Christian tradition in the Preamble to the European Constitution was supported with both historical arguments and transcendent ideals. Yet the EU is an essentially practical construction which must avoid a past full of terrible experiences. The fundamental goal of the Union is to secure peace and social justice, and this goal is put to the test on a daily basis. It is from this perspective, therefore, that one must consider the implications of this insertion in the Union's constitutional principles: the EU's nature as an essentially political construction, its commitment to human rights, and its stance on cultural and religious diversity.

The European Union: the political construction and religious diversity

The tragic experience of World War II was the reason why the main intergovernmental organizations established after the war placed first among their objectives the goal also set by the UN in 1945: “to save succeeding generations from the scourge of war”. Having learned the lessons of wars, the United Nations and organizations such as the Council of Europe and, later on, the CSCE recognized in the “faith in fundamental human rights, in the dignity and worth of the human person” one of the essential instruments of peace.

The famous Robert Schuman Declaration of 9 May 1950, however, appeared to pursue a different stake: that of the virtues of economic logic. It proposed that “Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.”

The notion of resolving European tensions through economic integration did not render the Schuman declaration any less a political project. The intention of deepening the political process was evident in that statement: “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.” One may claim today that postwar Europe started as a political project only to subsequently become also a war-free continent.

With a political goal and with a mode of operation appropriate for a political project, the European Communities necessarily made recourse to the system of values and references capable to ensure peace and justice for a community that was extremely diverse ethno-culturally and religiously. Such values and references were inevitably civic-political and they proved able to confer on the EC stability, to provide it with a basis for operation, and to endow it with legitimacy and meaning.

All the treaties of the European communities, including the founding document of 1957, include references to such civic-political values. They set forth and restate principles such as “Determined to lay the foundations of an ever closer union among the people of Europe”; “Determined to promote the development of the highest possible level of knowledge for their peoples through a wide access to education”; “A height level of employment and social protection, equality between men and women, economic and social cohesion and solidarity”; “A policy in the social sphere”; “Contribution to education and training of quality”; “eliminat[ion of] inequalities”.

The evolution of the European Communities after 2000 conserved this set of values and the meaning of the founding themes, which reached a certain closure in the Treaty of Lisbon.³¹ The latter saved, almost without any alterations, the goal of making explicit the European political project in terms of principles, and of civic and political principles specifically.³² The new Article 2 of the Treaty on European Union (TEU)³³ offered a synthesis of the following values underlying the EU: respect for human dignity, liberty, democracy, equality, the rule of law, and human rights, including minority rights. The Treaty sets forth that these rights are common to all member states, whose societies are characterized by pluralism, non-discrimination, tolerance, social justice, solidarity, and equality.

One must point out that the new wording of Art. 2 (formerly Art. 6.1) adds to the previous set the respect for human dignity and gender equality, as well as the explicit reference to minorities.³⁴ The values defining the European Union, which become mandatory through the ratification of the Treaty, constitute the basis of European identity *in the sense of the EU's devotion to the fundamental civic-political principles*. European public authorities must take those measures which allow for the translation of these values into practice: to jointly draft laws, to create public policies, and to guarantee their enforcement in the EU and the member states.³⁵ Today, the political obligation with respect to these civic and political values is compounded by a legal obligation, and non-compliance may be sanctioned by a complaint filed with the Court of Justice, as well as by the activation of the procedure of democratic guarantee which may even trigger the temporary loss of voting rights in the Council.³⁶

The Treaty of Lisbon also includes, in the Treaty on the Functioning of the European Union (TFEU), the instruments available to community institutions to ensure compliance with and enforcement of the common values. Thus, Art. 9 of the TFEU develops the “social clause” (the right to education, work, social protection, training, health, the fighting of social exclusion), while Art. 10 expands on the “non-discrimination clause” (on grounds of race, sex, ethnic origin, religion, belief, disabilities, age, and sexual preference). Finally, Art. 19 of the TFEU (formerly Art. 13 of the TEC) sets forth the transversal nature of these clauses: they apply across the range of European public policy sectors. Compliance with these principles and fundamental values becomes a matter of EU policy and is binding on both member states and the institutions of the community.

Besides the particular logic of building a political community on such a diversity of cultures as those of Europe, one must also inquire whether the claimed Christian specificity of the Old World is a historically accurate fact. Data arguably point in the opposite direction. By comparison with the other continents of the globe, one notable exception being Australia (itself a transplant of European culture), Europe remains the most non-religious one. It is the hearth of the Enlightenment and a center from which

secularization irradiates. According to a 2007 survey of 30,000 people in 27 EU member countries, on average throughout the 27 EU countries about half of its people (52%) believe in God, with much variation from country to country (only 16% of the population of Estonia believe in God, 23% in Sweden, 31% in Denmark, 38% in Iceland, 41% in Finland).³⁷

The Eurostat survey, to which references were made during the Convention debate, found that religion remained very important to the Maltese (88%), Poles (87%), Cypriots, Greeks and Romanians (86% each). But such data do not show that religion is a determining factor in the lives of all or most of those who affirm their religious affiliation. Once a religion has become institutionalized or popular, as it happened in these countries, particular trends will exaggerate statistical measures of the number of its adherents.

Fundamental rights in the EU and religious diversity

It has been pointed out, in various contexts, that the three Founding Treaties establishing the three European Communities did not address human rights. One reason was that, before the establishment of the European Coal and Steel Community, several member states were already a part of the system of fundamental rights protection of the Council of Europe. On 5 May 1949, the Statute of the Council of Europe had been signed in London, and on 4 November 1950 the European Convention for Protection of Human Rights and Fundamental Freedoms had been signed in Rome.³⁸ As time went by, all European Communities member states joined the Council of Europe. For the former, fundamental rights were however not functional only “in the shadow of the Council”. To repeat: *the entire European construction had the fundamental human rights as a point of reference*. This is a fundamental point in relation to the subject of this article.

This fact was emphasized on several occasions by the European Court of Justice (ECJ) even before the thesis could be legitimized on the basis of a constitutional reference. In the case *Internationale Handelsgesellschaft* (1970),³⁹ the ECJ noted that

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of doubts expressed by the *Verwaltungsgericht*, whether the system of deposits has infringed rights of fundamental nature, respect

for which must be ensured in the Community legal system.⁴⁰

In *Nold* (1973),⁴¹ the ECJ extended the statement above by listening to its human rights sources of inspiration:

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which are signatories, can supply guidelines which should be followed within the framework of Community law.⁴²

One might therefore argue that within the time span of “a few years” at the end of sixties and beginning of seventies the ECJ acknowledged the human rights “as an integral part of Community law in the form of general principles of law which have a source in the constitutional tradition common to Member States and in international treaties on human rights ‘on which the Member States have collaborated or of which they are signatories’.”⁴³

Subsequent developments only strengthened this trend, which was symbolically acknowledged on 5 April 1977 through the Joint Declaration on Fundamental Rights adopted by the European Parliament, the Council, and the Commission. The Joint Declaration states that “the Court of Justice has recognized that law comprises, over and above the rules embodied in the Treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based.” Furthermore, the European Parliament, the Council and the Commission “stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The first Founding Treaty which mentioned human rights explicitly was the 1986 Single European Act. It contained a reference to the determination of member states “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.”⁴⁴ However, as Rodoljub Etinski argued,⁴⁵ the turning point in the constitutional protection of human rights was the 1992 Treaty on European Union, which clearly set forth that “The Union shall respect fundamental rights, as guaranteed by

the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law (Article F(2) in Title I).” Significantly, the 1997 Treaty of Amsterdam added a new first paragraph, which reads: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”⁴⁶

The process continued. Article 6 of the Treaty on European Union was reformulated as:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Finally, the Charter of Fundamental Rights of the European Union was proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000.⁴⁷ Even if, for the time being, the Charter is not a legally binding instrument, it is symbolically and legally a document of utmost relevance.

The Council of the European Union has established a European Union Agency for Fundamental Rights.⁴⁸ The 2007 Treaty of Lisbon (ToL) amending the Treaty on European Union and the Treaty establishing the European Community, if adopted, creates a legal title for the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6.2). Meanwhile, the ToL invests the Charter of Fundamental Rights with the rank and power of primary law in the EU.

It was worth going through all the main steps of the development of EU’s human rights doctrine in order to eliminate any possible doubts with respect to the fact that: (1) the formal bases of the European Union incorporate today, even though the final stages may not have been completed, a full-blown treaty on the protection of fundamental rights and freedoms; and (2) the EU’s system of protection integrates asymptotically

the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The last two statements determine a well-defined framework within which the EU may deal with the problem of religious diversity. On the one hand, its Charter of Fundamental Rights will establish an explicit obligation for the EU to “respect cultural, *religious* and linguistic diversity”.⁴⁹ On the other, the EU must respond to the relevant requests of the European Convention for the Protection of Human Rights and Fundamental Freedoms. More specifically, it must integrate the European Court for Human Rights (ECHR) jurisprudence on freedom of thought, conscience, and religion. The latter covers equally the rights of the faithful and of non-believers (whether atheists,⁵⁰ agnostics or indifferent). It makes no distinction among important religions, exotic, esoteric or spiritualist religious groups (some of which are commonly branded as “sects”), and it censors the actions of religious actors when the fundamental rights are endangered.

The same duty of respect for the principles of the European Convention for the Protection of Human Rights (and of the Charter of Fundamental Rights) imposes on the EU the obligation to carefully select among any value-laden or symbolic statements which may acquire a constitutional dimension. That includes any statements made in the Preamble of an European Constitutional Treaty.

The Accommodation of the EU to the issue of cultural and religious diversity

Within the European construction, the question of ethno-cultural diversity emerged from a double perspective: *inter-national* diversity (diversity *between* the Member States) and *intra-national* diversity (diversity *within* the Member States).⁵¹ This distinction reflects the tension inherent within the idea of “unity in diversity”. On the one hand, the European Communities recognized the specificity of member states and interpreted it as an expression of the richness of the European continent. For this reason multilingualism has been constantly a part of EU policies and has had a commissioner responsible for it. European funds were established to ensure the preservation of archaeological sites and cultural assets. The same concern explains why, although the status of churches varies considerably across the EU, the issue of community standards in the field of religious denominations was never raised.

On the other hand, the European Union has been preoccupied with the negative relationship between diversity and discrimination, the latter being a problem of significance especially within member states. It is interesting to note in this context that although the Treaty establishing the European Economic Community contains no reference to human rights, it establishes from the beginning a general prohibition of discrimination based on nationality (former Art. 7(1)). The integration of

the fighting of discrimination among the structural principles of the European Communities took place with the Treaty of Amsterdam, which entered into force in May 1999. Article 13 of the Treaty requested the EC “to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” by any action that was appropriate.

Since 1999, Article 13 has been used for several types of measures.⁵² First, as a legal base for directives banning specific forms discrimination in particular fields (such as employment). These directives include the Racial Equality Directive (2000),⁵³ the Framework Employment Directive (2000),⁵⁴ and the Service Directive on equal treatment between men and women (2004).⁵⁵ Secondly, the Article served as a legal basis for Community action programs providing financial resources, including programs on combating discrimination (2001-2006),⁵⁶ the gender program (2001-2005),⁵⁷ the PROGRESS program,⁵⁸ and others.⁵⁹ Thirdly, Article 13 provided a legal basis for the establishment of European Years, such as the European Year for People with Disabilities (2003)⁶⁰ and the European Year of Equal Opportunities (2007).⁶¹ Other uses of the Article 13 included the Council decisions authorizing Framework Agreements or Protocols with States of the Western Balkans⁶² (which plan for the participation of these countries in Community programs),⁶³ and the establishment of the Gender Institute in Vilnius⁶⁴. While the Racial Equality Directive forbids only discrimination on the basis of racial or ethnic origin, the Framework Employment Directive addresses all the other forms of discrimination, including discrimination against religious minorities.⁶⁵

The Treaty of Lisbon made a final step with respect to discrimination. Article 10 of the consolidated EC Treaty states that, when defining and implementing any of its policies and activities, the Union “shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. As Toggenburg put it, the Union must thus “not only avoid discriminations (this is clear already from the general principle of equality and Article 21 of the Charter)” but it must “actively promote anti-discrimination whenever it is becoming active as legislator or as an executive organ. ... As a consequence, ethnic and religious antidiscrimination will therefore have to be a co-aim of every future EU-activity.”⁶⁶

A third direction of development for the question of cultural diversity within the EU consisted in the recognition of minority affiliation, which became a condition for adopting positive policies in favor of minorities. Minorities became a theme of European Parliament resolutions as early as the 1980s. Although the protection of minorities is closely related to the fighting of discrimination, the pressures in favor of creating a specific system of protection respond to a specific concern for national minorities. As indicated by the adoption of the Framework Convention for the Protection of National Minorities, many European countries define

national minorities as those groups of state citizens belonging to historical communities. The constitutional provisions or statutes in countries such as Austria, Denmark, Estonia, Germany, Liechtenstein, Luxembourg, Macedonia, Malta, Romania, Slovakia, Slovenia etc. guarantee specific rights to national minorities which other types of minorities do not enjoy.⁶⁷

In an initial phase, dubbed “idealistic” by Gabriel Toggenburg,⁶⁸ many Parliament resolutions were elaborated in the EP’s Committee of Culture. Initiatives attempted to develop even a Charter of Minority Rights.⁶⁹ In the same direction, the EP adopted the 1981 Resolution on a Community Charter of regional languages and cultures and on a charter of rights for ethnic minorities, the 1983 Resolution on measures in favor of minority languages and cultures, the 1987 Resolution on the languages and cultures of regional and ethnic minorities. In 1994, the European Parliament agreed on the Resolution on linguistic minorities in the European Community.

This important change in the 1990s was determined by the perspective of enlargement to the East. In Copenhagen, in June 1993, the European Council decided on the political conditions to be fulfilled before accession, and among them special emphasis was laid on the “respect for and protection of minorities”. In the framework of the Stabilization and Association Process addressed to the Western Balkans, any contractual relations were conditioned by the commitment to the generally recognized standards of human and *minority* rights.

In 2005, the Parliament’s Committee on Civil Liberties, Justice and Home Affairs adopted the 2005 Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe. It states that EU enlargement entails a more diverse Union and, as a consequence, the minority issues need to be given greater attention in the EU. Particularly, the need for special protection for Roma communities motivated the 2005 European Parliament resolution on the situation of Roma in the European Union,⁷⁰ and the related 2006 European Parliament resolution on the situation of Roma women in the EU. These resulted in the 2008 resolution on an “European strategy on the Roma”.

To conclude, throughout their history, the European Communities dealt with the issue of ethno-cultural and religious diversity by considering (1) national specificity, as an expression of the richness of the Continent and, consequently, the importance of supporting it with community resources; (2) the need for a system of protection against discrimination which should prevent dominant groups to force their cultural options against individuals with different ethno-cultural and religious identities; (3) the vulnerable nature of national minorities and therefore the need for special measures in their favor. All of these three approaches imply a recognition of and support for diversity and exclude the transformation of any ethno-cultural or religious identity – such as the Christian – into a criterion which is determinative of the “essence” of the Union.

Conclusions

The new millennium brought about extraordinary developments in the building of Europe, involving both state actors and social forces which were part of organized civil society. The variety of perspectives expressed within the European Convention in order to determine the future of the Continent eventually clashed in a fundamental disagreement and a heated debate when it was suggested that a reference to God or Christianity be inserted in the Preamble of the European Constitution. The controversy was resolved through the Constitutional Treaty. Subsequently, the Treaty of Lisbon “finalized” the political project announced by the 1950 Schuman Declaration by means of a code consisting of civic-political principles. The code is binding on Community institutions, member states, or any other state which might want to join the latter in the Union.

The development of the European system of human rights protection, of fighting discrimination and of the protection of vulnerable minorities represented a continuous process, propelled forward by the inner logic of a system constructed so as to ensure peace and social justice. The construction of the EU’s political community through civic and political values simultaneously ensured the free assertion of identity-related particularities. Experience has shown that the phrase “Unity in diversity” can only be read as a civic-political principle, and that diversity refers to the multiplicity of ethno-cultural and religious identities.

Whenever it had to seek a solution to identity crises within, the European Union looked at the set of principles discussed above, which has made it possible for the diverse European communities to live together peacefully for decades. These rules were set forth in the 1991 Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union during the dramatic attempts to put an end to the bloodshed in the former Yugoslavia.

The European Council turned to the same principles in June 1993 when, in adopting the Copenhagen enlargement criteria, it conditioned the entry of new democracies on guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities. They were invoked again when the EU tried to define a common position with respect to the roadmap for Kosovo’s independence.

While the option in favor of confessionalizing European identity expressed during the European Convention debates reflects the wishes of powerful churches which are also legitimate actors of the Continental civil society, this position betrays either a failure to understand the logic of the European construction, or an attempt to obtain a superior status which runs against the values of the Union. In this respect, the observations of the European Monitoring Centre on Racism and Xenophobia were borne out by the developments of the past few years:

The European Union and its Member States make significant efforts to promote, protect and preserve an open secular society with equal rights and opportunities. ... These values include respect for the uniqueness and freedom of the individual, equal opportunities for men and women (including the equal right of women to make individual choices in all walks of life) and equal treatment and non-discrimination on a number of grounds, including, for example, sexual orientation. Efforts to protect those principles may at times clash with the perceptions of certain individuals or faith groups.⁷¹

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Notes

1 As reported in *Bulletin quotidien Europe*, no. 8588, November 20, 2003, www.agenceurope.com.

2 "Towards the first European Council of the enlarged Union," *Tomorrow Europe 22* (June 2004), www.ciginfo.net/demain/files/tomorrow22en.doc.

3 *Ibid.*

4 They were also in favor of deleting the reference to the Union's dialogue with the churches and non-confessional organizations.

5 These members of the European Parliament also proposed amendments to Article 5 of the constitutional draft.

6 The proposal was also upheld by the Catholic Church in Romania.

7 This stance is, naturally, connected to the ROC's position in Romanian polls on public trust. Very often, however, the attitudes of the nominally Orthodox majority go against the official position of the Church. One example involves the question of organ donation. See Mihaela Frunză, "Ethical and living aspects of unrelated living donors in Romania," *Journal for the Studies of Religions and Ideologies* 8, 22 (Spring 2009).

- 8 “Turkish PM challenges EU to prove it not a Christian club”, *Xinhua News Agency*, 13 December 2004, www.highbeam.com/doc/1P2-16648404.html.
- 9 EurActiv, “European values and identity,” www.euractiv.com/en/culture/european-values-identity/article-154441.
- 10 Olaf Osica and Rafal Trzaskowski, “CFSP Watch 2005 – Poland,” www.fornet.info/CFSPannualreports2005/CFSP%20Watch%202005%20Poland.pdf
- 11 “Address of His Holiness Benedict XVI to the members of the European People’s Party on the occasion of the Study Days on Europe,” www.vatican.va/holy_father/benedict_xvi/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians_en.html.
- 12 Catholic News Agency, “Include God, Judeo-Christian tradition in European constitution: German bishops”, www.catholicnewsagency.com/new.php?n=8884.
- 13 EurActiv, “European values and identity”.
- 14 This period covers the first part of a decade of extraordinary creativity in EU history. It starts in 2000 with the adoption of the Treaty of Nice, with its historic Declaration 23 on the future of Europe, and with Joschka Fischer’s famous conference at the Humboldt University, “From confederacy to federation: Thoughts on the banality of European integration”. These were followed by the Laeken Declaration on the future of the European Union (2001), the European Convention (2003-2004), the Treaty establishing a Constitution for Europe (2004), and the Treaty of Lisbon (2007).
- 15 An ad-hoc meeting convened by the European Council in order to amend the EU Treaties in which representatives of the member state governments participate.
- 16 It is interesting to note here the special situation in Romania with respect to the relationship between organized civil society and political groups.
- 17 Jacques Delors reformulated the economics-state-society triad in the European social model as the competition that stimulates, the cooperation that consolidates, and the solidarity that unites. The triad emphasizes the dynamic dimension of the European construction. Jacques Delors, *El nuevo concierto europeo* (Madrid: Acento Editorial, 1993).
- 18 Manuel Castells, *La era de la información: Economía, política y sociedad* (Madrid: Alianza, 1998).
- 19 Jordan Bărbulescu, *UE de la național la federal* (București: Tritonic, 2005).
- 20 The 1948 congress reunited the 800 delegates who adopted the “Message to Europeans”. See Denis de Rougemont, *Europe en jeu* (Neuchâtel: Bâconnière, 1948).
- 21 Alain Touraine was a member of the Scientific guiding committee of the association *À gauche, en Europe*, founded by Michel Rocard and Dominique Strauss-Kahn.
- 22 Alain Touraine, *¿Cómo salir del liberalismo?* (Barcelona: Paidós, 1999).
- 23 There is an “European way of life” according to Jospin, that is, a typical way of acting, defending freedoms, fighting against inequality and discrimination, thinking about and organizing labor relations, gaining access to education and culture, and of organizing leisure time. All European countries have their own traditions, but together they make up a common universe. Lionel Jospin, “El futuro de Europa ampliada”, in *La integración europea*, ed. Aldecoa Luzarraga (Madrid: Tecnos, 2002).
- 24 Marián Kuna, “God, Christian Values and the European Constitution: Should the Latter Refer to the Former and Why?” Rebecca Blocksome, Nagypál Szabolcs & Peter Šajda (eds.), *Conflict Resolution and European Integration*, Ecumenical Anthology

- III, WSCF Central European Subregion (BGÖI & WSCF-CESR, Bratislava, 2004), 103-110.
- 25 Elias Kastanas, *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme* (Bruylant : Bruxelles, 1996).
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- 27 William L Ransom, Theodore Roosevelt, *Majority rule and the judiciary : an examination of current proposals for constitutional change affecting the relation of courts to legislation* (Clark, NJ : Lawbook Exchange, Ltd., 2007).
- 28 Vasile Boari and Sergiu Gherghina (eds.), *Weighing Differences: Romanian Identity in the Wider European Context* (Cambridge Scholar Publishing, New Castle upon Tyne, 2009), 11.
- 29 *Idem*.
- 30 Hans Kung, *Global Responsibility. In Search of a New World Ethic* (SCM Press: London, 1991).
- 31 Two treaties pending ratification were in fact signed in Lisbon – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). They shall be distinguished accordingly below.
- 32 See more generally Iordan Bărbulescu, *Procesul decizional în Uniunea Europeană* (Polirom: Iași, 2008), chs. XII.3, XIII.5.2 and 5.4., XIV.5.
- 33 The consolidated version of the Treaty on European Union, DO C 115/9 mai 2008.
- 34 Some authors believe such a reference would not have been made explicit had there been no Eastern expansion. Formerly communist European countries were considered problematic in this respect. Francisco Aldecoa, *La Europa que viene: El Tratado de la Lisabona* (Madrid: Marcial, 2008).
- 35 Respect for civic-political values becomes a condition for states which want to accede to the EU.
- 36 This procedure is included in the treaties ever since Amsterdam and was complemented by the Treaty of Nice. Initially, it was addressed to the new member states exclusively, but it was subsequently extended to cover all members.
- 37 *National Secular Society Newsletter*, 2 March 2007.
- 38 The ten countries were the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
- 39 Case 11-70. *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Judgment of 17 December 1970.
- 40 *Ibid.* para. 4.
- 41 Case 4-73. *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*. Judgment of 14 May 1974.
- 42 *Ibid.* para. 13.
- 43 Rodoljub Etinski, “O analiză retrospectivă și prospectivă a drepturilor omului în UE,” *Noua revistă de drepturile omului* 4, 3 (2008).
- 44 O. J. L 169/1, 29. 6. 87 .
- 45 Etinski, “O analiză retrospectivă și prospectivă a drepturilor omului în UE”.

- 46 O. J. C 340, 10 November 1997.
- 47 O. J. C 364, 18. 12. 2000.
- 48 Regulation No. 168/2007 of 15 February 2007, O. J. L 53 of 22 February 2007.
- 49 See Article 22 of the Charter (our emphasis).
- 50 In Nagel's sense: "I shall understand by 'atheism' a critique and a denial of the major claims of all varieties of theism." Quoted in Paul Cliteur, "The definition of atheism", in *Journal of Religion & Society* 11 (2009), <http://moses.creighton.edu/JRS/>.
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- 52 Toggenburg, "Unity in diversity".
- 53 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in OJ 2000 L 180, 22.
- 54 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in OJ 2000 L 303, 16.
- 55 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, in OJ 2004 L 373, 37.
- 56 Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination, in OJ L 303, 23.
- 57 Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality.
- 58 Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress, in OJ L 315, 1.
- 59 Decision No 848/2004/EC of the European Parliament and of the Council of 29 April 2004 establishing a Community action Programme to promote organisations active at European level in the field between men and women, in OJ L 157, 18.
- 60 Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003, in OJ 2001 L 335, 15.
- 61 Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) – towards a just society, in OJ 2006 L 146, 1.
- 62 See e.g. Council Decision 2005/518/EC of 22 November 2004 concerning the signing of a Framework Agreement between the European Community and Bosnia and Herzegovina on the general principles for the participation of Bosnia and Herzegovina in Community programmes, in OJ 2005 L 192, 8.
- 63 Gabriel N. Toggenburg, "The European Union and the protection of minorities," Strategic Background Paper delivered in Brussels, 7 October 2008.
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- 70 See OJ 2006 C 45E, 129.
- 71 European Monitoring Centre on Racism and Xenophobia, *Muslims in the European Union: Discrimination and Islamophobia* (EUMC, 2006), 62.