Chapter III

Italy and the European Union: A Legal Analysis

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Abstract

The tasks of this chapter are two-fold: descriptive and interpretative. The first is to describe essential facts concerning the relationship between the Italian legal order and that of the European Economic Community, now the European Union (EU). In this respect, it is important not to lose sight of the evolving nature of European construction and the increasingly strong foundations of integration in Italian constitutional settlement. This section seeks to lay the groundwork for a later discussion of these interpretations. There are contending theories and the literature is rapidly evolving. The chapter suggests that while the acquis is hardly susceptible to being re-discussed, the emergence of political movements and parties characterised by sceptical views about European integration may impinge on the role of Italy within the EU.

Keywords: integration, sovereignty, primacy of EU law, choice for Europe, counter-limits, Italian Constitution, dualism

1. Introduction

The tasks described in this chapter are two-fold: descriptive and interpretative. The first is to describe essential facts concerning the relationship between the Italian legal order and that of the European Economic Community (EEC), now the European Union (EU). The latter has passed 70 years and witnessed development, change,

Giacinto della Cananea (2023) 'Italy and the European Union: A Legal Analysis'. In: András Zs. Varga – Lilla Berkes (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?,* pp. 79–104. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2023.avlbcvci_3

and evolution that will be briefly charted in subsequent paragraphs. This section seeks to lay the groundwork for further discussion. For the sake of clarity, there are contending theories, and the literature is still rapidly evolving. The objective of this section is to render accessibility to wider public scholarship. The divergence between scholars reveals differences as to how a traditional concept of public law, sovereignty, must be intended and the role that political and judicial institutions can play. This chapter also explains why different scenarios may emerge in subsequent years.

2. Essential legal facts

It is helpful to begin with two quick caveats. First, for the descriptive purposes of this study, it is necessary to consider some essential facts that are relevant and significant from a public law perspective. In brief, empirical implies historical. In this respect, many accounts of the relationship between the Italian legal order and that of the EEC/EU are based on the analysis of some 'significant' judicial decisions. There is nothing wrong with this approach, as judicial politics are becoming increasingly relevant.[1] However, the broader institutional, political, and social context should not be neglected, especially when there is a 'rigid' constitution, and political forces make fundamental decisions, as occurred in Italy in 1948 and 1957. Moreover, judicial decisions regard only a part of our civil, economic, and social life. Judicial decisions occasionally affect other areas. This is the case with the Economic and Monetary Union (EMU), which has salient constitutional implications.

The second caveat concerns the significance of the following description. Constitutions have distinct cycles; however, there are rare moments when the trajectories of various national constitutions converge. A convergence of this type occurred in the late 1940s when the constitutions of Italy, Germany, and other European nations were transformed. Another event occurred after 1989 when other nations regained full independence. Thus, neighbouring countries often face similar problems. However, their solutions may and often do differ largely because of significant differences in history, institutions, and political preferences.

2.1. Constitutional openness

Retrospectively, two main choices shaped Italy after 1945: the balance between legal continuity and transformative change and the openness towards other legal systems.

The continuity of the Italian State was ensured, notwithstanding the radical discontinuity of the fascist regime (1922–1943). Political parties could have certainly

1 See Shapiro, 1981 and Stone Sweet, 2000.

chosen to amend the existing Constitution, the *Statuto Albertino*, which had a century of history. However, all relevant political actors thought it was necessary to formalise the foundations of the new liberal and democratic order in a new constitution. Thus, they chose to break with the earlier regime by replacing the old constitution with a new constitutional settlement.[2] The Republican Constitution was adopted and enacted in 1948. The parliamentary regime was reintroduced. The Constitution laid a rich bill of rights. Moreover, it broke with the institutional tradition because 20 regions were created, five of which had special legal status. This situation implied the repudiation of traditional centralisation, although real change was not easy to achieve.

There was also a discontinuity, as far as the external dimension of the State was concerned, which is clearly demonstrated by an analysis of three constitutional provisions. First, the primacy of international law was established. In this respect, Article 10 provided that the Italian legal system 'shall conform to the generally recognized principles of international law' (i.e. international custom) while treaties would have to be ratified by Parliament. Second, a new clause concerning limitations of sovereignty was established. According to Article 11

> Italy shall agree, on conditions of equality with other States, to such limitations of sovereignty as may be necessary to ensure peace and justice among Nations. Italy shall promote and encourage international organizations pursuing such goals.

This constitutional provision is of fundamental importance for two related but distinct reasons. First, it implies a rejection of the traditional notion of the indivisible nature of sovereignty, as conceived by Bodin and Hobbes;[3] that is, sovereignty is no longer regarded as a whole or totality but rather as a bundle of sovereign powers or functions. Consequently, under Article 11, the exercise of individual sovereign functions or powers can be transferred to international organisations. Second, although this clause was defined with a view towards international bodies, it provided a legal basis for European integration.

The third constitutional provision confirms and specifies the previous one in the field of labour. Coherently with the emphasis that Article 1 puts on labour (upon which 'the Republic is founded'), Article 35 affirms that labour must be protected 'in all its forms and practices'. Such protection is not limited to the state but transcends it. Indeed, Article 35 (3) states that Italy must 'promote and encourage international agreements and organisations that aim to establish and regulate labour rights'. The following paragraph, while recognising the 'freedom to emigrate', requires public authorities to protect Italian workers abroad.

When these constitutional provisions are considered as a whole, it becomes clear that the two central pillars of the fascist regime are broken: the authoritarian

2 For further analysis, see Cartabia, 2022.
3 See Hobbes, 1651.

government and the autarchy. This similarity to post-war Germany is evident. The Italian Constitution and German Basic Law (*Grundgesetz*) adopted international law as part of the national legal system.[4] The ramifications of these innovative choices become more evident when the path to European integration is discussed.

2.2. The choice for Europe

Recent and accurate historical studies have shown that the famous speech delivered by the French Minister of Foreign Affairs, Robert Schuman, on 9 May 1950 was not at all 'out of the blue'. On the contrary, it was preceded by an accurate elaboration by a group of high civil servants led by Jean Monnet, and its essential content was shared with other European leaders, such as Konrad Adenauer.[5] Whether or not Alcide De Gasperi, Italy's president of the Council of Ministers, had been previously informed about the speech, there is no doubt that he and his government were consistent supporters of the project. A broad pro-European consensus emerged between the Catholic and liberal forces. The Italian Minister of Foreign Affairs, Gaetano Martino, played a fundamental role in relaunching the project after the fiasco of the European defence community (1954).[6] A solid parliamentary majority supported the ratification of the treaties of Paris (1952) and Rome (1957), establishing the European Community of Coal and Steel and the EEC, respectively. However, parliamentary debates were quite harsh, and socialists and communist parties eventually voted against both treaties.

While the emphasis is generally on the fact that, as a consequence of these political decisions, Italy has been a founding member of both European organisations, other two aspects must be highlighted. First, these political decisions, together with those to join the military alliance based on the North Atlantic Treaty (1949), were Italy's fundamental choice after 1945. Second, in contrast to the widespread but wrong opinion according to which the European construction had an economic dimension, its political character manifested during parliamentary debates. During his speech at the Senate in 1952, De Gasperi unequivocally affirmed that 'in Europe, we build a coalition of democracies founded on the principle of liberty'. These were not just the words of official speech. Indeed, when Spain first applied for membership in the EEC, it was rejected precisely because it did not meet the standards of liberal democracies.

Over the following two decades, Europe's choice, initially promoted by the *élite*, received growing popular support. The left-wing parties' initial hostility towards

4 La Pergola and Del Duca, 1985, p. 598.

5 See Monnet, 1976. For a different interpretation, Milward, 1991 (for whom the European construction was instrumentally used to rescue the nation-State).

6 See Serra, 1989. On the role played by De Gasperi, see La Pergola, 1994, p. 260 (arguing, however, that De Gasperi had an instrumental approach, because he viewed Italy's participation in European institutions as a kind of insurance against the danger of domestic instability).

the communities faded.[7] The public has consistently endorsed Italy's active role in constructing an integrated Europe. Opinion surveys showed that the project of integration—the 'ever closer union between European peoples'—found more support in Italy than in the other Member States. It also obtained support from the Constitutional Court after its initial reluctance.

2.3. Judicial doctrines: separation

For a better understanding of the changing judicial policies, it can be helpful to pause a little to shed light on the conflicting views about the status of EEC law.

Since *Van Gend*, the case in which the European Court of Justice affirmed the principle of the direct effect of the Treaty of Rome,[8] the court's judicial policy has been characterised by a sophisticated conception of monism.[9] In other words, the legal systems of the Member States and the European Community (EC) were not regarded as being separate, in contrast with traditional 'dualist' theories of international law.[10] In 1964, the Italian Constitutional Court (ICC) recognised that Article 11 of the Italian Constitution authorised the state to limit its sovereignty. However, this opinion diverged from that of the European Court of Justice (ECJ) in *Costa v. ENEL*.[11] It refused to consider EC law as 'higher' than national law. This was manifested in its argument based on the traditional *lex posterior* criterion, according to which subsequent national legislation prevailed over previous EEC norms (the Treaty of the Roma). The assumption on which this argument was based was that there was no primacy in EEC law.

Ten years later, in 1973 in *Frontini*, the ICC refused the logic of monism embraced by the European Court. This supported the traditional criterion according to which *lex posterior derogat priori*. Consequently, ordinary courts (civil, administrative, and criminal) could enforce EC law against subsequent and conflicting national legislation only after the ICC itself had authorised them to do so on a case-by-case basis.[12]

2.4. Judicial doctrines: integration

A discontinuity occurred more than 10 years later in *Granital* when the ICC accepted that the EC law could be directly applicable without its prior judgement. However, the ICC did not implicitly ground this shift in monism in the ECJ approach. It maintained a dualist perspective, affirming that the EC and national legal orders,

7 La Pergola, 1994, p. 264.
8 ECJ, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).
9 Cannizzaro, 2012, p. 58.
10 For further analysis, Gaja, 1992, p. 123.
11 ICC, judgement n. 14/1964, [1964] CMLR, p. 425. On the European side, see ECJ, judgement of 15 July 1964, case 6/64, *Costa v. ENEL*.
12 ICC, judgement n. 183/1973, *Frontini* [1974] CMLR, p. 372.

although still distinct, were coordinated.[13] Extrajudicially, the former President of the ICC observed the following:

> The Constitutional Court progressed beyond its intermediate stance by accepting a view of supremacy that an American constitutional lawyer might find similar to that embodied in the supremacy clause of Article VI of the United States Constitution…. The 1984 decision takes the autonomy language of the 1975 decision and carries it to its logical conclusion. Italy's adherence to the European Communities through Article 11 of the Italian Constitution makes Community law applicable in Italy as the law of an autonomous legal order. This Article 11 acceptance of Community law therefore requires that ordinary courts determine whether Community law covers the subject matter dealt with by subsequent internal law. If it does, the Community law takes precedence over the internal law without regard to whether the internal law was adopted before or after the Community law.[14]

In brief, with *Granital*, the ICC accepted the primacy of EEC law over national law and examined it from the perspective of the decentralised system of constitutionality established in Italy. However, there is an important exception. The Court has reserved the power to assess the conformity of community norms with the fundamental principles of the constitutional order and the inalienable rights of human beings.

In 1984, the ICC accepted the concept of supremacy. However, as previously argued, the ICC did not repudiate its dualist approach. Consequently, the Court left the Italian Constitution without any protection against the excessive ambitions of EC institutions. Indeed, such protection was re-affirmed only for a sort of '*noyeau dur*', including fundamental human rights and the 'supreme' principles of our constitutional order, the so-called 'counter-limits'. Although no list of the latter exists, if there was a shift in the case law of the ICC choice, it was not from denial of supremacy to its full and unlimited acceptance. The ICC chooses supremacy under certain conditions and limits.[15]

This judicial policy was confirmed a few years later by another judgement (No. 389/1989), rendered by the ICC. Initially, the Court reiterated what it had affirmed in 1984. It then made a further step, holding that the Community legal order and the national one were 'reciprocally autonomous, but co-ordinated and communicating'. Consequently, self-executing EC norms had direct effects on the national legal order, and both judges and public administrations were required to disapply national rules contrasting with them.[16]

13 ICC, judgement n. 170/1984, *Granital* [1984] CMLR, p. 331. For further analysis, see Cartabia, 1990, p. 173.

14 See La Pergola and Del Duca, 1985, p. 613–614.

15 See Cartabia and Weiler, 2000, p. 128.

16 ICC, judgement n. 389/1989, § 4. For further remarks, see Cartabia, 1990, p. 191 (noting, however, the tension between the Court's doctrine and the results it achieved).

In summary, the 'European' jurisprudence of the ICC has had a gradual and incremental character. It began with the rejection of the supremacy of EC law on the grounds that the two legal orders were separated. Subsequently, it shifted to recognising that these legal orders were coordinated. Eventually, the doctrine emphasises that the relationship between them must be stressed. A clear development is inevitable because the legal order of the EC/EU itself has constantly evolved.

2.5. Constitutionalising of the choice for Europe

Thus far, we have seen that political leaders made the fundamental, and at that time controversial, decision to join the European Communities based on Article 11 of the Constitution, although it did not refer directly to Europe, and that the ICC backed this choice of constitutional basis and gradually accepted both the doctrines of direct effect and the supremacy of EC law, though not without conditions and limits. However, the adequacy of this constitutional basis was increasingly controversial because the scope of application of EC law steadily increased and it had a greater impact on national law in areas such as agriculture, industrial policy, and public procurement. It was contested, *a fortiori*, that the competencies of the EC were further expanded by the Treaty of Maastricht. This brought to the fore the extent to which 'Europe' was regarded as a domestic policy issue and raised the issue of whether State sovereignty could favour European integration.

In other countries such as France, Portugal, and Spain, for the first time after many years, political and social forces engaged in a national discussion on the benefits of European integration. Ratification processes, necessary for the new treaty to enter into force, allowed institutions to consider and resolve several issues concerning two central concepts of public law, sovereignty. and citizenship, in light of the norms establishing the European Monetary Union (EMU) and citizenship of the EU. The French case is particularly significant in this respect because the President of the Republic referred the Maastricht Treaty to the Constitutional Council which, for the first time, affirmed that the Constitution was an obstacle to the ratification of an international agreement. The obstacle was the provision of the preamble to the 1946 Constitution (incorporated by the 1958 preamble), according to which *'France may consent to limitations of sovereignty necessary for the organization and defense of the peace'.* Therefore, the French provisions are very similar to Article 11 of the Italian Constitution. Political institutions deemed that the decision taken by the Constitutional Council could be implemented by way of a minimal revision of the Constitution and, thus, added a new provision authorising the *'transfers of competence necessary for the establishment of the EMU'* and another concerning citizens. However, after the Danish referendum, the decision was made to hold a referendum in France.[17]

17 Stone, 1993, p. 70.

Things went differently in Italy; notwithstanding the requests for a referendum allowing people to express their views about European integration, the usual ratification procedure was used based on parliamentary approval. However, the Maastricht Treaty, with the complex structure of the EU and technical content concerning monetary policy and government budgets, did not receive much attention from most leading politicians, let alone the electorate. While the latter was generally, if not generically, for 'Europe', a new party, the Northern League, was very skeptical, an aspect to which we will return in the final part of this study.

Meanwhile, it must be said that a constitutional theory that seeks to accommodate the principles of national sovereignty with the realities of European integration and its new structures and processes remains to be constructed. This task was fulfilled, in part, during the following century in two stages. The first was the 2001 constitutional reform. The second stage was the constitutional reform that took place in 2012 after the economic and financial crisis that hit Europe.

The 2001 constitutional reform concerned the relationship between the central government and regional and local authorities. When such a relationship was transformed, with an unprecedented reinforcement of the regions' legislative powers, it was thought that it was necessary to clarify that not only national legislation but also regional legislation had to respect EU law. Article 117 of the Constitution was amended by a provision according to which any piece of legislation adopted by the state and regions must respect the Constitution, the legal order of the community, and international agreements. There has been much discussion in academic circles as to whether such a provision simply confirmed the limits stemming from these three types of legal sources or intended to establish a hierarchy between them. Although the debate has not ended, at least two aspects are clear. First, it supplements Article 117 to ensure an adequate constitutional foundation for European integration. Second, it is clear that according to the ICC, only EU law has direct effects and supremacy on national law, with the consequence that administrative and ordinary judges do not apply national provisions, while their contrast with the ECHR must be judged by the ICC itself. Some years after the reform, not only has the ICC confirmed that Article 11 still ensures a *'secure foundation'* to the law of the EU but also it has affirmed that the new text of Article 117 deals with only one of the several aspects raised by the relationship between the EU and the national legal order,[18] thus emphasising continuity.

For a better understanding of other constitutional reforms, some words should be said about the EMU and the crisis that emerged in 2009. When the Treaty of Maastricht was negotiated, its supporters emphasised the benefits of a single currency (e.g. it would serve to dilute the influence of the German central bank) and enhance monetary stability. As these issues are highly technical in nature, they have received scant attention from the public. Article 11 of the Constitution, seen in conjunction with another clause protecting 'saving in all its forms' (Article 47), was regarded as

18 ICC, judgement n. 220/2010, § 7 (all the Court's judgements are now available on the website: www.cortecostitutionale.it; in some cases, an English translation is also provided).

an adequate basis for the transfer of monetary policy to the EU. Things were very different 20 years later when the European debt crisis burst out. Although Italy was not one of the countries that could not refine their government debt and needed external support, the reiteration of financial orthodoxy by EU institutions and the conditions imposed on Greece, which were perceived as socially harsh and unjust, induced a split between the traditional parties and the parties and movements that openly criticised the EU, this time backed by some economists, lawyers, and political scientists.[19] The parliamentary majority supported all measures taken at the European level, including the creation of the European Stability Mechanism and the stipulation of the Fiscal Compact. It also supported constitutional reform. However, political opposition to the EMU grew to an unprecedented level, explaining the partial shift in the country's strategy, which will be discussed in the next section.

Meanwhile, it is appropriate to illustrate new constitutional reforms. This notion concerns various aspects of public budgeting. Article 81 of the Constitution concerning the state budget was amended in two ways: a controversial balanced budget provision was introduced, and recourse to borrowing was limited, coherent with the prohibition of excessive government deficits.[20] Article 97 was also amended by a new provision establishing that public administrations must ensure that their budgets are balanced and that public debt is sustainable *'in accordance with European Union law'*. Finally, under Article 119 (1), the obligation to have balanced budgets was imposed on regional and local authorities, with a view to *'ensuring compliance with the economic and financial constraints imposed under European Union legislation'*. Moreover, under Article 119 (7), such public authorities may have recourse to borrow only as a means of funding investments, excluding current expenditures. The first two provisions are not without challenges because the notion of the budget cycle used by Article 81 is unclear, and the notion of debt sustainability laid down by Article 97 is somewhat enigmatic. Therefore, it is challenging to understand whether and how those provisions can be enforced. However, considered as a whole, the new constitutional provisions had two goals: repeating, for emphasis or clarity, Italy's adhesion to the principles upon which the EMU is based and obtaining acceptance of public debt by the financial markets.

Retrospectively, both goals have been achieved, but not without costs. The tighter limits imposed on government budgets and public debt are, to say the least, *'not welcome in the political arena'* because they limit the political options for those who govern.[21] Moreover, they are viewed by the discontents as a sort of Trojan horse for further limitations of sovereignty, which would imply huge economic and social costs.

19 An interesting example is Giandomenico Majone, a political scientist who had previously analysed the regulatory strategy of the EU: see his book *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?*, Cambridge, Cambridge University Press, 2014.

20 For further analysis, see Giarda, 2018, p. 335.

21 Giarda, 2018, p. 346.

2.6. Judicial cooperation

A final essential fact that is legally relevant concerns judicial attitudes towards European integration. Notably, the Italian judicial system is not monist. By contrast, it is pluralistic for three reasons. First, there is no established rule for precedents. Consequently, lower courts are not formally bound by the rulings adopted by higher courts, even though they generally respect them. Second, Italy has a dualist system of judicial review with ordinary judges (at the top of which is the Court of Cassation) and specialist administrative courts, including the Council of State and the Court of Auditors. Third, the Court has become a key institutional actor. Within this pluralistic judicial system, divergent interpretations are not infrequent, and conflicts are not rare, especially between the Council of State and the Court of Cassation. All these judges, moreover, cooperate with the ECJ through the mechanism that has been called the *'jewel of the Crown';* that is, the preliminary reference mechanism.[22]

This procedural device was strategic in several ways. Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the lower courts can send preliminary references to the ECJ, whereas the highest jurisdictions are required to do so. This situation furnishes the ECJ with nearly two-thirds of all legal questions it must address. It allows the ECJ to involve national courts in the enforcement of EU law to ensure that such laws are applied uniformly. Consequently, it uses the legitimacy and competence of national courts. Regardless of the constitutional status of international or supranational rulings, national governments and parliaments feel incomparably more bound by the rulings of their courts.[23] Moreover, a preliminary ruling may give a lower court a better chance to promote adjustments in legal interpretation, which is impeded by a higher court.

As regards Italian courts, since the 1980s, the judicial dialogue between the ECJ and administrative and ordinary courts has gradually intensified. The quantitative and qualitative aspects deserve mention. Quantitatively, during the 1953–2015 period, French judges sent 931 preliminary references to the ECJ, of which 118 came from the *Cour de Cassation,* and 99 from the *Conseil d'Etat*. Italian judges sent 1,326 preliminary references, of which 132 came from the Court of Cassation, and 126 from the Council of State.[24] In sum, there was a greater propensity for Italian judges to use this mechanism and, comparatively, Italian administrative judges were more inclined to do so than ordinary judges given the latter's wider area of competence. Qualitatively, there is virtually no salient legal question, from public procurement to criminal law, in which national judges refrain from using preliminary reference procedures, thus making the ECJ an alternative source of authority to the ICC.

22 Craig, 2007, p. 285.

23 See Stone Sweet, 2004, p. 15.

24 ECJ, *Judicial statistics 1953-2015* (2015), 97-102. For further remarks, see della Cananea, 2016, p. 101.

This last remark may explain another shift in the ICC's judicial policies. It involved using the preliminary reference mechanism. The ICC has never considered itself as a 'court' in the meaning of Article 267 TFEU for several reasons: structurally, only one-third of its members are professional judges, while two-thirds are appointed by political institutions, the President of the Republic and Parliament; functionally, its main power is not to adjudicate disputes between individuals or between individuals and public authorities but to check the constitutionality of legislation. Moreover, as with other national constitutional courts, the ICC was reluctant to send preliminary references to the ECJ. Affirming that a constitutional court does not seek a preliminary ruling raises the question of whether this is a matter of law or policy. From a legal perspective, there is no insuperable obstacle to admitting that a constitutional court may be regarded as a court of last resort. This was confirmed when the ICC first sought a preliminary rule from the ECJ.[25] It suggests that sending references is a matter of policy.

When the ICC decided to seek a preliminary ruling, it specified that this could be done because there was a dispute between two public authorities; that is, the State and Region enjoying a special status, Sardinia. Therefore, according to the ICC, the necessity to seek preliminary rulings arises only regarding inter-institutional disputes (*giudizi in via di azione*); that is, those that arise either between the state and the regions or between the latter.[26] The second case concerned the complex interaction between the norms aimed at protecting the finances of the EU and domestic rules concerning the duration of criminal proceedings. Notwithstanding the strong perplexity raised by the Court of Cassation, backed by some prominent constitutional lawyers, about the risk that a national tradition would be infringed, the ICC chose to continue its 'dialogue' with the ECJ, and its choice furnished an adequate solution.[27] In other words, it chose dialogue instead of standing up as the last defence against national identity.

The third step involves the right to be silent within administrative procedures managed by the financial markets' regulatory authority: CONSOB. This required a slight digression. In US public law, the leading case is *Miranda*, decided by the Supreme Court almost 60 years ago. This case addressed several questions involving custodial interrogations without the presence of an attorney. In the Italian Constitution, the provision concerning due process in criminal trials (Article 111) can be, and has been, interpreted in two opposite ways. For some, this is the norm in

25 ICC, order n. 104/2008. For further details, see della Cananea, 2008, p. 523. See also Fontanelli and Martinico, 2010, p. 346 (arguing that 'this decision represents a veritable shift from the procedural impermeability between constitutional procedural law and EC law').

26 See Cartabia, 2009, p. 5.

27 On the issues involved with the *Taricco II* saga, there is a burgeoning literature, which is not always perspicuous. The final word has been said by the ECJ in its ruling on Case C-42/17, *MAS*, where it disagreed with the opinion issued by AG Bot, and by the ICC in its ruling n. 115/2018. For an analysis of the behaviour of some constitutional courts that affirm their role of ultimate defenders of national identities, see Guastaferro, 2012, p. 263.

criminal trials. For others, this norm was a manifestation of a broader principle of procedural fairness. The ICC has raised doubts about whether the former interpretation is compatible with Article 6 of the ECHR as interpreted by the European Court of Human Rights in *Chambaz*.[28] In a well-written preliminary reference (Order no. 117 of 2019), it urged the ECJ to resolve this doubt in the case of an insider dealing offence. AG Pikamae has consistently argued that a solution must be found in light of the distinction between natural and legal persons in that the former may invoke the right to remain silent.[29] The Court has followed the AGs' opinion. It examined the provisions of the EU legislation in light of Articles 47 and 48 of the Charter of Fundamental Rights of the EU. It has also referred to Article 6 of the ECHR on the assumption that even though the Convention has not been formally incorporated into the EU legal order, the fundamental rights it recognises and protects constitute the general principles of EU law.[30] Once the Court has held that Articles 47 and 48 included the right to silence of the natural persons who are charged, it follows that punitive penalties could not be legally imposed. As the Court has clarified, natural persons cannot be penalised if they exercise the right to remain silent.[31]

2.7. European law v. international law

Thus far, our legal and empirical analysis has shown that:

i) The choice of Europe was, together with NATO membership, a fundamental political decision after 1945.

ii) After the initial reluctance of the ICC to recognise the principles of direct effect and supremacy, there has been a significant development in its jurisprudence.

iii) Political institutions strengthened their ties with the EU in 2001 and 2012. Therefore, even though there is no clause like the *Europa-artikel* of the German Basic Law, there is increasing integration between the national legal order and that of the EU. The importance of this development can be better understood by examining the different states of things which concern international law after the controversial judgement issued by the ICC in the German liability case.

Before examining this case, it may be helpful to briefly consider the foundations of the present law and the options at our disposal when considering judicial remedies against States. All legal systems must make fundamental choices about justiciability in actions involving the state and its officers. Within the national system of public law, an option that is used diminishingly is to have a general cloak of immunity. The

28 ECtHR, judgement of 5 April 2012, *Chambaz v. Switzerland* (application n. 116603/04).
29 Opinion of AG Pikamae, delivered on 27 October 2020, Case C-481/19, *DB v Consob*.
30 ECJ, judgement of 2 February 2021, Case C-481/19, *DB v Consob*, § 36.
31 ECJ, judgement of 2 February 2021, Case C-481/19, *DB v Consob*, § 58.

opposite option is the acceptance of a general principle of justiciability, though the courts act as gatekeepers and, thus, allow remedies for state action affecting certain interests but not for others. However, from the viewpoint of international law, States enjoy immunity from suits before domestic courts.[32]

This privilege was at the heart of the complex dispute that arose at the beginning of the twenty-first century. In short, some individuals brought claims against Germany before ordinary Italian courts, seeking reparations for injuries caused by violations of international humanitarian law committed by German occupying forces during the Second World War, including those against Italian nationals. Germany instituted proceedings against Italy, requesting that the ICJ declare that it had failed to respect the jurisdictional immunity it enjoyed. Greece requested permission to intervene. The ICJ has endorsed this claim. However, the Court eventually found that Italy had violated Germany's immunity by declaring the civil judgements rendered by the courts enforceable,[33] although three judges dissented from the majority: Cançado Trindade, Yusuf, and Gaja (ad hoc judges sitting in this case).

Two years later, domestic courts reconsidered this immunity in light of the constitutional guarantee of access to a court.[34] The starting point was that such guarantees were absolute and could not be derogated. While the ICJ focused on jurisdictional liability, the ICC focused on another issue: the conflict between the norm of international custom, as interpreted by the ICJ, and the norms and principles of the Italian Constitution; more precisely the 'essential principles of the state order', including the principles of protection of fundamental human rights. The threshold thus set out is high because the ICC has reiterated its general doctrine of '*controlimiti*' (counter-limits) to the limitations of national sovereignty stemming not only from generally recognised norms of international law but also from EU law and the treaties agreed with the Holy Seat. The conclusion that follows from this doctrine is that if a fundamental right is infringed, its role is to ensure protection regardless of the consequences.[35] In practical terms, the national constitution trumps international law.[36] While the judges of the ICJ could, and did, express their dissent, this could not be done by the members of the ICC because the domestic constitutional framework does not provide dissenting opinions. However, the ICC was divided. A former member of the Court has subsequently said that he was even ready to resign from the Court to avoid being associated with a 'terrible decision', a form of 'legal protectionism'.[37] It is questionable whether the ICC has failed to give weight not only to international customary norms but also to the role of the ICJ in ensuring

32 Peters, Lagrange, Oeter and Tomuschat, 2015.

33 ICJ, judgement of 3 February 2012, *Jurisdictional immunities of the State* (*Germany v. Italy*; Greece intervening), § 100.

34 Art. 24 of the Italian Constitution.

35 ICC, judgement n. 238 of 2013. available in English on the Court's website: https://www.cortecostituzionale.it/ documenti/download/doc/recent_judgments/S238_2013_en.pdf.

36 Tomuschat, 2014, p. 189.

37 Stone Sweet and della Cananea, 2022, p. 1538.

that disputes among nations are resolved peacefully. This is even more questionable because it takes for granted that when Article 24 of the Italian Constitution refers to access to courts for the protection of individual rights, it only refers to domestic courts as distinct from international courts. The issue that arises is whether the ICC has deemed that the status of international law can be considered distinct from the status of EU law in light of its increasing political and legal importance, which is confirmed by the two recent reforms of the Constitution. This issue will be discussed in the following section.

3. Interpretations

While the previous section illustrated the main facts that are relevant and significant from a public law perspective, this section discusses their interpretations. The structure of this argument is as follows. It begins with the distinction between facts and interpretations. This is followed by an analysis of three interpretations that are not only distinct but also mutually exclusive in that each excludes or precludes the other. The first is the most authoritative interpretation, according to which, after seven decades of European integration, the Italian State is no longer what it was initially. The opposite interpretation emphasises the traditional concept of sovereignty. Another interpretation is based on the distinction between the *acquis communautaire* and new policies.

3.1. Facts and interpretations

This section is based on two premises that must be fully delineated for clarity. The first is a general distinction between facts and interpretations. The second premise relates to the development of the former from a public law perspective.

Generally, the first distinction is relatively easy to understand. Put simply, facts concern what happened and can be proven to be effective or real. Whether a certain constitutional provision exists is a matter of fact, not opinion. Thus, for example, when Victorian constitutionalist Albert Venn Dicey criticised the French *droit administrative* on the grounds that a certain constitutional provision excluded the liability of the servants of the state, he referred to a provision that no longer existed. Generally, an interpretation or opinion that is not based on facts or even prescinds from them is less likely to be considered by the participants in a discussion. That said, a statement about a fact is not only examined to ascertain whether it refers to something that is true.[38] Its importance and relevance should be considered in future

38 For an excellent analysis of this issue of method, see Loughlin, 1994, p. 50 (suggesting that, as knowledge is relational, truth or falsity may not be determined outside the social context).

studies. In other words, facts do not exist simply because we must ascribe meaning to them. Therefore, the importance of context must not be neglected.[39]

From the perspective of public law, a further caveat is apposite. The relevance and significance of all elements of fact are partly determined by essentially contested concepts;[40] that is, concepts involving widespread agreements, such as democracy and fairness. The EU Treaties provide an example. According to Article 4 of the TEU, the Union is founded on the values of democracy, liberty, respect for the rule of law, and fundamental rights. Arguably, a positive norm is insufficient to determine the content of concepts such as democracy and the rule of law and their meaning is functionally related to the practice in which these values are sustained. Not surprisingly, there are various opinions on what these values mean, and those of the new members of the EU may differ from the opinions of the founders.[41] However, this argument is valid for multiple reasons. First, even before the Maastricht Treaty, there was a shared understanding among the founders of the Community in that only liberal democracies could become part of it. Second, because Article 4 existed before the more recent enlargement, the agreement that then existed about certain ramifications of those values, such as judicial independence, cannot be neglected. Third, Article 4 does not simply note that these values are shared by the Member States but also requires the latter to respect them.[42] This notion is confirmed by Article 7 TEU. In this sense, the soundness of an interpretative proposition concerning the values upon which a union is founded must necessarily consider facts and uses.

3.2. A new type of State

As observed initially, the first interpretation argues that, if we consider not only the potentiality created by the Constitution of 1948, in particular the acceptance of 'limitations to sovereignty' established by Article 11, but also the facts that followed, a new type of State has emerged, which can be called the 'communitarized' State because it is involved in a process of integration. To better understand this school of thought, which is widely shared among public lawyers, a slight digression is necessary regarding the concepts of sovereignty and integration.

The concept of sovereignty embodied in the Italian Constitution, so the argument goes, is no longer that elaborated upon by Bodin and Hobbes at the birth of the modern state, taken for granted by the realist school of international relations. Indeed, in Bodin, there are two distinct conceptions of sovereignty: one is analytical because it distinguishes the various sovereign powers (including making laws, declaring war, and appointing the highest magistrates), and the other is synthetic because it views

39 Loughlin, 1994, p. 50.

40 Gallie, 1955, p. 167.

41 For further discussion, see von Bogdandy, 2021, p. 73. For a different approach, which views the enforcement of values as a political task, rather than legal, and, thus, calls for dialogue, see Mader, 2019, p. 133.

42 See Mangiameli, 2017, p. 198 (discussing the 'homogeneity clause').

sovereignty as a totality.[43] However, in Hobbes, the latter conception predominates. In line with this conception, many realists have argued that, from the perspective of international law, what matters is whether internationally agreed norms are enforceable through sanctions or military threats. In contrast to this established school of thought, Chayes and others have argued that in the modern world, sanctions and military threats are extraordinary measures. Most of the time, states comply with the norms they have agreed to simply because, in a complex and interdependent world, the normal way to exercise power is to be members of regional or global legal regimes and influence their decisions. Within such regimes, compliance is assured by other means, including incentives, pressure, and judicial or quasi-judicial mechanisms.[44] This managerial and pragmatic approach explains much of the world in which we live. Article 11 of the Italian Constitution fits this conceptual framework perfectly. As observed earlier, at its roots, there is the idea that 'a shared sovereignty is not only conceivable and admissible but also necessary in light of the goals—peace and justice among the peoples of the world—that the State, no State alone, could achieve'. Membership in international organisations is, thus, the only legitimate way to pursue constitutional purposes.

This general argument is further specified regarding Europe through the concept of integration used by judicial decisions and academic writing. The core of the ECJ's argument in *Van Gend en Loos* has two limbs. The first is that 'the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields', which confirms that sovereignty can, and has been, limited. The second limb of the argument is that community institutions are 'endowed with sovereign rights' that affect both Member States and individuals. The underlying idea is, thus, that sovereign powers are no longer exercised by each State individually but are 'transferred' to the Union and, thus, exercised jointly.

There is a rich literature that explores the rationale for EU integration and contending theories, including neofunctionalism, intergovernmentalism, and multi-level governance. In the Italian context, both the first and last theories gained consensus. The central tenet of neofunctionalism, the concept of spillover, that is, the idea that integration in one area creates pressures for integration in other areas, has been appealing to political leaders seeking to explain why communities would secure peace and prosperity, both of paramount importance for a country that adopted a constitution that refused war as an instrument to solve disputes (Article 11) and that literally had to be reconstructed after 1945. Moreover, it has appealed to both policymakers and scholars seeking to explain why the single market is supplemented by common policies, including a single currency. Multi-level governance, with its emphasis on the existence of multiple levels—subnational, national and supranational—of government, where authority and policymaking are shared, and, thus, on interconnection rather than hierarchy, is also appealing to policymakers seeking

43 Bodin, 1576.
44 Chayes and Chayes, 1995, p. 1.

to achieve goals that would be precluded without joint action (e.g. the protection of the environment or trade agreements with the most powerful States) or to alleviate the costs of unpopular decisions[45] in the logic *'Europe requires us to do so'*. It has an undeniable appeal for constitutional lawyers who wish to shed light on the role that subnational institutions can play and on judicial dialogue.[46]

Considered together, shared sovereignty and European integration support the theory of state, which emphasises the dimension of change. Simultaneously, the Republican Constitution is regarded as a key element of discontinuity regarding the previous political regime and as the source of a new order, where might and power are limited by democracy and law. The emphasis put on the limitations of sovereignty explains the diffusion of the idea of 'external bounds'. These three examples can be instructive. State aid to enterprises, a traditional instrument of administrative action is not prohibited by the treaties but is legitimate only if it does not jeopardise competition, and it is preferable that monitoring and surveillance are discharged by a supranational institution, the Commission. Similarly, the prohibition of excessive government deficits is viewed as an instrument aimed at preventing government failure, distinct from market failures, which are cured by public regulation. The fact that the national constitution now requires public authorities not to run excessive deficits and ensure debt sustainability confirms that these limits must not be viewed as external impositions but rather as requisites of sound governance. Discretion is not excluded but is limited by technical considerations and subject to impartial controls, particularly by judges.

In contrast to the popular understanding of democracy and input legitimacy, this school of thought emphasises output legitimacy and the rule of law. It advocates political deference to bureaucratic expertise, judicial wisdom, and external bounds derived from the membership of regional organisations as features of the modern state. It argues that a new type of state has emerged, one that is involved in evolving integration; that is, a state that has renounced full and indivisible sovereignty.[47]

3.3. Defence of national identity and democracy

What has just been said about the first school of thought can help understand the other, although this cannot be viewed as the opposite view. Its main concerns are the preservation of national identity and the defence of democracy in the only area where it has flourished historically: the state. At the outset, however, these concerns are not simply distinct but are also emphasised in the context of different visions of public law and the state. Therefore, they require autonomous treatments.

45 Craig, 2011, p. 16. See also Weiler, 2011, for a discussion of the legal culture of European integration.

46 See, for example, Tega, 2021. For a critique of 'multilevel constitutionalism', see della Cananea, 2010, p. 284.

47 Cassese, 2012, p. 81; Manzella, 2003, now in *Quaderno europeo. Dall'euro all'eurocrisi*, Venice, Marsilio, 2005

After the Treaty of Maastricht, several national politicians and scholars highlighted the Union's duty to respect Member States' *'national identities, inherent in their fundamental structures, political and constitutional'* (Article 4 (1) TEU).[48] However, in Italy, few studies have referred to national identity in connection with the organicist vision of the social body. Instead, several constitutional lawyers have expressed concerns about the threats to individual rights and equality. The core of the argument rests on the uniqueness of the Italian Constitution's framework for civil and social rights, including those related to health and social security. There is no particular role in this list for elements such as individual freedom, adherence to the rule of law and government transparency. These considerations, central to the liberal view of the state, are viewed formalistically. Hence, there is a radical critique of the limitations that stem from membership in the EMU, such as the prohibition of excessive government deficits and the primary concern for monetary stability. The negative consequences that follow from these 'neo-liberal' policy choices are said to affect workers and the protection of health. Some commentators criticised the asymmetry between the economic and social as follows:

> Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition, and which EU rules constrain or foreclose. If those are now required, there are only two ways to harness them: either by aligning EMU to democratic and social ends or by unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level.[49]

Concerns for democracy, another pillar of these theories, are expressed in several ways. While the founders of the EC saw it as a club of liberal democracies that was the best way to secure peace and prosperity and legitimacy was thus conceived in terms of outcomes, these commentators assert that the notion of democracy was attenuated or limited. Democracy is directed towards a deficit that exists within the EU. While other scholars identify the democratic deficit in the 'disjunction between power and electoral accountability' and express concern as to 'executive dominance',[50] these commentators explicitly address the tension between the technocratic nature of the EU and its legitimacy. Their main thrust is a mixture of bureaucratic overreach and lack of transparency and accountability, which shifts the union away from the perspective of democratic constitutionalism.[51] The differences between the first and second schools of thought are profound and can have diverse consequences.

48 See von Bogdandy and Schill, 2011, p. 1. (suggesting that the identity clause reshapes the relationship between the Union and its States).

49 Dani, et al., 2021, p. 309.

50 See, however, Moravcsik's defence of the EU from the charge of democratic deficit: Moravcsik, 2002, p. 603.

51 For further analysis, see Chiti and Teixeira, 2013, p. 683.

A detailed analysis requires an extended chapter. What follows is an outline of some issues, some of which are more abstract, while others are very concrete.

First, consider what is crucial from the perspective of constitutional law and legal theory; that is, the conception of sovereignty. The phrase 'limitations of sovereignty', employed by Article 11 of the Constitution, can be interpreted in the sense that it allows for the transfer of functions and powers to the EU. However, this notion can be interpreted in a radically different manner in that EU institutions can only be allowed to exercise functions and powers that still belong to the state. The underlying assumption of the latter interpretation is that sovereignty is inalienable, similar to the argument used in France in the referendum on the Treaty of Maastricht. The consequence is that sovereignty, traditionally intended, has not withered away but is still at the heart of the constitutional settlement. Thus, supporters of this theory concede that the powers related to monetary policy are exercised by the ECB *de jure*, not *de facto*; therefore, the acts of the ECB constitute binding determinations of matters that come within their remit. However, they argue that these powers can legally be returned to the state to which they belong. This interpretation can be appealing theoretically but is not immune to practical challenges. There is nothing to indicate that these powers can be returned to the state if they wish to remain in the EMU. Therefore, the only possible option is to withdraw from the EU. Legally, this is not a threat but an inevitable consequence.[52]

Now, consider the ratification of the EC/EU treaties. For almost three-quarters of the century, the legitimacy of the EC/EU was based on the mechanisms of representative democracy. Thus, governmental negotiations must be followed by the parliamentary ratification of treaties. The Parliament always ratified treaties and, thus, sanctioned the transfer of functions and powers to Europe. However, the discontents argue that this method is acceptable only from the viewpoint of 'formal' legality. What is lacking, for them, is a 'substantive' legitimacy, because the people should be allowed to express their voice through a referendum, as happened in France and the UK. This theory is even more problematic than the previous one because Article 75 of the Italian Constitution explicitly prohibits a referendum concerning international treaties, such as those upon which the EU is founded.[53] This discontent replies that nothing prohibits a consultative referendum. In this case, there was a precedent: the consultative referendum held in 1989 on a project to give a constituent mandate to the European Parliament. However, there is nothing to suggest that a mechanism not provided for by the Constitution can be converted into something that the Constitution explicitly prohibits. Nor is it easy to see how Article 75 could be amended because the very first clause of the Constitution provides that *'sovereignty belongs to the people, which exercises with the forms and limits established by the Constitution'*. In other words, the choice of representative democracy cannot be ignored.

52 See Chiti and Teixeira, 2013, p. 707. (criticising the 'politics of fear').
53 For further discussion, see Martinelli, 2022, p. 1555.

This may explain why some constitutional lawyers recently posed a provocative challenge to the ICC's established jurisprudence. As observed earlier, this jurisprudence has recognised the increasing integration between the national legal order and that of the EU. Critics contend that the Court should not hesitate to acknowledge the existence of a conflict between EU policies and the rights protected by the Constitution, which are said to be part of the national identity in the sense of Article 4 (1) TFEU. In light of the settled case law of the ICC, it is perfectly legitimate for constitutional lawyers to pose search questions concerning the legitimacy of obligations that stem from EU membership. Moreover, it should not be forgotten that a similar line of reasoning was used by the ICC in the German liability case, with the consequence that the national constitution, as interpreted by the ICC, trumped international law. It is by the same token perfectly fitting to subject this analysis to close critical scrutiny, for example, by raising the issue concerning liability, because within the EU, there is a centralised system of enforcement, which is based on the Commission and the ECJ, as opposed to the international system. This is especially so given that most of the cases in which the discontents complain about limitations imposed on social rights derive from national constitutional provisions, such as those concerning financial balance and debt sustainability. This also applies to a variant of the previous argument; that is, some decisions taken by the EU institutions, such as the Stability and Growth Pact (SGP), have gone beyond the treaties and, consequently, unduly limit the exercise of power by national institutions.[54] There are excellent arguments criticising the choice made with the SGP on the grounds of policy. However, in light of Article 126 of the TFEU, which entrusts EU institutions with the power to modify the standards for national budgetary policies, it is challenging to see how the SGP can be regarded as extralegal. A distinct issue is whether Italy had to agree with the limitations of its budgetary or financial sovereignty. This issue will be discussed in the next section.

3.4. Acquis *v. further integration*

Thus far, we have discussed two groups of theories that concern European construction as it developed in the last seven decades or so; that is, the *acquis*. Thus, it is time to consider the perspective of further integration. For analytical purposes, two opposing visions of Europe were delineated. For our purposes, it suffices to characterise each of them briefly. There is, first, the vision that is centred on the idea, or perhaps the ideal, of an *'ever closer union among the peoples of Europe',* to borrow the famous words used by the Treaty of Rome's preamble. The other vision of Europe postulates a greatly enlarged union with less intense ties, a sort of 'club' where the members agree only on a few fundamental objectives and principles and do not necessarily wish to change the current state of things. The intent here is not to discuss these visions in their entirety, as such views have already been expressed

54 Guarino, 2013, p. 211. (went even further, asserting that a sort of 'golpe' took place).

elsewhere.[55] Rather, the intent is to show that the differences between these visions of Europe are so profound that their practical consequences differ depending on the framework within which they are considered.

This applies particularly to the financial mechanisms existing within and outside the EMU. In this respect, the first school of thought tends to assume that the criteria governing the conduct of monetary policy are based on the *'nature of the things'*. For others, bureaucratic experts and unrepresentative bodies, such as central banks, make decisions but are unaccountable. They criticise, *a fortiori*, the European Stability Mechanism (ESM), which is a body created by a separate international treaty that lies outside the institutional framework of the EU and exacerbates the problems of complexity and opacity. Diverse opinions characterise the debate concerning the ratification of the new treaty, which modifies ESM. Since Italy is the only Member State that has not yet ratified the treaty, it is important for the entire EMU. The remainder of this paper is organised as follows. First, economic arguments in favour of and against the new treaty are illustrated. Next, the study considers specific legal issues. Finally, it discusses the political ramifications of this debate.

Two main arguments support the ratification of the new treaty on the ESM. First, there is a general argument regarding banking unions. The heart of the argument is that the *'banking union remains incomplete, without its cross-border deposit insurance pillar supported by a credible fiscal backstop'*.[56] Thus, the EMU remains exposed to financial shocks that may threaten its systemic stability, with the further consequence of making bailouts necessary, in contrast to existing rules. It is readily apparent that the theory of integration that underlies this argument is neofunctionalism, with its strong emphasis on spillover; that is, the idea that integration in one area creates pressure for further integration in the same area or other areas and that this would secure prosperity in the guise of stability. It is even more evident when considering that the next step should be to support ESM through a public guarantee against sovereign default; that is, a Eurobond. This general argument is supplemented by another argument concerning Italy: its public debt is huge,[57] and the exposure of some national banks is non-negligible. Hence, preventing banking crises that may negatively affect sovereign debt is necessary. Overall, if ESM reform fits well with EMU members' needs, it does more so with Italy's needs.

The opposing theory contests both arguments. It contests the advantages that would derive from the reform of the treaty establishing the ESM because this would transform the ESM from a *'manager of sovereign debt into an institution for the prevention, control, and management of such crises'*.[58] More concretely, the ESM would be entrusted with the power to decide whether a country that takes part in the EMU and must seek external financial support should restructure its government debt.

55 See della Cananea, 2019, p. 45.
56 Micossi and Pierce, 2020, p. 1.
57 It is 'colossal', for Micossi and Pierce, 2020, p. 1.
58 Messori, 2019.

This risk is particularly serious for Italy, precisely in light of its high public debt, which would be exposed to heavy instability. In brief, *'the EMU Member State that has the most to lose is Italy'*.[59]

Economic science contributes to a better understanding of the advantages and disadvantages of a government when faced with difficult strategic decisions. In legal analysis, it is extremely difficult, if not impossible, to weigh the advantages and disadvantages of such decisions. However, in some respects, legal analysis may clarify the grounds for possible misunderstanding. This is the case of the proposition according to which, if the new treaty is ratified and the ESM is entrusted with new powers, thus making an agreement with an EMU country where certain conditions are included, those conditions may be unilaterally and retroactively modified by the ESM board against the will of the state concerned. In my view, this proposition is not legally or politically tenable. This is not legally tenable because unilateral and retroactive modifications of bilateral agreements are excluded. This is politically untenable because there is no reason why a board should have privileged status against a country that is a signatory to a treaty.

However, the political spectrum is more divided than ever before. The majority that supported the government led by Mario Draghi were so divided that they decided not to conclude a new ESM Treaty. The new government, based on a Eurosceptic majority, initially affirmed that it was necessary to wait until Germany's Constitutional Court adopted its ruling on the action brought against the ratification of the new treaty. This rule was adopted by the end of 2022. Giorgia Meloni's decision was two-fold. First, they must come to grips with the question concerning the entire EMU, that is, whether the new treaty must be ratified after which every country may decide whether to use the instruments that it provides. However, they must clarify whether they intend to avail loans under the new treaty conditions. Logically and legally, the two issues are clearly distinct, and the stakes concerning the former are higher than those regarding the latter because Italy might obstruct further integration for the first time. However, politically, the distinction tends to blur in the opinion of the political leaders according to whom approving the ESM changes would *'end our national sovereignty'*. Moreover, the government might be tempted to threaten not to initiate a ratification process to negotiate other dossiers, such as the SGP reform. This would be, in itself, a change because it would show the government's intent to operate to maximise its (perceived) individual interest regardless of the perspective of an ever-closer union between the peoples of Europe[60] and might run counter to the maintenance of Italy's political position in the core of the EU. As in Borges's 'garden of forking paths', cyclical repetition is not disjointed from differently spreading trajectories.[61]

59 Messori, 2019, p. 12.

60 For a discussion that catches well the assumptions upon which this vision of the EU is based, see Harlow, 1992, p. 331.

61 Borges, 1948.

4. Conclusion

There is no attempt to summarise the preceding arguments. Rather, it is helpful to highlight some analogies and differences between Italy, Germany, and France, the three founders of the EU. Similarly to France and Germany, Italy is a founding member of the EC and is now part of the Union. Like Germany and France, its membership has been based on the mechanisms of representative democracy, and its constitutional identity has been gradually shaped in close connection with the European construction. Unlike Germany, however, there is, for the first time, a parliamentary majority that is reluctant, if not openly hostile, to further integrate, at least in some areas. The role of legal scholarship is to raise adequate awareness of past choices, especially those enshrined in the Constitution, which can be changed only through prescribed forms and within certain limits and to be equally aware that there are always sunsets and new dawns.

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