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The European Union and the identity of Member States

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1. Preface

The issue of the meaning attached to Constituent Units in Federations and in the Federal Political Systems in Europe has an emblematic example in the European Union itself: this is perhaps the most important case study available both for the fact that it is the only true process that aggregates sovereign States in which the federalist idea has some influence, and for the political and cultural role that Europe still plays in the Western World; and also because of the economic globalization process that has modified the perception of the economic and financial wealth (assets and capital) that circulates in the world.

With regard to these three profiles, Europe is still in search of its identity and of its place in the global system which depends on the positions of its Member States. It may therefore be useful to consider the "*Federation* (the EU) *from the standpoint of the States federated*".

In this sense the current crisis, that puts a strain on the European institutional structure with respect to the role of the Member States, brings up again the demand for uniformity/unification, implying the conferral of greater powers on the EU, as against the demand for multiplicity/differentiation, that instead underlies the stance whereby the Member States seek to preserve as many powers as possible, removing them from the Union. Indeed, in the crisis, the structure is struggling to find the right balance between prevalence of a central policy and possibility for Member States to serve their national interests (or national selfishness) in the best of ways.

Hence, an analysis not from the viewpoint of the EU but from that of a Member State like Italy, France or Germany, in brief of each of the 27 Member States in order to

come up with some remarks on the EU and on its future prospects, may prove to be of some interest.

In the process of European integration, reference to the building of the Community was the main topic for a long time and the States embraced it in the name of the benefits that would derive to them from the establishment of the supranational entity.

And the characteristics of the individual Member States have not been lost in this construction of a Community of States, if anything, very refined historic reconstructions highlight how Europe has been shaped according to the way of being of the States that constitute it; the drive, from all quarters, was in the direction of a European supranational body in which the Member States could recognize themselves mutually and peacefully.

The reason for this special unifying type of process has produced a European homogeneity that in the case of the European Union has led to the formulation of Article 2 TEU[1]. The engine of this evolution derives from the desire of the Federation to have a democratic nature; i.e. from the fact that by asserting its existence and its role, it may progressively lose the features of an international organization based on the absolute powers of the governments that have federated, and it may take on the profile of a democratic entity.

Evidence of the mix of the democratic principle with the federal principle has long since been present in the history of Federal States[2] as well as in the European experience.

In the experience of federal states, the growth in democracy has been accompanied by a decrease in the autonomy of Member States[3]. The most evident, but not the only, outcome of this process is the concentration of competences at Federal level with an impoverishment of local legislations[4].

In Europe, the excessive growth of the Community's competences and the interference of the powers of the European Institutions have been seen as a threat to the political autonomy of the Member States, since much power has been accumulated in the absence of a sufficient level of democratic legitimation. However, the persistent protest about Europe's *democratic deficit* has run the risk of not proving to be a good argument in defence of the prerogatives of the Member States[5].

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[1] See Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". On this argument, see Stelio Mangiameli, "The Union's Homogeneity and Its Common Values in the treaty on European Union", in *The European Union after Lisbon. Constitutional Basis, Economic Order and External Action*, eds. Hermann-Josef Blanke and Stelio Mangiameli, Heidelberg: Springer, 2012, 21 et seq.

[2] In this regard a sharp analysis is made by Konrad Hesse, *Der unitarische Bundesstaat*, Karlsruhe: Müller, 1962.

[3] See Robert Alan Dahl, *Quanto è democratica la Costituzione americana?*, It. trans., Roma-Bari: Laterza, 2003.

[4])...in the German case, barely offset by the participation of the *Länder*, by means of *Bundesrat*, to the federal legislative procedure.

[5] On this argument, see Marcel Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden: Nomos, 1997.

And so with the Maastricht Treaty, even before the principle of homogeneity was formulated, the focus of the debate was shifted to a different element: respect for the identity of Member States[6].

Therefore, with the entry into force of the Maastricht Treaty, within the framework of the principle of homogeneity, a discussion began in which European identity was opposed to the identity of Member States with constant references also to the issue sovereignty[7].

In this area the circumstance that the principles (and values) of homogeneity are the same both for European identity and for that of the Member States, is not important, since the identity of the latter is called upon to carry out from the systematic standpoint a role that is totally different from the principle of homogeneity. Indeed, even though based on the same elements of identity as that of the Union, the identity of Member States serves the purpose of delimiting the action of the Union.

The issue is clearer in the formulation of the principle of identity in the Lisbon Treaty, in the point which regulates the relationships between the Union and the Member States (Art. 4 (2) TEU)[8]. In fact, here it is stated that "*the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government; it shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*".

But how can a European Member State make reference to itself and define itself in such a way that can prove to be useful in a comparison with the other Member States of the Federation (*intrastate*) and with the Member States of other Federations (*interstate*)?

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[6] Cf. Art. F (1): "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy". The role of this principle in the *Amsterdam* version, with the introduction of the principle of homogeneity (Art. 6 (1)), is very different, because the democratic element is included in the term homogeneity and Art. 6 (3) TEU merely states that "The Union shall respect the national identities of its Member States".

[7] The question about identity has been raised especially by the German Federal Republic, in relation to the effect of the integration process on domestic federalism, with a constant loss of the *Länder's* "statehood". On the issue of the European identity, see, in the recent literature, Paul Nihoul, "Union économique, union politique, union juridique? : la contribution de la Présidence belge à la définition d'une identité européenne", *Annales d'études européennes de l'Université catholique de Louvain*, 9, 2011, 115-127; Vincenzo Baldini, "L'identità politica e costituzionale dell'Unione europea", in *Il costituzionalismo asimmetrico dell'Unione*, ed. Antonio Cantaro, Torino: Giappichelli, 2010, 111-125; Wolfgang Graf Vitzthum, "Das eigene muss so gut gelernt sein wie das Fremde", in *Der grundrechtsgeprägte Verfassungsstaat: Festschrift für Klaus Stern zum 80. Geburtstag*, Berlin: Duncker & Humblot, 2012, 1001-1014.

[8] On role played by this provision, see Hermann-Josef Blanke, "Art. 4", in *The Treaty on European Union (TEU). A Commentary*, eds. Hermann-Josef Blanke and Stelio Mangiameli, Heidelberg: Springer, 2013, 1 et seq.; Armin von Bogdandy and Stephan Schill, "Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag", *ZaöRV*, 70, 2010, 701-734. For some remarks about the formation of the provision, see Barbara Guastaferro, "Il rispetto delle identità nazionali nel Trattato di Lisbona: tra riserva di competenze statali e «controlimiti europeizzati»", *Quaderni costituzionali*, 2012, 152-155.

This first question is inevitable if we want to build a scheme of reference expressing the coordinates of the *Character*, *Role* and *Significance* of the Constituent Units of the European Union.

2. The Identity of the member States and political Territoriality

Undoubtedly, each Member State is defined geographically through its territory in the static and traditional sense, and its boundaries are still a valid element of its definition as political entity, above all from the standpoint of international and supranational law, and not only European law.

In Europe, the territory automatically defines political territoriality in the sense that it presupposes an internal homogeneity of the socio-economic, cultural and ideological foundations that politically substantiate the community and society thus making each European State different and identifiable from the other European States, not only for the space that it occupies on the continent but also for the synthesis of all the historic and current elements that connote the character of the people and give political sense to its action within the Community.

Obviously within the Member States, especially the larger ones, but not only (e.g. Belgium), there is a multiplicity of internal fractures that contribute to the variegated context of each Member State, and the federal or regional structure of the European States makes these differences even more evident.

Even Germany, that in Art. 72 Basic Law on the "*maintenance of uniformity of living conditions beyond the territory of a Land*" ("*die Wahrung der Einheitlichkeit der Lebensverhältnisse u*□*ber das Gebiet eines Landes hinaus*") lays down a fundamental constitutional principle for the centralization of the federal legislation, has had to modify this principle following the reunification with Eastern Germany, in order to attenuate its impact[9].

But from the standpoint of the European Union, in principle, the Member States are considered as a Contituent Unit whose main feature is given by the will of converging towards the Union.

This direction of the process of European integration is well defined in the second (the only point taken up by the Constitutional Treaty) third and fourth paragraphs of the

[9] Art. 72 (2): "if and to the extent that the establishment of equal living conditions throughout the federal territory [...] renders federal regulation necessary in the national interest" ("*wenn und soweit die Herstellung gleichwertiger Lebensverhältnisse im Bundesgebiet oder die Wahrung der Rechts- oder Wirtschaftseinheit [...] eine bundesgesetzliche Regelung erforderlich macht*"). On the reforms of Art. 72 GG, see Rupert Stettner, "Art. 72", in *Grundgesetz Kommentar*, ed. Horst Dreier, Tübingen: Mohr Siebeck, 2006, 1599 et seq.; Julia von Blumenthal, "La riforma costituzionale del 2006 e il «nuovo» federalismo", It. Trans., in *La Germania di Angela Merkel*, eds. Silvia Bolgherini and Florian Grotz, Bologna: Il Mulino, 2010, 43 et seq.; Enzo Di Salvatore, "La potestà legislativa derogatoria dei *Länder* tedeschi", *www.issirfa.cnr.it – Studi e interventi*, 2013, 1-11; Anna Gragnani, "Sindacato di costituzionalità e giusto equilibrio fra unità e differenziazione in uno Stato federale (in tema di giustiziabilità della Erforderlichkeitsklausel)", *Rassegna parlamentare*, 2005, 673-694.

TEU preamble, under which the Contracting Parties: a) *draw* "inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, b) *recall* "the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe", and c) *confirm* "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law"[10].

The Treaties present a remarkable attitude with regard to the economic, social, cultural and ideological peculiarities of the Member States in that they do not seem to recognize the political value of these factors. Indeed, these factors, that can explain the essence of the political relationships among Member States, because they influence the political position of each Memebr State in the European Institutions, are not taken into account in the definition of their "identity". Moreover, the elements of differentiation that have to do with culture, language and religion are the subject only of a specific and approrpiate protection in the Treaties.

Indeed, according to the principle of "united in diversity" the latter confirm the enhancement of the elements of national differentiation[11]. In the Treaty on the Function of the European Union, "culture" is a competence of the Member States, with regard to which the Union may simply "decide to take an action of support, coordination or complement", and even in this form there is the enhancement "of national and regional differences", and also an element of unification, albeit small[12].

A stronger emphasis on national peculiarities was present in the preamble of the European Constitution which states «*that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny*». This is perhaps the most controversial and least studied aspect of the European model because in the literature on European constitutional law an extremely formalistic approach prevails very often without considering that the political process of the European Union cannot be clearly and fully

[10]About the preamble TEU, see Stelio Mangiameli, "Preamble", in *The Treaty on European Union (TEU). A Commentary*, eds. Hermann-Josef Blanke and Stelio Mangiameli, Heidelberg: Springer, 2013, 1 et seq.

[11] See Art. 3 (3), last sentence, TEU: "[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced"; and Art. 22 of the Charter of Fundamental Rights of the European Union: "The Union shall respect cultural, religious and linguistic diversity".

[12] See Article 167 (1) TFEU "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and *at the same time bringing the common cultural heritage to the fore*". But see also paragraph 4: "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, *in particular in order to respect and to promote the diversity of its cultures*"; and paragraph 5: " In order to contribute to the achievement of the objectives referred to in this Article: – the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, *excluding any harmonisation of the laws and regulations of the Member States*; – the Council, on a proposal from the Commission, shall adopt recommendations".

explained without considering the way of being of the national political classes, their history vis-à-vis the European construction, the weight of the national economies, the financial structure of the Member States, and the selfish reactions of each individual State in foreign policy matters and in times when mutual solidarity should prevail.

The crisis has highlighted the importance of these aspects and their analysis leads us to say that the European government, because of the conduct of the Member States and of some in particular, also with the signing of the Europan Stability Mechanism and of the Fiscal Compact, has failed and seriously jeopardized the very existence of the Union and of the Euro, by distributing the financial costs (as in the case of Greece) with little solidarity, when a difference political behaviour could have made it possible to cut back costs and go on being competitive as European Union, as occurred when Germany dumped the costs of its reunification onto the other EU States.

But now that Pandora's box is open, we need to consider these aspects as the true (and only) determinants of the European process.

3. The Identity of Member States and the European legal order

In the Treaties, the theme of the identity of the Member States is given undisputed importance from the constitutional standpoint and as a function of the delimitation not only of the powers of the European Union but of the very integration process that cannot go as far as touching, maiming, modifying or canceling the identity of its Member States.

For these purposes the identity of the Member States is not delineated according to culture, language and religion and not even on the basis of the principles of the structure of their respective orders (European and national) that arise from the values of the homogeneity clause that are an effect of the process of transfer of the fundamental principles (like the respect for human dignity, freedom, democracy, equality, the rule of law, etc.) from the orders of the Member State to the European Union.

There are no doubts that the expression: "*These values are common to the Member States*" means that the foundation of the Union, namely the structural principles of its order, is not different from the foundation of the Member States, that is from the structural principles on which they have built their orders as a result of a century-old history fuelled by the constitutional events of the European States[13].

The circumstance that these principles/values are now shared does not attenuate the threat for the identities of Member States as one might believe – and Art. 4 TEU, hence, is not the direct consequence of the common vision of the structural principles. Indeed, identity, taken as element of differentiation (what makes each State different and unique), protected by the Treaty, has to do with the constitutional autonomy of the Member States

[13] On the issue of common values, see Ugo Villani, *Valori comuni e rilevanza delle identità nazionali e locali nel processo d'integrazione europea*, Napoli: Editoriale scientifica, 2011.

and with their inalienable powers, whose reservation is a specification of the division of competences between the Member States and the Union.

It is no chance that Art. 4 (1) refers to the classical clause of residuality under which "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States" and the principle of respect for equality and identity of the Member States by the EU is followed by the fields that determine the constitutional autonomy of the Member State, which add "their fundamental structures, political and constitutional, inclusive of regional and local self-government" and respect for "their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

According to the Treaties, the identity of Member States is binding on the interpretation of European primary law and on the validity of its secondary law.

In some respects, also considering the instruments that the States may put into action within the European order, one might say that there is some complementarity between respect for identity of Member States and respect for the principle of the competences conferred.

European law must govern only the matters conferred by the Treaties and always with respect for the principle of identity; if European law, albeit respecting the principle of the competences conferred, were to touch the identity of Member States protected by the Treaties, it would in any case be illegitimate.

Consequently one cannot say that Member State identity is incompatible with European competence and vice versa. In the Treaty, the two principles may give rise to situations of conflict and to actual forms of antinomy between legal rules.

In conclusion, it is a matter of solving the issues of interpretation of the provisions of the Treaties and of assessing the requests for cancellation that are made, also on the initiative of the Member States themselves, directly (Art. 263 TFEU) or incidentally (art. 267 TFEU), before the EU Court of Justice that carries out the task of ensuring "that the interpretation and application of the Treaties the law is observed" (Art. 19 TEU).

4. The Identity of Member States and the national Constitutions

The definition of the identity of Member States, provided by Art. 4 TEU, does not wholly reflect the content of identity, but represents a framework whose content depends rather concretely on the Constitution of each Member State. Indeed, it is up to the Member States to define the boundaries of their identity that must not be crossed by European Law, whereby the content of their identity would become a composite comprising between European level and national level; and, if this premise is accepted, the validity of secondary European law ends up depending not only on the Treaties but also

on the provisions of domestic (constitutional) law which could be the opposite of the application, execution and implementation of European law.

Moreover, a similar control over respect for identity, based on the State order, could be exercised on European law directly by the national judge, who by directly not applying it and in the absence of a control by the EU Court of Justice, through the preliminary rulings concerning the interpretation of the Treaties (Article 267 TFEU), would himself be the bulwark against the principle of supremacy of European law (according to statement no 17 of the Lisbon Treaty), even where European law were to be consistent with the principle of conferred competence and its use were to be respectful of the principles of subsidiarity and proportionality (Art. 5 TEU).

From this standpoint the issue of the priority of the national Constitutions over observance of European law would again re-emerge behind the theme of the identity of Member States.

From this there derives the attempts to build absolute and insurmountable "counter-limits" into the order of Member States, with respect to European law that is one of the recurrent topics posed by the constitutional judges of Member States and that would coincide with the protection of the essential core of the Constitution that cannot be renounced with respect to the European order, and would constitute a limit to constitutional revision from the standpoint of the domestic order in that its violation would touch the identity of the State and would hence determine a constitutional rift.

Very briefly we could recall the highlights of this vast body of constitutional case law that was at first essentially Italian and German, to which recently also the case law of other countries has been added, including French case law[14].

4.1. France

In particular as regards the latter, the French Constitution envisages a preventive constitutional verification mechanism of European Treaties, implemented by the

[14] Among constitutional case laws, it is worth mentioning the case law of the Spanish Court (judgment DTC 1/2004 of 13 December 2004), which, on the basis of Sect. 95(1) Sp. Const. ("The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment"), is similar to the French; and the constitutional case law of the Polish Court, whose decision (Judgement of 24 November 2010, Ref. No. K 32/09, published on 6 December 2010 in the *Journal of Laws* – Dz. U. No. 229, item 1506) is based on the same arguments of the *Lissabon-Urteil case*. On Spanish case law, see Maria Rosaria Donnarumma, "Intégration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de justice et des Cours constitutionnelles", *Revue française de Droit constitutionnel*, 84, 2010, 746-748. For some Spanish literature on the issue of national identity, see Miguel Ayuso, "La identidad nacional y sus equivocos", in *Europa: Costituzione o Trattato per suo Fondamento?*, eds. Marcello M. Francazani and Stefania Baroncelli, Napoli: ESI, 2010, 45-52.

Constitutional Council, which has the task of establishing compatibility with the Constitution, imposing on Parliament, in case of inconsistency, that the Constitution be amended without which ratification is not be possible (art. 54 F. Const.)[15].

The Constitutional Council has based its verification of the European Treaties on the principle of sovereignty as laid down in Art. 3 of the Declaration of the Rights of Man and the Citizen of 1789 ("The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it") and in art. 3 of the 1958 Constitution ("National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum").

The consequence of this control on the Lisbon Treaty was that in the case in which the provisions of the treaties were considered capable of questioning or touching French sovereignty, the Constitutional Council would recommend the preventive amendment of the Constitution, prior to ratification, so as to give constitutional juridical coverage to the European Treaties[16].

The procedure for verifying the European Treaties with respect to the Constitution has had an important precedent in the case of the European Constitution (2004)[17], in which it was stated that the principle of supremacy indicated in the European Constitution (art. I-6) and inclusion in the new treaty of the Charter of Fundamental Rights did not require a revision of the Constitution, while the provisions on the European Economic and Monetary Union, the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas were considered as "*clauses of the Treaty which transfer to the European Union powers affecting the essential conditions of the exercise of national sovereignty*" and hence such as to *require a revision of the Constitution*.

The revision of the Constitution was required also in the following cases: for the "principle of subsidiarity" as set forth in Article I-11 of the Treaty, because "*the implementation of this principle may not suffice to prevent transfers of competence authorised by the Treaty from taking on a dimension or being carried out in such a way as to affect the essential conditions of the exercise of national sovereignty*"; for "*any provision of the Treaty called a bridge provision*"; for the simplified revision procedures of the Treaties; and, more in general, for "*any provisions of the Treaty which, in a matter inherent to the exercise of national sovereignty and already coming under the competences of the Union or the Community, modify the applicable rules of*

[15] Article 54 Fr. Const.: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution".

[16] See Conseil constitutionnel, Decision N° 2007- 560DC – 20 December 2007 and the following Loi constitutionnelle n° 2008-103 du 4 février 2008 modifiant le titre XV de la Constitution.

[17] Conseil constitutionnel, Décision 2004-505 DC – 19 November 2004. See, *ex multis*, Florence Chaltiel, "Une première pour le Conseil constitutionnel – Juger un Traité établissant une Constitution", *RMCUE*, 2005: 5 et seq.

decision-making, either by replacing the unanimous vote by a qualified majority vote in the Council, thus depriving France of any power to oppose such a decision, or by conferring decision-making powers on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative" (para. No. 29).

The importance of the decision of the Constitutional Council on the Constitutional Treaty derives from the circumstance that the arguments were referred to by the decision on the Lisbon Treaty, since the contents were the same, beyond the structural difference existing between the two Treaties.

Consider that in order to understand the rationale of the protection of national sovreignty, and as the Constitutional Council pointed out on the occasion of the examination of the Maastricht Treaty (1992)[18] that markedly changed the previous European pacts, with respect to Article 3 of the Declaration of the Rights of Man and the Citizen and the first paragraph of Article 3 of the 1958 Constitution, we need to consider also the opening of the content of the constitutional provisions in favour of international law, like paragraph 14 of the Preamble to the 1946 Constitution, that states that France *"shall respect the rules of public international law"*; and paragraph 15, that states that *"subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace"*; and Article 53 of the 1958 Constitution, which provides, that *"treaties or agreements relating to international organisation"*, may only be ratified or approved by the President of the Republic pursuant to a Law.

Consequently the Constitutional Council has stated that *"it follows from these various institutional provisions that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements relating to participation in the establishment or development of a permanent international organisation enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States, subject to reciprocity"* (para No. 13)[19].

The French constitutional tradition, based on the jealous custody of the sovreign prerogatives of the State, is therefore based on the idea that the "*Treaties of the European Union (are) consecrated by the sovreign State*"[20], but at the same time it uses the revision of the Constitution as a means for adjusting its legal order to the needs arising from its participation in the European integration process[21], in accordance with the constitutional

[18] See Conseil constitutionnel, Décision n° 92-308 DC du 09 avril 1992.

[19] ...and it continues: "However, should an international agreement entered into to this end involve a clause conflicting with the Constitution or jeopardising the essential conditions for the exercise of national sovereignty, authorisation to ratify would require prior amendment of the Constitution" (para No. 14).

[20] See Florence Chaltiel, "La souveraineté de l'État et l'Union européenne, l'exemple français. Recherches sur la souveraineté de l'État membre", *LGDJ*, Paris, 2000: 160 et seq.

[21] On the issue of the identity of the Member States in the French literature, see Sébastien Platon, "Le respect de l'identité nationale des États membres: frein ou recomposition de la gouvernance?", *Revue de l'Union européenne*, 556, 2012, 150-158; Béligh Nabli, "L'identité (constitutionnelle) nationale: limite à l'Union européenne?", *Ivi*, 210-215; Jean-Denis Mouton, "L'État membre entre souveraineté et respect de son identité: quelle Union européenne?", *Ivi*, 204-209; François-Vivien Guiot, "L'identité européenne: au-delà d'une certaine

principles of opening up to the international community that uphold it, thus contributing to determining its constitutional identity.

4.2. Italy

In Italy, the relationships between domestic order and Community order in the Italian experience have been characterized by the idea that the fundamental principles of the Constitution (those that ensure its identity and the form of state chosen for the Italian Republic) and the inviolable human rights that it regulates have prevalence over the constitutional elements that have formed in the EU order through the treaties, and produced by the European integration process as a result of the rules produced by Community legal sources.

Indeed, the Italian constitutional judge has repeatedly confirmed the possibility of examining the ordinary law that ratifies and implements the European treaties in the light of the limits indicated, and goes as far as assessing the *"lasting compatibility of the Treaty with the aforementioned fundamental principles"*[22].

Right from the beginning the foundation of Italy's participation in the integration process was identified in Art. 11 Const., according to which "*Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of*

phénoménologie?", *Revue de l'Union européenne*, 559, 2012, 384-395; Constance Grewe and Joël Rideau, "L'Identité constitutionnelle des États membres de l'Union européenne: flash back sur le *Coming-out* d'un concept ambigu", in *Chemins d'Europe: mélanges en l'honneur de Jean Paul Jacqué*, Paris: Dalloz, 2010, 319-345; Florence Benoît-Rohmer, "Identité européenne et identité nationale: absorption, complémentarité ou conflit?", *Ivi*, 63-80; Anne Levade, "Citoyenneté de l'Union européenne et identité constitutionnelle", *Revue des Affaires Européènnes*, 1, 2011, 97-105; Vlad Constantinesco, "La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales: convergence ou contradiction? Contrepoint ou hiérarchie?", in *L'Union européenne: Union de droit, Union des droits – Mélanges en l'honneur de Philippe Manin*, Paris: A. Pedone, 2010, 79-94; Jean-Denis Mouton, "Réflexions sur la prise en considération de l'identité constitutionnelle des Etats membres de l'Union européenne", *Ivi*, 145-154; Anne Levade, "Identité constitutionnelle et exigence existentielle: comment concilier l'inconciliable", *Ivi*, 109-128; Béligh Nabli, "L'identité constitutionnelle européenne de l'Etat de l'Union", *Ivi*, 155-171; Dominique Ritleng, "Le droit au respect de l'identité constitutionnelle nationale", in *Vers la reconnaissance de droits fondamentaux aux états membres de l'Union européenne?*, eds. Jean-Christophe Barbato and Jean-Denis Mouton, Bruxelles : Bruylant, 2010, 21-47.

[22] See Corte costituzionale, judgment of 27 December 1973, no. 183, *Giur. cost.*, 1973, 2401 et seq., 2420; in the same sense as already stated Corte costituzionale, judgment of 27 December 1965, no. 98, *Giur. cost.*, 1965, 1322 et seq., 1339 et seq. For some literature on the concept of *counterlimits*, cf. Paolo Barile, "Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane", *Com. intern.*, 1966, 14 et seq., now in *Scritti di diritto costituzionale*, Padova: Cedam, 1967, 701 et seq., 713; more amply, Marta Cartabia, *Principi inviolabili e integrazione europea*, Milano: Giuffré, 1995, in part. 95 et seq. A final solution for the relationship between domestic and European law was found with Corte costituzionale, judgment of 8 June 1984, *Giur. cost.*, 1984, 1098 et seq.; on this decision, see the remaks made by Antonio Tizzano, "La Corte costituzionale e il diritto comunitario: vent'anni dopo", *Foro it.*, 1984, 2063 et seq.; Gladio Gemma, "Un'opportuna composizione di un dissidio", *Giur. cost.*, 1984, 1222 et seq.; Antonio Ruggeri, "Comunità europee, Stato e regioni dopo la sent. n. 170/1984 della Corte costituzionale sull'efficacia dei regolamenti comunitari", *Le Regioni*, 1985, 433 et seq.

sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends"[23].

In the case-law of the Constitutional judge, this article was to be interpreted as deeming that if there are given preconditions, it would be possible to sign treaties which restrict sovereignty, allowing that the traties be enacted through an ordinary act of Parliament and without a revision of the Constitution. This very circumstance was to make it possible to carry out an examination of constitutional legitimacy on the law implementing the European treaties. Indeed, the Court specified that the meaning to be attributed to the limitations of sovereignty cannot consist in accepting a "power to violate the fundamental principles of our constitutional order, or inalienable rights of the human person"; and that, if this were so, there would always be the "guarantee of the (constitutional) auditor on the lasting compatibility of the Treaty with the aforementioned fundamental principles"[24].

Although the Italian Court never renounced a dual interpretation of the relationships between domestic and European order, because they are both "*autonomous and distinct, albeit coordinated according to a division of competences laid down in the Treaty*"[25], it stated – following the *Simmenthal* decision[26] – that when confronted with an irreducible incompatibility between domestic and Community rule, "*it is the latter, in any case, that prevails*"[27].

However, the conclusion of the Court does not mean that the relationships between the two orders are absolutely removed from the area of competence of the constitutional judge, because the "coordination" between the two orders may concern only "the limitations of sovereignty" and never the relinquishing of sovereignty. Consequently – and

[23] On the problem concerning the constitutional basis of the European order, see, with different opinions, Antonio La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale*, Milano: Giuffré, 1961, in part. 296 et seq.; Rolando Quadri, *Diritto internazionale pubblico*, Napoli: Liguori, 1968, in part. 63 et seq.; Benedetto Conforti, "Regolamenti comunitari, leggi nazionali e Corte costituzionale", *Foro it*., 1976, I, 542 et seq.

[24] See the already mentioned judgment n. 183 of 1973, 2420.

[25] Corte costituzionale, judgment no. 183 of 1973. On the decision, see Paolo Barile, "Il cammino comunitario della Corte", *Giur. cost*., 1973, 2406 et seq.; Guido Panico, "La legittimità costituzionale della normativa comunitaria di effetto diretto: luci ed ombre della sentenza della C. Cost. n. 183 del 1973", *Riv. dir. eu*., 1974, 201 et seq.; Angelo M.V. Valenti, "Norme comunitarie e norme interne dello Stato nella giurisprudenza costituzionale", *Cons. Stato*, 1974, II, 702 et seq.; Mario Berri, "Legittimità della normativa comunitaria", *Giur. it*., 1974, I, 513 et. seq.; Riccardo Monaco, "La legittimità costituzionale dei regolamenti comunitari", *Foro it*., 1974, I, 315 et seq.

[26] Court of Justice, judgment of 9 March 1978, C-106/77; for a comment on the decision, see in particular, Luigi Condorelli, "Il caso *Simmenthal* e il primato del diritto comunitario: due Corti a confronto", *Giur. cost*., 1978, 669 et seq.

[27] Corte costituzionale, judgment of 8 June 1984, no. 170, *Giur. cost*., 1984, 1098 et seq.; on the decision see the remarks made by A. Tizzano, "La Corte costituzionale e il diritto comunitario", *Foro it*., 1984, I, 2063 et seq.; G. Gemma, "Un'opportuna composizione di un dissidio", *Giur. cost*., 1984, 1222 et seq.; A. Ruggeri, "Comunità europee, Stato e regioni", *Le Regioni*, 1985, 433 et seq. In the latest literature on the prevalence of European law, see Silvio Gambino, "Identità costituzionali nazionali e *primauté* eurounitaria", in *Quaderni Costituzionali*, 2012, 533-561

as prefigured by the 1973 decision – the law implementing the Treaty of Rome could be subjected to a constitutionality audit, for violation of Art. 11 Const., if the Community rule were to violate the fundamental principles of the order and of the inalienable rights of the human person[28].

With the constitutional revision of 2001 (Const. Law. no 3 of 2001), Art. 117 (1) It. Const. ("Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations") contains an explicit reference to compliance with the "EU constraints" (clearly distinguished from "international obligations") by the State and Regional legislation.

The wording of this provision has given rise to a lively debate in the literature as to the possible effects it might have, reviving also the age-old discussion between monistic and dualistic conceptions. Deeply antithetical positions were expressed, partly in continuation with the evolution that had occurred thus far with regard to the relations between the two orders ("minimalist" reading confirmed also by a decision of the *Cassazione*) that add nothing to Art. 11 Const.; partly new, that intend this provision to be a sort of *Europartikel* of the likes of Art. 23 GBL[29].

In similar circumstances the real scope of the provision obviously depended on the interpretation by constitutional case law which was expected to take a stance on its meaning.

In actual fact, the Court avoided making full statements on the meaning of this constitutional provision, and it did so only in 2007 with decisions no. 348-349 about the relationships between the ECHR system, the obligations deriving from the alleged violations confirmed with final judgment by the European Courts and national judges. However, the Italian Constitutional Court in its interpretation of Art. 117 (1) – in order to differentiate the constraint deriving from international obligations from those deriving from the EU order – specified that "*by signing the Community Treaties, Italy has joined a*

[28] On the relationship between the fundamental rights of the Italian Constitution and European law, see Vittorio Angiolini, "Trasformazione dei «principi fondamentali» della Costituzione italiana in confronto al diritto comunitario", in *Diritto comunitario diritto interno: effetti costituzionali e amministrativi*, eds. Vittorio Angiolini and Nicoletta Marzona, Padova: CEDAM, 1990, 1 et seq.

[29] In the sense that this provision has added nothing new, see Cesare Pinelli, "I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento comunitario", *Foro it.*, 2001, 194 et seq.; Corte di Cassazione, judgment of 10 December 2002, no. 17564, *Giur. cost.*, 2003, 459 et seq.; on the decision, see Andrea Guazzarotti, "Niente di nuovo sul fronte comunitario? La Cassazione in esplorazione del nuovo art. 117, comma 1, Cost.", *Giur. Cost.*, 467 et seq.; Enzo Di Salvatore, "La prevalenza del diritto europeo nel Trattato costituzionale alla luce dell'esperienza comunitaria", in *L'ordinamento europeo*, II, *Il riparto delle competenze*, ed. Stelio Mangiameli, Milano: Giuffré, 2006, 477. In the sense that this provision is a sort of *Europartikel* of the likes of Art. 23 GBL, see Federico Sorrentino, "Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario", *Dir. Pubbl. comp. ed europeo*, 2002, 1355 et seq.; Luigi Sico, "Senso e portata dell'art. 11 della Costituzione nell'attuale contesto normativo e nelle proposte di riforma costituzionale", *Dir. Pubbl. comp. ed europeo*, 2003, 1511 et seq. For an analysis of both interpretations, see Giuseppe Franco Ferrari, "Il primo comma dell'art. 117 della Costituzione e la tutela dei diritti", *Dir. Pubbl. comp. ed europeo*, 2002, 1849 et seq.

broader 'order', of a supranational nature, by surrendering a part of its sovereignty, including its legislative power, on matters dealt with by the Treaties, with the sole limit of the inviolableness of the principles and fundamental rights ensured by the Constitution" (Whereas in point of law 3.3).

In this way the Italian Constitutional Judge has ended up reconstructing the system of relationships between domestic law and European law in accordance with past schemes (decision no. 183 of 1973 and decision no. 170 of 1984, already mentioned), namely as nothing had happened as to the modalities for settling antinomies ("non application" for incidental judgment and inconstitutionality for direct judgments and for non self-executing rules), changing the latters' foundations where necessary: Art. 117 (1), instead of Art. 11 Const.[30].

4.3. Germany

In the case of Germany, the path is in part the same starting with the so-called "Solange" decisions ("so long as"), on the grounds that with the signing of the European Treaties (in pursuance of Art. 24 GBL), the legal order would not "*open [...] the doors to changes in the fundamental structure of the Constitution on which identity rests, without a revision of the Constituion and precisely through the legislation of supranational institutions*"[31]; as is evident also with Solange II, the question was essentially that of garanteeing the standard of protection of fundamental rights, ensured to German citizens by the fundamental Law, also in the application of European law[32].

The decision of the German Constitutional Court on the Maastricht Treaty, besides the issues already put forward in the previous decisions, where the regulation of relationships between the two legal orders was formulated in the light of the parameter of fundamental rights, also deals with other profiles, such as the violation of the principles of structure as in Art. 20 GBL, and the limits of constitutional revision, dealt with in Art. 79 (3) GBL, from the standpoints of the democratic principle, of the principle of the division of powers and independence of the State (*souveräne Staatlichkeit*)[33].

[30] See Raffaele Morelli, "La Convenzione europea dei diritti dell'uomo alla luce delle recenti novità del Trattato di Lisbona", *Teoria dello Stato e del Diritto*, 2010, 413 et seq.

[31] *BVerfGE* 37, 271 (279) ("*eröffnet* [...] *den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung nämlich durch die Gesetzgebung der zwischenstaatlichen Einrichtung zu ändern*").

[32] *BverfGe* 73, 339 (378), where it is stated that this standard of protection of fundamental rights has been made, strenghtened and guaranteed in the case law of the Court of Justice. In the literature, see Karl Eckhart Heinz, "Grundrechtsschutz und Gemeinschaftsrecht", *DÖV*, 1987, 851 et seq.

[33] *BVerfGe* 89, 155 et seq. and in *NJW*, 1993, 3047 et seq. For a documented collection of the literature concerning the decision, see Ingo Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993. Dokumentation des Verfahrens mit Einführung*, Berlin: Duncker & Humblot, 1994. Among the several comments of the decision, see Helmuth Steinberger, "Die europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Oktober 1993", in *Festschrift für Rudolf Bernhardt*, 1995, 1321 et seq.; Jochen Abraham Frowein, "Das Maastricht-Urteil und die Grenzen des Verfassungsgerichtsbarkeit", *ZaöR*, 1994, 1 et seq.;

The case law arguments of the German Constitutional Court were further repeated in the decision on the Lisbon Treaty of 2009. Indeed, in this decision the German Constitutional Judge claims its own examination of control over European law in the light of the parameter of the division of competences and of constitutional identity of the Federal Republic of Germany, reaching the conclusion of being able to decide, also in contrast with the case law of the Court of Justice, i.e. the non application of European law[34].

At the heart of the reconstruction of the German Court lie the provisions of Art. 79 (3), in connection with Art. 23 (1) third phrase, GBL. The first provision envisages the limits expressed by the constitutional revision ("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible") and the second states that "The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79". Consequently, if the treaties ratified contain rules that are in contrast with the constitutional limits to revision, even if ratified with a constitutional act, they would not be validly placed within the German order and hence they would be invalid.

In particular, through referral to articles 1-20 GG, the Court has defined the so-called eternity guarantee (*Ewigkeitsgarantie*) on which German identity depends.

This interpretation leads to considering the elements inherent in German identity, namely human dignity, fundamental rights and the structural principles of article 20 BL (i.e. the republican form of State, the federal, democratic and social principles and the rule

Christian Tomuschat, "Europäische Union unter der Aufsicht des Bundesverfassungsgerichts", *EuGRZ*, 1993, 489 et seq.; Juliane Kokott, "Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht", *AöR* 119, 1994, 207 et seq.; Volkmar Götz, "Das Maastricht-Urteil des Bundesverfassungsgerichts", in *JZ*, 1993, 1081 et seq.; Karl M. Meessen, "Maastricht nach Karlsruhe", *NJW*, 1994, 549 et seq.

[34] *BVerfGE*, 2 BvE 2/08 of 30 June 2009, in part. no. 339-340: "The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. The Basic Law strives to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution as *a right of the people to take constitutive decisions concerning fundamental questions as its own identity*. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with international treaty law – accepting, however, corresponding consequences in international relations – provided this is the only way in which a violation of fundamental principles of the constitution can be averted. [...] It does not in any case factually contradict the objective of openness towards European law, i.e. to the participation of the Federal Republic of Germany in the building of a united Europe (Preamble, Article 23.1 first sentence of the Basic Law), if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany". On the Lisbon-judgment and its effects, in the German Literature, see Ulrich Everling, "Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte", *EuR*, 2010, 91-107; Heinhard Steiger, "Staatlichkeit und Mitgliedstaatlichkeit – Deutsche staatliche Identität und Europäische Integration", *Europarecht*, Beiheft, 2010, 57-79 On the reactions to this judgment in the German and Italian literature, see Erhard Denninger, "Identität *versus* Integration?", *JZ*, 2010, 969-974, in part. 969-970.

of law), even though the German Constitutional judge has expanded the constitutional catalogue of identity. Indeed, in a significant passage of the decision[35], the German Constitutional judge has, on the one hand, added the profiles that are linked to the definition of the identity of the Member States as per Art. 4 TEU: "*essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution*"; on the other hand, he has included in identity "*important areas also (that) include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology*".

Furthermore, from this standpoint, the German Court has specified that "*European unification on the basis of a treaty union of sovereign states may [...] not be achieved in such a way that not sufficient space is left to Member States for the political formation of their economic, cultural and social living conditions*", emphasizing that "*this applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics*".

5. The weakness of the Constitutional Identity of MS against the "legal sovereignty" of the European order

The elements of the identity of Member States that the various Constitutional Courts have outlined, and particularly the German Court, are essentially linked to the constiutional identity of the State. The principle of respect for national sovereignty (France), the inviolability of the principles of State form and fundamental rights guaranteed by the Constitution (Italy), the "eternity guarantee" identified with the restrictions to constitutional revision (Germany), all rotate around what might be defined as the hard content or essential inviolable core of the national Constitutions and, since the impact of European Law on the National Constitutions cannot be denied, the Courts deem that this core of inviolable content can be opposed to European primary and secondary law in the form of national identity to be respected also under Art. 4 TEU. Along this path, also the European constitutional literature has come to consider that

[35] *BVerfGE*, 2 BvE 2/08 vom 30.6.2009, in part. no. 249.

national Constitutions (and their hard core) are the foundations of the European Constitution and of the European order[36].

However, so much tenacity seems, in actual fact, to hide a natural weakness of the constitutional identity of the Member States. Indeed, if it is true that the process of European integration has been able to grow in the course of more than half a century thanks to the clauses of European and international openings of the national constitutions (Art. 88 Fr. Const.; Art. 11 It. Const.; Art. 24 GBL), this does not mean that the national Constitutions are the foundation of the European legal order.

As specified by the Court of Justice, as far back as the Costa/ENEL judgment (1964), upholding its (monistic) view of the relationships between national and European orders "*by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their Courts are bound to apply*".

This premise produced major consequences that clearly show the weakness of the identities of the MS frounded on national Constitutions. Indeed, the Court of Justice has shown that, by creating a common order, "*the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves*"[37] and that "*the transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights*".

Quite correctly, therefore, it is not the national Constitutions that are the foundation of European law, but the common will of the Member States to give life to a common legal order on a permanent basis. The strength and supremacy of European law are based on this fundamental decision which is better called: *the legal sovereignty of the European order*.

The Court of Justice, that is still today the maker and guarantor of this European juridical supremacy, has expressed this principle of the construction of a *common order*[38], that in the course of time would become a "*community of law*"[39], in decisions that are so

[36] Cf. Ingolf Pernice, "Der Schutz nationaler Identität in der Europäischen Union", *Archiv des öffentilichen Rechts*, 136. Band, Heft 2, 2011, 185-221.

[37] See Court of Justice, judgment of 15 July 1964, C-6/64 (*Costa v. E.N.E.L.*): "The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question".

[38] On the formation of the common system see Court of Justice, judgments of 5 February 1964, C-26/62 (*Van Gend& Loos*); 15 July 1964, C-6/64 (*Costa v. E.N.E.L.*); 9 March 1978, C-106/77 (*Amministrazione delle finanze dello Stato v. Simmenthal*).

[39] Court of Justice, judgment 23 April 1986, C-294/83 (*Les Verts v. Parliament*) and in the same sense also Opinion 14 December 1991, no. 1/91 (*European Economic Area*). For an analysis of this process (from law to identity), see Paolo Mengozzi, "La contribution du droit à la determination de l'identité de l'Union européènne", *Il Diritto*

famous that it is enough to mention their names to realize how weak the positions of the national Constitutional Courts are as limits or counter-limits to European law. In the *Simmenthal* case-law (1978) the European Court of Justice, in fact, reacted to the Italian Constitutional Court's intent of enacting a judicial constitutional review on Italian statutes contrasting with community law "to ensure that they (the community provisions) are fully, completely and uniformly applied and to protect the legal rights created in favour of individuals".

Also in the ECJ case law on fundamental rights national constitutional rules on fundamental rights are not considered relevant. In fact in the judgment *Internationale Handelsgesellschaft* (1970) about the protection of fundamental rights in the community legal system, the European Court of Justice affirms that "*recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called in question. Therefore* the validity of a community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure"[40].

Nevertheless – as is very well known – the ECJ affirmed constantly that "*fundamental rights are part of the general principles of the law that the Court safeguards and, in this, it inspires to the common constitutional traditions of member States and to the treaties on fundamental rights signed by them, among them especial significance is to be given to the ECHR*"[41].

Obviously the use of common constitutional traditions for the protection of fundamental rights does not imply the fact that fundamental rights, or the principles of the structure of the Constitutions, are a limit to European law. Instead, given the way in which the Court of Justice has used the texts of the Constitutions of MS[42], it may be stated that European case law has recognized European law to have the power of overruling the Constitutional rules and the structural rules of the Member States, as in the *Tanja Kreil* case (2000)[43].

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dell'Unione europea, 2011, 585-601.

[40] Court of Justice, judgment of 17 December 1970, C-11/70 (*Internationale Handelsgesellschaft*).

[41] "However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. 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".

[42] Court of Justice, judgment of 13 December 1979, C-44/79 (*Hauer*).

[43] Court of Justice, judgment of 11 January 2000, C-285/98 (*Kreil*).

The legal sovereignty of the European order is furthermore complete because it is accompanied by the possibility of reparation for the damage caused to each individual or legal person by the non-application of European law. Indeed, in several decisions the Court of Justice has confirmed the principle that a Member State is obliged to make good damage caused to individuals as a result of breaches of Community law for which it is responsible. This applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (*Koebler* 2003)[44].

With this logic, the Court of Justice has acknowledged the Italian legislation limiting judges' liability only to cases "of intentional fault and serious misconduct" as being in contrast with the European order (*Traghetti del Mediterraneo* 2006)[45].

Even after the entry into force of the Lisbon Treaty, that reasserted the principle of the primacy of European law in Declaration 17, the principles of the legal sovereignty of the European order have remained unchanged in the case law of the Court of Justice in spite of the unique position taken on by the German Constitutional Court.

In fact, in the logic of the supranational order, the Court of Justice has revived the stabilization role it had already played in the past, through the principle of the primacy of European Law. And it is in this light that we are to interpret the recent case law in which the Court of Justice[46] has confirmed that the principle of the primacy of European law cannot be subordinated to special domestic procedures, not even to constitutional procedures[47].

In a subsequent judgment[48] the European judge confirmed that the national judge, in the presence of a domestic rule falling in the scope of application of EU law, that is

[44] Court of Justice, judgment of 30 September 2003, C-224/01 (*Köbler*). The Court infers that the protection of those rights would be weakened – and the full effectiveness of the Community rules conferring such rights would be brought into question – if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

[45] Court of Justice, judgment 13 June 2006, C-173/03 (*Traghetti del Mediterraneo*): "Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a Court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that Court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the Court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the *Köbler* judgment" (cf. also Court of Justice, judgment of 24 November 2011, C-379/10).

[46] Corte of Justice, judgment of 19 November 2009, C-314/08 (*Filipiak*). The preliminary ruling asked by the administrative Polish judge concerned the extension of the prevalence principle and, in particular, whether it would be applicable to a judgment of the Polish Constitutional Court, that delayed the effect of an own decision about a provision on the right of establishment guaranteed in Art. 43 TEC.

[47] This principle was for the first time stated in *Simmenthal* judgment (9 March 1978, C-106/77).

[48] Court of Justice, judgment of 19 January 2010, C-555/07 (*Seda Kücükdeveci v. Swedex GmbH & Co. KG*).In this case the matter was quite complex. The *a quo* judge asked the Court for a preliminary ruling "on the interpretation of European Union law before it can disapply a national provision which it considers to be contrary to that law",

deemed to be incompatible with the latter and for which it is impossible to make a consistent interpretation, must not apply said provision, "*without imposing or prohibiting that he submit a request for a preliminary judgment*".

Similar statements are contained in several judgments of 2010, all arising from the referral of German judges[49]. For example, the *Winner Wetten GmbH judgment* states that "*any provision of the legal order of a Member State or any legislative, administrative or judicial practice that leads to a reduction of the concrete efficacy of EU law because the judge who is competent to apply such law is denied the power to do all that is necessary not to apply the domestic legislative provisions that prevent the full efficacy of the directly applicable provisions of the Union's law, is incompatible with the needs inherent in the very nature of EU law*"[50].

Indeed, the Court of Justice concludes, but this is an ancient teaching, "*It is inadmissible that the provisions of national law, even constitutional laws, may undermine the unity and efficacy of EU law*"[51].

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because "under national law, the referring court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the *Bundesverfassungsgericht* (Federal Constitutional Court)".

[49] See Corte of Justice, judgments of 4 February 2010, C-14/09 (*Hava Genc v. Land Berlin*), para. 36 ("According to well-established case law, it follows both from the primacy of European Union law over Member States' domestic law and from the direct effect of a provision such as Article 6 of Decision No 1/80 that a Member State is not permitted to modify unilaterally the scope of the system of gradually integrating Turkish workers into the host Member State's labour force"); 8 September 2010, C-409/06 (*Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*), para. 53 et seq. ("It should be recalled at the outset that, according to settled case-law, in accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law"); 25 November 2010, C-429/09 (*Günter Fuss v. Stadt Halle*), para. 78 ("the Court has already held that the exercise of rights conferred on private persons by directly applicable provisions of EU law would be rendered impossible or excessively difficult if their claims for compensation based on the infringement of EU law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by EU law provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of EU law").

[50] Judgment *Winner Wetten GmbH,* para 56. But see also para 58: " It is to be noted, moreover, that, according to settled case-law, the principle of effective judicial protection is a general principle of Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, and that, under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Union law".

[51] Judgment *Winner Wetten GmbH,* para 61. In the same way was already judgment *Internationale Handelsgesellschaft* (17 December 1970, C-11/70). The issue, that goes beyond these short considerations about the institutional role of the Court of Justice, should be examined in depth with a special reflection on European case law and the decisions of national constitutional judges that provide particular reservations in respect to the European order (however, see Stelio Mangiameli, "Unchangeable core elements of national constitutions and the process of European integration. For a criticism to the theory of the '*controlimiti*' (counter-limits / Schranken-Schranken)",*Teoria del Diritto e dello Stato*, 2010, 1 et seq.). Recently the Polish Constitutional Court (judgment of 24 November 2010, Ref. No. K32/09, published on 6 December 2010) re-examined the compliance of the Lisbon Treaty with the national Constitution, with different results compared to the *Lissabon-Urteil*. In fact, the Polish Constitutional Court stated that "*it is the Parliament that devises appropriate solutions concerning the fulfilment of constitutional requirements which are indispensible due to the principle of protection of the state's sovereignty in the process of*

A confirmation of this inherent strength of the European legal construction, that we define as legal sovereignty, appears to be confirmed also by a judgment of the German Constitutional Court after the Lisbon-Judgment, that represents a sizing down of the claims of control of European law expressed in that judgment. In the *Mangold* ruling of 2010, on the *Verfassunsugsbeschwerde* submitted after the corresponding judgment of the Court of Justice[52], by the losing party in the European case, albeit confirming the principles expressed in the decision on the Lisbon treaty of 2009, the German Constitutional Judge abstained in practice from judging the judgment of the European judge, because of an excess of competence (*ultra-vires* control) according to the petitioner, but confirmed the role of coordinator of the European judge, in interpreting and in applying European law, with a view to ensuring the unity *europarechtsfreundlich* (friendly European law) and consistency of the supranational order[53] and stated that the possible tensions with the European case law are to be solved in a cooperative manner so that the *ultra-vires* control can be exercised only in an *europarechtsfreundlich* manner.

Thus in line of principle the German Constitutional Judge acknowledges that it must abide by the judgments of the Court of Justice as binding interpretations of EU law[54].

European integration" (suggesting, in this way, a revision of the constitution to ensure compliance of the European Treaty with the national Constitution).

[52] The Court of Justice, judgment of 22 November 2005, C-144/04 (*Mangold v. Helm*), by reference to the German law regarding fixed-term labour contracts was attacked quite strongly in the German literature (Jubst-Hubertus Bauer and Christian Arnold, "Auf *Junk* folgt *Mangold* – Europarecht verdrängt deutsches Arbeitsrecht", *NJW* 6, 2006; Alan Dashwood, "From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?", *CYELS*, 2007, 9; Norbert Reich, "Gemeinschaftsrechtswidrigkeit der sachgrundlosen Befristungsmöglichkeit bei Arbeitnehmern ab 52 Jahren", EuZW 2006, 20 et seq.), because it had declared German law to be in violation of the principle of non-discrimination on the grounds of age, on the basis of various international instruments and constitutional traditions shared by the Member States. Howerver, the German Constitutional Court, in its 2010 judgment brought in the wake of the decision of the ECJ by the company which had concluded these fixed-term contracts, actually abstained from ruling on the ECJ judgment in which, according to the plaintiff, the court had acted *ultra vires*, despire the fact that in the Lisbon judgment the German Constitutional Court had admitted that type of control. On the *ultra vires* deeds, see Remo Caponi, "Addio ai «controlimiti»? (per una tutela dell'identità nazionale degli Stati membri dell'Unione europea nella cooperazione tra le Corti)", in *Il nodo gordiano tra diritto nazionale e diritto europeo*, eds. Elena Falletti and Valeria Piccone, Bari: Cacucci, 2012, 43-53, in part. 46-48.

[53] *BVerfGE*, 2 BvR 2661/06 of 6 July 2010, para. 57-58. On this decision and, in particular, on this argument, see M. Raveraira, "L'ordinamento dell'Unione europea, le identità costituzionali nazionali e i diritti fondamentali – Quale tutela dei diritti sociali dopo il Trattato di Lisbona?", *Rivista del Diritto e della Sicurezza sociale*, 2011, 325 et seq., in part. 344 et seq.

[54] Para. 60 of the same decision, where a new "*Solange*" is stated ("*Solange der Gerichtshof keine Gelegenheit hatte, über die aufgeworfenen unionsrechtlichen Fragen zu entscheiden, darf das Bundesverfassungsgericht für Deutschland keine Unanwendbarkeit des Unionsrechts feststellen*").

6. The Case-law of the Court of Justice of the European Union about the Identity of MS

This supremacy of the European order also vis-à-vis the national Constitutions has led the Court of Justice to rule against the latter[55], but in given circumstances it has adopted, as a basis of its judgments, the provisions of the national Constitutions. Besides the *Hauer* case[56], where the national Constitutions are considered as sources from which common principles can be drawn, mention can be made of the *Omega* decision, where the principle of human dignity was invoked[57].

The Court of Justice has had the possibility of applying this principle in a judgment in which the principle of human dignity had been involved to limit a fundamental freedom recognised by the Treaty, namely the freedom of providing services recognised by the TFEU, because "*Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity*" (summary of the judgment, para. 2).

The national judge had put to the Court the following question: "*Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends the values enshrined in the constitution?*" (para. 17).

The Court of Justice, finally relates the issue of the limitation of the freedom to provide services ensured by the Treaty, not to the concept of public order, but to the protection of fundamental rights by the European order, and in this field it emphasizes that "*There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right*" (para. 34).

However, the Court considered that "*It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected*" (para. 37) and that "*In this case, it should be noted that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany*" (para. 39).

[55] Besides the already mentioned *Kreil* case, see Court of Justice, judgment of 16 December 2008, C-285/98 (*Michaniki*).
[56] Court of Justice, judgment of 13 December 1979, C-44/79 (*Hauer*).
[57] Court of Justice, judgment of 14 October 2004, C-36/02 (*Omega*), para. 41.

Furthermore, the principle of identity of Member States was expressly referred to by the Court of Justice in the *Sayn-Wittgenstein* case[58]. This was a special case on the names of people and the domestic legislation of the petitioner on the disclaimer of aristocratic titles as part of surnames. The issue concerned the inclusion of an aristocaratic title in the national's surname on the basis of the legislation of a Member State other than the State where the person had taken residence and as a result of an adoption (the national had come of age).

The Court of Justice has pointed out that "*the refusal, by the authorities of a Member State, to recognise all the elements of the surname of a national of that State as determined in another Member State, in which that national resides, and as entered for 15 years in the register of civil status of the first Member State, is a restriction on the freedoms conferred by Article 21 TFEU on every citizen of the Union*" (para. 71). However the Court acknowledges "*that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law*" (para. 83).

In this way the Court considers that this element of the constitutional history should be "*interpreted as reliance on public policy*" (para. 84), capable of justifying, in a Member State, a refusal to recognise the surname of one of its nationals, as accorded in another Member State[59].

At this point the European judge recalls, with several references to the *Omega* judgment, that the "*concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions [...]. Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society*" (para. 86). In this sense, the "*recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty*" (para. 87).

Moreover, the Constitutional Court acknowleges as well-grounded the argument of the State of origin that based its constitutional provisions on the abolition of the nobility on the principle of equality and that "*the European Union legal system undeniably seeks to ensure the observance of the principle of equal treatment as a general principle of law*" and "*that the objective of observing the principle of equal treatment is compatible with European Union law. Measures which restrict a fundamental freedom may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures*" (para. 89-90).

Moreover, the European judge emphasized that it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a

[58] Court of Justice, judgment of 22 December 2010, Case C-208/09.
[59] See, to that effect, Court of Justice, judgment of 14 October 2008, C-353/06 (*Grunkin and Paul*), para. 38.

conception shared by all Member States. The Court has expressly stated that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic, concluding that it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank[60].

The *Sayn-Wittgenstein* judgment was considered to be a signal for preparing a dialogue instead of an argument with the domestic judges on the topic of the constititional identity of Member States[61].

It must, however, be pointed out that also in the mentioned judgments there is no prejudice against the principle of legal sovereignty of the European order, supported by the constant work of the EU Court of Justice and that the limitations to the application of some provisions of European law are the consequence of a systematic interpretation of European law, with respect to which the provisions of the national Constitutions are taken on not for their regulatory scope but as part of facts that are important for the application of European principles, even when the latter have contents that are consistent with notions used by the national constitutional rules (such as human dignity and equality).

In this sense the scope and role of the principle of the protection of national identity as set out in Art. 4 (2) TEU is determined always and only by European law and not by the legal sources of Member States, including their Constitutions.

The sole institutional remedy that the European order seems to offer to the identity of Member States – as has been pointed out – is the possible judicial review of European regulations that were to cause damages – before the EU Court of Justice – directly by the Member States (Art. 263 TEU) or by national judges with a preliminary ruling (Art. 267 TFEU).

[60] "The answer to the question referred is that Article 21 TFEU must be interpreted as not precluding the authorities of a Member State, in circumstances such as those in the main proceedings, from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law, provided that the measures adopted by those authorities in that context are justified on public policy grounds, that is to say, they are necessary for the protection of the interests which they are intended to secure and are proportionate to the legitimate aim pursued" (para. 95).

[61] See Maja Walter, "Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive", *ZaöRV* 72, 2012, 177 et seq., 198.

7. The Identity of MS vs. the Identity of the European Union. The fractures of the last decade

The consideration of the role of the European order vis-à-vis the Constitutions of Member States can be deemed to be solved by stating the supremacy of the former over the latter.

However, the identity issue, at least starting from the failure of the 2004 Constitutional Treaty (by the French and Dutch referendums), has now gone beyond the role of the national Constitutions.

In particular, the failure of the constitutional Treaty has led to the fact that some Member States have taken on a veto power outside of the institutional framework outlined by the Treaties, that is not extended to each Member State as shown by the two Irish referendums.

At the political level, the identity of the State that has this veto power opposes the European identity and undermines the role of the Union; no legal supremacy is safe when faced with the possibility of unilaterally thwarting longstanding negotiations of European agreements.

This difference between Member States, with regard to the veto power on the developments of the integration process, has created (or has evidenced) within the Union a political rift, whose exacerbation would threaten not only the identity but the very existence of the Union.

The issue of the identity of Member States, vis-à-vis the identity of the EU has become problematic; it is no longer a legal-constitutional issue, but essentially a political issue. Social and hard-fact considerations have prevailed over the legal constraints in the relationships between the EU and Member States, and so in the case of national identity as limitation to the integration process, this has become a political understanding more than a legal notion.

The discussion on given principles referring to identity depends strongly on the political importance that the latter have and on the importance that the constitutional judge attaches to non-legal factors in the formation of the concept of national identity.

The circumstance that the German Constitutional Judge considers the principle of the primacy of European law in a relative way and announces that, as regards national identity, there is the possibiltiy that in some cases Germany may refrain from applying European law when it is contrast with national identity, clearly expresses – in spite of the second thoughts of the *Mangold* judgment – that the European Union seems to have emerged from an integration process marked by the evolution of European law, and has entered a phase where integration is strongly conditioned by the political personality of the member States and European integration is in some respects, not only at a standstill, but it has even reached the highest political limit for all States or – at least – for some of them.

"*The faith in the constructive force of the mechanism of integration cannot be unlimited*" (para. 238 of *Lissabon-Urteil*) says the German constitutional judge, and hence the problematic acceptability of the simplified revision process of the treaty and the attention to make sure that the European system does not usurp the competence to decide on its own competence (*Kompetenz-Kompetenz*). Not only this, however, determines national identity but it would require that "*European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions*" (para. 249).

To this we must add the discounting of all those symbolic and formal elements of European democratic growth, like the reference to European citizens as subjects represented in the European Parliament[62]. This position insists on interpreting the treaty as it was written before, and hence the citizens of the Union are the peoples of the Member States[63] and the conclusion that the European Parliament is not a representative body of a sovereign European people[64].

Ultimately, according to the protection of German identity, now there is a need to protect national sovereignty from that of the European Union. The German position appears to be deeply different from that expressed in 1993 with the judgment on the Maastricht treaty[65], and this is perceived immediately even if many expressions used in that judgment were borrowed by the *Lissabon-Urteil* (Lisbon judgment). The context is different, the spirit is different and the meaning is the opposite. It is no coincidence that the first reaction prompted by the 2009 judgment amongst German constitutional scholars was of obvious astonishment.

The decision of the German constitutional judge seems to be the mirror reflection of a Country that is toning down its European spirit, that had hitherto been very strong. And it intends to put a limit to Europe's political ambitions. And so, while in the 1993

[62]Art. 10 TEU: "Citizens are directly represented at Union level in the European Parliament"; Art. 14 (2) TEU: "The European Parliament shall be composed of representatives of the Union's citizens". On the relationship between European citizenship and identity of the EU, see Paolo Mengozzi, "La cittadinanza dell'Unione e il contributo della Corte di giustizia alla precisazione dell'identità dell'Unione europea", in *Cittadinanza e diversità culturale nello spazio giuridico europeo*, ed. Maria Caterina Baruffi, Padova: Cedam, 2010, 3-13.

[63] Art. 189 TEC: "The European Parliament [...] shall consist of representatives of the peoples of the States brought together in the Community".

[64] See para. 280 of *Lissabon-Urteil*: "Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality".

[65] As shown by the public notice "*Das Lissabon-Urteil des Bundesverfassungsgerichts: Auswege aus dem drohenden Justizkonflikt*", signed by notable German scholars and politicians (among them: Armin von Bogdandy, Christian Calliess, Christian Koenig, Ingolf Pernice, Christian Tomuschat), who underlined the lack, in the Lisbon Judgment, of the cooperation principle between the Constitutional Court and the Court of Justice, which characterized the judgment on the Maastricht Treaty.

judgment the emphasis was on the construction of European identity and the expression "*Staatenverbund*" was coined for it, by stating that "European Member States have founded the European Union in order to jointly carry out a part of their tasks and to jointly exercise to this end their sovereignty"[66]; now national identity, in the political meaning of the term, is tearing down or up the European Union, and its identity and the State's sovereignty is wholly protected, with the result that the European Union is a simple "by-product" body, a regional organization under international law that is entirely subject to the will of Member States.

As can be seen, this is a deep political rift that marks the decline of the federal idea for Europe, that freezes the principles of functional integration and jeopardizes even the *acquis communautaire*.

Besides the 2004 constitutional failure and the 2009 decision of the German constitutional judge, a very important element can be inferred from the solution adopted to deal with the economic crisis and the crisis of the euro: the Fiscal Compact.

Even though a legal basis was prepared with the addition of paragraph 3 to Art. 136 TFEU[67], the Fiscal Compact, just like the European Stability Mechanism, is a treaty *a latere* with respect to the European treaties; in some respects it uses the European Institutions (and in particular the Commission and the Court of Justice), but the international obligations it creates fall outside the European legal order proper[68], in spite of the fact that rules on the management of state deficits are inlcuded in the treaties and a specific protocol (no. 12) is dedicated to this matter.

This is not the right place to examine the provisions of the Fiscal Compact in depth, but we may wonder why this choice was made instead of a further evolution of the European treaties.

It must be pointed out that with the Fiscal Compact a considerable portion of sovereignty, that relative to the budget of the State, is put in common, not only to transpose the "balanced budget rule" into their national legal systems, through binding, permanent and preferably constitutional provisions, but above all, through the adoption of automatic correction clauses and by envisaging a body of sanctions that is applied when the rules on the deficit and debt containment are not complied with, going as far as envisaging constrictive actions towards the individual Member State in default.

If this is not downright federal coercive power (*Bundeszwang*), we are certainly witnessing advanced forms of federal execution (*Bundesexekution*) which go well beyond the

[66] *BVerfGE*, 89, 155, para. 109: "*Die Mitgliedstaaten haben die Europäische Union gegründet, um einen Teil ihrer Aufgaben gemeinsam wahrzunehmen und insoweit ihre Souveränität gemeinsam auszuüben*".

[67] At. 163 (3) TFEU: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

[68] See TSCG, Art. 3: "The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law".

possible "pressure" exercised on a State by the Federal Government that the US Supreme Court considers to be constitutionally acceptable[69].

We need to ask ourselves what is the common benefit or federal progress that Member States have obtained in return for this sacrifice of their sovereignty.

The matter is not the debt situation of some States like Italy, which certainly requires major containment and control measures, and this even aside from the Fiscal Compact, because it is its indebtedness that gets in the way of Italy's growth.

The crucial point is whether the Fiscal Compact actually does represent an evolution at European level in the framing of a European economic policy, as occurs with Federal States or with the orders that act in a federal manner.

In actual fact, Article 9 of the TSCG (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) emphasizes that the basis is the "economic policy coordination, as defined in the Treaty on the Functioning of the European Union", and that the Contracting Parties take the commitment to "undertake to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness"[70]. Along these same lines, and with reference to the euro zone, it is no coincidence that Article 10 indicates, as possible operational instruments that the Member States may use for joint actions, the various forms "of enhanced cooperation, as provided for in Article 20 of the Treaty on the European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market". Finally, Art. 11 specifies that "the Contracting Parties shall ensure that all major economic policy reforms that they plan to undertake will be discussed *ex-ante* and, where appropriate, coordinated among themselves" and that "Such coordination shall involve the institutions of the European Union as required by European Union law".

How can such an important sacrifice of national sovereignty, like the autonomy of the State budget be acceptable without increasing, to the same extent, the common powers of the European institutions so as to strengthen the European governance of economic policy?

If a certain amount of state sovereignty is surrendered by the Member States, but is not transferred to the supranational entity, to whom is it given?

These questions are crucial if we consider that a balanced budget and the progressive reduction of the debt stock are not capable of boosting the European economy and of

[69] The case-law of the Supreme Court asserts that the mesures taken from the federal Government can not be "so coercive as to pass the point at which *pressure* turns into *compulsion*" (see Steward Machine Co. v. Davis, 301 U.S. 548 (1937); South Dakota v. Dole, 483 U.S. 203 (1987)).

[70] The Article 9 continues: "To that end, the Contracting Parties shall take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability".

ensuring respect for the institutional rules that should characterize a full-fledged European democracy.

The truth is that with the Fiscal Compact there are some States that are laying the groundwork to exercise control over other States, without sterngthening the Institutions and European democracy. In fact everything is being done to maintain control over the economic conditions of the other Member States and avoid that the European institutions, under the joint control of the Council and of the European Parliament, may take the lead in framing Europe's economic policy.

Now, if individual (and specific) Member States are denied the possibility of having recourse to debt to fund their economic recovery, the sole true alternative is to build a sustainable European economic development plan and this would require also an increase in the size of the European budget (at least up to 2% of the EU GDP [Gross Domestic Product]). Moreover, the European budget should be funded with own resources and be run by a European Treasury. Finally, the adoption of appropriate measures would require conferring actual fiscal powers to the European Union.

All this is on the horizon of the European Union, but it is still too remote for its political weakness vis-à-vis the Member States or for the special political strength that some States exercise [as shown by the recent events of the European budget, that was prepared by the Member States (in Council) but was not approved by the European Parliament].

On the basis of all this we can conclude that the Fisal Compact has marked a deep rift in the Euopean Union among Member States that goes to the detriment of the European Union.

In conclusion the French referendum on the Constitutional Treaty, the decision of the German Constitutional Court and the Fiscal Compact offer a vision of the European Union from the standpoint of Member States in which – during the last decade – what seems to prevail is the intrinsic force of the socio-political elements that define the identity of Member States and their vision of Europe and the weakness of the European public sphere and of the socio-political elements required to maintain a strong identity of the European Union.

There have always been many *fractures* in the European system, but during the last decade, not only have they deepened, but they have above all become the expression of a selfish will of not wanting to find solutions, so much so that second thoughts have begun on the nature of the European system as a federal system, and also on the balance built up among the Member States in over half a century of common peaceful history. With respect to this equilibrium the protection of national identities is indeed a minor detail. We are talking about those identities that last century gifted us with two World Wars.