| Chapter 1 |

Constitutional Identity

Bertrand MATHIEU

ABSTRACT

Constitutional identity corresponds to the essential elements of national identity that a people has decided to enshrine in its Constitution, thus giving them legal effect. National identity is what allows a political community to be identified. This State formed by a People and endowed with the attribute of sovereignty is defined by its history, its values... so many elements that characterize both its raison d'être and its specificity. It is at the same time an element of separation from what is not it, an element of dialogue with other communities based on other principles of identity, an element of sharing with other States having in common some of these values.

In a context where globalization is tending to erase these identity values, the resurgence of national identity must lead us to question both its nature and its place in the international and more particularly supranational legal order. It is in fact an instrument of both cooperation and resistance. Indeed, European legal systems, built on the will to promote and defend shared values, are now tending to legally impose a common identity, exclusive of national identities, based on principles that appear to be consensual but whose substantial definition, essentially produced by jurisdictional bodies, tends to achieve a European imperium that is not devoid of ideological connotations.

The resistance of a number of national jurisdictions, in various forms, to this imperium makes it necessary to seek mechanisms that allow both the promotion of common values and the protection of identity-based values. These mechanisms must restore the place of political power which, in a democracy, is the most legitimate to settle possible conflicts. The determination of new mechanisms for regulating the balance between the requirements of national identities and those linked to the values and principles that sovereign States have decided to put in common will probably determine the survival of European legal systems.

KEYWORDS

identity, Council of Europe, nation, European Union, values

The notion of constitutional identity refers to several concepts, first of which is that of a constitution. The Constitution is understood as the text embodying an act of sovereignty in which a People determines the way it intends to govern itself (or be governed) and the principles and values specific to this People. This Constitution thus establishes a political organization but also an ideological system specific to a Nation. We can therefore consider that constitutional identity refers to the elements of its identity that a Nation recognizes as fundamental. It enshrines, within a legal document, elements relating to history, culture, religion, etc., that in a way constitute the

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identity heritage of the Nation. Constitutional identity is thus the legal manifestation of national identity, i.e., a set of norms that allow the national identity to assert itself and to oppose interference by principles or values that would be contrary to it, but also to hold a dialogue with other identities. It implies the distinction between what is our own and what is another's. This national identity conditions the very existence of a State. It is in fact the fundamental reason why a human group settled on a territory has constituted a nation and founded a State, even though these factors may have come into play in a different time frame.

While national identity refers to what is specific, it does not exclude the fact that certain principles or values specific to this identity are shared with other States or other groups of States; they may then constitute elements of the identity common to an international or supranational organization, which implies distinguishing between the specific and the common.

In the subsequent sections, an equivalence will therefore be established between constitutional identity and national identity, the former being considered the legal expression of the latter.

The return of the concept of national identity, both in the field of ideological and geopolitical debate[1] and in the legal sphere, is in some ways a sign of resistance to the globalization movement, which is reflected in the prevalence of the supranational over the national, and which is not only economic and commercial but also cultural. It should be noted, however, that this movement aimed at denying, or considering as secondary, the existence of a national identity is far from universal. Indeed, many States assert themselves as a power by claiming their national identity. This is the case, for example, of China, Turkey, India, and Russia. The crisis of national identity is in fact an essentially European phenomenon. Indeed, two supranational systems, that of the Council of Europe and that of the European Union, have adopted converging approaches aimed at replacing State identities with a common identity, whereas these systems were originally designed solely to identify and defend common elements of identity. For some of these States, such as Germany, the trauma of the Second World War led to a fairly easy acceptance of the assimilation of nationalism and national identity, with the rejection of the former leading to the abdication of the latter. For other States, such as France, which have a long national and State tradition, some have considered that this identity was strong enough to allow a European identity to prevail, but this issue is becoming increasingly important and is leading to a political divide that is tending to supplant the traditional divide of right vs. left. Finally, in States such as Hungary that have experienced successive imperial integrations, Ottoman, Austrian, German, and Soviet, the question of national identity is essential, indeed vital, and Europe, conceived first and foremost as a tool for emancipation, is today perceived by some as running the risk of losing an identity that has barely been recovered.

1 Del Valle and Soppelsa, 2021.

In Western Europe, the concept of Nation is being called into question and the virtues of the State are being challenged, as if there was only room for individuals and supranational structures, the general interest being diluted in the realization of the desires and rights of individuals. The identities recognized and valued are sexual, religious, or even ethnic, while the importance of national identities constantly diminishes. However, the return of the concept of national or constitutional identity should lead us to question their place in the construction of a political community and the conditions for dialogue with common identities that originate from the European melting pot.

1. National identity as a basis for a State political system[2]

If democracy in its various forms constitutes today a political model of reference, it should be remembered that this mode of government, as a mode of legitimizing and exercising power, is not the only one possible.

Democracy has a history. It was preceded by other political regimes, feudal, imperial, and theocratic. All of these were places where it could not develop. If we disregard the ancient cities, or more broadly the small political communities, democracy has found in the nation-State a framework for its development.

1.1. The identification of a political community

By definition, democracy presupposes the existence of a people. This people cannot be universal, which would imply, apart from the purely utopian nature of such a conception, that such a people could govern itself, obey common laws, and share identical values. In any case, this people, equivalent to the universality of human beings, cannot constitute a political society (as in a polity). Yet it is necessarily within a polity that the question of the exercise of power and its legitimization arises.

It is possible to consider that a political community brings together a certain number of individuals grouped on a territory and endowed with a system of government.

There are three basic conditions for the existence of such a political community: a People, a territory, and a political organization.

In the 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 a legitimate power.*[3] Territory therefore has a political dimension. It also has a social dimension.[4] To use a more contemporary terminology, a so-called "civil" society, detached from a territorial framework, cannot constitute a polity.

2 On this issue, see Mathieu, 2017. Translated into Hungarian, Szazadveg Publishing, 2018, into Spanish, Electoral Court Publishing, Mexico, 2021, into Russian, Hopma Publishing, Moscow, 2021.

3 Théry, 2007, p. 365.

4 Foucher, 2007, pp. 167–168.

Such political organization does not necessarily assume the form of a State.

The State structure, a modern form of political organization, has developed in some countries through the transformation of a feudal system into a monarchical system. In more recent times, this has occurred either through the break-up of empires (Austro-Hungarian, Soviet) or through the establishment of a federal organization bringing together relatively weak State or pre-State structures (United States, Germany), or through more or less artificial divisions carried out in the context of decolonization.

The affirmation of the nation-State in the 19th century strengthened the link between the people and the territory.

Another consubstantial characteristic of the State is sovereignty. Sovereignty is necessarily exercised within the framework of a territory. There was a moment in the Middle Ages when we moved from the idea of a territory as the possession of a man—where the royal domain belonged to the king—to the idea that power no longer implied that the sovereign was in a relationship of possession. We thus leave the realm of private law and enter into a logic of public law.

Sovereignty implies the existence of an initial and unconditional power. This power must be embodied in the right of the mightiest or the most competent, in dynastic right, in religious right, in the people itself. If sovereignty does not imply democracy, democracy can only exist in a system based on sovereignty.

The idea of a border as a line separating two State sovereignties really emerged at the end of the 18th century. In the nineteenth and twentieth centuries, the nation-State builds a political mystique around the border as an instrument of territorial delimitation. The border becomes an instrument of political and symbolic separation. The border is an invention associated with the birth of an international order based on State sovereignty, the border circles a homogeneous territory and raises a line of protection against external interference.[5]

As Chantal Delsol[6] points out, the notion of separation relates to the constitution of beings. *Creation is only established by separations: to constitute beings, we must draw their contours, in other words, their limits. Nothing exists except by its limits. A river without banks ceases to be a river and becomes a swamp. I exist because I can call myself human and not animal, woman and not man, etc. In this respect, borders signify first of all the existence of a society within them… Every human entity has no reality except through its differences. Differences are only concretised by separations: definitions, borders, and an undifferentiated world would be a magma without definition, and therefore without existence. We realise that there is no encounter, solidarity or link between entities that have been previously defined and therefore delimited.* The territory, and therefore the borders, constitute the framework of a representation made of places and histories. Each national community has its own "mental map."[7]

5 Cf. Dullin and Forestier-Peyrat, 2016.
6 *Le Figaro*, October 8, 2015.
7 Foucher, 2012, p. 23.

Today, the migration crisis and the reactions of certain States, which consist in erecting walls, as Hungary has done, for example, reflect the link that naturally exists between the border and identity, the closure of the former reflecting the fear of losing the latter. It is probably the vain temptation to abolish borders that gives rise to new walls. As Pascal Bruckner points out, "*there is no history without geography.*"[8] If we look at recent history, we must observe that since 1980, more than 28,000 km of new international borders have been established and another 24,000 have been the subject of delimitation and demarcation agreements.[9] The crises in Cyprus, the creation of Kosovo, or the annexation of Crimea by Russia, to mention only the European situation, demonstrate if need be the importance of territory and borders.

The nation refers to the idea of a people, not a sum of individuals, but a people driven, to use Renan's expression, by a collective will to live, or a "community of dreams," to use a more poetic expression by Malraux. This nation moulds a people as much as it is its expression. This notion of a people is not defined according to ethnic considerations, but by a voluntary adherence to its history, to values, and to a common project. As Jean-Marc Sauvé points out, "*in France, the State is the foundation on which the nation was built and constitutes its matrix.*"[10]

These States have a constitution. The original definition of the term in the field that interests us can be found in Aristotle, according to whom the Constitution is the government of a political community. It is this aspect that will considered here.

It is within this framework and context that modern forms of democracy have developed.

While globalization seemed to mark the slow death of the State structure, and the individual seemed to have finally attained mastery over his destiny and the freedom of his attachments, the State's defensive function revitalized it. In the context of the multifaceted instability that the world is experiencing today, the need for the State is obvious in the face of rising terrorism, conflicts, and economic and financial crisis. The relegation of the State to the background, or even the plea for its end in favor of the "self-managing" society of individuals, is the result of a certain vision of society's progress. The State as a concept has been denounced because of the faults of which it has been guilty, or of which it has been made guilty. However, with the resurgence of transnational threats and crises of all kinds, especially health crises, the State is once again being called upon to protect freedoms, ensure the development of the economy and defend democracy. Indeed, globalization is not the result of political will, but of the action of financial and economic forces which are not, in principle, democratic. Democracy, as a principle of legitimizing the exercise of power, only operates within a geographical framework that necessarily implies borders. Imagining a global political system would only lead to the establishment of a mechanism for the settlement of conflicts, whether military or economic. From this point of view,

8 Baudet, 2015.
9 Foucher, 2012, p. 7.
10 Sauvé, 2015, p. 12.

economic globalization operates as a "trompe-l'œil" for the construction of a society without borders. This "rootless" society exists only in the hands of private economic and especially financial entities. It can also be the prerogative of an elite that, culturally and financially, evolves within this framework without constituting a political society. These transnational economic and financial structures undermine State structures, thereby weakening democracy and the link between the State, the nation, and democracy.[11] The political space cannot, by its nature, be that of the world.[12] Analyses that aim to support the development of a "right without the State"[13] in fact lead to the question of whether such a right would not be, by its nature, incompatible with democracy. Democracy and national identity depend on each other.

Democracy is the framework and one of the modes of exercising politics. It therefore presupposes *belonging to a polity that is not global but implies a history, a language, and a culture, the delimitation of territories marked by borders, and the existence of a State that embodies the community and ensures security.*[14]

As Alexandre del Valle points out, Aristotle, Plato, and even Rousseau explained that democracy is impossible within a political unit of the imperial type.[15] Montesquieu remarkably demonstrates how Rome perished by granting the right of citizenship to all.

> "The peoples of Italy having become its citizens, each city brought to it its own genius, its own particular interests... The torn city no longer formed a whole, and, as one was a citizen only by a kind of fiction, as one no longer had... the same gods, the same temples, the same tombs, one no longer saw Rome with the same eyes, one no longer had the same love for the Fatherland and Roman feelings were no longer."[16]

A parallel can be drawn, all other things being equal, with the European Union's claim to build a European people. The idea according to which the people would be produced by the law and not the law by the people, supported, in particular, by Jurgen Habermas, constitutes the very negation of the democratic principle, by placing the legists above the people. Democracy implies, as Slobodan Milacic points out, that politics precedes the law, that the Constitution proceeds from the elections, that the people found the law.[17] To say that "the norm overrides the vote" calls into question the democratic principle itself.

11 Zarka, 2016, p. 102.
12 In contrast to the opinion of Rousseau, 2015, p. 105.
13 Cohen-Tanugi, 2016.
14 Le Goff, 2016, p. 242.
15 Del Valle, 2014, p. 109.
16 Montesquieu, 1734, p. 72; cf. the analyses of Manent, 2012, pp. 204 et seq.
17 Colloquium Aix-en-Provence, Nov. 2016, 25 ans d'élections démocratiques à l'Est: quels acquis, quels défis, proceedings forthcoming.

The failure of the European Union to build a real democratic political space as an extension of its economic space, shows that the deconstruction of the people-State-Constitution relationship leads to a democratic dead end.[18] Moreover, European law, like that of the European Convention on Human Rights, can only be applied through the implementation of State legal instruments.

Thus, democracy, as a principle of legitimization of power based on the will of the people, implies the existence of a polity confined within borders and formed by a people composed of citizens (non-citizens being by definition excluded from this polity) linked by a community of destiny and the sharing of common values. As Raymond Aron points out, individuals cannot become citizens of the same State unless they feel they share a common destiny.[19] In any case, democracy presupposes the existence of a demos.[20] From this point of view, democracy is necessarily inclusive, i.e., 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 national community, the framework of democracy.[21] The people is thus defined as a political entity and not an ethnic entity. The deconstruction of the link between the people and the State leads, on the contrary, to communities that are defined rather by ethnicity, religion, or language. From this point of view, unless ethnic communities are transformed into political communities, a communitarian conception of society is radically incompatible with the democratic principle. In fact, it refers to the existence of tribal societies. National identity overrides particular identities—not only can it not be considered discriminatory, but on the contrary, it constitutes a melting pot in which, at the political level, ethnic differences must be ignored. Even if this is far from always the case in practice, national identity excludes an ethnicized conception of society.

From this point of view, a citizen is one who is part of this political community. Aristotle establishes a clear link between the citizen, who is able to participate in the exercise of the deliberative function, and the polis.[22] This citizen cannot be embodied in an atomized individual who would see the political structure only as a provider of rights and material benefits and who would have his other community memberships prevail over membership in the political community, i.e., the national community. The very possibility of dual nationality must therefore be questioned. Acceptance of dual nationality is justified from the point of view of the individual who, having come from elsewhere and become integrated into a new society, wishes to establish a link between his or her community of origin and his or her community of destiny. It is more difficult to accept if one considers this same individual as a citizen and if one looks at the interest of the community to which he or she now belongs, that is, if one takes into consideration not only his or her rights but also his or her duties. If

18 Contrary to the thesis supported by Rousseau, 2016, pp. 93 et seq.
19 Quoted by Baudet, 2015, p. 332.
20 Cf. Baudet, 2015, pp. 13, 16.
21 Cf. Simone cited in Bheres, 2016; Simone, 2016.
22 *Politique*, Livre III-1, La Pléiade, p. 443.

there can be an accumulation of rights, then there can also be a conflict of duties.[23] Moreover, dual nationality, which is debatable in principle, is even more questionable when it concerns a representative of the nation who is responsible for expressing its will and ensuring its protection.

While their scope and universality may be debatable, fundamental rights are born in a national framework. The Declaration of 1789, while proudly addressing not only French citizens but also portraying a universal man, may have given itself the illusion of conquering Europe behind the revolutionary armies and may have allowed France, the "eldest daughter of the Church," to become the "eldest daughter of human rights." The fact remains that these rights were proclaimed within the national melting pot. Human rights were born in the State framework,[24] even if today their development contributes to questioning the State framework. As Hannah Arendt points out, "*it is only within a people that a man can live as a man among men.*"[25]

In this sense, *"the individual can claim his rights only insofar as a State guarantees them and, if necessary, intervenes to defend them. One can feel a profoundly cosmopolitan soul, but one is never a citizen of the world."*[26]

1.2. The sharing of common values by this political community

In further analyses that condition democracy upon the existence of a political community, it is appropriate to consider that this political community can only exist if its members share a certain number of values.

This analysis is developed by Aristotle, who states that "*when the same people inhabit the same territory, the city must be said to remain the same as long as the race of the inhabitants remains the same*" This "ethnic" conception is corrected by the analysis according to which this lack of ethnic homogeneity is overcome when "a community of aspirations" is formed.[27]

Tocqueville develops this link between political community and common values. Indeed, he considers that

> "it is easy to see that there is no society that can prosper without similar beliefs [...] for without common ideas there is no common action and without common action, men can still exist, but no social body. For there to be a society... it is therefore necessary that all the minds of the citizens should always be brought together and held together by a few principal ideas."[28]

23 Cf. Baudet, 2015, p. 342.
24 Lacroix and Pranchère, 2016, p. 37.
25 Quoted by Lescouret and Godin, 2016.
26 Todorov, 2008, p. 126.
27 *Politique*, La Pléiade, pp. 445 and 522.
28 Du principe de la souveraineté du peuple en Amérique, DA II, 15, quoted by Jaume, 2008, p. 105.

He also introduces a link between these values and democracy by stating that "*modern democracy presupposes morals, manners, opinions, and also a certain passion for citizens to perceive each other.*"[29]

The purpose of a constitution is not only to provide for the organization of power within the State—this is the institutional aspect—but also to set out the values of the political community it governs.

Contrary to what a simplistic and commonly shared analysis might suggest, fundamental rights are not the only values set out in the Constitution. For instance, the Statement in Article 1 of the Declaration of 1789 that "*men are born and remain free and equal in law*" is a postulate, which cannot be proven and does not create a specific right, even if it is the basis for the rights that have subsequently been defined. The secular, democratic, and social nature of the Republic affirmed in Article 1 of the French Constitution of 1958 is not a Statement of rights.

The existence of duties toward the community does not exactly refer to values, except to the virtues that characterize a good citizen with regards to protecting the community's interests. This is the case for requirements such as defending one's country, paying taxes, fulfilling one's civic duties, respecting the environment, etc. Other duties are of a rather moral character. They are not limited to regulating social life, but refer to a certain conception of society or man. For example, 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 friend and a good spouse*." The ideas of fraternity and solidarity (see, for example, Article 2 of the Spanish Constitution), or the idea that the burden of assisting the needy falls primarily on the family (French Constitution of 1848), draw from the same logic. The principle of dignity marks a remarkable innovation from this point of view. Although the principle of dignity can be expressed as a subjective right, the right to protection against attacks on one's dignity, it is essentially a philosophical affirmation referring, in a Christian tradition, to an ontological conception of man. It implies a duty not to violate the dignity of others, even if they consent to it. It justifies limitations on individual freedoms.

More broadly, the European Convention on Human Rights recognizes restrictions provided for by law as necessary in a democratic society and appropriate to safeguard 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 (Article 1); the law has the task of preventing actions harmful to society (Article 5); manifestations of freedom of opinion, including religious opinion, must not disturb public order (Article 10); and public necessity may justify dispossession (Article 17).

Although these collective interests do not refer to values, they reflect the need to base society on the duty to respect common values.

It is interesting to note that the draft European Constitution, which had the hitherto unfulfilled ambition of creating a political society, frequently recurred to the

29 Jaume, 2008, p. 30.

notion of values. This is particularly true of the Preamble, which refers to "*Europe's cultural, religious and humanist heritage, from which universal values have developed*," as well as Article I-2, entitled "*The values of the Union*." Leaving aside the fact that the text refers alternately to the universal nature of the Union's values and then to their specific character, it should be noted that its purpose is to construct a new legal order, to create ex nihilo a political community. Its authors rely on the existence of common values as the primary condition for the existence of such an order and community. In the same vein, the opening sentence of the Charter of Fundamental Rights of the European Union reads: "*The peoples of Europe, by establishing an ever-closer union among themselves, have resolved to share a peaceful future based on common values*."

One must therefore assume that the existence of common values is a prerequisite for the existence of a political community and hence a democratic regime. Unquestionably, a political community can be based on common values without democratic legitimacy, as is evident from the existence of theocratic regimes. On the other hand, democracy requires a community built around common values.

The values that structure national identity cannot be identified with fundamental rights alone. Their claim to universalism weakens the very concept of national identity. Indeed, these fundamental rights are very largely defined, or interpreted, but this amounts to almost the same thing, by supranational structures of a jurisdictional nature, or even by non-governmental organizations. In this sense, the constitutional courts, guardians of the national values expressed by the Constitutions, implicitly or explicitly submit to the interpretations determined by supranational bodies—we shall come back to this. If one accepts that a people is defined by its identity and that human rights are considered to have a universalist scope, this identity cannot be dissolved in these rights, even though these rights may be part of this identity.

The link between values and identity lies in the fact that the national community is not an accidental or temporary aggregate. It has its roots in the past. "*It is the only organ of preservation for the spiritual treasures amassed by the dead, the only organ of transmission through which the dead can speak to the living.*"[30] In this sense, we can quote Raymond Aron, who said that individuals cannot become citizens of the same State unless they feel they share a common destiny.[31]

The existence of a political community, the first condition of democracy, implies the recognition of its identity and therefore an otherness in relation to what is not it.

First of all, it is necessary to find out what constitutes the identity of a nation. This identity is difficult to define or to enumerate in legal terms. However, it can be found echoed in a constitution: This is the case for language, defined by Jacques Julliard as "*a rallying sign, a culture, a spirit, a form of relationship to the world.*"[32] It is of course, as has been mentioned, a territory, a geography. It is also a culture, a literature, an

30 Weil, 1949, p. 16.
31 Quoted by Baudet, 2015, p. 332.
32 *Le Figaro*, June 5, 2015.

architecture. It is a spirituality, a religion. To deny the Christian tradition of France, or even of Europe, is to commit a denial of reality as well as an act of rupture.

National identity is perhaps essentially the history to which not only books and monuments bear witness, but it is also a narrative. Ernest Renan stated that a nation is both a historical heritage and a contract for the future. History is first and foremost the story of "*shared ideals and beliefs, shared trials and sufferings.*"[33] History is the facts on which an imaginary world is built, and this imaginary world 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 perfect negative of the "roman national" (the national myth). In reality, it aims to destroy the esteem a people has for its past by inculcating a repentance that destroys national cohesion and social ties. How can we integrate the new generations and the foreigners we welcome into a community that denigrates itself and rewrites history to the glory of those who fought it? From the exaltation of (national) heroes, we have moved on to the exaltation of victims (of whom we would be the executioners). Pride in our history has been replaced by a desire for revenge on the part of those who see themselves as victims of our behavior. History has a novel element, it is also a science, and it cannot, under the guise of scientificity, bend to an anachronistic ideological vision.

On a personal level, as on a collective level, only an affirmation of one's identity allows one to know where one comes from in order to know where one is going, to know who one is, in order to know with whom one exchanges. It is the loss of the feeling of identity, the impression of dispossession, that leads to the rejection of the other and not, contrary to what we would like to believe, an identity clearly assumed and open to dialogue with other identities.

2. National identity as a principle of cooperation and resistance in the framework of supranational structures

The phenomenon of globalization, or internationalization, goes far beyond the economic and financial framework and also affects the values of nations by gradually building a system with a universal vocation, that is, one that is not really universal but aspires to become so. This is the case, for example, of an essentially individualistic conception of fundamental rights, of the rewriting of history in the light of contemporary and anachronistic conceptions. Similarly, in a more indirect but deeper way, the technological Big Four (GAFAs) tend to standardize ways of thinking, while creating and developing communities that organize themselves around their own value systems.

33 Le Goff, 2016, p. 17.

If we refocus on the legal field, international or regional law, largely constructed by supranational judges and relayed by national judges, is leading to a forced march toward uniformity.

These phenomena contribute to calling national identities into question and even to devitalizing them, but on the other hand, this attempt at uniformity leads peoples and certain States to withdraw into the defense of their national identity.

The challenge facing lawyers, in particular, is to articulate the requirements resulting from this movement of internationalization to which States have adhered by means of treaty provisions, and the protection of national identity that justifies the very existence of the State.

The guidelines that I will retain are as follows: On the one hand, it is necessary to ensure that States are not subject to the imposition of constraints to which they have not freely adhered and that they retain their free will with regard to their national identity; on the other hand, States must be subject to compliance with the commitments they have made. More concretely, this implies, at the European level, maintaining the mechanisms of respect for the treaties, in particular the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union, but also delimiting as clearly as possible what comes under national identities, for example questions relating to the conception of the family or religion, and access to one's own territory, and what comes under common values, for example, an independent justice system, respect for the rights of the defense, human dignity, or respect for free elections.

It is up to the constitution's authors to set the identity values and the national judge to enforce them, and it is up to the treaty to set the common values and the European judges to enforce them. The question then is obviously to know how to articulate the protection of these two identities.

The problem lies in the fact that the relationship between international law and national constitutional law does not lend itself to a single hierarchy of norms, which would lead to the creation of a federal constitutional system. It should be noted that the European Court of Human Rights has adopted this logic by defining itself as a constitutional court.

In reality, the current situation results in the existence of several legal orders: international, European, and national, whose relations are essentially regulated by judges, which leads them to intervene widely in the competences of political bodies.

2.1. The temptation to standardize by building a European identity to replace national identities

This phenomenon can be seen both in the law produced within the framework of the Council of Europe and in that produced by the European Union. In both cases, it should be noted that it is essentially the courts that are in charge and that the tools for this standardization/substitution are concepts that are a priori consensual, but whose substance is largely undetermined.

2.1.1. The Council of Europe and the design of a European identity

As far as the Council of Europe is concerned, the central body of this organization is the Committee of Ministers, which is made up of the foreign affairs ministers of the Member States. However, in terms of fundamental rights, the major role is played by the European Court of Human Rights. The Council of Europe has created a multitude of bodies whose role is essentially consultative and that will, in their specialized fields, participate in its mission. This is the case of the European Commission for Democracy and Law, known as the "Venice Commission."

Thus, the European States are effectively supervized by a multitude of bodies competent to ensure that European values are respected. The combined action of these bodies creates an efficient network for the protection and promotion of fundamental rights and European values. In this system, the European Court of Human Rights tends to see itself as a neo-constitutional judge of Europe.

In this sense, the ECtHR recognizes its right to ensure both the identification of European values and the dividing line between these European values and the room for manoeuvre left to the States. It considers that it is up to the Court to adapt the rights recognized by the Convention to what it considers to be the evolution of European society, which may lead it, if necessary, to recognize rights not included in the Convention. Furthermore, the Court considers that it must take into account any relevant rule of international law applicable to the relations between the contracting parties in interpreting the rights and freedoms recognized by the Convention, which is no longer the sole frame of reference. Finally, the Court freely interprets the principle of subsidiarity in the light, in particular, of legislative developments in the Member States—a majority of them, almost all of them?—thus modifying the spirit of the Convention, the substance of which is modified in the light of the evolution of national laws.

The legitimacy of intergovernmental bodies is essentially political. The legal legitimacy of European judges is of a different nature. The legitimacy of expert committees, such as the Venice Commission, that play a key role in affirming and defining common values should also be questioned.

The ECtHR limits the States' room for manoeuvre by referring to very general concepts that are subject to ideological interpretation. For instance, with regard to restrictions on certain rights recognized by the Convention, the Court refers to the respect of a necessary aim in a democratic society, which refers in particular to pluralism, tolerance, and the spirit of openness (7 December 1976, No. 5493/72). From this point of view, the Court confuses democracy and the rule of law in a "sleight of hand."[34]

To take just one example, the Court's case law is undoubtedly sensitive to the demands of the LGBT movements and favorable to theories such as so-called gender theory. The "moralizing" role of the Council of Europe is reflected in "warnings" such as that *"gender stereotyping by the authorities constitutes a serious obstacle to the*

34 On this distinction, cf. Mathieu, 2017 (Hungarian edition, Szazadveg, 2018).

achievement of genuine gender equality, one of the main objectives of the Council of Europe member States."[35] Relying, *inter alia*, on this case law, the Venice Commission considered that *measures aimed at removing the promotion of non-heterosexual gender identities from the public domain affect the fundamental principles of a democratic society, characterized by pluralism, tolerance, and openness, as well as the fair and appropriate treatment of minorities.*[36] But on the other hand, not all minorities are equal. Thus, the European Court of Human Rights has considered that it is in the general interest of society to avoid the emergence of parallel societies based on distinct philosophical convictions and that it is important to integrate minorities into society.[37]

2.1.2. The European Union and the imperium of consensual but largely indeterminate values

The same phenomenon can be observed with regard to the European Union.

Article 2 of the Lisbon Treaty refers to the values of the Union, expressed in a very broad way, which contribute to extending the competences of the Union and its intervention in areas linked to the sovereignty of States. These values include: respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

While nominally there is a broad consensus on these values, it is clear that very different contents can be attributed to them.

If we take the example of the rule of law, this concept is in fact a formidable instrument of assimilation.[38] While respect for the rule of law, which essentially implies respect for the individual and his or her protection against arbitrary action, is truly part of the common European heritage, it can be used to impose ideological conceptions, for example, on the place to be bestowed to sexual identities, or institutional systems, such as the separation of powers, which can be conceived as implying the independence of judges or the autonomy of the judiciary, which are not the same thing.

However, the concept of the rule of law, like that of non-discrimination, whose scope may be limitless, is in fact defined by the European judge. However, it may be considered that in a democratic system, it is not up to the judge to define the substance of these concepts, but at most to ensure respect for the fundamental requirements that fall within them, as defined by the States, if necessary, in the form of a convention.

From this point of view, conflicts between certain States and European structures, namely the courts, do not generally revolve around the recognition of values enshrined in the Treaty, but rather the meaning that should be ascribed to them.

35 Juridicic v. Croatia, February 4, 2021.
36 CLD AD (2013) 022 et avis CDL-AD(2021)050.
37 Konrad v. Germany, September 11, 2006.
38 Cf. Mathieu, 2017.

2.2. The diversity of national resistance to the imperium of European case law

The crises affecting the relationship between national laws and the rules 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, are of the same nature in that they pit ever greater European integration against the necessary respect for national sovereignty and constitutional identities. The profound differences between these two supranational orders do not allow for an exact transposition of both diagnoses and remedies, but the fact remains that these two systems are shaped by the role played by supranational judges in their development, that the reference norms tend to intermingle and to become homogenized, thus reinforcing the strength of the system as a whole.

With regard to the way in which the "friction" between European and national law is legally identified, the most "heavy-handed" is that which consists of proclaiming, in a general manner, the supremacy of constitutional law over conventional law, including that resulting from supranational jurisdictions. In this way Russia, relying on its constitutional provisions, but also on the absence of relevant provisions in the Convention, refused to apply the decision of the European Court of Human Rights condemning it for the lack of official recognition of same-sex couples (Fedotova v. Russia, 13 July 2021, No. 40792/10).

Resistance to EU law by national courts has taken several legal forms, and only a few recent examples will be given, the diversity and multiplication of which reflect the importance of the problem.

The Polish question is emblematic in this respect. Recently, the European Court of Human Rights (22 July 2021, case 43447/19) 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 CJEU case law has aimed at protecting the independence of national courts (e.g., 7 February 2019, C-49/18). In reaction to this, the Polish Constitutional Court, in its October 7, 2021, decision, ruled that certain provisions of the Union Treaty are incompatible with the Polish Constitution, specifically provisions of Articles 1 (1) and 2 in connection with those of Article 4 insofar as they order a national authority, or allow it, not to apply a provision of the Constitution. The Court of First Instance disputes that integration is achieved, *inter alia*, through the interpretation of EU law by the CJEU.

The German Constitutional Court has declared itself competent to decide that a European institution has acted beyond its competence under Union law (BverfG 29 April 2021, 2 BvR 1651/15, 2BvR 2006/15).

In a decision of December 10, 2021, the Hungarian Constitutional Court ruled that if the exercise of joint competences with the European Union is incomplete, Hungary has the right (and in some cases the obligation), in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive area of competence of the European Union until the institutions of the European Union take the necessary measures to ensure the effectiveness of the joint exercise of competences. Second, it declared that when the incomplete effectiveness of the joint

exercise of competences has resulted in consequences that raise the question of the violation of the right to identity of the persons living on the territory of Hungary, the Hungarian State is obliged to ensure the protection of this right within the framework of its obligation of institutional protection. Finally, the Constitutional Court declared that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government, and State structure is part of its constitutional identity.

The French Constitutional Council, like other constitutional jurisdictions, notably Italy and Spain in somewhat different forms, has reserved the application of European secondary legislation when principles inherent in constitutional identity are at stake. However, in the absence of a constitutional determination of these principles, the French Constitutional Court has applied them quite moderately, as when it judged that the prohibition on delegating the exercise of public force to private individuals was covered by such principles (15 October 2021, no. 2021-940 QPC).

The French Council of State has stated that the French Constitution remains the supreme standard of national law. It has thus ruled, with regard to the application of the so-called "privacy and electronic communication" directive, that it could decline to apply a provision of secondary legislation when it infringes a constitutional requirement that does not enjoy, under EU law, a level of protection equivalent to that guaranteed in the national legal order. This is the case for requirements linked to national security (CE 21 April 2021, no. 393099) and the principle of the free disposal of armed force, which implies that the availability of the armed forces must be guaranteed at all times and in all places to ensure the safeguarding of the fundamental interests of the Nation, foremost among which are national independence and territorial integrity (CE 17 December 2021, no. 437125).

These cases, which occurred within a relatively short period of time, show, beyond the legal logic involved, the difficulties that affect the relationship between the mechanisms of European integration and the affirmation of national constitutional identities.

2.3. Searching for mechanisms to reconcile respect for national constitutional identity with respect for the common European identity

The lines that follow only aim at outlining, in a synthetic and approximate manner, the avenues that could be explored in order to regulate the system relationships and ensure a conciliation between the promotion of the European identity and the protection of national identities.

Otherwise, either we will be heading toward a *de facto* federalism that is not acknowledged and that in the long term will generate revolts on the part of citizens reduced to mere spectators, or we will see a break-up of European structures due to the refusal of certain nations to submit and to abdicate their sovereignty.

2.3.1. Redefining the combination of national and European spheres of competence

This definition must be the work of politicians.

It is a question of clearly determining what competences should be entrusted to European structures and what competences and powers should remain in the hands of the States. In order to do so, a distinction must be made between what comes under the heading of European identity, which justifies the association of a number of States, and what comes under the heading of national identity.

There are two directions in which reflection must be undertaken, as both national and European competences need to be defined more precisely. It is in fact a matter of reflecting on what the States really intend to have in common.

For example, respect for human dignity, the right to a fair trial, and protection against arbitrariness are undeniably common values. The same cannot be said of the conception of the family, the definition of marriage, the place of religion, etc.

It should therefore be accepted that the affirmation of a principle of identity constitutes a reservation to the absolute prevalence of European orders over the national order, a prevalence that is fixed by the treaties and is only valid because it is accepted by the national constitutions.

2.3.2. Compliance with the principle of subsidiarity

Once the broad outlines of this distribution of competences have been established following work of an essentially political nature, it will be easier for the European Court of Human Rights to ensure that the principle of subsidiarity is respected.

This principle implies that only if constitutional protection proves insufficient should the matter be dealt with at the European level. Indeed, as Jean Paul Costa, former President of the Court, points out, this principle implies that the task of ensuring respect for the rights enshrined in the European Convention falls primarily to the authorities of the Contracting States and not to the Court, which only intervenes if the national authorities fail to do so. Thus, in the case of rights or freedoms belonging to both the constitutional corpus and the conventional corpus, one must admit that this protection is first of all ensured, as far as the control of the law is concerned, in the constitutional order.

Today the Court seems to be moving in favor of recognizing a principle of subsidiarity on certain so-called "societal" issues,[39] leaving them to the discretion of national legislation.

Similarly, Protocol No. 15 on the principle of subsidiarity assumes, according to the Brighton Declaration, that "States may choose the manner in which they wish to fulfill their obligations under the Convention." However, assessing this principle's scope remains in the hands of the Strasbourg Court. In the same spirit, following the same protocol, respect for the margin of appreciation of States is enshrined in the Preamble to the Convention. This can be a tool in the hands of the national judge, or government, to argue the Court's ultra vires.

39 For example, in matters of filiation, ECHR 22 March 2012, n° 45071/09 Ahrens v. Germany and n° 23338/09 Kautzor v. Germany.

2.3.3. Moving from an obligation to submit to an obligation of constructive dialogue

A conflict of the type that pitted the German Constitutional Court against the Court of Justice of the European Union, or, to remain within the framework of the Council of Europe, the resistance of the United Kingdom to the case law of the European Court of Human Rights concerning the voting rights of prisoners, testify both to the impasse created by the requirement of a single vertical relationship between European courts and national courts and to the need to find a way of resolving conflicts. It is therefore conceivable that, with regard to relations between courts, the national courts could resubmit a question to the European courts when a conflict arises or is likely to arise. One could also imagine the creation of a flexible conciliation body. For example, in the case of a specific conflict between the Court of Human Rights and a constitutional court or a national supreme court, an ad hoc panel could be convened. A more permanent panel could be convened to deal with recurrent or systemic issues. If conflicts are not resolved, or if, in the view of the State concerned, the solution of the conflict runs counter to a fundamental principle recognized by the constitutional order, the political authorities should be given the final say in the matter.

3. By way of conclusion

It should not be forgotten that although the protection of fundamental rights and freedoms has blossomed in the European melting pot, the States remain the natural framework for the expression of the sovereignty of the Peoples. However, the whole of this organization of State, People, and Sovereignty only makes sense in that it has been built on the basis of national identities enshrined in constitutions. Supranational systems respond to a post-national logic aiming to build a new identity through law, which is universal but disembodied. It largely ignores, when it does not attempt to outright wipe out, the traditions, customs, histories, mentalities, etc., of peoples who have been dispossessed of what led individuals to form an entity united around a common history and projects. If certain forms of supranationality have helped to maintain peace between peoples, the destruction of national identities in favor of a common European identity, which is quite artificial, can only lead to the break-up of a society that is both individualistic and sectarian, a source of conflicts that will no longer be regulated by the sharing of common values.

Europe is rich in the diversity of national identities and the strengthening of a common identity while respecting these national identities.

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