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ISSN 3058-1060 (print)
ISSN 3094-2918 (online)

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THE EU IS STRENGTHENED ...
IN DIVERSITY

CEA PUBLISHING

MISKOLC – BUDAPEST | 2026

EUROPE:
THE EU IS STRENGTHENED ...
IN DIVERSITY

ISBN 978-615-7027-68-8 (printed version)
ISBN 978-615-7027-69-5 (pdf)
ISBN 978-615-7027-70-1 (epub)

https://doi.org/10.54171/qms.2026.bmeteisid



Published by

© Central European Academic Publishing
(Miskolc – Budapest, Hungary)

All rights are reserved by Central European Academic Publishing
The address of Central European Academic Publishing: 1122 Budapest, Városmajor Str 12. (Hungary).

Series design
IDEA PLUS (Elemér *Könczey*, Botond *Fazakas*)
Kolozsvár / Cluj-Napoca (Romania)

Prepress
CEA UM

Printed and bound by

To my daughter, Ninan



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Introduction

In a world that is both falling apart and being rebuilt, Europe represents one of the most essential visions for our future. A powerful Europe is both feared by those who see national identities fading away and eagerly anticipated by those who believe that the future can no longer belong to nation-states.

Caught between fear and hope, Europe continues on its path and is building itself without the people it is supposed to unite. Therefore, Europe finds itself in a state of limbo. The European project operates outside democratic constraints; the will of the people has only a marginal impact. To quote P. Seguin (2012), "Where people vote, they no longer make decisions; where decisions are made, people do not vote." Furthermore, Europe is poorly defined in terms of its borders, its projects, and its institutional structure. By imposing an ideological dogma – under the guise, in particular, of the concept of the rule of law – it attempts to subdue rebellious people by wielding the weapon of finance. As a supranational legal system, it is essentially shaped by the law, whose instruments are designed to bring states under its control. The judge, who serves as the enforcement arm of this system, is also its driving force. Decision-making power essentially lies with bodies that lack any direct democratic legitimacy or that, while aspiring to democratic legitimacy, have representatives in name only.

Yet the European Union is more necessary than ever in the face of the many challenges of the modern world, many of which are beyond the capacity of individual states to address. What's more, even when united, Europe is weak in a world where the centers of power are shifting. Europe's weakness stems not only from a decline in its economy, industry, and innovation, it is also due to the fact that it is no longer a model, neither politically nor ideologically. Liberal democracy, which

for a long time served as a model and an aspiration for people around the world, no longer holds the same appeal. The hyper-individualistic conception of human rights – which Europe tends to impose on the world in the name of a postulated universalism – is being rejected in many parts of the world. Perhaps Europe – and many European states – have trivialized the great principles of liberty, equality, and respect for human dignity, which stem from Christianity, the Enlightenment, and the Revolutions; they have likely forgotten the need to reconcile these principles with the demands of the common good – which, incidentally, are capable of ensuring their protection. This general interest, championed by the states – which embody a shared history and a common purpose – no longer has a place within the supranational structure that is Europe. Yet it is these values, these roots, and this vision for the future that Europe must uphold, at a time when other value systems are competing with our own. Europe, often seen as a threat to national identities, can also serve as a shield to protect shared values.

But this defense of shared values cannot disregard the specific values of different peoples, which are embodied in their distinct traditions and histories. The feeling that their very identity is under threat can lead people to reject a Europe they perceive as a threat rather than a source of protection. The current debates on immigration and the resistance – or revolt – of certain states against what is seen as a diktat from Brussels, the impact of which is tangibly felt in their way of life, are one of its manifestations.

The motto "in unity there is strength" is used by many countries, including Belgium. The European project aims to bring this vision to fruition. When the Community became a Union in 2009, the process shifted from the pooling of certain powers to the creation of a structure intended to form a single entity and, in that sense, endowed with legal personality. The creation of the European Union undeniably reflects a desire for power – a claim to a place in what is no longer the concert of nations, but the concert of empires (American, Russian, Ottoman, Chinese, Persian, etc.). While the abandoned project f the European constitution aimed to endow Europe with symbols traditionally associated with a state, the motto chosen is: "United in Diversity." Although this

phrase has been removed from the Treaty, it is nonetheless emblematic of what the European Union is – or what it should be. While Article 1 of the Treaty sets forth the goal of achieving an "ever closer union among the peoples of Europe," respect for diversity – or, even more so, the enriching nature of that diversity – takes a back seat. Furthermore, the reference to "the peoples of Europe" unquestionably reflects a desire to diminish the role of states by referring to groups that are more vague and, above all, less institutionally structured. This is a certain desire to take the place of governments, which manifests itself in a subliminal way. Yet these identities – which we must preserve – are, in fact, national identities. The challenge and the stakes for the future of the European Union thus lie between these two – sometimes contradictory – requirements: on the one hand, to establish itself as a major power and equip itself with the necessary means to do so, and, on the other hand, to respect national identities.

Indeed, Europe – even it is united – is profoundly diverse. This is evident in its landscapes – from the fjords of Norway to the Greek islands – in its peoples – Vikings, Romans, Burgundians, Celts, Germanic peoples, Iberians, and others – and in its culture, which is both Greco-Roman and Christian. From this perspective, it is probably Greek philosophy, Roman law, and the Christian religion that have shaped most of what Europeans share or have inherited. The divisions within Christianity continue to have cultural and social implications today. Economic and bioethical issues, for example, are not approached in the same way by a Catholic, an Orthodox Christian, or a Protestant – or even by someone from those religious traditions. Europe is a land of conflict; throughout history, the battles between Prussia, Great Britain, France, Russia, and the Austrian Empire have shaped the course of events, forging and breaking alliances. It is the rivalry among colonial powers, which aims to expand Europe beyond its natural borders, under the guise of a civilizing mission and for economic, demographic, and power-related reasons. It is also the Europe colonized by the Arabs, who occupied southern Spain for centuries before being stopped by Charles Martel at Poitiers in 732. It was Europe that was threatened by the Ottoman Empire, whose troops would advance as far as the gates of

Vienna. Hungary, and especially Greece, would be under Ottoman rule for more than a century in the case of the former and four centuries in the case of the latter. Europe is the Europe of General de Gaulle – "from the Atlantic to the Urals" – which is viewed as a force multiplier. It includes Russia, which, on its own, is a sort of "continent" that belongs culturally to Europe, but whose territory lies on the edge of Asia. While Istanbul, in Turkey, marks the boundary between Europe and Asia, it is also the heir to Byzantium and Constantinople. The Balkan countries are a patchwork of deeply rooted national and religious identities and a hotbed of incessant conflict – two phenomena that are by no means unrelated. Cyprus, located in the middle of the Mediterranean – a former Venetian, British, and Ottoman colony – is so close to the Middle East that it is said the sound of the terrible explosion at the port of Beirut in 2020 was heard there. Cyprus, divided between Greeks and Turks – the latter of whom occupy half of its territory – and striving for unity, is a prime example of these divisions, in that only part of its territory is integrated into the European Union, with the other part constituting a state recognized only by Turkey. Cyprus is a member of the European Union but is excluded from the Schengen Agreement on free movement because of its de facto internal border with the Turkish Republic of Northern Cyprus.

Politically speaking, Germany is a 19th century creation, formed under Prussian dominance; the same being true of Italy. Belgium and Spain are not immune to the temptations of division, whereas France is a unitary state forged by monarchical power and strengthened by the Empire and the Republic. First Great Britain and then France developed a parliamentary and liberal political system, which has been adopted by most European countries, in one form or another. The countries of Eastern Europe were subjugated by the Soviet Empire after World War II. Some had a parliamentary and democratic tradition (Poland, Hungary, Czechoslovakia...), while others did not, particularly those that emerged from the breakup of the Soviet Union (Ukraine, Moldova, Georgia, Belarus...). Moldova is torn between its Romanian and Russian history, and its European aspirations. Ukraine, with one foot in Europe and the other in Russia, has found unity in the face of Russia's

aggression as it attempts to reestablish its dominance over its *borders*. Georgia and Moldova are partially – and de facto – occupied by Russia. Hungary has never recovered from losing more than half of its territory under the Treaty of Trianon in 1920. Poland, a country that has often been partitioned and is proud of its courageous history, is marked by a certain mistrust of Germany and a fear of Russia. Belarus, which has been de facto annexed by Russia – or at the very least has limited sovereignty – is the successor to the Grand Duchy of Lithuania; in that sense, it belongs to Europe. On a more anecdotal note, some very small European countries (Monaco, San Marino, Liechtenstein, etc.) stand as reminders of Europe's feudal past.

The sole purpose of this brief and disjointed overview of European history and geography is to illustrate the diversity of this continent, to which the European Union is striving to provide a political and economic framework. The driving force behind the European Union is indeed its desire to establish itself as an economic and geopolitical power in the face of competitors such as China and the United States – on which it has become largely dependent, at least in terms of its security – but also an unacknowledged awareness of its own decline. It was also the desire to establish lasting peace in the wake of World War II that provided the impetus for European integration. A force for peace or a child of peace? Europe is facing major challenges today. However, the European response to these challenges is not self-evident. It involves setting goals, defining boundaries, and finding forms of governance that both enable the achievement of these power objectives and respect and preserve the diverse identities that make up the nation.

Based on this observation, the purpose of this essay is not to oppose European integration. On the contrary, its author, aware of the vital need for a powerful Europe, seeks to expose what he sees as weaknesses at the institutional, democratic, and ideological levels, and to offer some suggestions aimed at harmoniously balancing respect for national identities with the building of a powerful Europe. In reality, this involves reviving the idea of a Europe of nations, while strengthening certain powers of the Union and resisting the temptation to create a Europe that stands in opposition to the Member States.

The initial discussion highlights the context: "between disaffection and power." On the one hand, a strong popular sentiment – stigmatized by the pejorative term "populism" – reflects a democratic crisis that is not confined to Europe alone, but which Europe, sometimes unfairly, embodies. Furthermore, at a time when competing powers are emerging on the world stage, Europe must become a "power" in order to address challenges that individual nations cannot tackle on their own.

The question then is whether the European Union as it exists today is capable of addressing these challenges. From this perspective, Europe is still in a "limbo": between the rhetoric of democracy, which tends to mask structures that are anything but democratic, and the dogmatic temptation to impose a common ideology on the people, if necessary through financial instruments. These financial and budgetary instruments are also effective tools for integration.

Finally, the most important – but also the most difficult – question – since it is easier for a lawyer to criticize than to build – is that of finding the most harmonious, or at least the least contentious, solutions possible between the construction of a powerful Europe and respect for national identities. While Europe has an identity shaped by what the peoples of the Union share, there are also national identities that cannot be reduced to this common identity. Europe should be governed in cooperation with the Member States, not against them, which means, in particular, reviewing the Union's governance and the division of powers, and giving national parliaments a greater role. One of the keys to this quest for harmony is to move from requiring national legal systems to submit to the legal system of the Union to developing mechanisms for dialogue – from a vertical relationship to a horizontal one between these legal systems.

CHAPTER I

The European Union: Between Disenchantment and Power

Much is expected of Europe to make up for the weaknesses of individual states, to respond to competition from powerful or emerging economies, to provide a deterrent, to preserve peace, to prepare for a potential conflict, to promote social policy, to integrate new Member States, to "protect the planet" (which is in no way threatened, even as human, animal, and plant species may be), but also to defend a certain conception of democracy, ensure the protection of minorities, help societies evolve by making them more "inclusive," and ensure that companies pursue policies – socially, ideologically, and environmentally – virtuous.

Europe is widely criticized for being a narrow-minded technocratic bureaucracy that constantly creates more and more regulations, for having no democratic foundation, for seeking to ideologically mold its peoples to conform to the prevailing dogma of "societal" progress, of being indifferent to "real people," and thus of fueling populism. In a way, the very way Europe defends democracy and the rule of law could fuel a form of populism that threatens the very things it strives to promote.

It would be futile to reflect on the future of Europe or to attempt to define the goals it should set for itself without first taking into account the broader context – namely, a democratic crisis at the European level and within European nations, of which populism is an expression.

1. THE CONTEXT: POPULISM AND THE DEMOCRATIC CRISIS[1]

Populism is often analyzed as a distortion of democratic sentiment expressed by people who are said to be giving in to their baser instincts, whereas technocracy refers to a form of government in which bureaucrats, detached from the concerns and needs of the people, manage society according to their own logic, based solely on technical considerations, including the law.

This dialectic quite clearly illustrates the simplistic terms in which the debate over Europe's future and present is framed. Out of touch with citizens' concerns, Europe fuels populist sentiment through the technocratic image it projects.

On the one hand, there would be an intellectual and technical elite, refining both economic models and those related to the requirements of the rule of law; and on the other, a population that is managed but has no decision-making power, with experts deciding how it should act, express itself, and think, in the name of a greater good whose conditions they themselves determine.

While this picture may seem exaggerated, it nevertheless accurately reflects the democratic crisis facing Western societies and the crisis of legitimacy that is undermining the European Union.

The term "populism" is used today to brand certain popular, ideological, or political movements as disgraceful. It represents the danger that must be combated, the imminent threat against which it is necessary to mobilize all legal means. While we must not turn a blind eye or a deaf ear to the dangers that may arise from the various manifestations of what is referred to by this term, condemning them is futile – if not counterproductive – unless we make an effort to explain before judging. In any case, if what is known as populism is a powerful movement

1 This analysis is based, in part, on a paper presented at the annual conference of the European Public Law Group, held in September 2024 in Legrena, Greece, and published in the European Review of Public Law (EPLO), Mathieu, B. (2025a)

– regardless of how long it lasts – there must be reasons for it. This phenomenon warrants an attempt at an explanation.

Populism is a genuine movement, a political phenomenon, however unstructured it may be. On the contrary, technocracy – of which the European Union would be an example, if it indeed exists – is more difficult to understand as an ideology.

What does populism reflect?

We should start from the observation that our democratic societies are, in fact, mixed systems. They are democratic in that the legitimacy of power is based on the majority expression of the will of the people, and liberal in that a number of mechanisms are in place to limit the exercise of power. The concept of popular sovereignty, as well as the mechanisms of elections and referendums, fall under the first requirement, whereas the protection of individual fundamental rights, the rights of minorities, the separation of powers, and the judicial function fall, for the most part, under the second.

While the term "populism" is part of democratic life, it is often viewed as a deviation, an erosion of democratic principles. It expresses its political views by voting for parties that demonstrate a willingness to challenge the way institutions operate and to give the people a voice. These movements may fall on the right or left of the political spectrum; they may also express themselves through abstention. They aim to disrupt the traditional political system and, in a sense, to break free from the straitjacket it is supposed to represent. While populist movements are in power in some European countries, they represent the majority in most countries, and when they fail to gain power, it is because they are divided and adhere to different – or even contradictory – ideologies. But they are often manifestations of the same problem: the perception that power has been seized by elites and by institutions whose legitimacy is not based on democracy. What they have in common is a desire to weaken the checks and balances – particularly judicial ones – that reflect the liberal nature of the regimes in question.

In a number of countries – for example, in France, but this is also the case in other countries and in some German *states* – the center-

right bloc (conservative right and Social Democrats) is in the minority, sometimes by a wide margin.[2]

There are many manifestations of populism that go beyond the electoral sphere; for example, the "Yellow Vests" movement in France – an expression of revolt in Peripheral France – and the "Nuit Debout" movement, led by the left and concentrated primarily in Paris.

But two events, which were even more telling, illustrated how the will of the people was ignored by the leaders. They probably helped fuel this populist movement.

One of the most topical events is the 2018 Greek crisis and its resolution by international financial institutions, which were led to make decisions in areas falling within the sovereignty of the state and the conduct of its domestic policy, contrary to the will of the Greek people as expressed through a referendum. The point here is not to judge the Greek government – which likely had no choice but to comply with the demands of the "troika"[3] by disregarding the results of the vote – but rather to note that, in a situation marked by a severe economic and financial crisis, the people are losing their decision-making power.

The second example concerns France. The fact that the 2005 referendum on the draft European Constitution was circumvented by the parliamentary ratification of the Treaty of Lisbon left a powerful impression on people. Regardless of what one may think about the appropriateness of the solution *ultimately* chosen, it constitutes a denial of democracy – one that is all the more specific because, by overriding a popular vote with a parliamentary vote, political leaders pitted the representatives of the people against the people themselves.

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2 Thus, in France, in the first round of the 2022 presidential election, the Rassemblement national, the Reconquête, and the Debout la France! – that is, the nationalist right – received 32.28% of the votes cast, La France insoumise, along with a few far-left parties, received 23.58% of the votes cast. If we take into account the abstention rate – 26.31% – we could conclude, based on a rough but revealing calculation, that voters who support the "central bloc" account for about 18%!

3 The European Commission, the European Central Bank, and the International Monetary Fund.

In these two events, what was at stake is the principle of sovereignty in its two dimensions. The external dimension, which relates to state sovereignty, and the internal dimension, which concerns the legitimization of power by the people. This also involves – and we will return to this later – the relationship between the European Union and the nation-states.

In reality, populism can only be defined by a number of criteria that constitute the lowest common denominator among movements that are otherwise very diverse. Pierre Rosanvallon identifies, among the defining elements, a preference for direct democracy – illustrated by the prominence given to referendums – a conception of popular sovereignty that rejects intermediary bodies and seeks to subject unelected institutions – such as constitutional courts and independent authorities – to political will; and an understanding of the general will as capable of expressing itself spontaneously.[4] As can be seen, both the internal and external conceptions of sovereignty come into play when supranational structures – particularly European ones – are not directly based on the sovereignty of the people. In economic terms, this ideology amounts to a call for a certain form of protectionism.

Populism is thus directly linked to the relationship between democracy and political liberalism.[5] While Western democracies reflected an imperfect but real balance between these two principles, populism reflects a revolt against a real or perceived imbalance – or at least one that is perceived as such. This imbalance would occur to the detriment of political power – in that it is the direct expression of the will of the people – and to the advantage of countervailing powers – in that they would be in the hands of an elite, an oligarchy. It is therefore these checks and balances that are being challenged, particularly judicial power. The latter is so, first and foremost, because it wields considerable power that is not based on democratic principles. Its legitimacy stems from its role as an impartial third party, and the perception

4 Rosanvallon, 2021, p. 16.
5 See Mathieu, 2017.; English translation published as Mathieu, 2023.

that this impartiality is sometimes an illusion fuels mistrust toward it.[6] Furthermore, this judicial power is viewed as embodying a "societal" vision, stigmatized by the term "human rights activism," and accused of prioritizing the rights of individuals and minorities and of supporting a "progressive " and hegemonic ideology – a model of society imposed by an urban elite that allegedly does not reflect the aspirations of a silenced majority. International and supranational organizations, as well as NGOs, are subject to the same condemnation for participating in this same ideological construct that has no connection to the political expression of the people.

The concept of "illiberal democracy" – coined by Prime Minister Orbán in Hungary but adopted under different names by other European regimes – reflects this situation and explains why the desire to weaken the judiciary, as well as the influence of NGOs, lies at the heart of these policies.

The populist desire to strengthen the influence of politics – whose legitimacy rests on the expression of the will of the people – is also part of the search for a leader, a man of the people, and thus part of a certain form of concentration of embodied and powerful authority.

This aspiration is also a reflection of a crisis of confidence. Trust is at the heart of democracy. The more power seems detached from its popular roots, the more it is diluted, and the more a sense of mistrust grows – a sentiment that is not unrelated to so-called "conspiracy" movements, which are often linked to populism. They are fueled by social media and online platforms, which are rife with all kinds of manipulation of public opinion.

While populism poses a threat to democracy due to the abuses to which it can lead – personal power, the absence of checks and balances, demagoguery, and so on – it is important not to confuse illiberal rule with dictatorship; the relevant criterion in this regard is that of reversibility.[7] That is, a situation in which free and fair elections lead to a change in government. In many countries, from Belarus to Venezuela,

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6 See Mathieu, 2024.
7 See Rosanvallon, 2021, p. 190.

this irreversibility – often achieved through rigged elections – signals the transition to a dictatorial regime. It is no longer simply a matter of flattering the people, but of stripping them of the power to decide their own fate and future. Nevertheless, the absence of checks and balances can facilitate the transition from one system to another.

These elements, which characterize populism, are a sign of a crisis in representative democracy, the rejection of which in turn fuels the very populism that is otherwise denounced. According to the aphorism attributed to Bossuet, "God laughs at men who deplore the effects of which they cherish the causes".[8]

The shift of real power toward entities whose legitimacy is not political but oligarchic (courts, supranational institutions or organizations, independent bodies, financial powers, etc.) leads to a sense of deprivation, a disconnect between the people and the elites, and a feeling of "misrepresentation".[9] This is likely one of the reasons for the low voter turnout, given the prevailing sense that concerns or considerations related to "populism" have no political outlet capable of effectively addressing them. "The emperor has no clothes"; politicians who campaign in favor of a program do not, in reality, have the means to implement it. This feeling is not entirely without basis in reality. Taking France as an example, many of the policy proposals put forward by political actors in general to resolve financial, economic, or immigration-related crises would not be able to overcome the jurisdictional or European obstacles standing in their way. A democracy in which, in the aftermath of an election, leaders admit their inability to keep their campaign promises is unsustainable.[10]

While this is certainly cause for celebration, we must acknowledge that we are no longer truly living in a democratic system, but rather in one that borrows many of its characteristics from an oligarchy.

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8 The original wording is as follows: "But God laughs at the prayers made to Him to turn away public misfortunes, when one does not oppose what is done to attract them," Bossuet, 1688.

9 Morin, 2021.

10 H. Guaino, roundtable discussion "What Future for Europe?", on the 19th December, 2023, organized by the Fondation Res Publica.

Perhaps democracy is no longer truly a system suited to our times, to the challenges we face, to its complexity, or to this changing world – but we need to say so, rather than fueling populism by leading the people to believe that this degraded form of democracy is the very essence of democracy.

Populism could be an illiberal democratic response to undemocratic liberalism.[11] Nevertheless, populism is likely more a symptom of a problem than a genuine solution to that problem.

While populism refers to a degraded form of democracy – whether as it is actually experienced or as it is imagined – that nonetheless possesses many virtues we should not overlook, technocracy refers to a system in which the legitimacy of power is based on knowledge and efficiency. In this sense, it is directly linked to a form of oligarchy and elitism, since technocratic power cannot be popular power.

In technocracy, experts and their methods play a central role in decision-making. It is, therefore, competence that legitimizes the exercise of power. The process that plays a central role in decision-making is based on the requirements of performance, rigor, and rationality. The selection of leaders is not a democratic process.

As Guglielmo Ferrero noted in 1899, "the mason, the blacksmith, and the farmer have no other means of influencing the state than their vote; without it, they are nothing more than a passive crowd that can be taxed and exploited at will; the industrialist, the banker, or the professor possess many other means of influence, which are more direct and effective".[12]

Technocracy is, in a sense, opposed to politics based on democratic legitimacy. That is something the Greeks understood perfectly well. From this perspective, the Athenian democratic system serves as an instructive point of reference. Paulin Isnard[13] demonstrates how democracy was built in opposition to the figure of the governing expert. By entrusting technical knowledge and administrative functions to

11 Morin, op. cit., p. 90 et seq.
12 Ferrero, 2024.
13 Ismard, 2019.

slaves, the Athenian system prevented those who possessed such knowledge and skills from holding political power. Excluded from the class of citizens, slaves have no claim to political power. While this situation makes it possible to limit the political body of citizens and to practice direct democracy by eliminating all forms of representation, the lessons that can be drawn from it are broader. Democracy, even representative democracy, entails a separation of political power from technical "power" and the subordination of the latter to the former. While direct democracy came at the cost of slavery, representative democracy obviously cannot exclude experts or technical specialists from the citizenry; it must pay the price of giving political legitimacy precedence over the legitimacy of knowledge.

For populists, this technocracy represents a rejection of democratic power; it fuels that very populism by fostering the belief that the exercise of power is based on a logic disconnected from everyday reality and carried out by an elite that is out of touch with what the people feel and express.

From this perspective, participatory democracy is *Janus-faced*. On the one hand, it aims to allow the people to express themselves directly, without the distorting filter of representation. Furthermore, it serves as a means of expression in which experts play a decisive role, as do citizens committed to the causes being championed, NGOs, and others... From this perspective, the civil society that is supposed to have a voice there is not the real society either, but rather a form of elitist society.

However, technocracy is a means of legitimizing power that is not sufficient in itself.

Today, this form of power – which populists denounce – is the result of an alliance between a certain form of technocracy and an ideology championed by a number of institutions. It is embodied in the concept of the rule of law. However, the rule of law has drifted away from – or been enriched by, depending on one's perspective – its original meaning, which, in short, refers to protection against arbitrariness, a form of *habeas corpus*, and an obligation to respect the hierarchy of "*tu patere legem quam ipse fecisti*" norms. Today, the rule of law is a

sort of "catch-all concept" whose scope encompasses a whole range of rights – "a pile of rights," as Guy Carcassonne has written. This rule of law is actually intended to transform society, to build it around individual rights while largely ignoring the rights and role of the state and the concept of the public interest that it is supposed to embody. However, this definition of the rule of law is not established or determined by the political authorities, but by the judge, who thus has both the power to define the standard of reference and the power to ensure compliance with it.

These analyses bring us back to the question of Europe. As a symbol of a technocracy in which power would be seized by experts and judges, and in which politics would take a back seat to the power of finance and the markets, the European Union is in the focus of criticism from populists. Indeed, the concepts of sovereignty, direct democracy, the primacy of politics, and the rejection of intermediary bodies – which lie at the heart of populism – are entirely foreign to the European system; they are inherently incompatible with it. Technocratic elites have long since supplanted political elites. The European Union has exacerbated this phenomenon due to the complexity of European decision-making mechanisms, which politicians can no longer master unless they themselves come from a technocratic background.[14]

Moreover, European lawmakers, central banks, and European judges seem to lack not only any democratic legitimacy but also any accountability, thereby fueling anti-European sentiment – even as that sentiment is tempered by a commitment to a Europe as a civilization,[15] that offers protection in a threatening geopolitical context and amid a sense of the West's decline.

Thus, while Europe is a largely technocratic institution the derivatives of which fuel populism, it can also provide a solution to some of the problems raised by that same populism, provided it reforms itself and respects national identities, which are under a sense of threat that

14 Coussedière, 2024, p. 77.
15 See Muzergues, 2024.

leads to an identity-based withdrawal that is also at the heart of the populist movement. We'll come back to that.

Ultimately, one might wonder whether populism reflects a vague awareness of what Hubert Védrine calls the temptation of Western civilization's suicide. He adds that "Europeans have proven incapable of establishing a proper system for managing migration flows. It throws everything off track on every front, from education policy to public safety… What follows is a kind of resignation, a sense of weariness".[16] In this context, it is understandable that the issue of immigration plays a central role in populist movements. While this position may fuel certain forms of racism, it would be the consequence, not the cause.

2. THE GOAL: A CONTINENTAL POWER

In the face of this situation, simply acknowledging the decline or denouncing populism is of no help. What Europe needs is a vision, and that vision can only be the one of power, in its many forms. The purpose of the European Union is to do better than the Member States that comprise it – or, more precisely, to do what they cannot do on their own. However, once this goal has been set, we need to define the borders of Europe. Indeed, Europe cannot have the same ambitions with 6, 27, or 36 Member States.

2.1 Defining an European Project

The question that must serve as the starting point for any discussion of Europe's future is: What kind of Europe do the people and governments of European countries want?

First of all, the key point is to determine Europe's place in a rapidly changing geopolitical world. Russia and Turkey are behaving like Empires, the United States is concentrating on its relations with China, the countries of the South see their future outside the Western model,

16 Roundtable Discussion "What Future for Europe?", on the 19th December, 2023, organized by the Fondation Res Publica.

and 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 economic, financial or military... 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's 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. Of course, 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 François 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... it 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.

This idea of European power has gained new momentum since Russia's war of aggression against Ukraine. By creating a sense of vulnerability among Europeans, it in turn raised expectations for Europe. This anticipation is an opportunity to be seized, even though it stems from fear rather than hope. Added to this crisis were the health crises – for which Europe was called upon to support Member States – and the migration crisis, for which Europe is both the problem and the solution. From a more short-term perspective, President Trump's election in the United States has raised fears among Europeans that the American "umbrella" – under which they readily seek shelter – may be weakening. Global warming is also a problem that far exceeds the capacity of individual nations to address it – and indeed, that of Europe alone.

In reality, the original European project was not particularly clear and was relatively modest; an overly ambitious and premature approach would certainly have led to failure. Moreover, as Alterio Spinelli notes in a 1963 essay,[17] three distinct trends inspired the European movement: federalism, which aimed to build the political institutions of a European democracy by creating European institutions modeled on national governments; functionalism, which sought to create a European bureaucracy responsible for administering certain public activities; and confederalism, which sought to establish a permanent system of intergovernmental cooperation among states.

In fact, the process of European integration began at the instigation of the Americans with the Marshall Plan. This involved, in particular, transferring responsibility for its defense to Europe, but it was actually NATO that was entrusted with this role. This debate has resurfaced today in light of the U.S. temptation to no longer tie Europe to its own fate.[18]

Furthermore, although the issue has now become a top priority, industrial policy had been excluded from the scope of the single market, particularly because state aid distorted competition. Today, however, this policy represents a major challenge for Europe.[19]

Finally, and more generally, the concept of power is not part of the DNA of European integration. As Pierre Lellouche points out, "Europe was conceived solely as a market, placed from the outset within the American sphere of influence and under American protection." It was conceived and built as a civilian power – a sort of large, benevolent, and peaceful NGO – in stark contrast to nationalist movements that rely on armed force and power struggles in general. "While Europe has established itself as a major market – one that is, moreover, wide open – it has never sought or wished to assert itself as a leading strategic player".[20]

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17 In Cavallaro, Quagliariello, and Reynié, 2024.
18 See H. Védrine, the roundtable discussion cited above, held on 19th December, 2023.
19 See Wyplosz, 2024.
20 Lellouche, 2024, p. 311.

It is, in fact, in these domains that Europe must develop a genuine vision and provide itself with the necessary resources.

However, one point of ambiguity must first be clarified. It concerns the question of whether this power should result in the strengthening or the emergence of European sovereignty. Emmanuel Macron titled his first major speech on Europe, delivered at the Sorbonne on September 27, 2017, "Toward a Sovereign, United, and Democratic Europe." This reference to sovereignty is misleading. It seems to reflect a desire to create a federal Europe that would aim to replace the sovereignty of individual states with its own. That is not the case; the speech makes little mention of institutional issues. In fact, it identifies a number of areas in which the European Union's powers should be strengthened. Admittedly, strengthening these powers may promote a certain form of federalism, but that is not the issue here. The President of the Republic outlines a number of areas in which Europe must take the lead and in which Member States must pool their resources in order to exert influence in today's world. This involves, in particular, developing a shared military strategy, securing Europe's borders, aligning foreign policy priorities, addressing the challenges of the ecological transition, managing the digital revolution and energy and space policies, not to mention some form of tax and social harmonization. It goes without saying that this program has not really gotten off the ground in recent years. From this perspective, the reference to European sovereignty is largely rhetorical. As Jean-Denis Mouton points out, the concept of sovereignty loses its meaning when it tends to replace the idea of independence with that of power.[21] In reality, Europe must be a "multiplier of power rather than a reducer of sovereignty".[22]

However, if we set aside this notion of sovereignty, the competences in question are indeed a matter of power for Europe.

Europe has potential. The European Union has a total population of 448 million, compared with the United States' 340 million, Russia's 144 million (though far behind China's 1.4 billion and India's nearly 2

21 Mouton, 2024, p. 207 et seq.
22 P. Bas, Le Monde, April 3, 2024.

billion). In the fields of economy and trade, the European Union is a global player. As the world's largest commercial bloc, it accounts for 16.2% of international trade, and its currency is the second most widely used in the world. The Common Agricultural Policy, with a budget of 380 billion EUR under the 2021–2027 multiannual financial framework, helps make the European Union one of the world's leading agricultural powers.[23]

Yet it is a Europe in decline that we need to revitalize. Indeed, in all these areas, Europe faces competition not only from state actors but also from non-state actors.

As Asma Mhalla notes,[24] tech giants are diluting – or rather, eroding – the traditional concept of sovereignty, which until now had been the exclusive preserve of nation-states. The "Big Tech" triptych consists of three aspects – the economic, the technological, and the ideological – which are all interdependent models, with each aspect of the triptych being symbiotically linked to the others. At the end of 2021, the market capitalization of the five U.S. tech giants was nearing 10,000 billion dollars, making them the third-largest virtual economic power, just behind the United States and China. But this power is not just financial. Meta and Google wield real power over their users, which reflects a certain worldview. The GAFA companies – now known as MAAM (Meta, Alphabet, Amazon, Microsoft, and Apple) – are positioning themselves as competitors, or even rivals, to nation-states by circumventing or exercising certain powers normally associated with sovereignty.

In a less invasive but equally ideological way, the influence of lobbies and certain NGOs is well established, notably the network of NGOs founded by G. Soros – particularly *Open Society* – which promote a certain vision of society and serve as a weapon against states. Without overlooking the covert activities of terrorist and mafia networks, which are facilitated by the existence of cryptocurrencies over which governments no longer have control – a situation that represents a fundamental breach of their sovereign powers.

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23 See Council of State report, 2024.
24 Mhalla, 2024, p. 23.

In addition, many norms and standards are developed by private entities, for example in the areas of international accounting and anti-doping. Internet regulation is also an area in which a private entity sets standards that run counter to those of all international stakeholders. As noted in the Council of State's study on sovereignty (2024),[25] "China is establishing itself as a formidable power in the development of technical standards, reintroducing an element of geopolitics into what is too often considered merely technical processes within the European Union." It is also worth noting the role played by credit rating agencies.

When it comes to competition among nations, the extraterritorial reach of U.S. law serves as a tool to advance U.S. economic interests. For many years, U.S. authorities have been enacting laws with extraterritorial reach in such sensitive areas as anti-corruption, international transactions, international sanctions regimes, financial and accounting regulations, and the fight against money laundering and terrorist financing. Several companies have been prosecuted by the Department of Justice and have been ordered to pay particularly high fines. As part of settlement agreements, between 2010 and 2019, French companies paid approximately $14 billion to U.S. authorities.[26]

This new perspective calls for a redefinition of priorities. Until now, Europe has primarily defined itself as a normative and moral power. However, one might question the effectiveness of this moral priority, regardless of the virtues it embodies. Indeed, the values that Europe rightly upholds – primarily through legal means – are no longer shared by all major players on the international stage; and, moreover, they backfire on us when they are subject to certain individualistic or communitarian excesses that call into question the very foundations of the social and symbolic order (in the area of family law, for example). Here we will draw on Pierre Lellouche's analysis:[27] new nationalist powers – sometimes revanchist, most often led by authoritarian governments – are seeking to put an end to the international order that

25 Council of State report, 2024.
26 See the aforementioned Council of State report.
27 Lellouche, op. cit., p. 23 et seq.

has been dominated by the West since 1945. China, Russia, India, and Brazil – the countries now collectively referred to as the "Global South," which account for the vast majority of our planet's 8 billion people – reject our values. Furthermore, morality has become the sole frame of reference for geopolitical considerations, as evidenced by the analysis of the causes and consequences of the war in Ukraine. "The constant emphasis on grand principles and the law – which, incidentally, is applied with varying degrees of strictness depending on whether crises are closer to home or receive more or less media attention – may satisfy clear consciences and provide material for fine, impassioned speeches, but it does nothing to prevent wars.....this intellectual defeat in the face of emotion, this preference for denying reality, for speeches and other grand orations rather than for reflection, effort, and action, are symptoms – among many others – of the deep-seated illness afflicting our democratic systems."[28]

In reality, there are two priorities that Europe must address: industrial development and innovation, and the military sector.

Founded on the idea of peace – which serves as its guiding principle – Europe is now facing war on its doorstep, even more directly than it did during the Yugoslav conflict, when member States did not hesitate to bomb Belgrade and recognize Kosovo's independence. Without the protection of the United States, some European countries could become easy prey. Europeans, with the possible exception of France, believed they were protected by NATO. They thus relied on this transatlantic organization.

Today, fears of a U.S. withdrawal should prompt us to develop a European defense policy. While military policy (armaments, production and procurement, recruitment, and training) must concern all states, it cannot do so equally. In this regard, France and Great Britain – regardless of the United Kingdom's exit from the European Union – have a vital role to play. The same is true of Germany, an economic power, and of Poland, which faces the risks of war even more directly.

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28 Ibid.

While military policies must be coordinated, it is difficult to imagine a European army under a single command, which would constitute a final transfer of sovereignty to a European entity lacking legitimacy when it comes to making decisions that could affect the survival of a particular state.[29]

However, behind the rearmament, a genuine geopolitical strategy must take shape. From this perspective, the Russian issue is particularly relevant. While it may be true, as Churchill is said to have remarked, that "Russia is a riddle wrapped in a mystery inside an enigma," that does not justify a lack of reflection on the relationship between Europe and Russia. On the one hand, when the Berlin Wall fell, Europe was unable to define its relations with Russia, its relations with the countries that emerged from the breakup of the Soviet Union and became its neighbors, and those of Russia. Nor is it capable of envisioning an end to the war in Ukraine, content merely to arm Ukraine while allowing its soldiers to be killed and its civilian population to be massacred, citing Ukraine's victory as the ultimate goal without defining what that victory might entail and without considering the conditions for ending the war.

While this geopolitical analysis does not supersede the sovereignty of states, it must also take into account energy issues and matters related to maritime spaces.

The second priority is industrial development and innovation.

In the report he submitted in 2024 on the future of Europe, M. Draghi recommends that Europe make it a priority to foster disruptive innovations by increasing and coordinating research efforts, simplifying regulations, by reforming competition rules to allow global champions to emerge, by getting back on track toward decarbonization, by strengthening security and reducing dependencies through control over raw materials, to build a defense industrial base based on the principle of European preference, and to make a specific investment effort in the space sector. The project is ambitious, and it's one we can get behind. However, it faces many obstacles. First of all, Europe is a

29 See Buhler, 2011.

regulation-making machine. The resulting excesses hinder the development of innovation and businesses. However, there is reason to fear that, in their eagerness to pursue "virtuous" deregulation, Brussels bureaucrats will do what they do best: produce regulations. These regulations are placing an ever-greater burden on businesses. This is the case with the *Corporate Sustainability Reporting Directive* (CSRD), which establishes new standards and requirements for non-financial reporting for large companies and publicly traded small and medium-sized enterprises. It requires the companies in question to disclose social and environmental data. A directive on the duty of care imposes environmental and social constraints on companies – such as non-discrimination – that push their primary purpose of generating wealth into the background in favor of a role in regulating society, in accordance with political objectives. For example, the Deforestation Directive cost Michelin 200 million EUR to ensure the traceability of its purchases from rubber producers.[30] Morality has been preserved, but importers – who are not subject to the same controls – will be the primary beneficiaries of this regulation. These constraints, which weigh on European companies – or those that manufacture in Europe – create distortions of competition compared to non-European companies that are not subject to them; they lead to relocations that weaken Europe's industrial and economic fabric. Furthermore, competition rules designed to promote the emergence of a European market sometimes lead to the destruction of successful companies, those poised to become successful, or those undergoing restructuring, on the pretext that they have received state aid. The dismantling of SNCF Fret – effectively imposed by European authorities on the grounds that state aid had distorted competition, is an economic aberration (regardless of the company's actual management and financial problems) and, in this case, an ecological aberration given the need to promote rail transport. Europe's industrial revitalization also depends on the formation of powerful, globally competitive groups. These competition rules are sometimes exploited. Thus, the ban on France subsidizing its (non-polluting) nuclear industry is

30 Bayart, Le Figaro, Nov. 10, 2024.

closely linked to the efforts of German anti-nuclear lobby groups to promote wind and solar power – specifically German, and ultimately Chinese, power.

However, the goal of European power may conflict with the vital interests of certain states. Thus, the draft agreement between the European Union and Mercosur aims to promote free trade between the European and Latin American markets. However, it highlights the limitations of this European policy. While it is beneficial for the export of certain European products, it risks destabilizing part of the French agricultural sector, which is vital to France's national interests. However, even though it believes that these interests are being harmed, the government cannot oppose the conclusion of the agreement. Furthermore, it opens the European market to products for which it will be very difficult to verify that they meet quality, health, and environmental requirements equivalent to those imposed by European regulations. Free competition is only valid when there is a level playing field. This example demonstrates the need for coordination – even in economic matters and free trade – between European power and the specific balances within individual states, since the former cannot be built in opposition to the latter. It also reflects the difficult balance between Europe's need to find new markets and its flagship policy of protecting consumers and the environment.

Other sectors require European investment. Immigration, first and foremost – whose uncontrolled growth, as we have noted, fuels populist sentiments – destabilizes the societies that are affected by it. The same is true in the areas of health and digital technology. One of Europe's unquestionable successes is the Erasmus program, which allows students from one European country to study in another. But morality is once again being unduly brought into the picture when the European Union denies Hungarian students access to this program... in order to punish the Hungarian government.

Issues related to strengthening Europe or its position as a power are tied to decision-making processes within the European Union. We will return to this topic in the final section of this book. The most commonly cited solutions call for increasing the European budget and

creating *Eurobonds* (bonds denominated in euros and issued in the name of the European Union rather than national governments). But increasing the budget without institutional reform would be futile, and the creation of a European debt would, as we shall see, be a factor in the surreptitious federalization of the European Union. Other avenues are worth exploring, such as increasing private funding for common policies. Another solution, one that is frequently proposed – particularly by the European Parliament – would be to drastically reduce the number of cases in which unanimity among Member States is required, replacing it with qualified majorities. This solution would seriously undermine the sovereignty of states, particularly with regard to matters of national sovereignty such as foreign and military policy. Respect for this sovereignty and the goal of efficiency could lead to the possibility of policies in which only those states that so desire would participate. In short, in certain cases, the qualified majority rule would replace the unanimity rule, but the decision reached would not be binding on the minority states. This solution does not apply to all European policies, but it may be relevant for those that enable the Union to assert itself as a power on the international and global stage.

The fact remains, however, that these policies and the conditions under which they are formalized and implemented depend on the definition of Europe's borders.

2.2 Defining the Borders of Europe

The issue of Europe's borders 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 more Europe enlarges, 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), with powerful States and satellite States. The idea is to develop mechanisms for enhanced cooperation or differentiated integration, whereby certain States choose to extend their integrated cooperation, without imposing it on others. One variation to this system would involve establishing a common set of competencies, with decisions on which could be made by a qualified majority, while allowing certain Member States to opt out of specific policies pursued by the European Union. One might criticize this mechanism for creating an "à la carte" Europe, but the à la carte menu is not incompatible with the main menu! Accepting the diversity of national approaches on certain issues will not prevent Europe from moving forward – quite the contrary.[31] The second option – which is not incompatible with the first and is advocated in particular by Emmanuel Macron – aims to establish an expanded European structure (a European political community), without the countries belonging to it necessarily being intended to join the European Union. In this context, one can also cite the association agreements between the European Union and certain countries, such as the European Free Trade Association, which links Switzerland, among others, to the European Union. It should be noted that this neighborhood policy requires a certain degree of flexibility, which the European Union does not always possess. Thus, as part of a project to form an association of three "microstates " (Monaco, San Marino, and Andorra),

31 For a historical perspective, see De Gruyter, 2023.

the European Union sought to impose common rules, leading Monaco to suspend negotiations, as the application of the rules on free movement (of people, goods, and services) was likely to threaten its very existence. Setting aside this example – which, all things considered, is minor but revealing – the logic behind an expanded European structure may offer certain advantages, both economically and in terms of maintaining 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 first issue to be addressed is that of the criteria for enlargement. The question is what the nature of Europe's borders is. If a border is meant to separate "us" from "them," then it is Europe's identity that is at stake. Are these borders geographical, ideological, geopolitical, or cultural? Given these criteria, is it conceivable that Turkey could have a place in the Union, especially since President Erdogan has, since 2003, placed religion at the heart of his conception of nationalism? Has the war in Ukraine pushed the EU's borders all the way to Russia's? The issue of borders – to which Europe seems to attach little importance – has made a striking return to the headlines (the crises in the Balkans and the creation of Kosovo, the annexation of Crimea and eastern Ukraine, etc.). In reality, Europe is built on the recognition of the individual – stripped of nationality and protected in their rights – and so the concept of a "foreigner" plays a minor role, even as migration crises necessitate the protection of the Union's borders. Faced with the resurgence of Russian imperialism – or at the very least, Russia's determination to defend its sphere of influence, its *frontiers* – Europe responds to a war of aggression by expanding not only its sphere of influence but also its jurisdiction.

While this expansion is driven by geopolitical considerations, it faces economic, social, and cultural obstacles that cannot be ignored, at the risk of upsetting the balance of the European model or, at the very least, fundamentally transforming it. Furthermore, if Europe is facing a profound democratic crisis, it seems obvious that democracy will be

even less able to function within an even larger framework. Indeed, democracy presupposes the existence of a people, and the question of whether a European people exists remains, to say the least, unresolved, regardless of how it is legally defined.

If we consider the situation from a geographical perspective – and geography has a profound influence on history – the western border is marked by the ocean, the southern border by the Mediterranean, while the eastern borders are less clearly defined. They will face the teams from Russia and Turkey.[32] It is in these areas that the interplay of tectonic forces among empires is likely to spark conflicts, yet they also represent a major geopolitical issue, as the history of the Balkans demonstrates.

These are a number of questions that, if not to be resolved, should at least be considered before contemplating the accession of a particular country or the expansion into a particular region on the outskirts of today's Europe.

The most sensitive issue concerns the promise of membership made to Ukraine. In fact, the European Commission has issued a favorable opinion on the enlargement, without giving any thought to how a country at war – whose future borders are uncertain and which is still plagued by corruption – might be welcomed. Furthermore, the accession of an agricultural country the size of Ukraine would destabilize the Common Agricultural Policy. Poland's reactions to the opening of European borders to Ukrainian products provide insight into the issue, even though Poland is one of the countries most committed to supporting Ukraine. One can understand the message being sent to the belligerents – both Ukraine and Russia – but there is reason to fear that, as was the case with Turkey, the practical impossibility of such integration will create frustrations that, in the long run, may alienate the Ukrainian people from the European project. As Thierry de Montbrial points out,[33] in the short term, the European Union has no choice but to support Ukraine, which is itself facing existential threats; however,

32 See Obert, Vernier, 2024.
33 Interview, Le Figaro, Feb. 22, 2024.

in the long term, commitments made without sufficient consideration could profoundly destabilize the European Union.

As for the other candidate countries in Eastern Europe and the Balkans, they all have gross domestic products lower than that of the poorest country in the European Union, namely Bulgaria.[34] Furthermore, the people of Moldova, like those of Georgia – whose territories are, in fact, partially occupied by Russia – are torn between a tendency toward Russia and hopes for Europe.

In any case, a potential expansion of the Union to include these countries will require a fundamental rethinking of European integration from a geopolitical perspective that incorporates defense issues – which until now have been outside the scope of the Union's concerns. From this perspective, Turkey's accession – which has been put off indefinitely – would have meant bringing in a country with a population of nearly 90 million, the successor to the Ottoman Empire, whereas the combined population of all European Union countries is just under 450 million people. At the front of the line are the six Balkan states of the former Yugoslavia, which have been candidate countries since 2003. It should be noted that Kosovo has applied for membership, even though its existence is not recognized by certain European Union Member States. Then there are the three countries that have sought to break free from Russia's sphere of influence since the outbreak of the war: Ukraine, Moldova, and perhaps Georgia – which, however, does not enjoy territorial continuity.

The accession of new Member States must, in fact, be guided by objectives that are consistent with those of the European project and must be carried out in a systematic manner.

From this perspective, Jean-Louis Bourlanges's report[35] is enlightening. He first considers the need to expand Europe, and then the methods of accession. Regarding the need to bring new countries into

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34 Goulard, 2024, p. 85.

35 Report No. 1526 of July 13, 2023, issued on behalf of the National Assembly's Foreign Affairs Committee, regarding the proposed European resolution on the follow-up to the Conference on the Future of Europe.

the Union, he points out the risk that would arise from leaving some of these countries behind, leading them to submit to other powers hostile to the Union, such as Russia, China, or Turkey.

Today, the criteria for accession to the European Union – known as the Copenhagen Criteria – focus on the establishment of stable institutions that guarantee the rule of law, democracy and human rights, respect for and protection of minorities, a functioning market economy, the ability to cope with competitive pressure and the forces of the European Union's internal market, the ability to assume the obligations of membership, and adherence to the Union's various objectives.[36] It is worth noting that institutional and ideological issues take precedence over economic criteria.

From this perspective, Jean-Louis Bourlanges considers it "essential to break down the process by which states become members. The integration process must be broken down into three distinct stages: political commitment to the values and principles of the European Union; access to the benefits and compliance with the requirements of the various common policies, under terms to be negotiated bilaterally between the candidate countries and the Union; and, finally, participation in the common institutions, which must be deferred until the candidate countries have fully met the requirements of a genuine democratic system." The report adds that this approach, "based on the dual principles of gradualism and flexibility, would make it possible to avoid the drawbacks of the high-risk 'all-or-nothing' approach in which the enlargement process is currently trapped". It should be noted, however, that moral concerns – that is, adherence to the Union's values – remain the top priority, according to the report's author. Thus, given the broad spectrum of the Union's values, integration is likely to place less emphasis on the cultural distinctiveness of the Member States concerned. On the other hand, as noted, the "gradualist" and flexible approach is a method that could be applied to many European policies.

In 2023, a report by the independent group of Franco-German experts on institutional reforms of the European Union proposed dis-

36 See Cloos, 2024, p. 142.

tinguishing four circles: the first comprising the Member States of the Eurozone and the Schengen Area; the second, the Member States of the European Union; the third, associate members; and the fourth, members of the European Political Community.[37]

While the "concentric circles" model of Europe has the drawback of leading to the perception that certain states are second-class (a drawback that is irrelevant when a state's non-participation in a particular EU policy stems from its own decision), the development of European-level structures capable of accommodating European states – even within a broader conception of what Europe is – may constitute a viable solution. This is indeed the case with the Council of Europe, which specializes in the protection of human rights and comprises 46 Member States, in addition to observer states (Canada, the Holy See, Japan, Mexico, and the United States). Despite its specialized nature, this institution plays an important role in cooperation among European countries due to its political and legal system, its common policies, and its programs, which are funded by a substantial budget. Thus, the Venice Commission of the Council of Europe (Commission for Democracy through Law) helps assess whether candidates for European Union membership meet the institutional and fundamental rights requirements. Excluding Russia is not necessarily the best response to the war of aggression in Ukraine; a withdrawal – as was the case with Greece under the colonels from 1970 to 1974 – might have been a viable alternative. It would have been a powerful symbol to recognize that Russia belongs to the broader European community, despite the crimes committed by its leaders.

Like the Union for the Mediterranean – a project championed by Nicolas Sarkozy that has had mixed results – the European Political Community, launched by Emmanuel Macron, is an interesting initiative.

The purpose of this Community is to strengthen ties between the European Union and other countries that are not members – either candidate countries, to whom the initiative's proponents have made it

37 Sacriste, 2024.

clear that this is by no means a substitute for enlargement, or countries belonging to the European Economic Area, or other countries, such as Azerbaijan or a former member of the European Union, the United Kingdom. The goal is to bring together all the countries that could be part of a "greater Europe," with the exception of Russia and Belarus. This format includes the Member States of the Council of Europe, plus Kosovo.

It is a flexible platform, a non-institutionalized forum without administrative structures, and not an international organization. The meetings take the form of a dialogue on all issues of mutual interest. This structure could serve as a basis for closer ties with the Council of Europe, given that the European Union is not a party to the European Convention on Human Rights, refusing, in particular, to submit to standards and a judicial system that are partly determined by external parties.[38] The Court of Justice of the European Union thus wishes to avoid finding itself in the same situation as the national courts on which it sometimes imposes its dictates.

The fact remains, however, that the expansion of the European Union could pave the way for many different scenarios, including the collapse of a system entangled in its differences and rigidities, incapable of ensuring the stability of a continent for which it would have, *de facto*, responsibility for. As Pierre Lellouche points out,[39] "there is no guarantee whatsoever that the Union, as we know it, will survive in its current form the geopolitical upheaval caused by the war in Ukraine, much less its expansion to forty Member States; such a system is utterly ungovernable unless it is fully federalized," which is not a solution that enjoys consensus in Europe.

38 Lefebvre, 2024, p. 148.
39 Lellouche, op. cit., p. 315.

CHAPTER II

The European Union: Between Democratic Rhetoric and Dogmatic Temptation

While democracy, on par with the rule of law, is a defining symbol of the European Union, the nature of the European legal order does not meet the traditional criteria of a democracy. The Union's expanded powers are exercised within a relatively undefined institutional framework that, in any case, does not fit easily into the categories developed by constitutional scholars or international relations scholars. Furthermore, the instruments of power and integration used by the Union do not conform to the standards of normative mechanisms either; they result from the indirect – yet highly effective – exercise of powers that are not directly conferred upon the European Union. From this perspective, the reference to the Union's values establishes an increasingly ideological dogma that serves as a powerful tool for integration and domination, with little regard for national identities.

1. THE QUESTION OF THE NATURE OF THE EUROPEAN LEGAL ORDER[40]

Before examining the nature of the European legal order, it is important to note that it is part of a broader context of change in legal systems and their relationships.

Reforms concerning Europe, like those concerning the organization of subnational entities, reflect the evolution of a system characterized by the interpenetration of legal orders or systems – an interpenetration that the constitutional text must take into account. But the paradox is that constitutional logic struggles to emerge unscathed from this process, because the Constitution is the embodiment of the principle of sovereignty, just as the Constitution implies the notions of hierarchy and primacy and, by definition, the system that is developing – that of the interaction and interpenetration of systems – does not function according to the logic of sovereignty and functions very poorly with the principle of primacy. From the perspective of subconstitutional entities, this mechanism is at work in virtually all systems. In Germany, a number of measures are aimed at strengthening the powers of the federal states – though federalism is, by its very nature, a somewhat unique system – and regional governments and autonomy reforms in Spain also reflect this trend, even as the economic crisis in that country reveals the financial cost of such a system. Furthermore, France, which is the quintessential unitary state, is also a federal state when it comes to its relationship with New Caledonia. This potential breakup of certain states (Spain, Great Britain) – which in some cases could lead to their dissolution (Belgium) – is being taken so seriously that it raises new questions for the European Union, particularly regarding whether the ties between these (potential) new entities and Europe will remain intact or be severed.[41]

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40 This analysis is based in part on a study entitled: Mathieu, B, (2025b) 'The European Union: a sui generis legal order: Prospects for Development' in Varga, A.Zs., Berkes, L. (eds.) *Federalism as the Future of the Diverse EU?*. Miskolc-Budapest: Central European Academic Publishing, pp. 187–222.

41 Le Monde, Oct. 17, 2012.

The relationship between national legal systems and the legal system of the European Union demonstrates the permeability of national constitutions. National constitutions nevertheless retain a distinct character, as evidenced by the fact that constitutional review is not the same as review for compliance with international conventions.

If we consider the two meanings of the term "constituent" – on the one hand, an element that makes up something, and on the other, that establishes a constitution – the state fulfills both of these functions with respect to the European Union. In this sense, the state is part of the European Union. It is one of its members. Alongside citizens – since EU law recognizes citizens of EU Member States as European citizens – the state is a subject of EU law. Within the European Union, it is also a co-author of the laws it enacts. But the state is also a constituent power in that it possesses the authority and legitimacy necessary to establish a legal norm that forms the basis of and organizes a legal system. An analysis of the role of the state as an element or instrument of European constituent power focuses on the relationship between the national constitutional order and the European institutional order.[42]

Furthermore, in addition to the principle of the State's participation in the European Union, some constitutions have introduced more specific provisions regarding the implications of the emergence of Union citizenship and the rights arising therefrom, as well as those pertaining to the Economic and Monetary Union or relating to the right to asylum or to the immigration policy. These constitutional amendments were carried out in different ways, depending on national constitutional rules, either through the legislative process or by referendum (Austria, Denmark, Ireland). Ultimately, the majority of the current Member States of the European Union[43] have carried out a constitutional amendment taking into account the European Union, either at the time of their accession (Austria, Finland, Sweden), or upon ratification of the Treaty on European Union and/or one of its amendments (Germany, France, Ireland, Portugal), or at a later date (Belgium).

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42 See Mathieu, 2006, p. 105 et seq.
43 See Levade, Mathieu, 2006, p. 161 et seq.

Those countries that have been able to avoid such a revision owe this either to "pro-European" constitutional provisions (Spain) or to the existence of constitutional provisions relating to international law that allow for the inclusion of the European Union.

Moreover, more generally speaking, constitutional law is increasingly required to take international law into account, particularly in the context of constitutional review. The discretion available to a national constitutional court regarding the use of international standards depends, in principle, primarily on the relevant constitutional provisions. These provisions may either address the hierarchy of legal norms or define the competence of the constitutional court. Thus, the Constitution may, for example, state that certain international norms have the same standing as the principles it itself establishes, or specify that, when reviewing the constitutionality of national norms, the constitutional court must use international law – or certain provisions thereof – as reference standards. The Constitution may also provide that international law or certain international conventions shall serve as a guide for interpreting constitutional provisions. But the Constitution may also be completely silent on this issue. A systematic analysis of constitutional case law that refers to international law shows, in fact, that judges are likely to use international law as a benchmark, regardless of whether the national Constitution is open to international law or not.[44] From this perspective, whether the judge is required to refer to standards derived from international law or whether the Constitution is silent on this point, case law reflects a difference in degree, not in nature, in the "internationalization" of the review carried out.[45]

Returning to the European institutions, the European Union is a supranational legal order rather than an 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 ac-

44 See Levade, Mathieu, op. cit.
45 Ibid.

tions of the Commission, the Parliament and, above all, the Court of Justice of the European Union.[46]

The first question that arises is how to contextualize the European institutions in light of the concept of a constitution as it has been developed within the framework of the nation-state.

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

Finally, beyond questions of typology, it is important to examine the claim that the Union is democratic in light of its foundations and the reality of how it operates.

1.1 A Constitutional Legal Order?

Assuming that the Constitution is consubstantial with the State, 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 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 uncon-

46 For an in-depth analysis of these issues, see Rideau, n.d.

ditional 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. According to Elisabeth Zoller,[47] the answer is no. Indeed, accepting that a political community is made up of a number of individuals grouped together on a territory and have a system of government, then in feudal France, Burgundy 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 as regards 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",[48] this legal order cannot be a constitutional order, as it is marked by the principle of speciality (essentially the protection of human rights).

However, as mentioned before, the organization of political communities, which we might call "post-modern", is becoming more com-

47 Mastor, Zoller, 2021.
48 ECHR, March 23, 1995, Loizidou.

plex and is manifested 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.

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.[49]

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.[50]

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".[51] However, this concept of public power is distinct from that of sovereignty, and may be the attribute of a non-State political society.[52]

Recognition of a specific legal order through the inclusion of "integration clauses" in national Constitutions

Many countries, such as France, Italy and Portugal, have enshrined the principle of European Union membership in the text of their national

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49 See Schoetti, 2004, p. 3.
50 See Pernice, 2004.
51 On this issue see Denizeau, 2004.
52 Moderne, 1960, T1, p. 51.

Constitutions. This affirmation constitutes 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 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 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.[53] 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.[54] However, this prevalence is applied by the 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.

The lack of constitutionality from a normative point of view

This last element must be taken into account for 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 politi-

53 On the use of Article 88-1, see Bruce, 2005, p. 3 et seq.
54 With the principle of direct effect, see Azoulay, 2003, p. 859 et seq.

cal 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.[55] Indeed, according to a classic definition, cited by Guillaume Drago,[56] 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. 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 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 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 into the 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

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

56 In Flauss and Drago, 2001/2002.

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.

The European Union and the principle of sovereignty

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".[57] 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 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 favor of a new entity? This logic would be part of

57 Sirey, Esmein, 1906, p. 2.

a contractual vision of the constituent movement.[58] States would then be abandoning their fundamental right to self-determination in favor 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.[59]

1.2 A Federal Legal Order?

'For someone who is not a specialist in EU law, defining the legal order that the EU constitutes is a delicate task, but, as Olivier Beaud notes.[60] "one can capture the uniqueness of Europe without confining it to 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.

58 For a hypothesis of contractual and international elaboration of a national Constitution, see Pierre-Caps, 2000, p. 36.
59 For a critique of this logic, see Viala, 2004, p. 367.
60 Beaud, 2022.

In search of a model

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

Empire

Empire is a political form based on a centre, a metropolis, around which dominated or colonised entities gravitate on the periphery.[61] 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).

Certain characteristics that have defined empires throughout history are not unfamiliar to the European Union: "a polycentric system of governance, overlapping jurisdictions, cultural and economic heterogeneity, blurred borders, and shared sovereignty".[62] Furthermore, the Holy Roman Empire, whose borders roughly correspond to those of modern Europe, did not have a single supreme power that took precedence over all others, but rather a hierarchically organized interweaving of sovereign rights distributed among various entities.[63]

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

61 See Ando, et al, 2017.
62 See De Gruyter, op. cit., p. 260.
63 Stollberg-Rilinger, 2024.

geostrategically (as could be the case with the Holy Roman Empire). While, in legal terms, it is difficult to adapt the concept of 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.

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.[64] This also raises the issue of the Union's territory.

64 See Spector, 2021, p. 147 et seq.

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 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 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.[65]

As Olivier 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.[66]

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 sover-

65 Spector, op. cit., pp. 64 and 169.
66 See Spector, op. cit., p. 38.

eignty is not an effective one for describing this reality.[67] 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 manoeuvered 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.[68]

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.[69]

The European Union: the temptation of federation

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

67 See in that sense Beaud, 1998, p. 83 et seq.
68 Zoller, 2003, pp. 43–166.
69 Spector, op. cit., p. 53.

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 stipulations of the Treaties.[70] 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".[71]

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70 See Arenas, 2022.
71 Martucci, 2021, p. 212.

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.[72]

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 Treaty on European Union (TEU) on the distribution of competences lists the types

72 Beaud, op. cit., p. 490 et seq.

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.

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

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 Eurozone, Member States can no longer issue money for the purpose of repaying their debts.[73]

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).

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".[74]

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73 Spector, op. cit., p. 170.
74 Beaud, op. cit., p. 541.

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.[75]

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

But 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 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 Céline 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.[76]

Rampant federalization carried out by the Court of Justice

Independently of the Treaties or the will of the Member States, this federalisation is taking place essentially under the influence of two

75 See Beaud, op. cit., p. 561.
76 Spector, op. cit., p. 169.

factors: the role played by the Court of Justice of the Union and the budgetary and financial operations.

But if we remain within the institutional sphere, it is worth highlighting the "federative" role of the Court of Justice of the European Union (CJEU).

The Court's major role stems primarily from the trend toward the judicialization of all issues. It is worth noting, by the way, that while this phenomenon bears the hallmarks of our contemporary societies – in which judges exercise an increasingly broad role in arbitration and decision-making[77] – it also bears older hallmarks. Thus, in France, the monarchy was first and foremost a state based on the rule of law. Closer to us,[78] the Habsburgs, in the Austro-Hungarian Empire, would turn to one of the three courts in Vienna whenever a somewhat sensitive issue arose; these courts were empowered to handle cases for which no political solution had been found.

In the European system, where "the idea of separation of powers is almost a challenge",[79] even though there is no executive or legislative branch in the strict sense of the term, there is indeed a judicial branch, represented, in particular, by the Court of Justice of the European Union. As Jean-Marc Sauvé points out, "this 'power' did not originally exist and is not a given. It developed gradually."

The Court's authority stems both from the functions it has assumed and from the powers conferred upon it by the Treaties.

The Court of Justice of the European Union is, first and foremost, the authoritative interpreter of the Treaties and, alongside the Commission, the guardian of their implementation.[80] The Court is also es-

77 See Mathieu, 2015, and Mathieu, 2024.

78 De Gruyter, op. cit., p. 103.

79 Remarks by J-M. Sauvé, Vice President of the Council of State and Chair of the committee established under Article 255 of the Treaty on the Functioning of the European Union (a committee created by the Treaty of Lisbon, tasked with issuing an opinion on the suitability of candidates to serve as judges and advocates general at the Court of Justice and the General Court of the European Union), at the opening of the Council of State's 2013–2015 lecture series on Oct. 16, 2013, from which we will draw extensively on the following discussion.

80 TEU, Art. 19.

tablished by the Treaties as an "institution" of the European Union and, as such, it contributes to the promotion of the Union's values, the pursuit of its objectives, and the advancement of its interests, as well as to the coherence, effectiveness, and continuity of its policies and actions.[81] The Court of Justice of the European Union is responsible for ensuring compliance with the founding Treaties and, more generally, the application of Union law. Admittedly, it has only discretionary jurisdiction in this regard, as the national court has been established as the ordinary court for applying European Union law.[82] But it has interpreted its powers broadly[83] in order to ensure the existence of a "community governed by law "[84] – that is, a community in which neither the Member States nor the institutions "escape scrutiny as to whether their actions comply with the fundamental constitutional charter that is the Treaty".[85] On this basis, the CJEU has indeed established itself as the "driving force behind European integration".[86] In a praetorian manner, it has shaped – beyond what might initially have been expected – the European Union's "own legal order"[87] around a central idea: the deepening of European integration.[88] 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 the Court of Justice of the European Communities).[89]

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81 Under Article 13 of the Treaty on European Union, the institutions of the Union are: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.

82 This follows, in particular, from the CJEU decision of March 9, 1978, Case No. 106/77, Simmenthal.

83 On these points, see Jacqué, 2012, p. 395; see also below.

84 CJEU, April 23, 1986, Case No. 294/83, Les Verts v. European Parliament.

85 Same decision.

86 von Bardeleben et al., 2012, p. 57.

87 CJEU, July 15, 1964, Case No. 6/64, Costa v. ENEL.

88 Sauve, op. cit.

89 CJEU, July 15, 1964, Case No. 6/64, Costa v. ENEL., and Feb. 5, 1963, Case No. 26-62, van Gend & Loos.

It is worth taking a closer look at this principle of primacy, which constitutes an extremely powerful lever of power in the hands of the European institutions, and particularly the Court of Justice.

The principle of the primacy of Union law is, and remains to this day, a creation of case law.[90] The Treaty of Lisbon, which incorporated many of the provisions of the draft Constitution, did not include a clause regarding the primacy of Union law. The signatory states merely referred to this principle in one of the declarations annexed to the final act of the intergovernmental conference that adopted the Treaty. Under the terms of Declaration No. 17, "the Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". This declaration makes it perfectly clear that the primacy of Union law is not a provision of the Treaties concluded by the Member States, but rather a concept established by the case law of the CJEU, and that it applies "under the conditions laid down by the said case law." The opinion of the Council's Legal Service, annexed to that same declaration, confirms this by noting that the principle "stems from the case law of the Court of Justice," which has regarded the primacy of Union law as "a fundamental principle of Community law (...) inherent in the specific nature of the European Community." While the principle *of pacta sunt servanda*, which implies the primacy of ratified Treaties, has general applicability in international law, the case law of the ECJ has added a very specific dimension to it, justified by the direct effect of Community law: the Court in Luxembourg seeks to require national courts to give that law precedence over all their domestic rules. The 1978 *Simmenthal* ruling,[91] solemnly declared: "every national court must, in a case within its jurisdiction, apply Community law in its entirety (...) and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule".

90 See on this point, the analysis by Seners, 2025.
91 ECJ, March 9, 1978, Case No. 106/77.

This case law places the European Union within a federal framework that is in no way reflected in the text of the Treaty.[92]

By drawing on the principles of primacy and direct effect, the Court has also expanded the Union's powers through the theory of implied powers[93] and a teleological method of interpreting texts.[94]

From a normative perspective, it has developed general principles of European Union law, which has enabled it to build, on this basis, a genuine system for the protection of fundamental rights,[95] thereby significantly expanding its scope of jurisdiction.

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.

It can therefore be said that the European legal system has not only accorded the Court a prominent place, but has also been largely shaped by the case law of the Court of Justice.

However, incorporating the Court into the framework of the separation of powers may be a misdirection. As Thierry Baudet points out,[96] "judges of supranational organizations cannot be subject to the same separation of powers as national judges, as long as no integrated political structure is created."

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92 Rouvilliois, 2023, p. 197.

93 CJEC, March 31, 1971, No. 22-70.

94 See in particular, CJEC, March 31, 1971, Case No. 22/70, Commission v. Council (known as the AETR case); CJEC, Sept. 13, 2005, Case No. C-176/03, Commission v. Council.

95 CJEU, March 1, 2011, Case No. C-236/09, Belgian Consumers' Association Test-Achats ASBL; Burgorgue-Larsen, 2011, p. 969.

96 Baudet, 2015, p. 272.

However, the Court of Justice of the European Union cannot be considered as a true constitutional court.[97] 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.

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.

1.3 A Democratic Legal Order?

First and foremost, it should be noted that the term "democratic" must be understood here *in the strict sense* – as a principle of the legitimacy of power – and that it carries no positive or negative connotations in this context.

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 fact, although it is repeated ad nauseam in Treaties and Court of Justice rulings, the reference to democracy comes across in certain speeches as more of a fiction than a reality. Thus, according to Jacques Delors, "this seemingly technocratic project is moving forward under

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

the aegis of a sort of gentle and enlightened despotism";[98] Jean-Claude Juncker, for his part, states that "there is no democratic alternative to the European Treaties".[99]

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.

The issue of legitimising 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 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.

The text of the Constitutional Treaty project 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 European legal order is founded on the 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's just observe that the European People, if it exists at all, has never been called upon to give its opinion on the

98 Lecture delivered in Strasbourg on Dec. 7, 1999.
99 Le Figaro, Jan. 28, 2015.

founding acts of the European Union. The 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 European legal order, and the extent of the powers transferred. 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 as to whether a European People exists at all. The European 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. The 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. 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.

But 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's more, the absence of a homogeneous political space and of a European public opinion[100] 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,

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100 Gerkrath, 2004, p. 363 et seq.

who has noted both the historically consubstantial nature of democracy and the Nation, at least in modern 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 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.[101] 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 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.[102] 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.

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

101 See in that sense Vedel, 1977, p. 23, see also Habermas, 1998, p. 218.
102 For an assessment of this nature, see Timsit, 2003.

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, represented the Peoples of the Nations, before representing European citizens.

The term "Parliament" 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.

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 European 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 postulative. 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 from their international origins a taste for expert advice and listening to lobbies, rather than political debate,[103] even if the situation has changed a bit. The search for consensus is preferred to confrontation.[104] 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.[105] In that sense, the Parliament, as the body of representative democracy within the Union, should have 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 issue of 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.[106] The causes of this situation are numerous and of varying nature: individualism, communitarianism, disintegration of shared values, multiculturalism, globalisation, financial crises, the loss of in-

103 See in this regard Magnette, 2000.
104 See in this regard, Angel and Chaltiel Terral, 2008.
105 Rosanvallon, 2008.
106 See Mathieu and Katrougalos, 2023.

fluence 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*".[107]

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"[108] 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.[109]

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,

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107 Manent, 2006, p. 10.
108 Spector, 2021, p. 92.
109 Spector, ibid., p. 25.

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 States the rule (...) on a democratic form of government, whereas it is not really in a position to meet this standard for itself".[110]

2. THE TOOLS OF INTEGRATION

Even as the European Union creates its own legal instruments of power – beyond those granted to it by the Treaties – it invokes the "values of the Union," which are more ideological than legal in nature, to impose, in an increasingly dogmatic manner, moral or "societal" concepts on Member States concerning, for example, minority rights and certain conceptions of the family. It combines these values with institutional requirements, under the guise of the rule of law. All of this significantly expands the scope of the Union's authority. Moreover, it is taking steps to ensure that compliance with these directives is backed by sanctions against non-compliant states.

Another instrument of power – one that is just as powerful but less ideological in nature, and rather linked to a set of circumstances from which the Union can benefit – is the use of new budgetary and financial tools.

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110 Beaud, 2022, op. cit., p. 551.

2.1 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 enshrined in the Treaties, and contributes to the development of conflicts between the Union and certain States that wish to assert their own identity.

"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 Olivier 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.[111]

Article 2 of the Treaty on European Union 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 in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

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111 Beaud, 2022, op. cit., p. 545.

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 freedom and dignity are 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.

These values largely overlap with those promoted and upheld within the framework of the Council of Europe. From this perspective, the interpenetration and intertwining of the two systems are evident in that the case law of the courts in Luxembourg and Strasbourg generally converges on this matter, and that the opinions of the Venice Commission (in the work of which a representative of the European Union participates as an observer) may be taken into account in deciding whether or not to close an institutional chapter and one relating to fundamental rights, which is a condition for accession to the European Union. However, the European Court of Human Rights operates within a very broad scope, which may touch on issues that pertain to the fundamental – though not necessarily shared – values of states. It was this Court that, among other things, mandated the recognition of the parentage of children born through surrogacy abroad and the liberalization of gender reassignment... Similarly, in a ruling dated October 13, 2022, European judges deemed the conviction (to a symbolic sentence)

of a "Femen" activist following the desecration of a Parisian church by her to be unjustified.

A prime example of the overlap between the two systems: In its judgment in Case C-78/18 of June 18, 2020, the Court of Justice of the European Union, after assessing the Hungarian law on the transparency of organizations receiving foreign support, ruled that the legislation requiring certain civil society organizations, that receive foreign support above a certain threshold, to register, declare, and publish their sources of funding – and providing for penalties in the event of noncompliance – was discriminatory and unjustified and therefore violated primary EU law. This bill had been the subject of a joint opinion by the Venice Commission and the OSCE/ODIHR (889/2017), which emphasized that "the objective of increasing transparency in civil society does not appear to be, in and of itself, a legitimate objective under international human rights instruments" (paragraph 137).

This form of legitimisation by the values 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,[112] 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,

112 See Spector, 2021, op. cit., p. 61. and Mathieu, 2017, op. cit.

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 at least ademocratic bodies, such as the European Court of Human Rights, 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.[113]

There is a need to create, almost *ex nihilo*, a European people based on shared values, and this requires education. As Céline Spector observes:[114] "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

113 See Beaud, 2022, op. cit., p. 545.
114 Spector, op. cit., p. 255.

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.[115]

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.[116]

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.

The Union's values as instruments for broadening its competences

In Opinion 2/13 of December 18, 2014, the Court of Justice of the European Union states that the European legal system is based on the fundamental premise that each Member State shares with all the other Member States a set of values on which the Union is founded. This premise implies and justifies the existence of mutual trust among Member States regarding their compliance with the Union law that implements it.

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.[117]

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 par-

115 See Spector, op. cit., p. 241.
116 Spector, op. cit., p. 307.
117 See Schoettl, 2022.

ticular 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 premise 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".

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 applies 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 the European institutions and control by the 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.

Decision 64/16 of the Court, dated February 27, 2018, concerning Portuguese judges' unions, follows the same line of reasoning. The Court considers itself competent to assess the compliance with Union law of austerity measures affecting judges' salaries, based on Article 19-1 of the Treaty (which embodies the principle of the rule of law). To this end, it has developed the concept of a European judiciary, arguing that national judges, like the Court of Justice of the European Union, are European judges because they are responsible for applying European law. They are therefore subject to European Union law.

Thus, the European Court of Justice defines the standards it is responsible for enforcing – which can raise issues regarding the separation of powers – and expands the Union's powers far beyond the scope of the Treaties into areas falling under the sovereignty of the Member States, particularly in institutional matters.

Looking ahead, and in line with this reasoning, one might wonder whether the Court could intervene in the political organization of states, given that national governments and parliaments apply Union law, and on the basis of the principle of separation of powers.

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 feel in general 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 re-

motely related to these competences; and the rest, i.e. one deliberation in five, was utterly foreign to them.[118]

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 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. It should be noted that such laws have been enacted in Bulgaria and Lithuania, and that a debate has taken place in Romania. This is proof, if any were needed, that not all states share the same understanding of the principle of non-discrimination when it comes to the education that children should receive.

In December 2022, the Commission proposed[119] 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".[120] It aims to prevent that 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

118 Bellamy, X., quoted by J. Schoettl, above-mentioned Art.
119 Press release of 7 December 2022.
120 Lenoir, 2023.

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.

However, this system does not appear to be a sufficient deterrent, and the Bourlanges Report (cited above) refers to expert analyses that recommend amending Article 7 of the Treaty, which states that in the event of a "serious and persistent breach by a Member State" of the rule of law, the Member States (excluding the State in question) may, by unanimous vote, suspend that State's voting rights. This revision would involve replacing the unanimity rule with a four-fifths majority rule.

As François Seners points out,[121] the European Union has shifted from a legal system based on competences to one based on values. This trend has, of course, been reinforced by the incorporation of the Char-

121 Seners, 2025, above cited article.

ter of Fundamental Rights of the European Union[122] into the Treaties and by the impact of the case law of the European Court of Human Rights.

2.2 Budgetary and Financial Instruments and the "Hamiltonian" Movement

In order to deal with exceptional economic or financial circumstances, the European institutions have been given new tasks, sometimes surreptitiously, even *contra legem*,[123] sometimes explicitly, at the Member States' request.[124] 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.[125] 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.[126] The creation of a Fund for the Recovery and Redemption of State Debts by the U.S. Federal State in 1790 reinforced federalism.

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122 The Treaty of Lisbon granted it the same legal status as the Treaties.
123 See in particular: BVerfG ruling, 5 May 2020, 2 BvR 859/15.
124 See Arenas, thesis cited above.
125 This is a considerable sum on the scale of the Union, as it represents almost three quarters of its multiannual budget (2021–2017), i.e. around four times the annual budget.
126 See Guaino, 2023, p. 329.

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



CHAPTER III

Rethinking the European Union While Respecting National Identities

Based on the premise that the European Union fulfills a need for power that individual states cannot meet on their own, but also on the observation that the European Union – which has a weak democratic foundation but genuine technocratic power – is attempting to dogmatically impose on Member States a system of values with an increasingly tight framework – one that has major institutional implications – to the detriment of national sovereignty, it is necessary to explore some avenues for preserving, or even developing, these power objectives, while respecting the essential elements of national identities.

The first step in the analysis is to identify "national identity," a concept to which the European Treaty itself refers. The second aims to identify mechanisms that would ensure that Europe is governed in partnership with the Member States, rather than against them. The guiding principle advocated here, with regard to the relationship between the Union and the Member States, aims to shift from an obligation of compliance to forms of dialogue.

1. IN SEARCH OF NATIONAL IDENTITY[127]

The key debate – one that is often sidelined for ideological reasons – is that of the relationship between national identities and a shared European identity.

As Jean-Marc Sauvé points out, the Constitution expresses the indissoluble link between a society's past and the future it wishes to build for itself; it also expresses a link between the particular and the universal. A constitution is an act of sovereignty through which a political community defines the fundamental rules and principles governing its identity, its values, and the manner in which power is organized and exercised.[128] National identity can be assessed in terms of both political structures and values.

Assessing national values against the lens of shared European values raises certain questions that cannot be dismissed, regardless of the perspective ultimately adopted. Thus, while fundamental rights and freedoms form the core of the values expressed in Western constitutions, one cannot assume that national values are limited solely to individual rights and freedoms. They may pertain to the nation's identity or character – such as its social character – and may be expressed through principles such as the principle of human dignity, referring not only to rights but also to duties. As the European Court of Human Rights has noted, they may concern the issue of "living together".[129] Another example: the very existence of a nation implies the recognition of a special bond between certain individuals and the state: nationality. The concept of the state implies, *at the very least*, a distinction between citizens and non-citizens. As a result, some of the most fundamental rights must be recognized for all human beings, others for nationals and legally present foreigners, and still others for nationals alone.

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127 These developments are based in part on those published under Mathieu, B. (2022) 'Constitutional Identity' in Raisz, A. (ed.) *International Law From a Central European Perspective*. Miskolc-Budapest: Central European Academic Publishing. pp. 21–39. https://doi.org/10.54171/2022.ar.ilfcec_2

128 On this issue, see Mathieu, 2013.

129 ECHR [Grand Chamber], July 1, 2014, No. 43835/11, SAS v. France.

However, the Venice Commission appears to question the very notion that certain rights can be reserved for nationals (Opinion CDL (94)II).

It is necessary to distinguish between principles that fall within the national constitutional order and those that form part of the common European heritage, based on the view – which we will adopt here – both exist and must coexist harmoniously.

The notion of constitutional identity refers to several concepts, first and foremost that of the Constitution. The Constitution is understood as the text that embodies an act of sovereignty, which determines how people intend to govern themselves (or be governed) and the principles and values specific to those people. This Constitution thus establishes not only a political structure but also an ideological system specific to a nation. We can therefore consider that constitutional identity refers to those elements of a nation's identity that it recognizes as fundamental. It enshrines in a legal text elements related to history, culture, religion, and so on – which, in a sense, constitute the nation's cultural heritage. Constitutional identity is thus the legal manifestation of national identity – that is, a set of norms that enable national identity to assert itself and resist the encroachment of principles or values that would run counter to it, while also allowing it to engage in dialogue with other identities. It involves distinguishing between what is one's own and what is of someone else... This national identity is a prerequisite for the existence of a state. In fact, it is the fundamental reason why a group of people settled in a particular territory, formed a nation, and established a state – even though these factors may have come into play at different points in time. While national identity refers to what is specific, it does not preclude the possibility that certain principles or values inherent to that identity may be shared with other states or groups of states; in which case they may constitute elements of the common identity of an international or supranational organization, which requires distinguishing between what is unique and what is shared. In the discussion that follows, we will therefore establish an equivalence between constitutional identity and national identity, considering the former to be the legal expression of the latter.

The resurgence of the concept of national identity – both in the realm of ideological and geopolitical debate[130] and in the legal sphere – reflects, in a sense, a resistance to a trend toward globalization that is characterized by the primacy of the supranational over the national, and that is not only economic and commercial but also cultural. It should be noted, however, that this movement aimed at denying – or treating as secondary – the existence of a national identity is far from universal. In fact, many states assert themselves as powers by invoking their national identity. This is the case, for example, with the United States, China, Turkey, India, and Russia. The crisis of national identity is, in fact, a primarily European phenomenon. In fact, two supranational systems – those of the Council of Europe and the European Union – have adopted converging approaches aimed at replacing national identities with a common identity, even though these systems were originally intended solely to identify and defend shared elements of identity. For some of these countries – Germany, for example – the trauma of World War II led to a relatively easy acceptance of the equation between nationalism and national identity, with the rejection of the former leading to the abandonment of the latter. For other countries, such as France, which have a long national and state tradition, some have argued that this identity is strong enough to allow a European identity to prevail; however, this issue is becoming increasingly significant and is leading to a political divide that is beginning to replace the traditional *right-versus-left* divide. Finally, in countries such as Hungary, which have undergone successive imperial integrations – Ottoman, Austrian, German, and Soviet – the question of national identity is essential, vital, and Europe – originally conceived as a tool for emancipation – is now perceived by some as posing a risk of losing an identity that has only just been regained.

Indeed, in Western Europe, the concept of the nation is being called into question, the virtues of the state are being challenged, there seems to be room only for individuals and supranational structures; the common good is diluted in the pursuit of individuals' desires and rights;

130 Del Valle ana Soppelsa, 2021.

the identities that are recognized and valued are sexual, religious, or even ethnic; and the role of national identities is increasingly diminished. However, the resurgence of the concept of national or constitutional identity should prompt us to reflect on their role in the construction of a political community and on the conditions for dialogue with shared identities forged, in particular, in the European melting pot.

1.1 The Issue of Identifying a Political Community[131]

By definition, democracy presupposes the existence of a people. Such a people cannot be universal, which – aside from the purely utopian nature of such a concept – would imply that this people could govern itself, obey common laws, and share identical values. In any case, this people, which is conflated with the universality of human beings, cannot constitute a political society. However, it is necessarily within a political society that the question of the exercise of power and its legitimacy arises. We can consider that a political community is made up of a number of individuals grouped together on a territory and have a system of government.

There are, therefore, three fundamental conditions for the existence of such a political community: a people, a territory, and a political organization.

In a geographical sense, a territory is "a space appropriated and occupied by a human group that identifies with it and bases part of its identity on it, in parallel with the establishment of legitimate authority".[132] The territory therefore has a political dimension. It also has a social dimension.[133] To use more contemporary terminology, a so-called "civil" society – detached from a territorial framework – cannot constitute a political society.

This political organization does not necessarily take the form of a state.

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131 On this issue, see Mathieu, 2017, op. cit.
132 Théry, 2007, pp. 365–366.
133 Foucher, 2007, pp. 167–168.

The state structure, a modern form of political organization, developed in some countries through the transformation of a feudal system into a monarchy. More recently, this phenomenon has occurred either through the breakup of empires (Austro-Hungarian, Soviet, etc.), or through the establishment of a federal organization bringing together relatively weak state or pre-state structures (the United States, Germany), or through more or less artificial divisions created in the context of decolonization.

The rise of the nation-state in the 19th century strengthened the bond between the people and the territory.

Another characteristic that is inherent to the state is sovereignty. Sovereignty is necessarily exercised within the boundaries of a territory. There was thus a point in the Middle Ages when there was a shift from the idea of a territory as a man's possession – the royal domain belonging exclusively to the king – to the idea that power no longer required the sovereign to be in a relationship of ownership. At that point, we move away from private law and into the realm of public law.

Sovereignty implies the existence of an original and unconditional power. This power must be embodied in the reason of the strongest, in the reason of the most competent, in dynastic reason, in religious reason, and in the people. While sovereignty does not imply democracy, democracy can exist only within a system based on sovereignty.

The concept of a border as a line separating two sovereign states truly emerged at the end of the 18th century. In the 19th and 20th centuries, the nation-state built a political myth around the border as a means of demarcating territory. The border becomes a tool of political and symbolic separation. Borders are an invention associated with the emergence of an international order based on state sovereignty; they delineate a homogeneous territory and serve as a protective barrier against external interference.[134]

As Chantal Delsol notes,[135] the concept of separation "pertains to the constitution of beings. Creation comes about only through sepa-

134 See Dullin and Foestier-Peyrat, 2015.
135 Le Figaro, Oct. 8, 2015.

rations: to establish beings, one must define their outlines – in other words, their limits. Nothing exists except through its limits. A river without banks ceases to be a river and becomes a swamp. I exist because I can call myself human rather than an animal, a woman rather than a man, and so on. (...) In this regard, borders signify, first and foremost, the existence of a society located within them (...). Any human community derives its existence solely from its differences. (...) Differences manifest only through distinctions: definitions, borders; and an undifferentiated world would be a formless mass without definition – and therefore without existence. We realize that encounters, solidarity, and connections exist only between entities that have been previously defined – and are therefore delimited." Territory – and thus borders – provide the framework for a representation composed of places and stories. Each national community has its own "mental map".[136]

Today, the migration crisis and the responses of certain states – which involve building walls, as Hungary and the United States, among others, have done – reflect the natural link between borders and identity, with the closure of the former reflecting the fear of losing the latter. It is probably the futile temptation to abolish borders that is leading to the resurgence of walls. As Pascal Bruckner points out, "There is no history without geography".[137] Looking at recent history, it is worth noting that, since 1980, more than 28,000 kilometers of new international borders have been established, and another 24,000 kilometers have been the subject of delimitation and demarcation agreements.[138] The crises in Cyprus, the creation of Kosovo, and Russia's annexation of Crimea and invasion of Ukraine – to mention only the situation in Europe – demonstrate, if proof were needed, the importance of territory and borders.

The nation refers to the idea of a people – not merely a collection of individuals, but a people driven, to borrow an expression from Renan, by a will to live together, or a "community of dreams," to use a more

136 To quote Foucher, 2012, p. 23.
137 Preface to Baudet, 2015.
138 Foucher, 2012, p. 7.

poetic expression from Malraux. This nation shapes its people just as much as it is an expression of them. This concept of a people is not defined by ethnic considerations, but rather by a voluntary commitment to a shared history, values, and common purpose. As Jean-Marc Sauvé points out, "In France, the state is the foundation upon which the nation was built; it constitutes its matrix".[139]

These states have adopted constitutions. The original definition of the term 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 was within this framework and in this context that modern forms of democracy developed.

Just as globalization seemed to signal the slow demise of the state structure, and just as the individual seemed to have finally gained control over their destiny and freedom from ties that bound them, the state's defensive function is revitalizing it. Against the backdrop of the multifaceted instability plaguing the world today, the need for the state is becoming increasingly evident in the face of the rise of terrorism, conflicts, and economic and financial crises. The relegation of the state to a secondary role – or even the call for its abolition – in favor of a "self-governing" society of individuals stems from a certain vision of societal progress. Because of the flaws for which it was responsible – or for which it was blamed – the concept of the state has been denounced. However, with the resurgence of transnational threats and crises of all kinds – particularly health crises – the state once again finds itself in the driver's seat to ensure the protection of civil liberties, economic prosperity, and the defense of democracy. In fact, globalization is not the result of political will, but rather of the actions of financial and economic forces that are, by their very nature, undemocratic. Democracy, as a principle that legitimizes the exercise of power, functions only within a geographical framework that necessarily involves borders. Envisioning a global political system would only lead to the establishment of a mechanism for resolving conflicts, whether

139 Conseil d'État, 2015, p. 12.

military or economic. From this perspective, economic globalization is, in a sense, an "illusion" of a borderless society. This "off-the-ground" society exists only in the hands of private economic – and, above all, financial – entities. It may also be the preserve of an elite that, culturally and financially, operates within this framework, without necessarily constituting a political society. These transnational economic and financial structures undermine state structures, thereby weakening democracy[140] – the link between the state, the nation, and democracy. The political sphere cannot, by its very nature, be the same as the world.[141] Analyses aimed at supporting the development of a "law without the state"[142] actually raise the question of whether such a law might not, by its very nature, be incompatible with democracy. Democracy and national identity are interdependent.

Democracy is the framework and one of the ways in which politics can be exercised. It therefore presupposes "belonging to a community that is not global but involves a history, a language, and a culture; the demarcation of territories defined by borders; and the existence of a state that embodies the community and ensures security".[143]

As Alexandre del Valle points out, Aristotle, Plato, and even Rousseau explained that democracy is impossible within an imperial-style political entity.[144] Montesquieu brilliantly demonstrates how Rome fell by granting citizenship to everyone. "From that point on, Rome was no longer the city whose people had once been united in spirit (…). Once the peoples of Italy had become its citizens, each city contributed its own spirit and its particular interests (…). The torn city no longer formed a unified whole, and, since one was a citizen of it only by a sort of fiction, since one no longer had (…) the same gods, the same temples, the same burial sites, one no longer saw Rome through the same eyes; one no longer had the same love for the Fatherland, and Roman senti-

140 See Zarka, 2016, p. 102.
141 Contrary to the view expressed by Rousseau, 2017, p. 105.
142 See Cohen-Tanugi, 2016.
143 Le Goff, 2016, p. 242.
144 del Valle, 2014, p. 109.

ments ceased to exist".[145] All other things being equal, a parallel can be drawn with the European Union's ambition to build a European nation. The idea that the people is created by the law – and not the law by the people – as advocated, in particular, by Jürgen Habermas, constitutes the very negation of the democratic principle, by placing legal scholars above the people. Democracy implies, as Slobodan Milacic points out,[146] that politics takes precedence over the law, that the Constitution is derived from elections, and that the people are the foundation of the law. To say that "the norm takes precedence over the vote" calls into question the very principle of democracy.

The European Union's failure to build a genuine democratic political space – as an extension of the economic space – demonstrates that the dismantling of the relationship between the people, the state, and the constitution leads to a democratic impasse.[147] Furthermore, European law – such as that of the European Convention on Human Rights – can only be applied through the implementation of national legal instruments.

Thus, democracy – as a principle of legitimizing power based on the will of the people – implies the existence of a political society, defined by borders and composed of a people made up of citizens (non-citizens being, by definition, excluded from this political society) who are bound together by a shared destiny and common values. As Raymond Aron points out, individuals cannot become citizens of the same state unless they feel they share a common destiny.[148] In any case, democracy presupposes, in any scenario, the existence of a *demos*.[149] From this perspective, democracy is necessarily inclusive – that is, it brings together individuals who share the same values. In this sense, immigration can only be accepted – and prove to be a source of enrichment – if it is accompanied by the integration of those who join the na-

145 Montesquieu, 1951, p. 72; See the analyses by Manent, 2012, p. 204 et seq.
146 Danelciuc-Colodrovschi, Mathieu, Philippe, 2017.
147 Contrary to the argument put forward by Rousseau, 2016, p. 93 et seq.
148 Quoted by Baudet, 2015, op. cit., p. 332.
149 Ibid., pp. 13 and 16.

tional community[150] and the assimilation of those who seek citizenship. The people are thus defined as a political entity rather than an ethnic one. On the contrary, the dismantling of the bond between the people and the state leads to a focus on communities defined by ethnicity, religion, or language. From this perspective, unless ethnic communities are transformed into political communities, a communitarian conception of society is fundamentally incompatible with the democratic principle. In fact, it points to the existence of tribal societies. National identity takes precedence over particular identities; not only can it not be considered discriminatory, but, on the contrary, it serves as a melting pot in which, at the political level, ethnic differences must be set aside. Although this is far from always being the case in practice, national identity precludes an ethnicized conception of society.

From this perspective, a citizen is someone who is part of this political community. Aristotle establishes a clear link between the citizen – who is capable of participating in the exercise of deliberative functions – and the city-state.[151] This citizen cannot be reduced to an isolated individual who views the political structure solely as a source of rights and material benefits and who prioritizes other community affiliations over membership in the political community – that is, the national community. We must therefore consider whether dual citizenship is even possible. The acceptance of dual citizenship is justified from the perspective of the individual who, having come from elsewhere and integrated into a new society, wishes to forge a link between his or her community of origin and his or her new community. It is more difficult to accept if we consider that same individual as a citizen and look at the interests of the community to which they now belong, taking into account not only their rights but also their duties. While rights may overlap, duties may also conflict.[152] Moreover, while dual citizenship is questionable in principle, it is even more controversial when it involves

150 See Simone, in Bherer, 2016.; Simone, 2016.
151 Aristote, 2014, p. 443.
152 See in this regard, Baudet, 2015, op. cit., p. 342.

a representative of the nation who is charged with expressing the nation's will and ensuring its protection.

While their scope and universality may be open to debate, fundamental rights originate within a national framework. The Declaration of 1789, while not only proudly addressing French citizens but also portraying a universal man, was able to foster the illusion of conquering Europe in the wake of the revolutionary armies and enabled France, the "eldest daughter of the Church," to become the "eldest daughter of human rights." The fact remains, however, that these rights were proclaimed within the national crucible. Human rights originated within the framework of the state,[153] even though their development today is helping to challenge that very framework. As Hannah Arendt points out, For only within the framework of a people can a man live as a man among men".[154] In this sense, "an individual can assert his or her rights only to the extent that a state guarantees them and, when necessary, intervenes to defend them." "One may feel deeply cosmopolitan at heart, but one is never a citizen of the world".[155]

1.2 This Political Community's Sharing of Common Values

Building on the analyses that view democracy as contingent upon the existence of a political community, it is important to recognize that such a political community can exist only to the extent that its members share a certain set of values.

This analysis is developed by Aristotle, who states that "when the same people inhabit the same territory, it must be said that the city remains the same as long as the lineage of its inhabitants remains the same." This "ethnic" conception is corrected by the analysis that this lack of ethnic homogeneity is overcome when "a community of aspirations" is formed.[156]

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153 Lacroix and Pranchere, 2016, p. 37.
154 Cited by Lescouret and Godin, 2016.
155 Todorov, 2008, p. 126.
156 Aristote, 2014, pp. 445 and 522.

Tocqueville explores this connection between the political community and shared values. He believes, in fact, that "it is easy to see that no society can prosper without similar beliefs (…) for without shared ideas there can be no collective action, and without collective action there are still individuals, but no social body. For society to exist (…) it is therefore necessary that the minds of all citizens be constantly united and held together by a few fundamental ideas".[157] He also establishes a link between these values and democracy by asserting that "modern democracy presupposes customs, manners, and opinions, as well as a certain passion among citizens to perceive one another".[158]

The purpose of a constitution is not only to establish the organization of power within the state – which is the institutional aspect – but also to articulate the values of the political community it governs.

Contrary to what a simplistic and widely held view might suggest, as has been noted, fundamental rights are not the only values enshrined in the Constitution. Thus, the statement set forth in Article 1 of the Declaration of 1789, according to which "all men are born and remain free and equal in rights" constitutes an unprovable postulate that does not establish a specific right, even though it serves as the foundation for the rights subsequently set forth. The secular, democratic, and social nature of the Republic, as affirmed in Article 1 of the 1958 French Constitution, is not part of the Bill of Rights.

The existence of duties toward the community does not refer strictly to values, but rather to the virtues that characterize a good citizen in terms of protecting the community's interests. This applies to obligations such as defending one's country, paying taxes, fulfilling one's civic duties, and respecting the environment… Other duties carry moral implications. They do not merely serve as regulators of social life; they reflect a certain conception of society or of human nature. Thus, Article 4 of the 1795 Declaration proclaims that "no one is a good citizen unless he is a good son, a good father, a good brother, a good

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157 "On the Principle of Popular Sovereignty in America," DA II, 15, quoted by Jaume, 2008, p. 105.

158 Jaume, 2008, op. cit., p. 30.

friend, and a good husband." The ideas of fraternity and solidarity (see, for example, Article 2 of the Spanish Constitution), or the notion that the responsibility for assisting those in need falls primarily on the family (French Constitution of 1848), are part of this line of thinking. From this perspective, the principle of dignity represents a remarkable innovation. While the principle of dignity can be expressed as a subjective right – the right to protection against violations of one's dignity – it is essentially a philosophical assertion that, within a Christian tradition, refers to an ontological conception of human beings. It entails a duty: the duty not to infringe upon the dignity of others, even if they consent to it. It justifies restrictions on individual freedoms.

More broadly, the European Convention on Human Rights permits restrictions prescribed by law that are necessary in a democratic society and appropriate for safeguarding the interests of society and the rights and freedoms of others.

The French Declaration of 1789 refers extensively to these common interests: thus, the common good may justify social distinctions (Art. 1); the purpose of the law is to prevent actions harmful to society (Art. 5); expressions of freedom of opinion, including religious freedom, must not disturb public order (Art. 10); and public necessity may justify expropriation (Art. 17). Admittedly, these collective interests do not refer to values, but they reflect the need to base society on the duty to respect shared values.

It is interesting to note that the draft European Constitution – which had the as-yet-unfulfilled ambition of creating a political community – repeatedly referred to the concept of values. This is particularly true of the Preamble, which refers to "the cultural, religious, and humanist legacies of Europe, from which universal values have developed (...)," and Article I-2, entitled "The Values of the Union." Setting aside the fact that the text alternates between referring to the universal nature of the Union's values and their distinctive character, it should be noted that its purpose is to establish a new legal order and to create, *ex nihilo*, a political community. However, its authors argue that the existence of shared values is a prerequisite for the existence of such an order and such a community. Similarly, the opening sentence of the Char-

ter of Fundamental Rights of the European Union reads as follows: "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values."

It should therefore be recognized that the existence of shared values is a prerequisite for the existence of a political community and, consequently, a democratic system. Undoubtedly, a political community can be founded on shared values without being based on democratic legitimacy, as the existence of theocratic regimes clearly demonstrates. On the other hand, democracy requires a community built around shared values.

The values that shape national identity cannot be equated solely with fundamental rights. Their claim to universalism undermines the very concept of national identity. In fact, these fundamental rights are defined – or interpreted, though it amounts to much the same thing – by supranational bodies with judicial authority, or even by nongovernmental organizations. In this sense, constitutional courts – as guardians of the national values enshrined in the constitutions – conform, implicitly or explicitly, to the interpretations determined by supranational bodies – we will discuss it later. If we accept that a people is defined by its identity and that human rights are considered to have universal scope, that identity cannot be subsumed by those rights, even though those rights may be part of that identity.

The link between values and identity stems from the fact that the national community is not the result of chance, nor is it a temporary aggregation. It has its roots in the past. "It is the sole repository for the spiritual treasures amassed by the dead, the sole means of communication through which the dead can speak to the living".[159] In this regard, as Raymond Aron points out, individuals cannot become citizens of the same state unless they feel they share a common destiny.[160]

The existence of a political community – the fundamental prerequisite for democracy – implies recognition of its identity and, therefore, its distinctness from that which is not part of it.

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159 Weil, 1949, p. 16.
160 Quoted by Baudet, 2015, op. cit., p. 332.

First, we must examine what constitutes a nation's identity. This identity is difficult to capture in a definition or a list of legal criteria. However, echoes of this can be found in a constitution: this is the case with language, defined by Jacques Julliard as "a rallying cry, a culture, a spirit, a way of relating to the world".[161] As we've mentioned, it is, of course, a territory, a geographical area. It is also a culture, a literature, and an architecture. It is a form of spirituality, a religion. To deny the Christian tradition of France – or even of Europe – is to deny reality as much as it is an act of rupture.

National identity is perhaps essentially the history that is not only documented in books and monuments, but is also a narrative. Ernest Renan says that a nation is both a historical legacy and a contract for the future. History is, first and foremost, the story of "shared ideals and beliefs, shared trials and suffering".[162] History consists of facts upon which a collective imagination has been built, and that collective imagination shapes national identity. This conception of history is no more incompatible with a scientific conception of history than the artistic perception of a monument is with a strictly architectural study. However, all too often, the so-called scientific approach to history is the exact opposite of the "national narrative." In reality, it aims to undermine a people's respect for their past by fostering a sense of repentance that erodes national cohesion and social bonds. How can we integrate the younger generations and the immigrants we welcome into a community that denigrates itself and rewrites history to glorify those who fought against it? We have shifted from glorifying (national) heroes to glorifying victims (of whom we are supposedly the perpetrators). Our pride in our history has been replaced by the desire for revenge on the part of those who see themselves as victims of our actions. History includes an element of fiction; it is also a science, and it cannot, under the guise of scientific rigor, yield to an anachronistic ideological perspective.

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161 Le Figaro, June 5, 2015.
162 Le Goff, 2016, op. cit., p. 17.

On a personal level, as well as on a collective level, only by asserting one's identity can one understand where one comes from in order to know where one is going, understand who one is, and understand with whom one is interacting. It is the loss of a sense of identity – the feeling of being dispossessed – that leads to the rejection of others, and not, contrary to what we are led to believe, an identity that is clearly embraced and open to dialogue with other identities.

1.3 National Identity: A Principle of Cooperation and Resistance Within the Framework of Supranational Structures

The phenomenon of globalization – or internationalization – goes far beyond the economic and financial spheres and also touches on the values of nations, gradually building a system that aspires to be universal, even though it is not yet truly so. This is true, for example, of an essentially individualistic conception of fundamental rights, and of the rewriting of history in light of contemporary and anachronistic conceptions. Similarly, in a more indirect but more profound way, the GAFA (or MAAM) companies tend to standardize ways of thinking, while creating and developing communities that are organized around their own value systems. If we refocus on the legal sphere, international or regional law – largely shaped by supranational judges and implemented by national judges – is driving a rapid march toward uniformity. These phenomena contribute to calling national identities into question and even to eroding them. On the other hand, however, this drive toward standardization is leading peoples and certain states to retreat into a defense of their national identity.

The challenge that legal scholars face in particular is to reconcile the requirements arising from this trend toward internationalization – to which states have committed themselves through Treaty provisions – with the protection of national identity, which justifies the very existence of the state. However, Article 4, paragraph 2, of the Treaty on European Union states that "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional

(...). It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. (...)".[163]

The real question – and we will return to this later – is who determines whether a rule or principle is part of national identity. Let us note, from the outset, that it seems inconsistent to accept that the European court should be the guarantor of respect for national identities that it would be in a position to define. In reality, the very reasoning of the European judge tends to deny the existence of national identities, since it adopts a logic according to which rules recognized by a majority of Member States – and even, according to his understanding of the Union's interests, rules accepted in only a minority of states. In a 2005 *Mangold* decision,[164] the court held that a rule prohibiting age discrimination could be recognized as a "common" constitutional tradition even though it had that legal status in only two states. As the President of the CJEU made very clear during a symposium in Riga in 2021, "the existence of divergences among national legal systems may not automatically rule out the incorporation into the EU legal order of a legal principle which is recognised in only a minority of Member States".[165] François Seners aptly notes that "for a Cartesian mind, what is common is what is shared by all, and, by definition, an element of a common identity should not be able to conflict with any of the national identities involved".[166]

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163 This principle was recognized in connection with Austria's ban on the use of titles of nobility on identity documents CJEU, Dec. 22, 2010, No. 208-109.

164 CJEU, Nov. 22, 2005, Case No. C-144/04.

165 "The existence of divergences among national legal systems may not automatically rule out the incorporation into the EU legal order of a legal principle which is recognised in only a minority of Member States."

166 Seners, above cited article.

1.4 The Temptation to Standardize by Creating a European Identity that Replaces National Identities

This phenomenon is evident both in the law developed within the framework of the Council of Europe and in that developed by the European Union. In both cases, it should be noted, on the one hand, that it is primarily the courts that are driving this process and, on the other hand, that the tools used for this standardization/substitution are concepts that, *a priori*, are widely accepted but the substance of which remains largely undefined. The crises affecting the relationship between national laws and the law of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, on the one hand, and European Union law, on the other, stem from the same underlying logic in that they pit ever-deeper European integration against respect for national sovereignty and constitutional identities.

It should not be forgotten that, while the protection of fundamental rights and freedoms has flourished within the European framework, states remain the natural setting for the expression of the sovereignty of peoples. However, this entire framework – the state, the people, and sovereignty – makes sense only insofar as it has been built upon national identities enshrined in constitutions. Supranational systems are based on a postnational logic aimed at using the law to construct a new identity that is universal in scope but disembodied. It largely ignores – if not actively seeks to do away with – traditions, customs, histories, and ways of thinking… People are thus deprived of what once led individuals to form a community united by a shared history and common goals. While certain forms of supranationalism have contributed to maintaining peace among peoples, the destruction of national identities in favor of a rather artificial common European identity can only lead to the fragmentation of a society that is both individualistic and communitarian – a source of conflicts that shared values will no longer be able to resolve.

Europe's strength lies in the diversity of its national identities and in the strengthening of a common identity while respecting those national identities. From this perspective, revisiting the statements made

by some of the founders – or architects – of European integration can serve as a helpful reminder. Here's a very quick selection. In 1953, Alcide de Gasperi stated that the union of states is based on the unity of nations, not on their disintegration. In 1962, in a remark not without humor, General de Gaulle declared: "I do not believe that Europe can have any living reality if it does not include France and her Frenchmen, Germany and its Germans, Italy and its Italians, and so forth. (...) So, it is true that the homeland is a human, sentimental element, and that it is upon elements of action, authority, and responsibility that Europe can be built. What elements? Well, the states." Finally, when Europe opened its doors to the former Soviet satellite states, Jacques Delors declared: "We are going to welcome old nations, but young states, marked by discontinuity – countries whose ethnic boundaries do not always coincide with their political borders and which have a legitimate desire to assert their regained sovereignty. "Have we truly sought to understand ways of thinking and a history that differ from our own? (...), We must therefore acknowledge these differences in order to respect them and learn from them." Quoting Milan Kundera, he adds: "It often strikes me that the known European culture harbours within it another unknown culture made up of little nations. They know that their existence can be called into question at any moment, that they could disappear".[167] Finally, Philippe Seguin made a prediction that, while fortunately it has not come true, is nonetheless potentially possible: "Let us therefore fear that, in the end, national sentiments – by dint of being stifled – may become so inflamed that they turn into nationalism and lead Europe, once again, to the brink of serious difficulties, for nothing is more dangerous than a nation that has been denied for too long the sovereignty through which its freedom is expressed – that is, its inalienable right to choose its own destiny".[168] Brexit, however, was the first – and unfortunate – manifestation of this.

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167 These quotations are taken from Cavallero, Quagliariello and Reynie, 2024.
168 Cited by Rouvillois, 2023, article mentioned above, p. 197.

2. GOVERNING EUROPE WITH THE MEMBER STATES, NOT AGAINST THEM

Preserving national identities while ensuring the effectiveness and efficiency of European action requires exploring four directions. The first step is to clearly define the division of powers between the Union and the Member States, so as not to allow the European institutions – and in particular the Commission and the Court – to unduly expand the powers granted to the Union by the European Treaty. It is also necessary to review the Union's governance by restoring to the Member States – and more specifically to the bodies in which they are statutorily represented – a leading role in shaping the Union's policies. Furthermore, national parliaments must regain a role that helps bridge the "democratic deficit" affecting the functioning of the European Union. Finally, with regard to the relationship between national legal systems and the European legal system, it is necessary to move from an obligation to comply to mechanisms for dialogue.

The following pages do not constitute a draft manual on new European institutions, but rather a few areas where it seems worthwhile to engage in reflection – without underestimating the difficulty, or even the obstacle, that revising the Treaties might pose, since such a revision obviously requires the unanimity of the contracting States. In any case, priority should be given to reforms that address practices and are likely to be subject to consensus. It is worth recalling the 1966 Luxembourg Compromise, which provided that when, in the context of decisions that may be adopted by a majority vote on a proposal from the Commission, the very significant interests of one or more partners are at stake, the members of the Council shall endeavor, within a reasonable period of time, to reach solutions that could be adopted by all members of the Council, while respecting their mutual interests and those of the Community… Or the majority system tempered by the pursuit of unanimity.

2.1 Redefining the Relationship Between National and European Competences

This redefinition must be done by policymakers.

In fact, the goal is to clearly determine which competences should be entrusted to European structures, and which competences and powers 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. Our reflection must proceed in two directions.

First, to define national and European competences more precisely. As far as these "values" are concerned, reflection is required on what States really intend to share.

On the other hand, acknowledging that the assertion of a principle of identity constitutes a qualification to the absolute primacy of European law over national law – a primacy that is established by the treaties and is valid only because it is accepted by national constitutions. Given the rather general provisions set forth, for example, the Charter of Fundamental Rights of the European Union, it is up to national legislators to enshrine in their constitutions the principles or areas that pertain to their national identity; this may apply to the concept of the family and, even more so, to border control. From this perspective, it might be possible to determine that, without prejudice to the constitutional right to asylum, France has the sovereign authority to determine the conditions under which foreigners may enter its national territory.

Compliance with these principles must therefore be binding on the national court and serve as a limit on the intervention of the European court. On the other hand, a general provision aimed at recognizing the existence of principles that are inherent to national identity fails to achieve its objective because it leaves it up to national and supranational judges to define the content of those principles.

This reform must be accompanied by measures designed to ensure compliance with the principle of subsidiarity.

This principle implies that, when it comes to fundamental rights, the issue should be addressed at the European level only if constitu-

tional protection proves insufficient. Thus, with regard to rights or freedoms that are part of both the constitutional framework and the European legal framework, it should be considered that, when it comes to the review of legislation, this protection is first and foremost ensured within the constitutional order.

Once the broad outlines of this division of powers – established following a process that was primarily political in nature – are in place, it will be easier to ensure that the Court of Justice of the European Union upholds the principle of subsidiarity. 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 the control of its interpretation and application.[169]

2.2 Reviewing the Union's "Governance"

The aim here is neither to disentangle 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 characterizes 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.

The very general outline of the European institutions is as follows.

The European Council (composed of heads of state or government) is the highest political body of the European Union. Its mission is to set broad policy guidelines and to mediate between states. The Council consists of the ministers from the states whose competences are relevant to the matter at hand. The European Commission, composed of a president and a college of commissioners (one per Member State), is an administrative institution with political powers that is responsible for

169 See Spector, op. cit., p. 156.

the interests of the Union. Finally, the European Parliament consists of members elected in each of the Member States according to a distribution based on the population of those states. The ordinary legislative procedure (OLP)[170] provides that, in order to enter into force, draft laws – drafted by European Commission officials – may be amended and must be adopted without change by both the Parliament and the Council, with the Council deciding by a qualified majority (at least 55% of the Member States representing 65% of the European Union's population). But only the Commission has the power to propose legislation. The co-decision procedure applies to budgetary matters. In certain areas that are sensitive for Member States, special legislative procedures nevertheless allow the European Parliament to be excluded from the co-decision procedure (for example, in the area of tax harmonization). In other areas, such as competition policy or monetary policy, the European Commission and the European Central Bank act as independent institutions, without their decisions requiring prior approval by the Council or the Parliament, and are subject only to the oversight of the Court of Justice of the European Union. The Common Foreign and Security Policy is also governed by specific rules. Decisions are made by the Council, in accordance with the guidelines of the European Council, by unanimous vote. Members of the European Parliament can only take action on this matter through resolutions. In addition, Members of the European Parliament play a role in the appointment of the College of Commissioners. Finally, the European Parliament has the authority to bring a case before the Court of Justice.

As Olivier Beaud[171] 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

170 TFEU, Art. 294.
171 Beaud, op. cit., p. 551.

decision-making power. Within the Council, it is conceivable that the majority rule is enforced for the most important decisions and for the most interventionist ones in the lives of States, and 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 the 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".[172]

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.[173] 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 2008, the Treaty of Lisbon strengthened the independence of the President of the European Commission from national representatives, as the President is no longer appointed by unanimous consent but by a majority vote and is confirmed by the European Parliament. As Édouard Balladur noted,[174] the turmoil has allowed the European technostructure to further expand its power and authority at the expense of the European Council, which is the supreme body of the European Union.

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172 See Blumann, 2023, p. 315 et seq.
173 See Blumann, op. cit., p. 315 et seq.
174 Balladur, 2023.

This trend can be clearly illustrated by the experience of the former director of Frontex, Charles Jaigu. The latter describes a situation in which, during a meeting of the Council of Interior Ministers, a Director-General of the Commission explained to the French Minister of the Interior that it would be simpler for the Commission to prepare the meetings of the Council of Interior Ministers of the EU devoted to the functioning of the Schengen Area. He comments on this situation by noting that "the responsibility for preparing these political meetings of ministers should have fallen to the General Secretariat of the Council of the European Union, the intergovernmental body. "This may sound technical, but it is crucial to understanding how the Commission is stripping Member States of their sovereignty." Indeed, on the one hand, it would have been essential to hear the policy positions of the state ministers; on the other hand, the Commission has no jurisdiction over security matters.

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 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, 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.

The second area of reform should focus on the European Parliament.

As Céline Spector points out,[175] "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 democratizing the functioning of European institutions, by creating a European political debate around which European political parties are structured. The European Union needs to be re-politicized 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.

Finally, as has been suggested, consideration should be given to the possibility of adopting decisions by qualified majority in certain areas – which remain to be defined – where unanimity is currently required, provided that Member States that have chosen not to participate are not bound by the decisions thus adopted.

2.3 Restoring the Role of National Parliaments[176]

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

175 Spector, op. cit., p. 177.
176 On this issue, see Oberdoff, 2008.

way of reducing the democratic deficit. According to Pascal Lamy, the Union is indeed a laboratory of governance, but it is not experienced by citizens as a real political space.[177] 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.

The French Constitution has gradually adapted to the process of European integration. As a first step, it recognized France's membership in the European Union by enshrining it as a constitutional provision. More specifically, this participation takes place within the framework established by the 2007 Treaty of Lisbon (Art. 88-1 C). While France's participation in decision-making within the European Union significantly strengthens the role of the so-called executive branch – or, more precisely, the government (whether that power is exercised by the head of state or by the government) – constitutional provisions aim to institutionalize the role of the French Parliament. The Parliament may intervene at a later stage regarding draft legislation and proposed acts of the European Union that are required to be submitted to it, adopting resolutions as appropriate (Art. 88-4 C), the enlargement of the Union may require the Parliament's involvement under the conditions applicable to a revision of the Constitution (Art. 88-5 C). The Parliament may also oppose changes to the rules governing the adoption of European Union acts under certain conditions (Art. 88-7 C).

One of the ways in which Parliament carries out its work should be highlighted. It allows the National Assembly or the Senate to issue a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity; this opinion is forwarded to the presidents of the European Council, the European Commission, and

177 Lamy, 2004, p. 56.

the European Parliament. In this context, the assemblies may, through the government, refer a matter to the Court of Justice of the European Union if they believe that the principle of subsidiarity is not being respected. An appeal may be filed as of right upon the request of 60 members of the Chamber of Deputies or 60 senators (Art. 88-6 C). While the first provisions cited aim to involve the parliamentary assemblies in certain decisions made by France, this last provision follows a slightly different logic; it aims to provide the Parliament with a means of intervention in the event of a conflict between France and the European Union regarding the division of powers. However, it did not experience great prosperity.

Beyond the mechanisms through which national parliaments exercise oversight over European policy, it is worth considering the direct participation of representatives from national parliaments in European institutions. This participation could take two forms. The first would involve having a portion of the Members of the European Parliament elected by and from within the national parliaments, as is the case with the Parliamentary Assembly of the Council of Europe. However, this possibility faces a practical challenge given the heavy workload of Members of the European Parliament, as those elected to these positions cannot serve in both roles simultaneously. One might imagine that their alternate would take their seat in Strasbourg, but that solution is not satisfactory.

Another solution would be to create a second chamber in the European Parliament, composed of representatives from the national parliaments. Admittedly, this arrangement could be similar to the establishment of a federal system. But even if it looks like it, that doesn't mean it is. On the contrary, not only would it introduce into the European institutional system a body the democratic legitimacy of which could not be disputed, but it would also give greater voice to the Member States and better protect their interests. Its primary mission could be to ensure that the European Union adheres to its areas of competence and the principle of subsidiarity during periodic meetings.

2.4 Moving from a submission obligation to an obligation of dialogue

Today, the relationship between the European legal order and national legal orders is based on the unconditional supremacy of all Union law over all national law, including constitutional law. This European hierarchy is, however, modified by the fact that, in a number of countries – and particularly in France – constitutional norms are placed at the top of the hierarchy. Indeed, regardless of the nature of the European Union, it is its recognition by national constitutions that gives it its legitimacy. The European Union is, first and foremost, a Treaty; this Treaty establishes an organization empowered to create its own standards and enforce them on Member States, while also having at its disposal – notably through the Court of Justice – means of enforcement. Since European law is subject to the recognition of national constitutions, it can take precedence over constitutional rules only to the extent and within the limits established by the constitutions themselves. Thus, the primacy of EU law is conditional.

This system, which defies Kelsenian logic, functions through judges' role in regulating the relationships between legal systems. The authority of the Luxembourg judges is carried forward by the national courts, which have become European courts under the authority of the Court of Justice. But these national courts derive their legitimacy first and foremost from the national constitution, which establishes their powers. This is how they may find themselves (at least as far as the higher courts are concerned – the Constitutional Council, the Council of State, Court of Cassation) with a conflict between the two roles assigned to them: that of ensuring the application of EU law and that of ensuring compliance with the national constitution.

Most of these courts have established the principle that they apply EU law, while at the same time erecting a barrier – one that is far more theoretical than practical – namely, the reservation of principles pertaining to constitutional identity. In other words, and in different forms depending on the Member State, the framers of the Constitution are presumed to have accepted the subordination of national law to EU

law, but this presumption may be rebutted when the application of EU law conflicts with a specific rule or principle of the Constitution, from which the framers of the Constitution would not have intended to permit any derogation.

Determining the substance of this reservation is essentially beyond the scope of political authority; it is left, on a case-by-case basis, to the discretion of the national court. However, this raises an initial difficulty related to the division of competences between the European court and national courts. Indeed, respect for the constitutional identity of the Member States is both a Treaty principle – enshrined in the European Treaty – and, as such, subject to review by the Court in Luxembourg; and a principle that, by its very nature, falls within the scope of each national constitution and, as such, is subject to recognition by national courts. It is well known that, in a federal system, the issue of the division of powers is a major one that justifies the existence – as in the United States – of a supreme court.[178] But in a system like that of the European Union, as it stands today, there cannot be a supreme court. It is therefore up to each national court with jurisdiction over constitutional matters to define what constitutes identity – at the risk, admittedly, of rendering the primacy of European law meaningless. But this fear is actually largely unfounded. Indeed, the multiplicity of legal standards and systems is an instrument of power for judges, and they should not forgo it in favor of a narrowly national conception of law. European and national judges, drawing in particular on fundamental rights, are gradually establishing a body of norms that are largely independent of political decision-making. They recognize their authority to select, from a complex system of norms derived from different legal systems – or even non-legal systems (such as statements by NGOs or international organizations) – the reference standards that they apply.

This role assigned to the national judge risks turning them into a de facto secondary constituent, even though it is the judge's responsi-

178 On the issue of the relationship between the protection of fundamental rights and the division of powers between the states and the federal government in the United States, see Mathieu, 2025a.

bility to, in a sense, prioritize constitutional rules and principles based on whether or not they are compatible with Union law and whether or not there is authority to derogate from them. It is also a certain diplomatic competence that is recognised. As a former Chief Justice of the French Court of Cassation once said: "The judiciary is now taking on the role of the diplomacy within its own sphere of action, because international judicial life has adopted a pace that requires us to engage directly with the rapidly changing realities of the evolving world".[179] It can therefore be considered that it is up to the constituent itself to set limits on the application of Union law. To take a highly topical example, it would be possible – and, let us recall, likely appropriate – to enshrine in the French Constitution the provision that France retains control over its borders, subject to the principle of free movement granted to nationals of EU Member States and the right to asylum as defined by the Constitution. This would amount to establishing, in a quintessentially sovereign area, a constitutional reservation that would not necessarily prevent the application of European rules, but would allow national authorities to "take back control" if they deem it necessary. Furthermore, the reference to the principle of the free movement of persons for EU citizens preserves this fundamental achievement – this pillar – of Union law. As for the reservation regarding the constitutional right to asylum, it would not constitute a departure from this principle, which is enshrined in national values, while preserving national jurisdiction to define its scope. We should always keep in mind Francis Bacon's saying (1625): "Judges must be lions, but lions under the throne." This principle applies to both national and European judges.

Another issue concerns monitoring the European Union's compliance with the powers granted to it by the Treaties. This task should primarily fall to the European judge, but we know how the judge's "activism" leads to an expansion of those powers. However, the states – which are, in fact, the entities that delegate authority – must be able to retain a certain degree of control. It is important to remember that the European Union is not a federal system. That, in fact, is the position of

179 Louvel, 2015.

the German Constitutional Court. In the face of the EU court's authority, we must seek out conciliation mechanisms aimed at establishing a dialogue that is not limited to judges alone. The goal is to establish a more balanced relationship between the European Union's exercise of the powers assigned to it and respect for what the Member States consider to be part of their identity – in other words, matters they have not entrusted to the European Union.

To this end, it is necessary to provide a brief overview of current law before outlining a few possible directions for future development.

The Court of Justice of the European Union has repeatedly affirmed the primacy of EU law over all national laws, including constitutional laws. In his opinion on a Court ruling dated November 5, 2017, Yves Bot (C-42-17) notes that the Court has consistently held that an allegation of a violation – whether of fundamental rights as set forth in a Member State's constitution or of the principle of a national constitutional structure – cannot affect the validity of an act adopted by the institutions of the Union. Similarly, in a decision dated February 22, 2022 (C-430-31), the Court held that, while it may be called upon, under Article 4(2)(2) of the TEU, "to be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State. By contrast, that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of its obligations under EU law, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court". Similarly, 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 supreme court, responsible for ruling in the last resort on the distribution of competences between the Member States and the Union.

In light of this case law – or rather, despite it – national courts' resistance to European Union law has taken several legal forms; we will cite only a few recent examples, the diversity and proliferation of which reflect the significance of the problem.

From this perspective, the Polish issue is particularly relevant. While the European Court of Human Rights[180] ruled that the Polish court responsible for applying European law was not a court established by law within the meaning of the European Convention (Art. 6, right to a fair trial), and following case law from the Court of Justice of the European Union aimed at protecting the independence of national courts,[181] the Polish Constitutional Tribunal, in a decision dated October 7, 2021, responded by ruling that certain provisions of the Treaty on European Union were incompatible with the Polish Constitution, in particular the provisions of Article 1, paragraphs 1 and 2, in conjunction with those of Article 4, insofar as they require a national authority not to apply a provision of the Constitution, or permit it to do so. The Court disputes the notion that European courts give their interpretation of treaty law precedence over Polish constitutional law.

The German Constitutional Court ruled that it had jurisdiction to determine whether a European institution had acted beyond the powers granted to it under EU law.[182] Indeed, it ruled[183] 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.

The French Constitutional Council, like other constitutional courts – notably those of Italy and Spain, albeit in slightly different forms – has limited the application of secondary European law when principles inherent to constitutional identity are at stake. However, in the absence of a constitutional definition of these principles, the French Constitu-

180 CJEU, July 22, 2021, No. 43447/19.
181 For example, CJEU, Feb. 7, 2019, Case No. C-49/18.
182 BverfG, April 29, 2021, 2 BvR 1651/15, 2 BvR 2006/15.
183 See not. Judgment of 30 June 2009 – 2 BvE 2/08 et al., BVerfGE Compendium No. 123, p. 267.

tional Court has applied them in a particularly limited manner, holding, as things stand, that the prohibition on delegating the exercise of public authority to private individuals falls within the scope of such principles.[184] In a decision dated February 8, 2024, No. 2023-1079 QPC, the Constitutional Council reaffirmed its established case law that a legislative provision may be consistent with domestic constitutional law while being contrary to European Union law.

In two 2021 decisions, the Council of State ruled that, in cases where the application of primary or secondary law, as interpreted by the Court of Justice of the European Union, would have the effect of depriving a constitutional requirement – which does not enjoy equivalent protection under EU law – of effective safeguards, the administrative judge is obligated to set aside its application to the strict extent required by respect for the Constitution.[185] In this decision, it reiterated that, since the Constitution remains the supreme law in France, it was incumbent upon the Court to ensure that the application of European law, as interpreted by the Court of Justice of the European Union, did not undermine constitutional requirements that are not guaranteed to an equivalent extent by European law.

A conflict of the kind that pitted the Polish Constitutional Tribunal – and, to a lesser extent, the German Constitutional Court, against the Court of Justice of the European Union, demonstrates both the impasse created by the requirement for a single vertical relationship between the European court and national courts and the need to find a way to resolve such conflicts.

The chosen solution, if the context allows, can be pragmatic. In this way, the Italian Constitutional Court seeks to resolve concrete problems without being blocked by principles.[186]

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184 Constitutional Council, Oct. 15, 2021, No. 2021-940 QPC.

185 Council of State, Apr. 21, 2021, No. 393099, French Data Network, and Dec. 17, 2021, No. 437125.

186 Vinago, F., remark at the symposium organized in Rabat by the Venice Commission on the relationship between international law and national law, Sept. 4, 2024.

It is thus conceivable that, as regards relations between courts, national courts could consult European courts each time a conflict arises or is likely to arise.

Conversely, a mechanism could be established whereby a constitutional preliminary ruling – unlike the current system – would be raised by the CJEU and referred to the relevant constitutional courts.[187]

Consideration could also be given to the creation of a flexible, ad hoc conciliation body, a kind of Court of Jurisdictional Conflict. However, in case a conflict is not resolved, or – and it is necessary to emphasize this – 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. Indeed, while judges can help find solutions to conflicts, it is not their role to take the place of political leaders when exercising sovereign power or participating in negotiations within *ad hoc* bodies. It is in this context that the national parliament's involvement could play a key role. It would therefore be appropriate to revitalize and expand the provisions of Article 88-7 of the Constitution by allowing Parliament either to be involved in a government initiative or to act on its own initiative to help resolve conflicts. For example, it could be provided that, in the event of an appeal by members of Parliament to the Court of Justice of the European Union, or in the event of parliamentary opposition to a change in the rules governing the adoption of Union acts, the President of the Republic may be required to refer the matter to the European Council. The aim is to strengthen political dialogue between the European Union and national governments and not to reserve that dialogue exclusively for the European level.

This is only a rough outline, still very tentative, but the sticking point in conflict resolution lies in the fact that, ultimately, it is an essentially political prerogative; it therefore requires the participation of national parliaments (or peoples). *Mutatis mutandis*, a similar line of reasoning should also be applied to the particularly constructive case

187 Proposal by Huber, P.M. cited by Seners, F. in his aforementioned article.

law of the European Court of Human Rights. In a democratic system, the final say cannot be left to a dialogue among judges.

Thus, if it is impossible to resolve a conflict between laws or court rulings, the matter should be referred to the national legislature. As Edouard 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".[188]

188 Balladur, op. cit.



Conclusion

The debate on the European Union touches on issues already addressed in previous essays.[189] They involve both a transformation of the fundamental concepts of constitutional law – such as the state, the separation of powers, and democracy – and an emphasis on the role of the judiciary as a regulator of political and social life, which, from this perspective, tends to supplant political power. At the European level, these developments take on a whole new dimension. The weakness of political power amplifies their effects. The gap between the government and citizens is widening, and the lack of transparency in decision-making processes makes the decisions that are made less acceptable. Driven by an insatiable appetite for power that nothing seems capable of curbing, the European Union is steadily eroding the room for maneuver of national political leaders. An irresponsible bureaucracy has seized power, with little oversight from a parliament that is out of touch with citizens' concerns and torn between internal squabbles and ideological battles. Government officials have, to a greater or lesser extent, voluntarily relinquished their responsibility. Europe gives the impression of a ship out of control. But this ship is sailing on increasingly dangerous waters.

As economic, climate, and – more immediately – war threats grow increasingly dire, and as geopolitical stakes become critical, Europe seeks to refine and elaborate a concept of the rule of law, embellished with every possible nuance, expecting the law to shape society and rein in a Promethean political power. Categorical rights – and the freedoms granted to individuals to choose their gender, their name, and the time of their birth or death – mask the deep-seated conflicts plaguing the

189 Mathieu, 2013, op. cit.; Mathieu, 2015, op. cit.; Mathieu, 2017, op. cit.

world in the eyes of a Europe that is at once self-absorbed, ashamed of its history, uncertain of its values, and anxious about its future... But the Brussels machine is running at full speed, and the Strasbourg chamber is abuzz with all sorts of intrigues and ideological nonsense. Europe's rivals – or enemies – are at its gates, and, like Byzantium on the eve of its fall, people there are debating the sex of angels.

Yet in this world, where peace is no longer truly desired, where popular uprisings are brewing, and where clashes between civilizations are taking on a new dimension, Europe is an urgent necessity. The world is undergoing a realignment, and small and medium-sized countries no longer have the capacity to be true players on the global stage. But these countries must not give up their own identities in favor of a new European identity; on the contrary, they must enrich the European identity with their own identities. If Europe is more widely accepted by its peoples, it will be all the stronger for it.

It is now up to Europe to establish the institutions and operating mechanisms that will enable it to achieve its goal of becoming a major power while respecting the identities of its Member States. It is first and foremost a matter of will, rather than a legal issue. There is a risk, however, that inaction and a wait-and-see attitude will lead to further compromises and concessions. Unless there is a sudden surge of energy, it is in the face of adversity that Europe will be forged... or destroyed, and only then will people open their eyes.

Cyprus, December 2024

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