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# *Common constitutional traditions as Constitutional Law of Europe?*

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## **Abstract**

This paper refers to the European constitutional situation before the stop caused by the French and Dutch referenda. After the Constitutional failure the Lisbon Treaty removed the word constitution from the written dimension of the Treaties but the acquisitions of the ECJ case law still remain. The topicality of such paper about the dialectic between the national and supranational principles represents a starting point for a new reflection about the common constitutional traditions.

## **Key-words**

Common constitutional traditions, European Court of justice, constitution, sources of law

# *Common constitutional traditions as Constitutional Law of Europe?*<sup>1</sup>

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SUMMARY: 1. The system of Community law sources. - 2. The roles of general principles and transnational law. - 3. The case law of the Court of Justice. - 4. The introduction of Art.F (now Art.6, n.2) of the EU Treaty. - 5. The normative content of common constitutional traditions. - 6. The principles concerning constitutional organisation. - 7. Applicatory perspectives of these. - 8. The protection of fundamental rights in European law. - 9. The peoples of Europe and the "European people". - 10. The role of common constitutional traditions and the European Constitution.

1. Nowadays, there is very little doubt that the constitutional traditions common to the European continent have been very influential for the process of integration undertaken by the Community institutions, and subsequently pursued through the founding of the European Union. The links between this process and an intricate set of cultural factors, most of which can be traced to constitutional traditions of this type, are evident.<sup>3</sup> What is less clear, however, is whether in a context like this these traditions can take on, from the legal point of view, a function similar to those underlying "sources of law" in the technical sense in which this term is usually used by lawyers. This is the problem that will be debated here below.

Using the founding treaties of the three Communities and, later, of the European Union, a corresponding number of international organisations were also set up, each with their own individual characteristics and legal systems. These are constituted by rules and principles deriving from a plurality of

<sup>1</sup> This paper was presented at the conference "The Emerging Constitution of the European Union", EUI, Florence, 19-20 April 2002. The work presents, in abbreviated form, the ideas published in the first and fourth chapters of *"Il patrimonio costituzionale europeo"*, published by Il Mulino, Bologna, 2002. A first version of the first chapter of the book has also been published in English in *"Aux confins du droit. Essais en l'honneur du Professeur Charles-Albert Morand"*, Helbing & Lichtenhahn, Bâle, 2001, pp.307-319. This version has been specially prepared for the seminar held at the EUI on 19<sup>th</sup> April 2002.

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<sup>3</sup> Cf. The conference proceedings of *Le patrimoine constitutionnel européen*, held in Montpellier, 22-23 November, 1996, Strasbourg, Editions du Conseil de l'Europe, 1997

normative sources and most have been progressively unified into what has generally been called - sometimes rather approximately - "Community law". As well as directly establishing a set of provisions and norms, the constitutive treaties also foresee the competence of Community organs to issue "regulations" and "directives", constituting fully-fledged normative acts, made in respect of the rules deriving directly from the treaties. Treaties and normative acts given by Community organs thus form the first nucleus of a substantially unified system of sources, organised according to principles formulated by scholars referring mainly to state systems.

With respect to the generality of these latter, however, the system of sources of Community law can be distinguished by the fact that the source at the top is constituted by a treaty, or rather, by a set of treaties. These are acts that gain their normative force through agreement by the stipulating parties (that is, the Member States of the Union) on the basis of the principle of unanimity. This sharply contrasts with the demonstration of sovereignty underlying, in most cases, state constitutions.

This set of circumstances has, however, led to a situation that is rather anomalous. It was initially brought to the attention of scholars, after the case-law of the Court of Justice established the principle of direct effect of Community law within the limits of the states themselves and the principle of the supremacy of the Community system with respect to the legal systems of the Member States.

According to this view, states, although exercising their sovereignty individually and organising their internal legal orders autonomously, are subject to Community law, which acts as a *supra* level source. This derives from the treaties, the normative content of which derives from unanimous agreement between the states.

When states are organised on the basis of the democratic principle, single members can (at least theoretically) participate directly or indirectly in the activity of drawing up binding norms, although they cannot exercise a determining role in relation to them, given the constraint of majority rule. In this case, however, each single state has the power to condition each and every modification of the constitutional framework to which it is subject. Thus, while, on the one hand (if one views states as the main protagonists of this

scenario), this outcome might seem like a return to the most radical form of the social contract, it might, on the other (if the citizens are considered as the main protagonists), seem like a deviation from the democratic principle, precisely because of the lack of recognition for the voters' power to effectively influence, at least through forms of democratic representation, the constitutional activities of the Union.

Given the tendency of the constitutional structure of the Union to develop towards forms typical of democratic states, the supremacy of Community law with respect to state law was sharply redefined and limited (during the signing of the Maastricht Treaty in 1992). As a result, the role of the Court of Justice was circumscribed to controlling the enactment of provisions and norms forming the so-called "first pillar" and excluding those dealing with foreign policy, common security, and co-operation between police forces and judges in criminal matters (Art.L, now Art.46, of the EU Treaty).

However, this position has been partially weakened by the provision contained in the Treaty of Amsterdam which provides for a recovery of the competence of the Court of Justice, on the basis of a declaration of acceptance of its jurisdiction by the Member State and, within certain limits, also independently of such acceptance. This occurs in the case of "preliminary decisions on the validity or interpretation of the frame-decisions and of the decisions on the interpretation of conventions set forth according to the herein title [namely, relative to the co-operation between police and judiciary bodies on penal matters] and on the validity and the interpretation of applicatory measures of the same" (Art.K.7, now Art.35, EU Treaty). However, the resulting situation would seem to favour states rather than citizens.

2. Despite these difficulties, which are the result of some of the ambiguities intrinsic to the institution, the Community law system of sources has developed along lines that are very similar to those used by state systems. This has led to discussion about the roles of legal precedents and general principles.

Thus, while the analysis of the role of the treaties, regulations and directives has been carried out on the basis of interpretations that are already firmly consolidated within the limits of international law or those of the constitutional law of single Member States, there has been greater uncertainty over, on the

one hand, their usability in reference to the Community system of the notion of constitution and, on the other, the determining of the role to be played by legal precedents and general principles.

The uncertainty concerning the use of the notion of constitution derives from the use of this term - which the doctrine and jurisprudence have adopted - to indicate the set of principles and rules contained in the treaties from which the fundamental structure and functioning of Community institutions derive. This meaning of the term constitution, however, does not fully correspond to the meaning that it takes on when it is used to indicate the expression by which, among the sources of a state legal order (or in the case of an order that is comparable under this profile to a legal order), the sovereignty of the state in question can be expressed. It does indeed seem problematic for Community institutions to enforce this kind of function in reference to the treaties since, with respect to the order in which they operate, they constitute a source that is essentially external.

Thus the spread of this use of the term constitution in reference to the Community institutions has led to a great deal of confusion, in the sense that while it has led some scholars to support the idea that a "European constitution" already exists, deriving from the constitutive treaties (or that part of those containing the set of principles and rules which ensure the functioning of a particular institution), others continue, not entirely without reason, to deny the existence of a European constitution until the states check the revision procedures of the treaties. I will return to this point after discussing a series of preliminary problems concerning this area.

Concerning precedents, given the lack of any explicit provisions, the practice followed by most of the Member States (those with civil law systems) has generally been adopted. This does not recognize precedents as a source, but does accept them as being important for the systematic reconstruction of the legal system. This position is, in reality, not dissimilar to the function recognized to "persuasive" precedents. It should, however, be remembered that the rejection of precedents as a source, which is the position of lawyers from the civil law countries, is due more to the consideration that they are the result of interpretative activity and not of political choice (which is instead the case of the law) than the fact that they produce effects which may be more or

less similar to those of the law. Be this as it may, however, it seems obvious that the authority of the precedents established by the Court (and also perhaps that of the *obiter dicta* contained in its judgments) is notably reinforced by the make-up of the panel and by the position it holds in the Community system.

As for the general principles, opinion is favourable to their recognition as sources, both within Community law and within some state systems, although several distinctions are necessary, above all in relation to the different type of treatment that the notion may receive in concrete cases. Thus, a distinction needs to be made between a first technique (sometimes explicitly foreseen by the legislators, especially in reference to the norms on interpretation, where these are expressed in written form, but are viewed as general and widely used) which allows for a series of “principles” to be applied to cases that are not regulated explicitly (the so-called *analogia iuris*, compared to *analogia legis*, which leads to the application of the rule foreseen for one case when this is compared to another, but which is not envisaged by normative texts) and which must be deduced from the complete set of rules forming the system. The second technique, used mainly by legislators, consists in first fixing the principles and then, through a different source (often of a lower level), the rules used to apply them.

In Community law this last technique is applied specifically to “directives”, through which Community organs identify objectives to be reached, leaving it up to the states to decide on the means and forms to achieve this. This kind of normative act is made concrete in Art.249, previously Art.189, EC Treaty; however, case-law and doctrine have deduced that it is not immediately binding on the Member States, which must make it applicable through internal laws. Doubts persist, however, in relation to the similarity of normative content between directives and regulations (which are held to be immediately applicable once they become effective, according to ex.Art.254, ex Art.191, EC Treaty, with the consequent derogation of the general principle whereby the specification of the normative force of the sources are dependent on their formal requirements) and *vis-à-vis* any eventual “horizontal effects” (in the case that the directives are more exclusive, at any rate as direct effects, with consequent difficulties of a systematic order).

The Court of Justice has also used the technique defined by comparative doctrine as recourse to “transnational law”, according to which a rule established within one order can be applied in another even if it has not been explicitly foreseen by the law in force in the country in which the judge is working (or else a rule common to several orders can be interpreted in one way rather than another), as the effect of a cultural influence which induces judges working in a particular country to receive concepts or, as in this case, principles developed elsewhere. Referring to a specific case, the application of this technique is explicitly foreseen by a provision of the EC Treaty (Art.288, par.2, previously Art.215), in which it is however limited by the circumstances according to which the principle must be deduced not from any cultural tradition, but only from those belonging to the Member States of the Union, and it is necessary that these be traditions “common” to all the states.

3. This technique has been applied by the case-law of the Court of Justice in several cases; these have become particularly important in relation to general principles in the area of the protection of fundamental rights, compensating for the lack of a charter of rights applicable to the Community system.

It is in these cases, in particular, that the Court has referred to “constitutional traditions common to the Member States”, indicating that this path could well be open to other wider ranging applications. Indeed, it can be seen that the Court of Justice has used the general principles as they are described here as sources capable of producing norms which are immediately operative as law in the Community system, and thus, on the basis of the principle of the supremacy of this system and of the principle of direct effect, also in the Member State systems. Naturally, the presupposition of the application of the principles and rules resulting from these traditions to a certain paradigm is that the Court is competent to judge on the paradigm itself, and that it has been invested by the question through a regular petition, etc. However, these conditions are not generally considered as a factor underlying the theoretical delimitation of a source of law, but only as a circumstance capable of influencing the practical effectiveness of this, that is, the validity of the normative acts that it produces.



This interpretive line, which has been confirmed in the successive jurisprudence, means that the general principles deduced from the constitutional traditions common to Member States constitute “law” which the Court of Justice is obliged to apply, according to Art.230, formerly Art.173, of the EC Treaty, on a par with any of the juridical norms set forth explicitly in the treaties.

4. After this case-law had consolidated, the “European Union Treaty” evoked the “constitutional traditions common to the Member States” of the Union itself in a provision aimed at establishing what its attitude towards the “fundamental rights” should be. Specifically, Art.6, n.2, of the version of the treaty currently in force states that “the Union respects fundamental rights which are guaranteed by the European Convention to safeguard the rights of man and the fundamental freedoms, signed in Rome on 4<sup>th</sup> November 1950, and which derive from the constitutional traditions common to the Member States, in that they are general principles of Community law”.

Although on first reading this provision seems to acknowledge and strengthen the above orientation of the case-law, it should be observed that Art.46, lett.d), of the EU Treaty (previously Art.L) instead introduces a limiting criterion on the effectiveness of this source when it states that the Court of Justice can apply the provision of Art.6, n.2, “only with regard to the activity of the institutions”. The doctrine that has analysed this notion does not, moreover, recognise a source of law in constitutional traditions, but rather a notion with cultural characteristics.

In reality, it is clear that the provision, made concrete by the cited norm of the treaty, makes explicit common constitutional traditions and the protection of fundamental rights, but that it neither constitutes a new Community source nor codifies the source deriving from the case-law of the decisions of the Court of Justice. This is extremely clear (in relation to the protection of rights) in the debate that has surrounded whether it would be appropriate for the European institutions to formally comply with the European Convention in relation to the safeguarding of the fundamental freedoms and rights of man; in other words, whether it should proceed to acknowledge the relevant principles, transforming them into Community law. The Court of Justice has intervened in this debate to

state that the Community organs cannot comply with the Convention because the matter of fundamental rights goes beyond their competence, so that, if there is a desire to insert it into Community law, the constituting treaties will need to be modified.

Therefore, if the principles of the European Convention (and, more generally, all those deriving from the common constitutional traditions) have been considered as capable of being applied as general principles of Community law by the case-law of the Court of Justice, it seems unlikely that they were receded to the level of mere cultural factors by Art.F of the Maastricht Treaty and by the interpretation of the norms of the treaties which were subsequently adopted. It could, however, in any case, be maintained that they continue to operate at the very least as transnational law.

The Community organs seem to have followed these lines of argument when they subsequently foresaw a series of activities aimed at developing a “Charter of Rights”, destined to be inserted into the treaties. The declaration of rights drawn up by the “Convention” held for this purpose, and approved (although with a reserve on the right to successively define its legal nature) by the Nice Conference of 7-9 December 2000, confirms the line taken by the Court of Justice, indicating the EU Treaty, the other Community treaties, the social charters adopted by the Community and the Council of Europe,<sup>4</sup> and the jurisprudence of the Court of Justice and the Court of Human Rights, as well as the two indicated in the text mentioned above, as possible sources of the rights in question. Indeed, the common constitutional traditions of the Member States head this list. As we shall see in more detail further down, even when the Charter cannot be officially cited as legally binding as a result of a treaty or some other similar means, it cannot but determine a strengthening with regard to the jurisprudential direction mentioned above taken by the Court of Justice, which had referred to common constitutional traditions.

Given that there is a structural difference between the two forms of normative production – where the branch based on the unanimous agreement of the

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<sup>4</sup> The European Social Charter (of the Council of Europe) adopted in Turin on 18<sup>th</sup> October 1961 and revised on 3<sup>rd</sup> May 1996, and the Community Charter of Fundamental Social Rights of Workers of 9<sup>th</sup> December 1989 (approved by the heads of state and governments of the EC). On the control procedure of the application of the European Social Charter cf. the acts of the congress that took place in Strasbourg at the *Institut des Hautes Etudes Européennes* on 10<sup>th</sup> November 2000, published in “L’Europe des Libertés”, special issue edited by P. Benoît-Rohmer.

Member States is rooted in the Union's original format of an international organisation, while that based on jurisprudence does not depend on this kind of agreement but on the authority that non-legislative sources are able to provide (in common law systems, but not only) so that it is also substantially original, the development of the general principles of Community law achieved by the jurisprudence on the basis of common constitutional traditions seems to be able to operate independently of the parallel development of rights based on treaties. Only in the case where a situation of incompatibility occurred between the two forms of normative production that it was impossible to resolve through systematic interpretation would the problem of how to resolve eventual antinomies have to be faced. However, this situation has not yet occurred, and nor does it seem very likely to do so.

5. At this point the main question is which constitutional traditions common to countries forming part (or which might in the future form part) of the European Union need to be looked at here? To answer this question, we need to start with an examination of the orders of the countries in question so as to identify those principles that, over the course of time, have represented the theoretical bases of the orders themselves; we need to evaluate the normative data, but also the pronouncements made during the debates leading to their adoption and their concrete application, the jurisprudence, etc. The examination of contemporary constitutional orders is obviously important (since it is clearly not very productive to look at principles that have been abandoned or even debated and disregarded); nevertheless, it is also important to analyse the stages through which they have passed on their way to reaching their current form. To this end, I will therefore examine not only the studies on the history of the constitutional history of the single Member States but also the studies on constitutional history carried out with regard to the entire European area (this will obviously include the development of several non-European countries which have stayed close to Europe, starting with the United States).<sup>5</sup>

These principles can be divided into two large groups according to whether or not they treat fundamental rights directly or refer to them only indirectly,

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<sup>5</sup> Cf. for an example of this kind of work, R.C. Van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge University Press, 1995. Also by this author, see *European Law in the Past and the Future*, Cambridge, Cambridge University Press, 2002.

through the realisation of that organisational form of society, which is the primary assumption of the legal protection of the same rights, given that it provides the means for the realisation of such protection.

It should, however, be noted that the recognition of these rights and legal protection do not exhaust the constitutional traditions that are taken into consideration here. Even though, in fact, the moment at which “subjective” rights are enacted through the instruments belonging to “objective” law constitutes the most technically appropriate form of implementation, it is clear how in practice the recognition of rights and their protection do not take place only through the procedures foreseen and regulated by law. This is indeed also possible in many other circumstances in which they are realised through spontaneous enacting (that is, beyond the boundaries of legal duress) of orientations that have matured in the limits of a certain culture, to which the person in question and the social group of which he forms part belong. It is in fact the cultural traditions (without any added adjectives) of humanity that influence and contribute to forming legal traditions and, in particular, constitutional traditions.

Broadly speaking, then, the search for constitutional traditions implies a search for the cultural traditions of a particular society, but, in concrete, the widening of the field of research to all those phenomena that can be tied to the notion of culture would end up by dissolving this reference through over-generality. In concrete, the traditions that are taken into consideration here are in fact mainly those that appear to be able to translate into “general principles of Community law” in the sense that this is described above. To single out a criterion by which to limit the notion examined here it is thus necessary to develop, on the one hand, the meaning of the term “constitutional” and, on the other, to evaluate the range of the limit deriving from the expression “common to the Member States” (of the Union) which can be considered as more or less equivalent to the term “European”, and which constitutes the other description of the “traditions” recalled in Art.6, no.2 of the EC Treaty.

As to the first problem, we need first to examine the debates that have developed around the possibility of using the description “constitutional” to limit the corresponding discipline, i.e. to distinguish the organs that occupy the highest position in the organisation of the state. In other words, to identify a

category of legal acts that more directly constitute the exercising of sovereignty. The developing of the discipline known as “constitutional law” and the differences that can be identified with other legal disciplines, on the one hand, and non-legal disciplines that study the same facts, on the other, does not, however, provide us with elements that can be used unequivocally to this end.<sup>6</sup>

Nor does an analysis of the use of the adjective “constitutional” throw any light on this potential category of the organs of state, which occupy relatively high positions in their organisation, if compared to the administrative and jurisdictional organs.

In reality, in order to identify a meaning that is fully acceptable for the adjective “constitutional”, it is necessary to go back to the history of constitutions and mainly to the development of this notion in relation to the matters that led to the formation of the “modern state” and its development over the last four centuries. This development was marked, first, by the setting up of the organisation of the public powers through the forming of the large European monarchies and the administrations whose task it was to enact the directions that were given from them; second, by the development of the role of modern parliaments and other institutes founded on the democratic principle, to which has corresponded the increasing recognition of the fundamental rights of the individual and the improvement of the organs of guarantee (judges, administrative judges, constitutional judges, etc.). Together with the single steps of this development, we need to identify the constitutional inheritance that has come into being and to which the jurisprudence of the Court of Justice, Art. 6 no.2 of the EC Treaty and the recent European Union Charter of Rights have referred.

6. The constitutional organisation of the European Union was initially mapped out according to internationalist principles, even if with some correctives that represented a first step towards a federal type of framework (from the outset these were presented as one of the objectives, although no times was specified for their realisation). In the Paris Treaty of 18<sup>th</sup> April 1951, constitutive of the

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<sup>6</sup> Cf. A.Pizzorusso, *La Costituzione, il diritto costituzionale e le altre discipline*, in “Rivista di diritto costituzionale”, 1999, p.182 ff.

European Coal and Steel Community, the institution of, first, a “High Authority” was provided for, together with that of a “Special Council of Ministers”, in which all the governments of the Member States were represented. The former was constituted by members chosen on the basis of their “competence” and operating “in complete independence, in the general interest of the Community”<sup>7</sup> and competent also to adopt directly obligatory provisions for individuals.<sup>8</sup> Also provided for was, second, a “common assembly”, composed of “delegates” from national parliaments (in the waiting period before the enacting of “projects aimed at allowing election through direct universal suffrage, according to a uniform procedure for all the Member States”),<sup>9</sup> and holders of “powers of control”, including the possibility of passing a vote of no confidence on the High Authority.<sup>10</sup> Finally, the treaty provided for a “Court of Justice”, formed of “persons offering all the guarantees of independence and uniting all the conditions required for the exercise, in the respective countries, of the highest jurisdictional functions, namely, that they be law consultants of the highest competence”, named in common agreement with the governments of the Member States and competent to ensure the respect of Community law, deciding on cases proposed by the Member States, the Council, firms and company associations.<sup>11</sup>

The constitutive treaties of the European Economic Community and the European Community of Atomic Energy, signed in Rome on 25<sup>th</sup> March 1957 in a political context that was very different in many respects, did not make federalist hopes very much more concrete, but they did contribute to significantly reinforcing the role of the Community in the area of the “Common Market”; alternate phases followed this, some of which launched developments and some of which acted as a brake on this activity. These phases were sometimes linked to the enlarging of the Community, which at this point seemed very clearly geared to unify, in the following years, most of the geographical area that could be described as Europe.

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<sup>7</sup> Art.9 Constitutive Treaty of the ECSC, subsequently substantially confirmed in the texts that substituted it: see Art.213 (ex Art.157) of the EC Treaty.

<sup>8</sup> Art.14 and 15, ECSC Treaty.

<sup>9</sup> Art.21, no.3, ECSC Treaty.

<sup>10</sup> Arts.20 and 24, ECSC Treaty.

<sup>11</sup> Art.31ff. ECSC Treaty

From the organisational point of view, the most interesting aspects of these developments, which are still ongoing, were provided by the realisation of the direct election of members of the European Parliament; by the increase in its powers (which now allow it to participate in the legislative activity carried out by the Commission and the Council and in the formation procedure of the Commission); by the activities of the European Council - formed of the heads of state or government of the Member States and the role of which was similar to that of a sort of collegial head of state; by the increase in the number of cases in which the Council deliberated by a majority rather than unanimously; and by the reinforcing of the functions of the Community organs, in particular, the area of "foreign policy and common security" and that of the "co-operation between police forces and judiciary systems in regard to penal matters" (even if their assertion took different forms as a result of the adoption of the system of "pillars"). Provisions were adopted for the Schengen Treaty on the abolition of domestic frontiers and for the realisation of monetary union. All this activity reinforced the roles they played. Above all, however, it was once the stratification of a vast and consolidated "*acquis communautaire*" had taken place, including the adoption of a single discipline for many important areas of the economy, and greatly strengthened by the unification of the monetary system and the almost complete removal of domestic borders, that greater stability came about.

The first decisive contribution towards consolidating the political initiative that gave rise to these events was provided by the work of the Court of Justice when, as mentioned above, it affirmed the principle of the superiority of Community law over domestic law and the principle of the direct applicability of this within the legal orders of the Member States. Moreover, as became implicitly clear from the results achieved in practical terms by these decisions and several of the others that were taken, it tacitly confirmed the possibility of the Court's own jurisprudence to act as a factor shaping and producing Community law that is not immediately derivable from the deliberations made by the representatives of the Member States. As also mentioned above, moreover, there is the Court of Justice's affirmation indicating the common constitutional traditions of the Member States as general principles of Community law, to which I will return below.

The treaties of Maastricht of 7<sup>th</sup> February 1992, Amsterdam of 2<sup>nd</sup> October 1997 and Nice of 26<sup>th</sup> February 2001 (this last is still in the process of being ratified), have continued this process, giving rise, amongst other things, to a fourth institution called the “European Union”, functioning in very close harmony with the others. The latter, however, also if finds its origins in documents like the Spinelli project of 14<sup>th</sup> February 1984, has still not realised all the conditions that would allow us to say that this process has now reached a clear and definite outcome.

As has already been pointed out, the inspiration to common constitutional traditions within the limits of Community law was unavoidably curbed by the fact that the institutions giving form to the Union and the Community were set following the model used by international organisations, for which the principles are different from those formed through reference to state orders (particularly after the latter adopted, even if only more or less fully, democratic standards, and which were less compatible with the international organisation managed by states). From the start, however, the development that saw the Community system coming close to forms that were typical of state orders, has led to the combination of solutions from the first type with those of the second, and it is likely that this framework will continue in the future, even if it is difficult to establish at what point a relatively stable balance can be reached. What it does seem possible to claim with some degree of certainty is that it will not be possible for either of the two fundamentally opposed requirements – those of ensuring that a certain right of control of the Member States over the Community institutions and of realising a certain level of representativeness of the Community organs towards those who are affected by their provisions according to the democratic principle – to be entirely disregarded even in the future. As a result, a more stable solution, if it is possible to find one, is that of realising the best possible reconciliation between the two requirements, and certainly not that of privileging one to the detriment of the other.

Having said this, it can be observed that the “European form of government” is mainly characterised by a relationship in which there is virtually no separation between the legislative and executive powers, and that this situation is made more serious by some of the specific factors characterising the framework of the organs to which corresponding functions are assigned, leading to a



framework that is completely different to the kind that one finds in state orders at both regional and federal levels. The problem is further complicated by its connection with the problem of the relations that exist between the Community organs and the jurisdictional organs of the Union, even if the structure of these last is in many ways different from that of most of the jurisdictional organs of the Member States and even if a "European Constitutional Court" does not yet exist.

Certainly, the main problem, in trying to define the form of government currently practised by the European Union, is that of identifying the nature and the role of the "European Council" (Art.4, formerly Art.D of the EU Treaty), which assembles the heads of state or government of the Member States as well as the president of the Commission. The way in which this organ is composed makes it impossible to view it as a truly permanent organ of government, since it is inconceivable for either its activity to be continuous or for it to treat a limitless series of problems. Instead, the only kind of meeting that it is possible for it to hold leads inevitably to their definition as "summit meetings" between heads of state, mainly aimed at ratifying the work carried out in other seats, to its exercising an important role in terms of image, and to being called on to discuss and truly resolve any particularly complex problems only under exceptional circumstances. Even its representation as a collegial head of state appears untenable, as things stand, since it is unable to express its own will as separate from that represented by the members of the states forming it. And it is clear that this will must be formed following the procedures that are typical of international law (which do not exclude the role of summit meetings, but which treat them within normal frameworks). The development of the organisation of the European Union towards a framework that is less tilted towards the internationalist conception thus passes mainly through the identification for this organ of a role that is less incompatible with those that can be shaped within the limits of the constitutional type of conception, but it seems unlikely that this will occur without some sort of structural changes being effected.

Linked to this problem is that of the more fully effected specification of the role of the Commission (Art.211, formerly 155 ff., EC Treaty) into a European government true and proper. The difficulties probably arise from not so much

from its current structure – which is undoubtedly highly conditioned by the need to ensure the presence of members from different countries (although this not a question of forms of representation: Art.213, formerly Art.157, par.2 EC Treaty) as much as from the relations it holds with other organs (Council and Parliament, above all, but also including other more minor organs) - which seems to make its governing activity difficult because of the complex mix of activities of different organs that every procedure necessitates. As well as resolving the problems concerning other organs, the main question relative to the Commission is probably precisely that of freeing its actions of these conditionings, subject to the verification of their effective usefulness. As to the structure of the Commission, definite progress can be seen to have been made in the new procedure for constituting the organ. This means that there are now closer links with the European Parliament and that the role of the president is now more similar to that of a *premier*. Linked to the problems of the structure and role of the Commission are obviously those relative to the Community public administration.

Juxtaposing the role of the Commission is that of the Council of Ministers, “formed of a representative from every Member State at the ministerial level, with binding power over the government of the Member State” (Art.203, formerly 146, par.1, EC Treaty), with which the Committee of Permanent Representatives of the Member States (COREPER) collaborates, and “responsible for the preparation of the work of the Council and execution of the tasks that the Council gives it” (Art.207, formerly 151, EC Treaty). One might predict the role of a second chamber for this organ – along the lines of the German *Bundesrat* – in a two-chamber parliament. This would, however, mean very large changes, and I am not sure whether the time is right for these.

A better definition of the competencies of the European Parliament (Art.189, formerly 137 ff., EC Treaty) is also probably necessary. This should consist essentially, although not exclusively, in specifying its legislative competencies and those that guide and keep track of the activities of the Commission more closely, although in this latter case the main problem lies in the fact that the Commission’s capacity to function cannot depend on the functional capacity of the parliamentary groups and the parties to which they correspond. It is, moreover, clear that attaining any level of efficiency for these last would not be

easy; while waiting for some kind of solution to this problem, it might be worth considering the possibility of strengthening, for some purposes at least, links with national parliaments.

In conclusion, the close application of the principle of separation of powers in relations between the legislative and executive powers (which is rarely put into practice with any rigour at the state level either) would seem very problematic at the Community level, where specific difficulties can be added to those that make it problematic to fulfil this objective at every other level in any case. A greater separation between the competencies between the legislative and executive organs is certainly to be hoped for,<sup>12</sup> even if it must be taken into account that the carrying out of normative functions by the executive is universally widespread even at state level, so that the only plausible reason for this not occurring at the European level (or for its occurring less in the future than it does now) lies in the fact that European legislation should be one closely based on principles, intended to be developed at national, regional and local levels according to the vertical techniques of subsidiarity.

Although there is a large and detailed literature on the area, it would seem legitimate to highlight that in this set of problems the central point of difficulty lies in developing a framework capable of realising a better balance between the general internationalist and constitutional influences for the organisation of the Community.

The judiciary organisation of the Union (Court of Justice and the Court of First Instance) instead appears to be grounded on a much firmer framework, especially after the revision of the effective regulations adopted with the Nice Treaty. In a long-term perspective, however, it should not be excluded that several of the problems that have been more widely debated concerning state jurisdictions will not emerge further down the track. However, these perspectives seem, for the moment, to be far removed in time.

The main problems that currently need to be resolved appear to be linked, above all, with relationship with national jurisdictions and with the European Court of Human Rights, but neither of these are problems of organisation. The first derives from some margins of uncertainty that still exist – in some Member

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<sup>12</sup> Cf. the White Book, published by the European Commission on “European governance” of 25<sup>th</sup> July 2001, p.36.

States rather than others – over the relationship between Community law and domestic law. To date, these have been almost completely left up to the orientations provided by the Court of Justice and by the national supreme courts and constitutional courts and, while these are not yet completely in line, most of the major problems have been resolved.

7. In order for relations between the European Union and the Member States to be fully organised into a stable and efficient system, it is necessary for the Community institutions to be able to fully express their true capacity as political actors as distinct from the states, which seems to date to have happened only in reference to certain problems, but not across the board. In particular, the lack of a Union foreign policy became clear with the Yugoslavian crisis, which has perhaps proved to be the most challenging situation in which Europe has found itself since the Second World War (this was obviously tied to the problems raised by the Cold War, which usually went right over the heads of most Europeans, who felt its consequences and only very rarely felt that they could exercise any effective political role). Certainly, the creation of a better framework from this point of view too will not come about only as a result of the resolution of juridical and institutional problems, but also through the creation of an organisational framework capable of greater rationality and efficiency.

From the technical-juridical point of view, the problem of relations between the European Union and the Member States presents itself as one of the relation between juridical orders, but there are still considerable doubts about the setting up of such relations, and this interpretation would seem more correct: there is, in fact, a considerable difference between the solutions that are adopted in practice in the countries that follow the traditional monist conception of international law and therefore affirm the superiority of Community law – even in relation to domestic constitutional law – and those that instead opt for the dualist conception, attempting to safeguard a sphere of intangible principles, without being clear about the consequences of any violation of these principles on the part of the Union.

Once again, although there is a wide literature on the problem, I would like to make the point that a conflict of the gravity that would come about as a result

of the violation of supreme principles by the Union could certainly not be resolved by a constitutional or European judge, but would give rise to a series of problems that would probably lead to the dissolution of the Union or to the exit of one of its members if it remained isolated. There are many good reasons for believing that the opposite is more likely to happen, however, in the sense that a Member State might violate supreme principles, leading to a vigorous reaction by the majority of the members of the Union.

Concerning this eventuality, it should be pointed out how the “constitutional” principles of Community law have enabled the system of guarantees that support them to increase due to the procedure provided for by Art.7 of the EU Treaty, in the text introduced with the Treaty of Amsterdam, which foresees the adoption of sanctions against those Member States that are responsible for “the serious and continuing violation [...] of principles according to Art.6, par.1”, that is, the “principles of freedom, democracy, respect for human rights and fundamental freedoms and the state of law”. The relative procedure foresees a preliminary request from the European Council to the Member State in question to present its observations regarding the reported violation, thus the establishing of the violation by the Council with a decision taken by a unanimous vote (not taking into account the vote of the Member State in question nor any eventual abstentions), at the proposal of a third of the Member States or of the Commission and subject to opinions in compliance with the European Parliament (deliberated with a majority of two thirds of the votes cast). This can lead to the suspension of some of the derivative rights for the Member State in question from the application of the EU Treaty, including the right to vote in the Council, with a majority deliberation qualified according to Art.205, par.2, EC Treaty; the measures adopted can be successively amended or revoked with the same majority, following changes in the situation that led to them.

Art.1 of the Nice Treaty foresees the amendment of Art.7 of the EU Treaty: a) in the sense of attributing power of initiative procedures to the European Parliament; b) in the sense of providing for the evaluation of “a clear risk of serious violation” of the above-mentioned principles, to be pronounced by a majority of four-fifths of the members of the Council subject to an opinion in compliance with the European Parliament, prior to the establishing of the

“existence of a serious violation”; c) in the sense of providing that the Council, before proceeding with such deliberation, should listen to the Member State in question and that it can “request that independent individuals present a report on the situation of the Member State in question within a reasonable amount of time”.

The introduction of this provision clearly signals – even if it is absolutely not definitive – the developing structure of the European Union towards a framework that is less tied to internationalist traditions, and which comes closer to constitutional traditions. It leads, for example, to a clear limitation on the right of citizens to choose the constitutional system of government that they prefer; if such system does not respect several fundamental principles that the Union takes on as part of its constitutional order, the Community organs can intervene with sanctions against which the sovereign nature of the order of the state in question cannot be opposed.

Given that most state legal orders provide for a system of territorial autonomies, varying in what they are called and how they are planned, but in any case such as to lead to – at least in several cases – various levels of legislative and administrative activity, relations between the Union and Member States and between the latter and the different levels of autonomy cannot be conceived as a single hierarchy, and direct relations that step over one or more levels (this can also take place in state environments) can instead be both feasible and useful.

This view opens up the way to the problem of the possibilities for the *Länder*, regions and other such institutions (and, to a lesser extent, to the corresponding problems of local bodies, such as, for example, large metropolitan municipalities) to directly enact Community law, and to the problem of the opportunities for these subjects to participate in the ascending phase of the formation of Community law, or else in the activity of some Community organs (starting with the Committee for the Regions, but not only). Analogous evaluations can also be made in reference to other institutions freely working in the society.

8. The protection of fundamental rights within the European Union has represented a problem for many years because of the separation that has

come into being between the Community legal system and the system of the European Convention for the safeguarding of fundamental freedoms and human rights, headed by a distinguished international organisation, the Council of Europe. Undoubtedly, this separation constitutes an anomaly that can be explained above all with the strongly innovative and pioneering characteristics that both these initiatives have taken on in the difficult situation that was created in post-war Europe, when the uncertain state of affairs created by the war tended to continue because of the impossibility of arriving at the stipulation of a peace treaty with Germany and with the threat of a third world war, which in fact did take place in a weakened form, through the "Cold War".

In this situation, the two political projects that gave rise, respectively, to the formation of the European Communities and the activity of the European Court of Human Rights constituted initiatives that were very important for opposing the resurgence of the difficulties that had led to the terrible tragedies that had destroyed Europe in the first half of the twentieth century. The realisation of an integrated Franco-German economy made it possible to call an end to the controversy over the Rhine frontier, thereby eliminating the principal cause of the tensions that had led to the two world wars, at least as regards the European aspect of these. The creation of the European Court instead made it possible for individuals to affirm their rights, even in the face of the state of which they were citizens, thereby putting an end to the situation where men were completely subservient to the state, even to the point where their lives were sacrificed in order to satisfy the conceit of a military commander or the fanaticism of an over-excited politician – these factors having played a significant role in giving rise to wars inspired by nationalist passion.

The economic union showed that it was possible to achieve many more positive results by working together than by mutually crushing each other, and the activity of the Court of Strasbourg showed that it was right and possible to defend individual rights against states without this meaning that there had to be any betrayal of the state. Historians will undoubtedly go on to establish more precisely the reasons lying behind the lack of closer co-ordination between the two initiatives, but it is not difficult to imagine that such reasons lie in the strongly innovative characteristics that each project presented and that made it difficult to place them per se in a hypothetical reform movement

of wider and better co-ordinated dimensions, also given the state of international relations. The circumscribed and relatively modest nature of both also enabled them to establish themselves without too much difficulty and without giving the impression that they intended to effect a general transformation of European society, within which the division into states that had taken place over the last few centuries were still extremely important.

Once the two institutions had established separate roots, in fact, they set up different organisations, operating in fields and ways that were quite distinct, and they thus developed quite independently, without any apparent need to co-ordinate between themselves. This need began to take on a more resolute form, however, as a result of their success and above all when the activity of the Community began to take on, at least in certain fields, a role similar to that of a super-state. In addition, this also became more apparent when the interventions by the Court of Strasbourg began to become less sporadic, allowing for possibility that the Convention would be accepted as a basic component of a European legal system (thanks to the end of the Cold War and to the events following this).

In this situation, the projects to co-ordinate the activities of the two institutions became more necessary and the proposal to make the Communities adhere to the Convention seemed like a good solution to this, although the negative opinion of the Court of Justice<sup>13</sup> brought this discussion to an abrupt close, through its exclusion. The drawing up of a European Union Charter of Rights, which substantially acknowledged the Convention by giving it a new juridical status, became at this point obligatory. It was felt, indeed, that this solution might well offer some advantages in the sense that it would render it possible to update the text - no longer recent, even though it had aged less than its original date might suggest, thanks to the jurisprudential changes that had been made and the protocols that had been added to the original document. It was also suggested that it be co-ordinated with the European Social Charter since, despite its importance and despite the fact that it treated events that had clearly played a part in European life over the previous ten years, it had not succeeded in playing a role proportionate to the importance of its preceptive content.

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<sup>13</sup>Court of Justice, 28<sup>th</sup> March 1996, n.2/94.



Above, we have seen how events developed and how the question was still waiting to be resolved. The description of this gives some clues as to the tracing of a first minimal solution. This comes from the observation that the drawing up of the Charter of Rights did not represent a normative activity aimed at recasting a previously unregulated topic into an essentially new discipline, but that it constituted the recognition of principles that had already been developed, on the level of normative activity, within state constitutions and, on the level of systematic interpretation, within the area of activity of the doctrine and constitutional jurisprudence. Rather than a new normative source, then, the Charter of Rights can be considered as an important sign of the recognition of the normative content of an essential component of the constitutional traditions common to the Member States of the European Union. The latter – first through the jurisprudence of the Court of Justice and then through the treaties – had already recognised the nature of the general principles of Community law and had thus already formed part of the constitutional inheritance of the European peoples for many years.

9. We tend to speak of these European peoples in the plural, maintaining that it is difficult to recognise a single “European people” in the inhabitants of the continent, showing characteristics reflecting those of the single national collective groups that have been the protagonists of the history of this continent. This observation has given rise to a widespread belief that the European Union will not take on the characteristics of an institution founded on its own autonomous sovereignty rather than on the agreement of the Member States until the day when its citizens can reach – from the linguistic and cultural point of view and, more generally, from the point of view of the *affectio societatis* uniting it – a kind of mix that will allow them to consider themselves as a single people. They will thus be able to talk of themselves as a “European nation” in the same way as the English, French, German, Italian, Spanish, etc. nations were discussed during the nineteenth and twentieth centuries, as a legitimising factor for the corresponding states. This view, however, does not take into account the historicity of the concept of the nation or of the development that it has undergone in more recent times.

If we can claim that, starting from the times corresponding above all to the last few decades of the eighteenth century, a tendency has developed to appreciate the cultural, linguistic and sometimes even religious particularities that distinguish different populations, attributing markers of identity of this kind to human groups and - from a corresponding community *animus* - an identity that is important from the political point of view, allowing them to legitimise claims for the conservation or, eventually, the formation of a state of which all the individuals sharing these characteristics and *animus* could form part, it is equally clear that this tendency has gone through a phase showing a growth in its intensity, a period of maximum strength and, finally, a period of strong decline.

It has indeed happened that the expectation of identifying state borders with "linguistic or ethnic borders" between the different nations has, although in some cases managing to do this fairly easily, in others shown it to be virtually impossible, without making use of seriously repressive measures towards minority groups such as the transferral of populations, forced assimilation and conversions, or even the extermination of those believed to be extraneous to the dominant group. Consequently, during the twentieth century, the excessive appreciation of the national factor and above all, the idealisation of belonging to a state-homeland as the highest possible aspiration possible for a human being, whereby any other constraint - not excluding the same absolutely legitimate desire to survive wars and conflicts of all kinds - should be postponed, has ended by resolving itself into a dangerous degeneration of the idea of the nation, to which some of the most tragic and criminal events that have bloodied the course of history are owed.

This kind of evaluation - while not hindering the notion that the descriptions determining the national identities of single individuals deserve respect on a par to any other of the differences combining to form the cultural richness of humanity (and thus supporting, within reasonable limits, the political or legal claims aiming to favour the defence of such national identity both within the limits of a state that symbolises it or within the limits of a state that is multi-national or in the form of minority protection) - leads one to hold that the descriptions that are more strictly tied to the idea of nations as this has

developed over history, are not the only ones on which the construction of a state or a body similar to a state can be grounded.

The conditions to overcome the kind of deterioration that has taken place concerning the idea of nation, and that it can be limited to an essentially cultural description, seem to have been fully realised in Europe, after the terrible experiences that took place in the first half of the twentieth century, such as those that culminated in the atrocious crimes characterising the *shoah*. Despite the evidence of delays in this kind of politico-cultural maturing that we have seen among the peoples living in various regions of the Balkans and of which their recent experiences offer proof cannot be considered as strong enough to contradict a conclusion of this kind. It would also seem to be generally supported by the many and persuasive signs of proof of the contrary, which show that the coming together of peoples has gone considerably forwards thanks to the technical progress that now allows for easier communication and which enables relations to be much easier than in the past. It would thus seem that the idea of the nation and its corollaries cannot form part of the European constitutional inheritance if not within the limits in which it can help to establish a national identity understood as a sub-type of cultural identity, worthy of protection as such, but certainly not as the basis for claims of irredentism or of attitudes that are opposed to tolerance, held up as the maximum unifying value of human society. Consequently, the realisation of a “European people”, understood in this sense, cannot influence the development of the European Union towards the acceptance of legal forms that are more efficient than those currently enforced. This can be clearly seen in the history of the continent, which was characterised – in the period prior to the development of the idea of the nation – by homogeneous features allowing it to be viewed as a politico-cultural unit. The recovery of this type of identity does not in any way contrast the respect of national identities currently recognised as such.

10. Let us now draw some conclusions, in the light of the above considerations, regarding the problem of a “European constitution”, a problem that has recently been widely debated at the political and legal levels.

It first needs to be said that when speaking of a European constitution in this sense, the discussion cannot be limited to the fact that the European Union has its own legal order and organisation, making it possible to identify principles and applicable regulations within the structures that already exist, and, in particular, some more general principles and regulations that form a sort of frame in which the others can be placed, just as constitutional norms generally refer to state orders and organisations.

Clearly, constitutions in this general sense can be discussed in reference to any type of order or organisation in an essentially descriptive sense that is obviously different to that in which the term constitution has been used in reference to states, above all from the beginning of the second half of the eighteenth century. In a more specific sense, the constitution lays down the basic nucleus of principles and regulations that hold a system and an organisation together, and which normally accept sources of the order itself into the hierarchy at a level that is higher than those belonging to other sources (even if this superiority does not always have an invalidating effect on incompatible subordinate norms or any other similar consequences).

The problem to be addressed is thus if the notion of constitution, which has basically been considered in reference to state orders, can also be applied to an order such as that of the European Union, despite the differences that distinguish it from a state order. And, if the answer to this is yes, whether a European constitution already exists, or whether it is simply a potential construct that the European institutions will be able to realise only where a corresponding political will endowed with enough consensus to realise it comes into being.

As we have seen, the European Union order, in its current form, represents the result of the combination of two factors. The first of these is the original agreement made, through constitutive treaties, by six founding states and then widened to include other Member States with adherence treaties. This first basis undoubtedly finds its grounds in international law, according to which the treaties currently regulating the Union have been stipulated and which thus do not lead to a full sovereignty over them. It is thus more reasonable to talk of a partial transfer of sovereign rights (as declared in Art.23, par.1, German Constitution, introduced into this in 1993, with a wording similar to that used in

the preamble of the French Constitution of 1946, recalled in par.1 of the Preamble to the Constitution of 1958<sup>14</sup>).<sup>15</sup>

The second factor is represented by the recognition of the common constitutional traditions of the Member States as general principles of Community law. This recognition has been effected by the jurisprudence of the Court of Justice independently of a specific internationalist base and has thus given to the unwritten principles that are ascribable to such traditions a role that is comparable to that typical of the principles and regulations constituting the constitution of a country that has an unwritten constitution (the most obvious example of this is the British constitution, which, as is well-known, is made up of unwritten principles, often integrated in different ways by written texts, which moreover recognise such principles, rather than introducing new principles). It should be noted that the subsequent acceptance of the appeal to constitutional traditions that was inserted into the Maastricht Treaty did not operate a novation of the source of this precept, tending instead to confirm its character as an unwritten source, on a mainly jurisprudential basis.

It certainly cannot be excluded that, as many hope, one day it will be possible to amend the constitutive treaties of the Union and Communities, adopted in respect of their procedural rules, leading to a true and proper constitution as the base of a related legal system; at this point, however, even in the light of the constitutive acts of the second Convention operating according to the Laeken agreements, this does not seem very near. Neither can it be excluded that, at a certain point, the organs of the European Union might decide autonomously to free themselves of the constraints that currently subordinate them to the Member States, substituting the order founded on the treaties for a constitutional order of a federal type. This hypothesis was held as possible by some when for the first time (in 1979) the election of the European Parliament took place with direct universal suffrage (and which some people expected to lead to a stand similar to that taken in the *Jeu de paume* of 20<sup>th</sup> June 1789,

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<sup>14</sup> A less exhaustive wording is used in Art.88, par.1 of the French Constitution, introduced with the constitutional law no.92 –554 of 25<sup>th</sup> June 1992, in which the common exercising of certain competencies of the Member States of the Union and the Communities is discussed.

<sup>15</sup> Provisions considered as endowed with a similar range, even if differing to some extent from these, can also be found in Art.9, par.2 of the Austrian *BundesVerfassungsgesetz*, in Art.34 of the Belgian Constitution, in Art.20 of the Danish Constitution, in Art.28 of the Greek Constitution, in Art.11 of the Italian Constitution, in Art.49 *bis* of the Luxembourg Constitution, in Art.92 of the Dutch Constitution, and in Art.93 of the Spanish Constitution.

which determined the *interversio* of the general French State powers, turning the constituency of delegates into a constituting assembly). However, the Strasbourg assembly did nothing of this kind and, with hindsight, this is not surprising. Currently, the only part of European law that does not find its origins exclusively in the agreements between the states – and that is thus not characterised by heteronomy – is the jurisprudential law that has been developed by the Court of Justice, according to which the recognition of the constitutional traditions common to the Member States as “general principles of Community law” plays a particularly important role.

This reconstruction allows us to advance the hypothesis that, if we can already talk of a European constitution today, in the specific sense that the notion of constitution has taken on over the last two centuries, it is more correct to do so by referring to the common constitutional traditions of the Member States, presenting the currently enforced constitution of the Union as an unwritten constitution in which several texts that existed before the formation of the Community institutions and other later texts as having been included in various ways. These texts are the result of the treaty norms, documents of various kinds, such as the Charter of Rights (even independent of the fact that it has been explicitly attributed a specific ranking), and they exercise an essentially interpretative function of unwritten constitutional norms. The principles and rules that derive from the common constitutional traditions are not, as we have seen, pactional norms, but principles and rules produced from a jurisprudential source to which the organs of the European Union (the Court of Justice, but also the others as well as the Member States and the citizens of the Union) recognise normative and higher law force.

In addition, with reference to a constitution of this kind, the admissibility of “conventions of the constitution”, which might integrate or interpret it in various ways, as happens in the British case, also needs to be evaluated. The position of the constitution in the system of sources operating within the limits of Community law also needs, like all constitutions, to be specified, and, on the basis of general criteria regulating relations between the legal orders, an evaluation made of how these are placed with regard to its relations with the sources belonging to the orders of the State Members and with those belonging to the other orders with which the European order has special links.

From the first point of view, what would emerge (according to the indications contained in the section of the preamble to the Charter of Rights mentioned above) is a system of Community sources with a base in the constitutional traditions common to the Member States, an autonomous expression of the sovereignty of the European Union, developed little by little in the treaty provisions, in those of the Community normative acts, in the Community and national jurisprudence, etc. From the second point of view, the relationship established between territorial and non-territorial public bodies operating within the Union and with the private orders of various kinds that establish relations with it would thus be made more precise. Moreover, these relations would obviously also be clarified with international organisations and with states not forming part of the Union.

An approach of this kind to the current problems of European unification would probably have the merit of making some of these less dramatic than they have recently been made out to be. This is true of the problem of the European Constitution, where it is recognised that European integration does not at all depend on the approval of a document that is deliberated by a constitutive assembly or through a referendum and with features similar to those of state constitutions that have been adopted in the more recent period of the development of a “modern state”, since it is perfectly viable for a constitution to be constructed on its own on the basis of the currently existing situation (although it also has to be admitted that it will have to – and probably for a long time yet – reconcile the features of constitutional traditions with those of the internationalist traditions which initially formed the European institutions).

This is also true of the problem of the “European people”, where it is admitted that the national idea that constituted an important factor for the formation of a certain type of state during the nineteenth and twentieth centuries, but which is today in decline, at least in those parts of the world that are more economically and culturally developed, so that it is likely that it will undergo some sort of a change (although it is by no means said that this will lead to a complete end of its influence, it is more likely that it will take the form of a reduction to the rank of a basically cultural factor). It would thus seem possible that forms of solidarity based on different values, which in the past united the peoples of Europe, can play a more important role than would have been

possible in the age of nationalism given the realisation of more successful forms of political and social organisation.

This is true for the problem of the so-called “democratic deficit”, which, according to most, still characterises the European institutions, and which would most definitely seem to be reducible (where this seems possible and necessary) if we give to the democratic principle and other principles of contemporary constitutionalism the rank of supreme source of the European order (bearing in mind that, also at the state level, for the well-known difficulties that oppose each other, the enacting of the democratic principle does not always reach acceptable levels light-heartedly).

Finally, this is also true for the problems that need to be resolved in order to achieve the right balance in the relations between the Union and the states and between the latter and regional and local institutions, as well as between the public institutions taken as a whole, and between private institutions and single individuals, also in their capacity as holders of fundamental rights and freedoms.