Chapter 6

The European Union: A Sui Generis Legal Order: Prospects for Development

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Abstract

The first phase of our collective research focused on the concept of constitutional identity. This raised the question of how this identity could be defined and, if necessary, protected, in the light of the requirements linked to the participation of States in European Union bodies.

The second phase of this research focuses on the nature of the European legal order. The first step is to identify the legal categories that may assist in characterising the European Union. The document setting the context for the research starts from the premise that the European Union, which has embarked on the road to federalism, is halfway along this path, and sets out the prospect of a European Union as a simple structure for cohabitation and cooperation between States.

Between a federation and an alliance treaty, there is probably a middle path, a legal order that is no longer federal but confederal in nature. Confederation means maintaining and guaranteeing the sovereignty of the confederate States. In any case, it seems advisable not to lock ourselves *a priori* in pre-established legal categories which may prove obsolete or inappropriate.

As a first step of this approach, however, it is worth considering the nature of the European Union, resulting from the current Treaties.

Secondly, it is noteworthy how the European Union uses integration mechanisms which go beyond a strict interpretation of the Treaties, with particular reference to the rule of law and the Union's values.

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Finally, the third phase of the study will seek to consider the possible transformations of European institutions in a direction that is more respectful of State sovereignty.

Keywords: European constitutionalism, federalism vs confederation, state sovereignty, CJEU, democratic legitimacy, rule of law.

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1. What is the European Union?

Within this framework, I will briefly analyse the European institutions in terms of three classic concepts of constitutional law: the concepts of constitution, sovereignty and democracy. Indeed, if we examine the federal nature of the Union, reference should be made to the characteristics of the State.

The second step is to put the European Union into perspective with the characteristics of a federal legal order.

Indeed, the European Union is a supranational legal order, to a greater extent than any international legal order. Although the European Union is governed by international law, in that it has been created by a Treaty, the process of integration is underway, both as a result of amendments to the Treaties and the combined actions of the Commission, the Parliament and, above all, the Court of Justice of the European Union.

1.1. Is the European Union a constitutional legal order?

Assuming that the Constitution is consubstantial with the State, a distinction must be made between a material and a formal definition of the Constitution. Materially, the constitution essentially determines the form of the State (unitary State, federal State, etc.), the form of the government (monarchy, republic, democracy), the organisation of powers (head of State, Parliament, judiciary, etc.), the distribution of competences between these powers, and the limits of power within the State (conditions for constitutional revision and fundamental rights). From a formal point of view, the Constitution is the written act which contains these different elements. So, while the existence of a material Constitution is a prerequisite for the existence of a State, a State may not have a formal Constitution, as in the case of France under *the Ancien Régime* or of Great Britain today. These material and formal definitions are essentially descriptive. From a normative point of view, the Constitution can also be seen as a particular norm with specific characteristics. In this sense, the Constitution is a norm, setting the conditions for the enactment of other norms and conferring their validity.

From this point of view, the link between the State and the Constitution is explained by the fact that the State is considered as sovereign, and therefore has a monopoly on the enactment of general and unconditional rules. Within the State,

the holder of sovereignty, i.e. the People in a democracy, is the author of the Constitution, the norm from which both the powers exercised within the State and the produced norms derive.

However, the question of whether only the State can have a Constitution has been raised today. It has come back vigorously, together with questions about the nature of the European Union.

The original definition of the term "Constitution" in our field of interest dates back to Aristotle, according to whom a Constitution is the government of a political community. It is this aspect that will be highlighted here. It is therefore necessary to ask whether the State is the only conceivable form of political community. With E. Zoller (*Droit constitutionnel*, PUF), it is possible to answer negatively. Indeed, accepting that a political community is made up of a number of individuals grouped together in a territory and having a system of government, means that Burgundy in feudal France could be considered as a political community. In fact, the State would be the modern form of a political community, and this identification would result in a distinction between Constitution and State. However, any group of individuals subject to certain common rules should not be treated as a political community. Thus, an association or a trade union is not a political community, essentially because it is subject to the principle of speciality with regards to both its purpose and its competence. Similarly, and to bring us closer to constitutional law, a territorial collectivity is not a political community when it is subject to the principle of speciality and derives its existence and competences solely from State recognition and empowerment. In the same vein, despite the European Court of Human Rights' claim that 'the Rome Convention is a constitutional instrument of European public order' (Court of Human Rights, Loizidou, 23 March 1995), this legal order cannot be a constitutional order, as it is marked by the principle of speciality (essentially the protection of human rights).

However, it should be noted that the organisation of political communities, which might be called "post-modern", is becoming more complex, and is demonstrated by the development of legal orders that are no longer always hierarchical, but rather interconnected. Thus, the traditional classifications and the usual tools of constitutional law have difficulties in grasping certain realities, such as the regional organisation of certain States (Italy or Spain) or the European Union. It is worth pointing out that in all these situations, sovereignty is the stumbling block to classification.

From this point of view, and independently of the failure of the European Constitution project, the question arises as to whether the Community legal order falls within the scope of constitutional law. An affirmative answer could be justified by the apprehension of the European Union as a federal State in the process of development. This issue will be discussed later. Nonetheless, the European Union can be considered as having a material Constitution. Moreover, it constitutes a specific legal order whose existence is recognised by national constitutions. However, it does not meet the conditions for the existence of a normative constitution. The first observation is the existence of a material Constitution.

The construction of the European Union took place by the conferral of competences from the States to a supranational organisation. The nature of this pooling of national competences changes when some of the competences transferred are closely linked to the exercise of national sovereignty. The criteria used by the French Constitutional Council to consider that a conferral of competences affects the essential conditions for the exercise of national sovereignty are, from this point of view, revealing. This is the case when competences in an eminently sovereign domain are transferred to the European Union, or, in the same domain, when the State loses control over decision-making, either through the loss of the power to prevent, or through the switch from unanimity to majority decision-making, or through the loss of the power of initiative, or through the decision-making intervention of bodies in which the States are not represented as such, like the European Parliament.[1]

Such an approach undoubtedly leads to the transfer to the European Union of competences which are the hallmarks of national States. In this way, it may be considered that the European Union is gradually constitutionalising itself by "taking on" competences linked to the exercise of sovereignty. In a system of interconnectedness, this constitutionalisation takes place as and when the States transfer these competences to the Union. In most cases, this operation takes place following a revision of national constitutions, whether this involves a specific authorisation for transfer or a general clause authorising such transfers. While realism requires us to consider that national sovereignty may remain substantially weakened following such operations, in principle, it remains embodied in the State. Indeed, States retain the "competence of competence", which lies at the heart of the very concept of the State.[2]

In fact, as a result of this process of constitutionalisation, the European Union gets the prerogatives of a public authority. Indeed, it is indisputable that the European Union enjoys the prerogatives of a public authority, if one accepts that 'these prerogatives are exercised by public authorities and enable them to unilaterally impose decisions on subjects of law and, when appropriate, to return to enforcement by coercion'.[3] However, this concept of public power is distinct from that of sovereignty, and may be the attribute of a non-State political society.[4] Moreover, the inclusion of "integration clauses" in national Constitutions marks the recognition of a specific legal order.

Many countries, such as France, Italy and Portugal, have enshrined the principle of European Union membership in the text of their national Constitutions. This affirmation constitutes a recognition of the specific nature of the European Union. Article 88-1 of the French Constitution recognises that 'the Republic shall participate in the European Union constituted by States that have freely chosen to exercise some of their powers in common' by virtue of the Treaties of the European Union. This

1 Schoettl, 2004, p. 3.
2 Pernice, 2004.
3 On this issue, see: Denizeau, 2004.
4 Moderne, 1960, p. 51.

wording is important. On the one hand, the European Union's specific status is recognised by national law. On the other hand, this Union has been created by the States that constitute it. It is the product of the free will of States and is vested with the powers transferred to it. A double movement is thus outlined here: on the one hand, the constitutive (in the absence of a constituent) role of States, and on the other the specificity of the legal order thus created.

By choosing to rely on Article 88-1 of the Constitution and not on the provisions of Article 55 C, generally governing the relationship between international law and domestic law, the Constitutional Council has followed this logic.[5] Firstly, it considers that the 'authors of the Constitution have thus enshrined the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order'. On the other hand, it considers that this article imposes, in principle, the prevalence of European Union law over national law, including constitutional law. This prevalence can be considered as one of the elements in the constitutionalisation of the European legal order.[6]

However, this prevalence is applied by a judge, by virtue of a national constitutional provision and not in application of a Community requirement. More precisely, this Community requirement is mediated by the national Constitution.

However, from a normative point of view, the European legal order is not constitutional.

This last element must be taken into account when considering that the European Union is not a constitutional legal order in the normative sense of the term. It is in fact the absence of sovereignty of this political entity that deprives this text of its constitutional nature. Indeed, the European "Constitution" cannot be considered as the norm that confers validity on other norms. This is essentially evidenced by the fact that in many national laws, as pointed out earlier, Union law takes precedence over national law, not by virtue of the European norm, but by virtue of the national constitutional norm. From this point of view, the Court of Justice of the European Union cannot be considered as a constitutional court.[7] Indeed, according to a classic definition, cited by G. Drago (in "*La Constitution européenne: une Constitution?*"), the purpose of a constitutional court, i.e. its *raison d'être*, is, inter alia, to ensure the supremacy of the Constitution *vis-à-vis* all the bodies of the State and the citizens. The Union's lack of sovereignty is also reflected in the fact that this new legal order cannot reform itself, since the revision of its fundamental rules is conditional upon the agreement of all the States in the form of a Treaty. Indeed, if it may be accepted that a Treaty is the founding act of an entity that then becomes sovereign (as in the creation of the United States of America, or the creation of new States in the context of decolonisation), the autonomy of the political entity thus created is manifested

5 On the use of Article 88–1; see Bruce, 2005, pp. 3 et seq.

6 With the principle of direct effect, see Azoulay, 2003, pp. 859 et seq.

7 For a comprehensive analysis of this issue, see Favoreu, 2002, p. 35; see also the analyses of Gaudin, 2000, pp. 209 et seq. and Flauss and Drago, 2006.

by its own capacity to adopt and amend its constitutional rules. It is in this sense that the existence of a genuine Constitution implies the recognition of a constituent power which, in a democracy, can only be the People.

Thus, the existence of a material "Constitution" has the consequence of introducing the European legal order to a constitutional context, even if this introduction is imperfect. While sovereignty is the hallmark of the State, there may be political entities which are lacking this sovereignty, and are however exercising competences that traditionally fall under sovereignty. From a normative point of view, European norms that are directly integrated into national law, have a predominant role in the latter, sometimes going so far as to make the legislator the implementing agent of Community law. Conversely, European law takes into account the 'constitutional traditions common to the member States'. In short, while Europe does not yet have a true "Constitution", its transformation into a political society and a legal order with rules on organisation, functioning and a common system of values make it an undeniable subject of contemporary constitutional law.

It is in fact the principle of sovereignty that has become one of the key instruments for determining the nature of the European Union, even by preterition.

Recognition of the European Union's legal order as constitutional implies dissociating the Constitution from the State. Conversely, it seems impossible to dissociate sovereignty from the State. State sovereignty is a phenomenon that has emerged with the birth of modern States, which can be dated back to the 16th century. This link between these two concepts can be found in classical constitutional law. Thus, Esmein asserts that "the State merges with sovereignty" and corroborates this analysis by quoting Loyseau, according to whom 'Sovereignty is the form that gives *raison d'être* to the State, even the State and sovereignty taken in concreto are synonymous'.[8] This rapprochement allows for identifying the continuity of political thinking on this issue from the 16th century to the beginning of the 20th century. It is perfectly suited to a unitary State.

However, even if the European Union could be recognised as having a legal personality, it cannot hold sovereignty, even though the principle of State sovereignty is not called into question. By its very nature, sovereignty cannot be shared. As long as States have the power to modify the European constitutional system, each with a veto right in this respect, and as long as States retain the option, however theoretical, of withdrawing from the Union, sovereignty remains in their hands.

State sovereignty is thus an obstacle to the formation of a sovereign constitutional legal order. Could we imagine, however, the States being the authors of a founding constitutional act leading to the abandonment of their sovereignty in favour of a new entity? This logic would be part of a contractual vision of the constituent movement.[9]

8 Esmein, 1906, p. 2.

9 On the distinction between this contractual school and the statist school, see Pernica, p. 16; For a hypothesis of contractual and international elaboration of a national Constitution, see Pierre-Caps, 2000, p. 36.

States would then be abandoning their fundamental right of self-determination in favour of the European Union. Carrying out this operation presupposes the sovereignty of the State at the external level, and the intervention of the holder of sovereignty at the internal level. It implies the destruction of both sovereignties, that of the State at the international level, and that of the People at the internal level. When a constituent act stems from a revolution, it is an almost mystical act by which the political fact is transmuted into a founding legal act. When it is the result of a contractual process, the constituent act is nonetheless subject to a strictly legal logic. An act of sovereignty, it destroys that sovereignty, merging distinct sovereignties into a common sovereignty. From this point of view, the paradox of the Constitution of a sovereign legal order is that it implies the self-destruction of its founding States.[10]

1.2. The European Union: a legal order with an undemocratic basis.

As a preliminary point, it should be noted that the term "democratic" is to be understood in the strict sense of the term, as a principle of legitimisation of power, and that it does not have any positive or negative connotation here.

Furthermore, this analysis will not focus on the place of democracy in the functioning of the European Union, and specifically on the role that the European Parliament can play in this respect (cf. below), since the latter institution will be considered essentially as the symbolic representative of a people that is no less symbolic.

The assertion that the European Union has a democratic foundation is based on the democratic nature of the States that constitute it, and in fact leaves open the question of the legitimacy of the Community legal order – not the reality of this legitimacy, but its nature.

In the absence of a genuine democratic foundation for the European Union, one of these bodies, i.e. the Parliament, bases its legitimacy on the fact that it represents the citizens of the Union.

One of the fundamental issues is the legitimisation of the European legal order.

The European Union presents itself as a democratic legal order. This assertion comes at the cost of a number of approximations. At a deeper level, it raises the question of whether the European legal order can be legitimised by the democratic principle. Article 6 of the Treaty on European Union stipulates that the Union is founded on the principles of liberty, democracy, respect for human rights, and the rule of law.

The Treaty gives a specific importance to democracy, which is distinct both from the substantive legitimacy represented by the assertion of rights, and from procedural and substantive legitimacy represented by the rule of law.

Consequently, it is worth considering whether democracy is the founding principle, or one of the founding principles of the Union.

10 For a critique of this logic, see Viala, 2004, p. 367.

The text of the Constitutional Treaty expressed the democratic principle in both its representative and participatory forms, but these references relate more to the functioning of the Union than to its foundations.

If one accepts that the European Union is the result of the association of democratic States, the question remains open as to whether Community legal order is founded on democratic principle. An affirmative answer to this question implies the existence of a European People and the exercise of an initial constituent power by this People. To reverse the question, let us just observe that the European People, if such a thing exists at all, have never been called upon to give their opinion on the founding acts of the European Union. Treaties have been ratified in accordance with the procedure laid down by each State. It is the peoples of the States, or their representatives, who have expressed their views. The existence of referenda in all the States would have had a strong symbolic value; moreover, instead of the People of each State, the People of the Union should have spoken. The failure of a number of national referenda on European integration undoubtedly reveals mistrust or even hostility on the part of the citizens of a certain number of States towards European integration as it is operated, but those referenda do not constitute an expression of the European People against Europe. In reality, the European Union is based on an agreement between States. However, this agreement is specific in terms of the integration mechanisms it puts in place, the way in which national Constitutions apprehend the Community legal order, and the extent of the powers transferred. Its founding legitimacy is nonetheless based on an agreement of intent concluded by States. Yet, the Constitution of a group of States based on the rules of international law is extraneous to the democratic model.

At a deeper level, it should be asked whether a European People exists at all. The Community Treaties and a number of national Constitutions have voluntarily affirmed the existence of a European citizen. This status is the corollary of the status of citizen of a Member State. It has no autonomy in terms of national citizenship. Brexit demonstrated the secondary nature of the reference to the "People" of the Union. Indeed, this European identity does not enjoy any autonomy compared to national identities. In fact, the non-existence of a European *demos* was demonstrated by the loss of European citizenship for British citizens when Great Britain withdrew from the European Union.

However, in any case, these citizens, who benefit from specific protections and limited powers of intervention in the European institutional game, do not constitute a sovereign People. What is more, the absence of a homogeneous political space and of a European public opinion[11] may cast doubt on the very consistency of a potential European People.

The question, then, is whether there can be such a thing as a non-national democracy. This issue has been developed by Doyen Vedel, who has noted both the historically consubstantial nature of democracy and the Nation, at least in modern

11 Gerkrath, 2004, pp. 363 et seq.

history, and the need to go beyond this correlation. Yet, the European Union is not a State, and there is no European Nation. In reality, the European Union must be considered as an original construction which is not, as has already been said, based on the principle of sovereignty which is understood as the exercise of an initial and founding power. It needs to be repeated; indeed, the analysis is distorted and the drafters of legislative texts are sometimes misled by the fact that the recognition of democracy as the sole legitimising principle tends to result in the condemnation of any system of command that is not directly based on this principle.[12] This ideological stance must be overcome.

No people, no sovereign, no democratic legitimacy. These clear-cut assertions must be immediately nuanced by the observation that the absence of democratic legitimacy as a founding principle of the European Union does not, as demonstrated later, exhaust the question of democracy within the European Union.

In fact, the legitimacy of the European Union is manifold: it is based, for example, on the democratic nature of its Member States, on the exercise of democracy within the Union and on the notion of *acquis Communautaire*.[13] From this point of view, the European Parliament is unique in that its legitimacy is based on the election of its Members by citizens. The question is whether, regardless of the absence of a democratic foundation for the European Union, the European Parliament is not, within the Union, the body meant for embodying this share of legitimacy.

1.2.1. Does the European Parliament represent European citizens?

Although representation is not necessarily democratic, it is indeed possible to represent, for example, interest groups, and although democracy is not necessarily representative, the European Parliament represents the integration of a mechanism for representative democracy within European institutions. In this sense, in its "isoglucose" ruling of 29 October 1980, the Court of Justice referred to the European Parliament as the democratic element in the construction of Europe. Only the Parliament can rely on direct democratic legitimacy, as it is elected by direct universal suffrage. While Members of the European Parliament are undoubtedly representatives, the question is what exactly they represent.

In fact, the European Parliament, initially designating itself in a self-proclaimed manner as the Assembly of European Communities, first represented the Peoples of the Nations, before representing European citizens.

This establishes the principle that European citizens participate in the exercise of power through a representative assembly.

Identifying European citizenship is conceptually difficult. Indeed, as it has been said, this status only supplements the status of citizen of a State, to which it is linked.

12 Vedel, 1977, p. 23; see also Habermas, 1998, p. 218.
13 For an assessment of this nature, see Timsit, 2003.

However, irrespective of the nature of European citizenship, the Parliament appropriately represents European citizens who have directly elected its Members.

Nevertheless, the existence and recognition of a genuine representation of European citizens faces a number of obstacles. First of all, Members of the European Parliament are elected in national constituencies according to nationally organised methods of election.

In addition to the national roots of representation at European Union level, there is the absence of a genuine European political space.

The diagnosis can be made quickly, but needs to be clarified. Firstly, although Community law recognises political parties, and parliamentarians nowadays sit on the basis of political affinity rather than nationality, the structuring role of these parties is weak. The Maastricht Treaty appropriately emphasised this point by stating that 'Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.' (Article 191). This provision must be interpreted as postulated. Indeed, the political will of the citizens of the Union, which political parties should help to formalise and MEPs to represent, is still nowhere to be found. The Parliament's functioning does not really follow a majority logic. Moreover, culturally, European institutions, including the Parliament, have retained a taste for expert advice and listening to lobbies, rather than political debate,[14] from their international origins. The search for consensus is preferred to confrontation.[15] European citizens thus find it difficult to identify themselves with a European Parliament that does not represent them within a European political space that the EP is unable to forge. The political nature of European elections reflects national dividing lines, not European ones. Moreover, communication between European citizens and MEPs is essentially non-existent. From this point of view, European patriotism invoked by Habermas remains merely theoretical.

Democracy implies both political choices and the universal recognition of shared values.[16] In that sense, the Parliament, as the body of representative democracy within the Union, has the task of initiating this political debate and formalising the common values proclaimed in the Treaties, which have, however, difficulty in emerging as a factor of cohesion within Europe.

The question arises differently when our focus is put on the democratic functioning of the European Union.

First of all, it should be noted that the European Union is facing a crisis of liberal democracy, which is affecting most Member States and, in a broader perspective, Western political systems, or those inspired by them.[17] The causes of this situation are numerous and of varying nature: individualism, communitarianism, disintegration

14 In this regard, see Magnette, 2000.
15 In this regard, see Chaltiel, 2008.
16 Rosanvallon, 2008.
17 Mathieu and Katrougalos, 2023.

of shared values, multiculturalism, globalisation, financial crises, the loss of influence of religions. This issue will be discussed further in connection with "values". This phenomenon is amplified in the European legal order by the disconnection of the link between institutions and a real people, the construction of a "*cratos*" without a "*demos*".[18]

The legitimisation and the functioning of the Union essentially follow procedural logics. From this point of view, it is both a paradox and a dead end to assert, as we shall see, that certain values impose themselves as the substratum of the Union, while denying the existence of substantial constraints in shaping opinions, notably in the name of multiculturalism. We use concepts such as "environmental democracy"[19] which, in addition to its lack of rigor, confuses an objective, i.e. the protection of the environment, with a mode of legitimisation of power, i.e. democracy, thus creating a "curtain of smoke".

Furthermore, the rise in power of the European Parliament should not conceal a phenomenon of depoliticisation reinforced by the essential role played by bodies that reinforce the feeling of democratic dispossession: independent agencies, whose tasks are technical, the Court of Justice, the Central Bank and, above all, the European Commission. This is how legalism and technocracy prevail over democracy.

This situation is compounded by the weight of lobbies, often embodied in powerful NGOs, for which transparency requirements, particularly in terms of funding, are weak.

In this way, the European Union both reveals and amplifies democratic disillusionment.[20]

The discrepancy between the place granted to the democratic principle in European legislation and the role played by its requirements in the actual operation of the Union is striking. As Olivier Beaud notes,

> The authors of the Lisbon Treaty have put the Constitution of a club of democracies ... at the forefront ... and have been concerned with the political homogenisation of Member States ... The inconsistency becomes apparent when we ask ourselves, almost naively, whether the essential conditions of democracy are really fulfilled in the very sphere of the European Union. In other words ... there is no doubt that ... the institutional system of the European Union is far from satisfying the conditions of the concept of democracy, which leads in the final analysis to leaving the power of the last word to the people or their representatives, it is not the election of the European Parliament that can counterbalance the initial structure of Europe, which is based on the pre-eminence of the Commission and the Council of Ministers, nor is there any further political responsibility for the leaders of the European Union. Consequently, there are some paradoxes in the fact the European Union imposes on its Member

18 Manent, 2006, p. 10.
19 Spector, 2021, p. 92.
20 Spector, 2021, p. 25.

> States the rule ... on a democratic form of government, whereas it is not really in a position to meet this standard for itself.[21]

This issue raises another issue on the nature of the European political order, and in particular the legal form it takes.

1.3. The European Union: a federal legal order?

For a non-specialist in EU law, defining the legal order it constitutes is a delicate exercise, but as Olivier Beaud[22] points out: 'it is possible to account for Europe's originality without trapping it in the self-referential understanding it may have of itself'.

Europeanist or constitutionalist doctrine has produced conflicting analyses on the legal nature of the European Union. Reference to existing categories have proven to be disappointing or approximate, this is why we give in to the temptation of speaking about a *sui generis* legal order, which is equally approximate. Nonetheless, comparing the European structure with existing categories is one way of better understanding its nature.

Several political structures can be invoked, among others: empire, confederation and federation.

1.3.1. Empire

Empire is a political form based on a centre, a metropolis, around which dominated or colonised entities gravitate on the periphery.[23] It can be either a colonial Empire, like that of former France or Great Britain, or an Empire embracing vast territories, as was the Soviet Empire, and still is the Russian Empire (whose policy of aggression is explained, if not justified, by the reconquest of certain lost territories).

However, the pathway of empire is not a very fruitful one, as the European Union is not based on a logic of conquest and domination, but on the principles of equality and freedom. However, the fact remains that the European Union can give an imperial feeling to some of the smaller or more recently participating Nations. This is probably true of States that have experienced imperial domination, or successive dominations, and which see in the fussy imposition of rules, or even common "values", an imperium. Against a backdrop of revived imperial models, such as the Russian and Ottoman Empires, Europe is trying to carve out a place for itself, albeit as a weak Empire, both militarily and geostrategically (as could be the case with the Holy Roman Empire). While, in legal terms, it is difficult to adapt the concept of

21 Beaud, 2022, p. 551.
22 Beaud, 2007.
23 French Constitutional Council, Decision No. 92-308 DC of 9 April 1992, Treaty on European Union.

Empire to the European Union, it is not foreign to the feelings of certain nations or certain peoples.

This issue also raises the issue of Europe's borders.

1.3.2. Confederation

A confederation of States is a suitable model for advocates of a Europe of Nations.

A confederation is an entity to which the Member States delegate a number of external competences, often in the field of foreign and defence policy, but retain the essence of their sovereignty, which is reflected in particular in the unanimity requirement for all major decisions. So, it is essentially an alliance meant for common defence. In reality, there is no permanent central body. In his treatise on the law of nature and people, Pufendorf had already proposed a definition for Confederation by the power of States to block the decisions of the federative assembly, in such a way that any action by the confederate body depends on the ability of the associate members to reach a negotiated consensus at the time of deliberation. According to Montesquieu, a confederation has two decisive characteristic features: firstly, it is a form of association within which each State retains its sovereignty and remains free to break the ties which bind it to the others at any time; secondly, decisions within the Council of the Confederation, where the elected representatives of confederate States sit, are taken unanimously, which is tantamount to granting a right of veto. According to the same author, a confederation only works on a small scale, i.e. when the number of united members is small.[24] This also raises the issue of the Union's territory.

1.3.3. Federation

The prospect of a federal State or a federation, which is more realistic and will be covered later, has often been invoked to characterise the path towards which the European Union is heading. This perspective is in conflict with the perspective of a kind of confederation, which has just been invoked.

The founding act of a federal State is a *Constitution* (and not a treaty, as in a Confederation). Federated entities organise (through a Constituent Assembly) the institutions of the new State, and distribute competences between the Union (i.e. the central State) and the federated States.

Consequently, a federal State has its own Constitution. It may be amended, generally not unanimously, but with the agreement of a reinforced majority of the federated States. In other words, "the initial agreement may be overturned against the will of a number of associates". Even if such measures cannot be taken without all interested parties having defended their views (principle of participation), this situation shows the considerable abdication of freedom agreed to by Member States

24 Spector, 2021, pp. 147 et seq.

when they joined the Federation. Ultimately, one of the Member States can be prohibited from leaving the Federation (as is the case in the United States).

A federal State is characterised by "the superimposition of two legal orders": citizens are subject to both a law elaborated by the federal State and a law emanating from its federated State. So, while federal law applies to every citizen, in the areas assigned to the Member States, citizens are subject to rules that can vary profoundly from one federated State to another. Indeed, "within the fields recognised to them", each federated entity decides which competences it wishes to exercise and how it wishes to exercise those competences, i.e. it elaborates the rules of law in its interpretation. This can lead to major disparities in status between individuals depending on their place of residence (it is true that the situation is the same, with less striking disparities, in unitary States due to decentralisation).

The areas open to the partners' intervention vary across different systems; the Constitution lays down the rules for the distribution of competences between them, but federated States never have the full competences of a sovereign State. Upon joining the Federation, they have had to sacrifice some of their powers to the Union.

However, a federation does not necessarily take the form of a State. According to Olivier Baud, a federation is not a federal State but a federative association, or a political order lacking sovereignty. In his view, the concept of sovereignty is inadequate for considering the federal phenomenon, because, unlike the unity of sovereignty, a federation presupposes a duality of powers: federal power and federated powers. From this point of view, it should be noted that while the idea of shared sovereignty is conceptually impossible, given its indivisible nature, it is conceivable to share the exercise of competences that fall under sovereignty.

A federation differs from a confederation in that it has coercive force in law to compel each State to submit to common deliberations, without forming a federal State in the strict sense of the term; rather, it is a form of post-State transnational integration.[25]

As O. Beaud points out, political homogenisation is a historical law of federations.

From this point of view, it is interesting to take account of the federal process in the United States.

In the United States, the federation of States was constituted in a period when the thirteen colonies did not yet have a strong institutional framework, nor a long political history. Those States did not aim at relinquishing their sovereignty, but rather at strengthening it by uniting.[26]

When the States of America were constituted, and in the very spirit of the Philadelphia Convention, the federation was not conceived as a State. The federal government is not a State, but the government of a federation of States. From this point of view, the concept of sovereignty is not an effective one for describing this reality[27],

25 Spector, 2021, pp. 64, 169.
26 Spector, 2021, p. 38.
27 In that sense, see Beaud, 1998, pp. 83 et seq.

particularly since there is no federal State vested with the "competence of competence". In the words of Elisabeth Zoller, the evolution of this system is the result of a "spiral that eludes its authors". This spiral was essentially manoeuvred by the Supreme Court and was symbolised by the 1803 *Marbury v. Madison* ruling. Two key elements mark this evolution. On the one hand, a Federal Constitution is understood as the act of sovereign People, and on the other, a federation is recognised as having the power to interpret the provisions of a Federal Pact. These elements are complemented by others, such as the role played by the protection of human rights and the recognition of dual citizenship for individuals.[28]

In this hypothesis, the constitutionalisation movement of a federal legal order, its "transformation into a State", is the work of the Federal Supreme Court.

Incidentally, it will be pointed out that in U.S. federalism, the law is no longer the expression of the general will, it represents a compromise of interests and passions tempered by the power to judge.[29]

Before considering the nature of the European Union in terms of the concept of federation, it is worth taking a brief look at its institutional structure.

The institutional structure of the European Union is highly complex, which makes it difficult to fit it into any single category, while at the same time it allows for a degree of flexibility that is conducive to the development of the competences of certain bodies, to the benefit of becoming independent from both the text of the Treaties and from the Member States. It is a multi-level political association, governed by an institutional triangle: intergovernmental bodies, the European Council and the Council of the European Union, which set the Union's broad guidelines; the European Commission, responsible for pursuing the general European interest and preserving the *acquis communautaire*, which has sole legislative initiative; the European Parliament, which benefits from a co-decision procedure enabling it to legislate on an equal footing with the Council of Ministers in all areas falling within the competence of the Community; and the Court of Justice of the European Union.

This architecture was built in several stages, the most essential ones can be summarised as follows.

The Maastricht Treaty (1992) made major changes to the institutions, by strengthening the role of the European Parliament, which gained co-decision powers with the Council of Ministers in the adoption of legislative texts, as well as the power to block the appointment of European Commissioners, and introduced European citizenship. The Amsterdam Treaty (1997) allowed the Council to suspend a Member State's voting right upon finding a serious and persistent violation of the principles of democracy, human rights or the rule of law. Finally, a European Charter of Fundamental Rights of the European Union was adopted alongside the Treaty of Nice (2000).

Consequently, while the Union's institutions exercise their competences by virtue of the principle of attribution, these competences are not easily deduced from the

28 Zoller, 2003, pp. 43–166.
29 Spector, 2021, p. 53.

stipulations of the Treaties.[30] Determining them involves an interpretation of the Treaties. This takes into account both the competences explicitly granted to the European institutions and their objectives. This is how 'it turns out that the delimitation of the Union's competences depends on a dialectic between objectives and powers, maximised by the teleological interpretation adopted by the Court of Justice'.[31]

1.3.4. An apparent federalisation

We will rely on an analysis by Olivier Beaud, which aims to determine certain points of analogy between a federation and the European Union, even though the author concludes that there is no identification.[32]

First of all, there is a structural homology between the European Union and a federation. Indeed, the European Union is both a union of States and an institution characterised by a strong differentiation between the Union and the Member States. There is, moreover, a strong analogy between the constituent power in a federation and the way in which Europe was constructed. The way in which European and national legal orders are intertwined bears a strong resemblance to the way in which federal and federated legal orders are interconnected, both of which are characterised both by autonomy and interdependence. Finally, the system is characterised by the duality of legal orders.

On the other hand, there is dual nationality: that of the federation and that of the Member State.

In addition, the Court of Justice of the European Union, responsible for solving disputes between the Union and the Member States, as well as those between Member States concerning the application of European law, is the guardian of the Treaties and a veritable federal arbitrator. The principle of exception for non-performance of a contractual obligation, which applies in general international law, is not applicable in Union law.

Finally, the Treaty of Lisbon has developed a system for distributing competences close to that of a federal system, by providing that the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. This logic means that the Union's objectives must respect the distribution of competences, and that any competences not attributed to the Union in the Treaties belong to the Member States. Article 5 of the TEU on the distribution of competences lists the types of competences, including exclusive and shared competences. In the latter area, the States may legislate and adopt legally binding acts, but they exercise their competences to the extent that the Union has not exercised its own.

30 Arenas, 2022.
31 Martucci, 2021, p. 212.
32 Beaud, 2022, pp. 490 et seq.

However, the question of whether the European Treaty would be equivalent to a constituent pact is the "unresolved issue of European construction" (cf. above).

From another point of view, although in the context of intergovernmental cooperation at the European Council, the unanimity rule prevails for decisions pertaining to the fundamental interests of the States, once a decision has been taken, it is no longer possible to exempt oneself as one pleases. Domestic legal systems must adapt to European policies and comply with certain forms of normative harmonisation. Monetary policy is dictated by the European Central Bank (ECB), which reports to the European Parliament without the latter being able to order any change in its policy. In the euro zone, Member States can no longer issue money for the purpose of repaying their debts.[33]

In this way, it is possible to consider that a quasi-federal model has been developed, characterised by the constant expansion of the European Union's competences, the broadening of the range of matters on which qualified majority voting is admitted, and the supremacy of Community law, implemented by the Court of Justice (which will be reviewed later).

1.3.5. The European Union is not legally a federation

First of all, in the Preamble to the Treaties, the Union cautiously does not define itself as a federation. No reference is made to the existence of a political union, even if it could be argued that a union of the peoples of Europe could only be political. The Union is supposed to be ever tighter, but it is not specified what kind of entity this would be. As Olivier Beaud points out, "there is both caution and emphasis".[34]

Moreover, there are both enhanced cooperations (such as the European Monetary System or the Schengen Agreements), as well as reverse processes in which protocols endorse derogatory practices conflicting with the idea of a federal pact.[35]

Finally, the recognition of a member's recognised right to withdraw from a Treaty is also foreign to a federal pact.

However, above all, what separates the Union from a true federation is that the institutions of the Union do not have the competence to make final decisions or to amend the Constitution. Member States have retained the competence of competence. They have (in principle, as we shall see) a right of veto when their fundamental interests are at stake.

Therefore, it can be argued that the European Union is neither a confederation nor a federation, but a mixed form. It combines certain confederal features (European Councils) with certain federal features (Commission, Parliament, Court of Justice and European Central Bank). In this respect, the German Constitutional Court has defined the European Union as an association of States supported by the Member

33 Spector, 2021, p. 170.
34 Spector, 2021, p. 541.
35 Beaud, 2022, p. 561.

States and respectful of their national identities. According to the Court, Germany's fundamental law envisages the Union as more solidary than a Confederation but less solidary than a Federation, by specifying that a European State cannot be created without a European People, the people being the sole medium of sovereignty indispensable to democratic legitimacy.

As C. Spector points it out, it could be argued that the European economic order is federal and that the political order remains cooperative, which causes dysfunctions.[36]

1.3.6. A creeping federalisation

Independently of the Treaties or the will of the Member States, this federalisation is taking place essentially under the influence of two factors: the role played by the Court of Justice of the European Union (which will be covered in relation to the "values") and the budgetary and financial operations.

1.3.6.1. The "federative" action of the Court of Justice of the European Union

The European Union confers an outstanding role to the Court of Justice, which invokes a teleological interpretation of the Treaties, starting from the goals assigned to the European Union in order to extend the scope of European law. Thus, it admits simplified revision clauses for the Treaties without unanimous ratification.

More specifically, the two major principles structuring European law, i.e. direct applicability and the primacy of Union law, have been established by the Court of Justice of the European Union (back then known as the Court of Justice of the European Communities).[37]

In general, the Court of Justice interprets the Union's competences broadly, by referring to the theory of implicit competences.[38] This case law, which formulates means and objectives, has had the effect of drawing into the orbit of the European entity matters which seemed, *a priori*, to fall outside its scope.

Moreover, the preliminary ruling procedure has given the European Union a highly effective weapon for maintaining the unity of European law within the Member States' jurisdiction. This is one of the areas where the phenomenon of federalisation is the most pronounced.

Although the unanimity rule applies when the vital interests of the State are at stake, it is ultimately the Court of Justice that decides whether such interests are at stake. This is an essential issue, to which we shall return in the final part of this study.

Thus, the federalisation movement of the federal legal order is the work of the Court of Justice, which has positioned itself as the supreme federal court.

36 Beaud, 2022, p. 169.
37 Costa v. ENEL, 1964, Case 6–64; Van Gend & Loos, 1963, Case 26–62.
38 European Agreement on Road Transport of 31 March 1971, Case 22–70.

However, the Court of Justice of the European Union cannot be considered as a true constitutional court.[39] Indeed, the purpose of a constitutional court is to ensure the supremacy of the Constitution *vis-à-vis* all the bodies of the State and the citizens. Yet, in many countries, including France, European law takes precedence over national law, not by virtue of the European norm, but by virtue of the national constitutional norm.

1.3.6.2. Fiscal and financial federalisation

In order to deal with exceptional economic or financial circumstances, European institutions have been given new tasks, sometimes surreptitiously, even *contra legem*,[40] sometimes explicitly, at the Member States' request.[41] In 2020, the Commission was vested with the competence to issue common debt securities to finance a temporary instrument for recovery from the health crisis, called "Next Generation EU", with a budget of €750 billion.[42] This decision was taken on the basis of Article 311 of the TFEU, the first paragraph of which stipulates that 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies'. This is a fundamental development, falling into the scope of a certain kind of fiscal federalism that is absent from the Treaties. For the first time, the European Union has resorted to massive borrowing. This loan has given rise to financial solidarity between States, *a priori* prohibited by Article 125 of the Treaty on European Union.

From that perspective, the reference to U.S. federalism is instructive. This procedure is similar to that used in the United States after the War of Independence, when the federated States wanted to offload their war debts onto each federal State.[43] The creation of a Fund for the Recovery and Redemption of State Debts by the U.S. Federal State in 1790 reinforced federalism.

This procedure, used in the wake of the COVID crisis, constitutes what could be referred to as a "Hamiltonian" movement. In the 1780s, Hamilton advocated the mutualisation of war debts between the Confederate States, whose public finances were very disparate. It is to be feared, or hoped, depending on particular points of view, that this decision paves the way for the constitution of a political Europe which, once again, would not have really been decided.

Nevertheless, in December 2022, the German Constitutional Court reacted to this procedure, by accepting it with reservations. The Court took this opportunity to reiterate that the construction of Europe was limited by the respect for the fundamental

39 For a comprehensive analysis of this issue, see Favoreu, 2002, p. 35; see also the analyses of Gaudin, 2000, pp. 209 et seq. and Flauss and Drago, 2001, 2002, pp. 703–721.

40 See in particular: BVerfG, 2020, 2 BvR 859/15.

41 Arenas, 2022.

42 This is a considerable sum on the scale of the Union, representing almost three quarters of its multiannual budget (2021–2017), i.e. around four times the annual budget.

43 Guaino, 2023, p. 329.

principles of the States, and that it should not lead to the disappearance of State sovereignty. This closes the door on a federal-type development.

Nonetheless, it must be asked whether the legal-political model with *federal tendencies* corresponds only to a moment in history, when the two State and supra-State structures coexisted in a more or less balanced way, before leading to a true federal structure, as demonstrated by the history of the United States, Germany and Switzerland. The real issue at stake is to find out whether such a development would be the result of the political will of peoples and States, or the result of an undermining process by jurisdictional and technocratic institutions.

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2. The Union's values: a European integration tool

The European Union is in search of its identity through reference to the values on which it considers itself to be founded. In fact, the reference to these common values, of which the Court of Justice is the guardian, is a highly effective tool for integration that goes far beyond the Union's objectives, and contributes to the development of conflicts between the Union and certain States that wish to assert their own identity.

2.1. "Values" as markers of European identity

As it has been pointed out, despite the *petitio principii*, the European Union is not a legal order based on the democratic principle. Unable to find its justification in competences of an essentially economic or financial nature, the European Union refers to values that are supposed to constitute its identity.

In the absence of *demos*, the Union refers to the abstract universalism of fundamental rights.

As O. Beaud points out, the reference to values as a basis for the legitimacy of the European Union has become virtually ubiquitous in the programmatic provisions of recent Treaties on the Union. The invocation of values would thus aim to reintroduce meaning into the European Union. Europe is supposed to assert its identity to the rest of the world, and the only demarcation line drawn by the European Union is that of democracy and human rights.[44]

Article 2 of the TEU provides the following:

> 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

44 Guaino, 2023, p. 545.

> in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This list features a number of characteristics. On the one hand, it refers to rights which constitute the core values shared by Western States, notably dignity and freedom, which are complemented by specific rights such as minority rights, non-discrimination and tolerance. If, abstractly, those values can be considered as consensual, they are much less so when it comes to putting them into practice: how to articulate universalism and minority rights; non-discrimination and differences between nationals and (non-European) foreigners; traditional values and specific recognition of sexual minorities. The second feature of this enumeration is that it formulates undefined principles of different nature: Which concept of the rule of law is referred to in this text: substantive, formal, strict or broad? Who defines its scope? Are dignity and freedom distinct from human rights? In what manner are freedom and dignity articulated? Finally, it is postulated that these values are common to all Member States. Although it may be considered that sharing these principles is a condition of EU membership, the basic issue is whether it should be presumed that the States have accepted any constructive interpretation that the Court of Justice may give to them, as regards their definition, scope and articulation.

This form of legitimisation also comes up against an issue of embodiment. The issue is whether a political project can be constructed without history, myths and symbols. Refusing to refer to Europe's Christian roots, a purely descriptive statement that did not pre-empt the place of religion in the European legal order, is not really counterbalanced by the existence of an anthem and a flag.

In addition to this abstraction there is the fact that these values come with a legal scope that is supposed to mark the overcoming of politics by law,[45] but a disembodied law. This process is indicative of the fact that the European project aims to construct a people through law, and not to develop a law that a people would grant to itself.

This construction also comes up against another obstacle. The principles and values referred to are universal; if not, they are at least intended to be so. In the Western imagination, these values are supposed to be shared by any political society, regardless of its history, geography or mores. These are, moreover, quite exactly the values affirmed within the framework of the Council of Europe. Then, the question that arises is how it is possible to conceive of a European identity, based on or around those values. This question is all the more pressing given that those values are supposed to replace those that are part of the identity of a particular country, and which might not be soluble in the common identity.

Thus, despite the affirmation of those shared values, the Union is undergoing an identity crisis, without overcoming its weak democratic legitimacy.

This situation is aggravated by the fact that the scope of the values referred to owes little to a determination by political bodies, but is the result of apolitical, or

45 Spector, 2021, p. 61; Mathieu, 2023.

at least ademocratic bodies, such as the European Court of Human Rights, and the Council of Europe's Venice Commission. Moreover, NGOs, whose belonging to "civil society" serves as a testimony of legitimacy, hardly subject to transparency obligations, and pursuing specific and diverse interests, play a non-negligible role, accentuating a communitarian conception of recognised rights, that further blurs the lines of identity. Indeed, how can we affirm the existence of common and intangible values, when those values include relativism and the recognition of any identity-based value system? The rejection or acceptance of such identity-based systems, which are likely to conflict with the common foundation, is based on essentially ideological considerations. Conversely, the promotion of the Union's values can be accompanied by the removal of legal guarantees to the detriment of those who do not share the same value system, the heterodox or the marginal.[46]

There is a need to create, almost *ex nihilo*, a European people based on shared values, and this requires education. As C. Spector observes:[47] 'History, philosophy and civic education courses must include a reflection on the fratricidal memory of European peoples, decentralisation studies, the struggle of women, migrants, workers with insecure jobs, LGBTIQ+ persons, etc.'. One can understand why the European Union has protested against a Hungarian law banning the promotion of gender theory or the possibility of sex reassignment in schools.

Moreover, the fact that European integration is part of a system of values, reinforces subjects of law who are entitled defend their fundamental freedoms before the Court of Justice of the European Union, to the detriment of citizens who exercise their sovereignty, deliberate on common affairs and decide on their destiny within the framework of a democracy.[48]

Consequently, history and culture must have a secondary role, what matters from this point onwards is loyalty to rights and procedures, attachment to the rule of law and the welfare state.[49]

Thus, in a somewhat caricatured way, the structuring of the Union can only be achieved by destroying the singularity of States, i.e. the very thing that justifies their existence.

2.2. The Union's values as instruments for broadening its competences

Among the Union's values, the concept of the rule of law, an all-in-one concept, now plays a strategic role in both delegitimising sovereign functions and legitimising the infringements of national sovereignty by European institutions.[50]

46 Beaud, 2022, p. 545.
47 Beaud, 2022, p. 255.
48 Spector, 2021, p. 241.
49 Spector, 2021, p. 307.
50 Schoettl, 2022.

Independently of the difficult-to-implement procedure set out in Article 7 of the Treaty, which makes it possible to penalise a State which fails to comply with the requirements of the rule of law, in particular by suspending voting rights, another simpler and more effective procedure, designed to enforce compliance with this same principle, has been implemented outside the provisions of the Treaty.

Particularly topical, and pointing towards budgetary and financial federalisation, the conditionality of aid channelled under the Recovery Fund subject to the respect for the rule of law enables the Commission, in the event of a violation of the rule of law likely to affect the management of the funds or the financial interests of the Union, to deprive "guilty" States of aid under the European Recovery Plan. In this way, the 'fundamental values of the Union, including the independence of the judiciary' are invoked.

This procedure has its origins in a resolution of the European Parliament, which considered the following to be violations of the rule of law: 'attacks on freedom of the media and journalists, migrants, women's rights, LGBTQIA+ rights and freedom of association and assembly'. An objective reading would suggest that the criteria are quite removed from the requirements of sound management of European funds.

A more serious argument relates to the proper functioning of the justice system. It is this issue that is at the core of the ruling of 16 February 2022 (C-175/21) by which the Court of Justice of the European Union dismissed Poland's and Hungary's appeal against this sanction mechanism, which empowers the Commission to suspend aid to member countries that do not respect the "values of the European Union".

This ruling deserves to be analysed in some detail, given the extent to which the Court's reasoning suggests a broadening of the Union's competences.

The Court postulates that

> Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 [TEU] ...". The laws and practices of Member States should continue to comply with the common values on which the Union is founded.

It is immediately noticeable that the scope of those values is particularly broad.

According to the Court, the rule of law has a prominent place among those values. To verify compliance with the requirements of the rule of law, the Court takes into account

> relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of [OLAF] and the [EPPO] as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of

> Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (the Venice Commission)], in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.

This analysis will cover the heterogeneity of the "authorities" empowered to define the scope of the rule of law, and therefore the potentially undefined and extensive nature of the concept.

The Court refers to the contested regulation which states that the value of the rule of law 'includes the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers and non-discrimination and equality before the law' (§154). In addition to this definition, which refers to a concept that may be accepted by consensus, according to which the rule of law is in fact protection against arbitrariness, the Court validates an extensive concept enshrined in the contested regulation

> the concept of "the rule of law", as defined for the purposes of the application of the said regulation, 'shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU'. It follows that respect for those values and principles – in so far as they form part of the very definition of the value of 'the rule of law' contained in Article 2 TEU or, as is apparent from the second sentence of that article, are closely linked to a society that respects the rule of law – may be required in the context of a horizontal conditionality mechanism such as that established by the contested regulation.

For good measure, the Court adds that 'the values of equality, non-discrimination and equality between women and men [...] allow the EU legislature to adopt secondary legislation intended to implement those values' (§194). Further on (§324), it states even more clearly that 'it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value'. Lastly, it refers (§325) to the definition adopted by the Venice Commission, according to which

> the concept of "the rule of law" requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.

Although this definition may be conceived at an abstract or doctrinal level, it is conceded that it leaves plenty of room for interpretation, particularly as regards the terms “dignity”, “rationality”, “impartial” and “fair”.

Thus, the rule of law is merely the generic term for the set of values enshrined in the Treaty, and compliance with it, such as its implementation, is the basis for intervention by European institutions and control under European jurisdiction.

More specifically, the Court held that

> The Court has also ruled that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law, with the result that it is for a national court to disapply any provision of national law which infringes the second subparagraph of Article 19(1) TEU, if necessary after obtaining from the Court an interpretation of that provision in the context of a reference for a preliminary ruling (§198).

Furthermore, respecting ‘the national identities of the Member States, inherent in their fundamental structures, political and constitutional’ does not imply that this result-based obligation may vary from one Member State to another (§265).

Thus, having established the Union’s competence with regard to the institutional organisation of the State (in this case, its jurisdictional organisation), the Court rejects the reservation linked to the respect for State competences relating to their constitutional structure, thus marking the subordination of the States’ constitutional law, both in terms of the interpretation of common values and with regard to institutional matters, to the previously defined principles.

The Polish plan, which was approved by the Council in June 2022, calls not only for transferring the judges’ disciplinary system to another body and for implementing the right for Polish courts to submit questions for preliminary rulings to the Court of Justice of the European Union, but also for improving legislative work, in particular through the introduction of public consultations and the limited use of fast-track procedures at the Parliament.

There are many other examples, albeit less emblematic, of the way in which reference to the Union’s values is used to support an extension of its competences.

Thus, MEPs generally feel relatively unbound by the Union’s competences. One of them noted that, in the first year of the 2019-2024 parliamentary term, only half of those deliberations related to the Union’s competences; for around a third, the subjects debated were only remotely related to these competences; and the rest, i.e. one deliberation in five, was utterly foreign to them.[51]

In April 2023, the Commission and fifteen Member States brought an action against Hungary before the CJEU, alleging that Hungary had breached the rule of

51 Bellamy, quoted by Schoettl, 2022, p. 8.

law by adopting a law discriminating against LGBT people, the purpose of which was, as mentioned, to ban propaganda in favour of homosexual relationships and gender reassignment in schools.

In December 2022, the Commission proposed[52] a regulation aimed at harmonising at EU level the rules of private international law on filiation, with filiation established in one country to be recognised in the others. It is stated that this proposal is one of the key actions mentioned in the EU strategy for children's rights and equal treatment of LGBTIQ people. Thus, for example, the recognition of the civil status of children born through surrogate motherhood, which tends to be integrated in the norms even in States which consider that surrogate motherhood, is contrary to public order.

In November 2023, a proposal for a directive, emanating from the Council and the Parliament, intends to counter "Strategic lawsuits against public participation", known as "gagging procedures".[53] It aims to prevent those persons most exposed to media, political and litigation attacks, i.e. business leaders, public officials, political parties, companies and State bodies themselves, from seeking justice for infamous imputations when the authors present themselves as "human rights defenders", i.e., according to the text,

> individuals or organisations engaged in the defence of fundamental rights and various other rights, such as environmental and climate rights, women's rights, the rights of LGBTIQ people, the rights of people from racial or ethnic minorities, workers' rights or religious freedoms.

One of the privileges often enjoyed by powerful NGOs is the reversal of the burden of proof. It is the petitioner who must demonstrate to the judge the seriousness of his/her action. On the other hand, if the judge deems the "powerful" person's appeal unfounded, the latter will have to reimburse legal fees, travel expenses, medical expenses for psychological support and compensate the detractors for damage to their reputation or 'emotional distress related to the court proceedings'. This person is also subject to 'effective, proportionate and dissuasive penalties'. Moreover, NGOs not involved in the case may intervene in the proceedings in support of the defendant. In the name of the values supposedly defended by the "accusers", this mechanism unquestionably infringes the right to an effective legal remedy, and violates the principle of equality before the law, which prohibits discrimination between good and bad litigants.

It is thus on the basis of rather vague concepts, whose legal scope is quite largely undetermined, that the bodies of the Union, and especially the Court of Justice, intervene outside the scope of the Treaty to impose on States both respect for certain values, sometimes alien to their own identity, and institutional organisation methods falling within their sovereignty.

52 European Commission, Press release, 2022.
53 Lenoir, 2023.

3. How to transform European institutions to generate a more balanced relationship between the Union and its Member States?

The developments that follow are merely intended to outline some alternatives.

These alternatives could be the subject of a third phase of research, in order to verify their relevance and to implement them, where appropriate.

The first question concerns the aims of the European Union, while the second one concerns the organisation of the Union and its relations with the Member States.

3.1. What kind of European project is envisaged?

The question on which any reflection on the future of Europe must be based is: what kind of Europe do the peoples and governments of Europe want?

First of all, the key point is to determine Europe's place in a rapidly changing geopolitical world. Russia and Turkey behave like Empires, the United States is concentrating on its relations with China, the countries of the South see their future outside the Western model, and a hotbeds of wars, religious or ethnic conflicts are emerging everywhere, even on the borders of political Europe and within geographical Europe. This raises the question of whether Europe sees itself as a power, whether economically, financially or militarily. Europe may conceive itself as a model embodied in the promotion of human rights; however, it should be noted that the concept of human rights, based in particular on individualism and the promotion of minorities, including sexual minorities, which Europe defends, is not universal in character and, what is more, is rejected by peoples attached to other cultural or even religious traditions. Moreover, in a world where power relations are intensifying, Europe cannot limit itself to asserting its values. By all means, as it is recalled over and over again, denying one's values is breaking with one's identity (this principle, which Europe defends for itself, could also be asserted by Member States), but as F. Mitterrand said, in another context, pacifists cannot be on one side of the border and tanks or bombs on the other. In economic terms, the unregulated globalisation of trade, goods and capital flows has destructive effects. Europe can play an obvious protective role in this area, which will be discussed later, but Europe must be given competences to deal with issues that States cannot resolve on their own level. In this sense, Europe can represent a guarantee for States against external threats of all kinds, and can even exert pressure as a powerful player on the global stage.

The second question relates to Europe's borders. It has never really been resolved. Between a continental Europe "from the Atlantic to the Urals" and a political Europe as a club of liberal democracies, as well as a strategic Europe, the choice is not really made. Europe builds itself by imposing a multitude of rules (the *acquis communautaire*) and principles on candidate countries, which are likely to affect the societies concerned, whereas it is not really reflecting on its destiny. On the one hand, the

promised accession of Turkey is running up against economic and social problems, as well as ideological ones that we do not dare to assert, as they would conflict with the image Europe wants to project of itself (how to integrate a population with a Muslim majority). On the other hand, for understandable reasons, Ukraine's promised accession to the EU ignores all the obstacles it will face.

From this point of view, the larger Europe becomes, the more it will move towards an imperial model. The European integration of the old Central European States formerly under Soviet domination, an unfortunate parenthesis in their history, was part of the logic of reconstructing Europe following the fall of the Soviet Empire. It is not certain that the model can be replicated *ad infinitum*. This imperial model can take two forms. The first one is about the creation of a multi-speed Europe (which already exists in the case of Schengen and the monetary union), consisting of powerful States and satellite States. The idea would be to develop mechanisms for enhanced cooperation or differentiated integration, whereby certain States choose to extend their integrated cooperation, without imposing it on others. The second, probably more virtuous and promising model, advocated in particular by E. Macron, aims to establish an enlarged European structure (European political community), without the countries belonging to it necessarily having a vocation to join the Union. This imperial logic can have certain advantages, both economically and in terms of protecting peace in Europe. Incidentally, enlargement by simply integrating new States can only strengthen the most powerful States, on the one hand, and European technocracy embodied in the Commission, on the other. These issues are of interest for the distribution of competences between the Union and the States.

The other issue, which will not be discussed again, is that of the choice between a federal system, aiming in the long term to put an end to State sovereignties and merge them into a common entity, and a Union of sovereign States, sharing competences which they cannot assume themselves with sufficient power. This issue directly concerns the governance of the Union and the choice between a predominantly institutional or a predominantly intergovernmental mechanism.

Taking these options into account, and naturally, without being able to arbitrate between them within this framework, it would be more modest to envisage reforms that are likely to reduce tensions between the Union and the States, and to protect the European construction without leading to the progressive dissolution of State sovereignties.

3.2. What kind of European governance is envisaged?

The following proposals and summaries are structured around three questions: How to govern the European Union, how to clarify the distribution of competences between the Union and the States, and how to move from a vertical relationship between the Union and the States, to a horizontal one?

3.2.1. Reforming the "governance" of the Union

The aim here is to disentangle neither the complexity of competences of the Union's bodies, nor to develop a new institutional model, but merely to outline some guidelines.

The institutional nebulosity that characterises the European Union certainly contributes to strengthening the powers of the bodies that represent the Union's own interests, namely the Commission, the Court of Justice and, to a lesser extent, the Parliament.

As O. Beaud[54] notes, 'somehow, the most democratic element in the European Union is still the emergence of the European Council, which has real political decision-making power, considering that these Heads of State and Government represent the peoples of Europe, albeit indirectly'. The European Council, like the Council of Ministers, are bodies responsible for intergovernmental cooperation. They should determine the Union's objectives and have the ultimate decision-making power. Within the Council, it is conceivable that majority rule is enforced for the most important decisions and for the most interventionist ones in the lives of States, and a qualified majority may be required for less important decisions. However, in view of the developments that may take place in the context in which such decisions are applied, it is appropriate that States retain a right of veto. Indeed, respect for the autonomy of Member States implies the existence of a right of veto over decisions relating to what they consider to be their vital interests (more on this later). The President of the Council must be the true representative of the Union, whereas today, with a particularly short term of office, this person is unable to bring projects to fruition, 'which paradoxically leads to the Commission's supervision of the Council's work, and the latter's reduction to the role of merely recording proposals submitted by the supranational body'.[55]

As far as the Commission is concerned, its current pre-eminence stems from the fact that it has been entrusted with the task of primarily representing, and even embodying, Europe's general interest, as opposed to the Council, which represents the national interests of the Member States, and the Parliament, which, by virtue of the way it is elected, remains dependent on the same interests.[56] The Commission is thus the governing body of the Union.

It ensures that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. The Commission has both political and administrative benefits.

In reality, a fundamental institutional development would aim to transform the Commission into a body primarily implementing the general decisions taken by the Council. The Commission has no legitimacy of its own, and must once again become

54 Lenoir, 2023, p. 551.
55 Blumann, 2023, pp. 315 et seq.
56 Ibid.

an essentially administrative body implementing the broad guidelines set by the Council. If the Commission's action has a certain political character, it should be inspired by the following formula: the Council determines the policy of the Union, and the Commission governs it. In that sense, the powers and political role of the Commission's President should be drastically reduced.

This reinforcement of the Council's competences at the expense of those of the Commission is necessary for the purpose of ensuring real accountability as a result of the decisions taken. Elected representatives are accountable to their people, whereas the Commission's accountability to the European Parliament is not a true form of democratic accountability, in view of the low level of representation of MEPs.

As C. Spector[57] points out,

> the Union does not establish the European Parliament as a new forum for expressing the people's will. This Parliament is not a representative body of the sovereign European people, as it is made up of quotas of MEPs elected in various procedures, with considerable inequalities in representation.

It is thus advisable to reflect upon the improvement of the representativeness of the European Parliament.

Genuine representativeness - which, it should be borne in mind, would risk pushing the Union even further down the road to federalism - would mean electing MEPs from transnational lists. This is probably the most effective way of democratising the functioning of European institutions, by creating a European political debate around which European political parties would be structured. The European Union needs to be re-politicised from the level of two institutions, the Council and the Parliament, with the Parliament being primarily responsible for defending the Union's interests. While this development would help in incarnating the existence of a European people, which today is no more than a fiction, the representation of the peoples of the States should also be strengthened. This is why it would be conceivable for national parliaments to be represented in the European Parliament, but within the same Chamber, so as to avoid the federal shifts that bicameralism would inevitably bring about. This reform would, however, encounter a material obstacle arising from the fact that it would be difficult for the same person to attend both national parliament and European Parliament sittings. Nonetheless, solutions could be found, for example through the intervention of alternates in a single-member constituency system, or the next-in-line in a proportional-type electoral system.

The role of national parliaments in European politics also needs to be strengthened in order to support the preponderance of national government bodies (Presidents or Prime Ministers) in determining national European policies. The additional involvement of national parliaments in the European Union's decision-making processes is not only another way of reducing the democratic deficit. According to

57 Blumann, 2023, p. 177.

Pascal Lamy, the Union is indeed a laboratory of governance, but it is not experienced by citizens as a real political space.[58] Enhancing the involvement of national parliaments in European policy enables them to act as bodies of democratic control, on the one hand, and to create a democratic network across the European continent through their cooperation, on the other hand.

The contribution of national parliaments to the "proper functioning" of the European Union is mentioned in the very text of the Treaty. Nevertheless, subject to a comparative study, the influence of national parliaments on European policy and decision-making is currently low.

3.2.2. Distribution of competences between the Union and the States

This definition must be elaborated on by national political leaders.

In fact, the goal is to clearly determine which competences and powers should be entrusted to European structures, and which ones should remain in the hands of the States. To do so, distinction should be made between the scope of European identity, justifying the association of a number of States, and the scope of national identities. This distribution must be as clear as possible. It must avoid the shifts noted above, which urge the Union to broaden its competences without any real limits, particularly in the name of protecting the rule of law. From this point of view, it must be stated clearly that the values enshrined in Article 2 of the Treaty cannot form the basis of the Union's own competence.

As far as these "values" are concerned, reflection is required on what States really intend to share. So, for example, respect for human dignity, the right to a fair trial and protection from arbitrary action are undoubtedly shared values. The same cannot be said for the concept of the family, the definition of marriage, and the place of religion.

Control over the distribution of competences cannot be exclusively conferred upon the Court of Justice of the European Union, as both a judge and a party. Thus, the principle of subsidiarity, initially conceived to limit the uncontrolled extension of the Union's competences, has been turned upside down by the Court of Justice which has assigned to itself control of its interpretation and application.[59]

National constitutional or supreme courts should therefore be involved in the exercise of this control.

3.2.3. Moving from a submission obligation to an obligation of dialogue

On 8 May 2020, the Court of Justice of the European Union reminded the Karlsruhe Court that it had sole jurisdiction to determine whether or not an act of a European Union institution was contrary to Union law. Thus, the Court acts a federal

58 Lamy, 2004, p. 56.
59 Spector, 2021, p. 156.

supreme court, responsible for ruling in the last resort on the distribution of competences between the Member States and the Union.

Article 4(2) of the TEU stipulates that the Union shall respect the national identities of its Member States, which are inherent in their fundamental structures, and the essential functions of the State, in particular those of ensuring its territorial integrity, maintaining law and order and safeguarding national security, i.e. the sovereign functions. Nevertheless, the Court of Justice considers that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State (opinion of 8 March 2011, No. 1–09).

Thus, the European Court of Justice imposes a hierarchical relationship between Union law and national law, including constitutional law.

Faced with this imperium, the German Constitutional Court has recognised its power to control whether the Union respects those competences. Indeed, it ruled[60] that as long as the Member States remain masters of the Treaties, it is on the authorising legislation adopted by the Parliament that the democratic legitimacy and the very existence of the Union is based. Consequently, when a Union act is adopted outside the scope of the competences specified by the authorising law, the German Court considers that it necessarily loses its democratic legitimacy and that Germany is certainly obliged to ensure the application of Union law, but only within the strict limits of the integration programme specified by the authorising law. However, the Court paves the way for a dialogue by considering itself obliged to refer a question to the Court of Justice for a preliminary ruling before exercising *ultra vires* control, and by considering itself bound by the interpretation provided by the Court of Justice of the European Union. Thus, the German Constitutional Court places European integration in a logic of complementarity and dialogue, rather than in a logic of confrontation and hierarchisation of rights.[61]

This, in fact, is the direction in which the relationship between Union law and national law should shift, both in terms of respect for the distribution of competences between the two levels and in terms of the fundamental requirements resulting from national Constitutions.

The difficulty lies in the fact that, on the one hand, it cannot be left to national courts alone to define what constitutes national identity, as otherwise the European Union's competences could be devoid of their substance at the whim of national decisions, and that, on the other hand, the European judge cannot define the scope of national identity issues as a last resort, as this would deprive States of all sovereignty. In either case, it is impossible to be both a judge and a party. This is a difficult issue and attempts should be made to resolve it.

60 BVerfG, 2009, Judgment of 30 June, 2 BvE 2/08 et al., BVerfGE Compendium No. 123, p. 267.
61 Montebourg, Forthcoming.

It is thus conceivable that, with regards to relations between courts, national courts could consult European courts each time a conflict arises or is likely to arise. Consideration could also be given to the creation of a flexible, *ad hoc* conciliation body, a kind of Court of Jurisdictional Conflict, made up of representatives of the supreme courts of the State concerned and European judges, responsible for ruling on conflicts of jurisdiction.

However, in the case where a conflict is not resolved, or assuming that a conflict is resolved in such a way as it could violate a fundamental principle recognised by the constitutional order of the State concerned, the political authorities should be given the final say in the matter. It is then within the Council that the State could interpose its veto on the basis of specific constitutional provisions. As E. Balladur points out, 'the supremacy of national Constitution over any other national or international rule of law prevents the Union from seizing the competence of competence under cover of the rule of law'.[62]

4. Conclusion

It appears clear that the European Union is at a turning point in its history. While institutional evolution is taking place without any real political decisions by the Member States, but under the influence of internal bodies such as the Commission and the Court of Justice, the outcome is the creation of a hybrid organisation that is more than a confederation of sovereign States, but less than a federal structure. From that perspective, references to the concept of sovereignty, whether invoked to support States' control of their own destiny or, on the contrary, to design a federal type of Union, are revealing of what is at stake. The intention to impose a common ideology and social conceptions on States with different mentalities and histories is a factor of resistance to European construction, which is also reflected in the ballot box. On the contrary, economic and geopolitical challenges, and the war at Europe's borders, call for stronger cooperation mechanisms between States. In search of its borders, Europe is also faced with the challenges of a potential enlargement. The construction of a new institutional model and new relations between the States and the Union aim to respond to the need to ensure Europe enjoys a future that is both respectful of national identities and a factor of power.

62 Ibid.

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