Chapter II

National Constitutional Identity Confronted With the Constraints of European Union Law

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Abstract

This chapter considers some of the developments on national identity presented in a previous publication but focuses specifically on the analysis of the construction of a 'European identity' and the points of friction between these two types of identity.
Constitutional identity corresponds to the essential elements of national identity a person has decided to include in its constitution, thus giving them legal scope. National identity enables the identification of a political community. This state community, formed by a people and endowed with the attribute of sovereignty, is defined by its history, values, and many elements that characterise its raison d'être and its specificity. Meanwhile, it is an element of separation from what is not it, an element of dialogue with other communities founded on other identity principles, and an element of sharing with other states that share some of the values in common.
Considering the relationship between this national identity and the values of European identity, European identity, originally conceived as the common denominator of the values of national identities, developed in an almost autonomous manner through the affirmation of values forged by the Union's bodies and, first, the Court of Justice of the European Union. Based on the common values enshrined in the Treaty, the Court will develop an extensive interpretation and definition of these values, in particular of the concept of the rule of law, which will allow it to extend its competences and enter into a federal logic that is not desired by the states. This identity, intended to be common and often imposed on the states, tends to achieve a European imperium that is not without ideological connotations.

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The resistance of several national jurisdictions to this imperium makes it necessary to seek mechanisms that allow for 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, has the greatest legitimacy to settle possible conflicts. The determination of new mechanisms of regulation between the requirements of the defence of national identities and those linked to the values and principles that sovereign states have decided to put in common, probably conditions for the survival of European legal orders.

Keywords: constitutional identity, European identity, nation, values, European Union, political community

1. Introduction

The notion of constitutional identity refers to several concepts, primarily those of the Constitution. The Constitution is understood as the text and the manifestation of an act of sovereignty that determines how people intend to govern themselves (or to be governed) and the principles and values specific to these people. Thus, the Constitution focuses on a political organisation and an ideological system specific to a nation. Therefore, constitutional identity refers to the elements of identity a nation recognises as fundamental. It inscribes legal text elements relating to aspects such as history, culture, and religion, which constitute the identity heritage of the nation. Constitutional identity is, thus, the legal manifestation of national identity; that is, a set of norms that allows national identity to assert itself and oppose the interference of principles or values that would be contrary to it but also to dialogue with other identities. This notion implies a distinction between what is proper and what is not. National identity conditions the existence of a state. Indeed, it is the fundamental reason a human group settled in a territory, constituted a nation, and founded a state, even though these factors may have come into play at different times.

If national identity refers to what is specific, it does not exclude the fact that certain principles or values appropriate to this identity are shared with other states or other groups of states; they can then constitute elements of the common identity of an international or supranational organisation, which implies distinguishing the proper from the common. It is, therefore, necessary to define this concept, which is largely undefined, before analysing its relationship with the requirements of other legal orders, particularly the European Union (EU). Therefore, the developments that follow will establish equivalence between constitutional and national identity, considering that the former is a legal expression of the latter.

Specificities of national constitutions are closely linked to historical and constitutional developments. Various questions have been raised by history and answered by constitutions. The role of religion in the state, its relationship with national minorities, and the definition of some fundamental societal values are conditioned by history.

The return of the concept of national identity in ideological and geopolitical debates[1] and in the legal field reflects resistance to the globalisation movement, which is reflected in the prevalence of the supranational over the national and is not only economic and commercial but also cultural. However, 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 powers by claiming their own national identities. This notion is true for China, Turkey, India, and Russia. The national identity crisis is essentially a European phenomenon. Indeed, two supranational systems, the Council of Europe and the EU, have adopted a converging logic aimed at substituting a common identity for state identities, whereas these systems originally aimed only at identifying and defending common identity elements. For some of these states, such as Germany, the trauma of the Second World War led to the 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, with a long national and state tradition, some have considered this identity powerful enough to allow a European identity to prevail. However, this question is becoming increasingly important and is leading to a political gap that tends to replace the traditional gap between the right and left. Finally, in states such as Hungary, which has experienced successive imperial integrations with Ottoman, Austrian, German, and Soviet countries, the question of national identity is vital, and Europe, first conceived as a tool for emancipation, is today perceived by some as running the risk of losing an identity that has barely been recovered.

Indeed, in Western Europe, the concept of the nation is being questioned; the virtues of the state are being challenged; there is only room for individuals and supranational structures; the general interest is being diluted in the realisation of the desires and rights of individuals; the identities that are recognised and valued are sexual, religious, or even ethnic; and the place of national identities is being increasingly reduced. However, the return of the concept of national or constitutional identity must lead one to question its place in the construction of a political community and the conditions of dialogue with common identities forged, notably in the European melting pot. In particular, it is a matter of observing the mechanisms of cooperation and subordination that are at work through the relationship between national and European identities.

1 Del Valle and Soppelsa, 2021.

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

If democracy, in its different forms today, constitutes a political model of reference, notably, this mode of government, as a mode of legitimisation and exercise of power, is not the only one possible. Democracy has a long history. It was preceded by other political regimes: feudal, imperial, and theocratic. Therefore, there are many grounds on which it cannot develop. If one disregards ancient cities, or, more broadly, reduced political communities, democracy has found a framework for its development in the nation-state.

2.1. Identifying a political community

By definition, democracy assumes the existence of people. These people cannot be universal, which implies, besides the purely utopian character of such a conception, that they can govern themselves, obey common laws, and share identical values. In any case, these people, confused by the universality of human beings, cannot constitute a political society. However, the question of the exercise of power and its legitimisation is necessary to arise in a political society.

A political community can be considered as several individuals grouped in a territory and endowed with a system of government. There are three primary conditions for the existence of such a political community: people, territories, and political organisations.

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] Therefore, the territory has a political dimension. It also included social dimensions.[4] To use a more contemporary terminology, a so-called 'civil' society, detached from a territorial framework, cannot constitute a political society.

2.1.1. Political community and state structure

This political organisation does not necessarily take a state form. The state structure, a modern form of political organisation, has developed in some countries through the transformation of the feudal system into a monarchical system. In a more recent period, the phenomenon occurred either through the break-up of empires (Austro-Hungarian, Soviet), through the establishment of a federal organisation bringing together relatively weak state or pre-state structures (United States, Germany), or through artificial divisions carried out in the context of decolonisation.

2 On this question, see Mathieu, 2017, Translated into Hungarian, Szazadveg Editions, 2018, into Spanish, Electoral Court Editions, Mexico City, 2021, into Russian, Hopma Editions, Moscow, 2021.
3 Théry, 2007, p. 365.
4 Foucher, 2007, p. 167–168.

The affirmation of the nation-state in the XIXth century strengthened the link between the people and territory. Another substantial characteristic of a state is its sovereignty. Sovereignty is exercised within the framework of territory. Thus, the Middle Ages saw a shift from the idea of territory—the possession of a man—the royal domain belonging to the king—to the idea that power no longer implied that the sovereign was in a relationship of possession. Thus, one leaves private law to enter the logic of public law.

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

The idea of a frontier separating the two-state sovereignties emerged at the end of the 18th century. In the XIXth and XXth centuries, the nation-state built a political mystique around the border as an instrument of delimitation of the territory. A border is an instrument of political and symbolic separation. A border is an invention associated with the birth of an international order based on the sovereignty of states, which goes around a homogeneous territory and raises a line of protection against external interference.[5]

As Chantal Delsol points out, the notion of separation

> relates to the constitution of beings. Creation is established only by separations: to constitute beings, it is necessary to draw their contours—in other words, their limits. Nothing exists but by its limits. A river without banks ceases to be a river to become a swamp. I exist because I can say I am human and not an animal, a woman and not a man, etc. In this respect, the borders mean, first of all, the existence of a society that is inside… Any human whole has reality only by its differences. […] The differences are concretized only by separations: definitions, borders, and an undifferentiated world would be a magma without definition and, therefore, without existence. One realizes that there is no meeting, solidarity, or link between entities previously defined and thus, delimited.[6]

The territory and, therefore, the borders, constitute the framework of a representation made of places and histories. Each national community has its ink mental map.[7] Today, the migration crisis and the reactions of certain states that comprise building walls, as Hungary has done, for example, reflect the link that naturally exists between the border and identity; the closure of the former reflects the fear of losing the latter. It is probably the vain temptation to abolish borders that brings walls back to life. As Pascal Bruckner notes, 'There is *no history without geography*'.[8]

5 See Dullin, Forestier-Peyrat, 2016.
6 *Le Figaro*, Oct. 8, 2015.
7 Foucher, 2012, p. 23.
8 Baudet, 2015.

Considering recent history, 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, and the annexation of Crimea by Russia—to mention only the European situation—demonstrate the importance of territories and borders.

The nation refers to the idea of a people, not a sum of individuals. It refers to a people carried, to use an expression by Renan, by a collective will to live or a 'community of dreams', to use a more poetic expression by Malraux. The nation forges as many people as it expresses itself. This notion of peoplehood is not defined by ethnic considerations but by voluntary adhesion to history, values, and a common project. As Jean-Marc Sauvé notes, '*In France, the State is the foundation on which the nation was built, it constitutes its matrix*'[10].

These states have provided themselves with constitutions. The original definition of the term in the field of interest can be found in Aristotle, according to whom the constitution is the government of a political community. This aspect has been retained in this study. It is within this framework and context that modern forms of democracy have developed.

2.1.2. Political community and democracy

While globalisation seemed to mark the slow death of the state structure and the individual seemed to have finally found mastery of his destiny and freedom of his attachments, its defensive function revitalised it. In the context of the multi-form instability the world is experiencing today, the necessity of the state is imposed in the face of the rise of terrorism, conflict, and economic and financial crises. The relegation of the State to the background or even the plea for its end in favour of the 'self-managing' society of individuals, is the result of a certain vision of the progress of societies. Given the defects for which it was faulty or of which it was made faulty, the concept of the state was denounced. However, with the resurgence of transnational threats and crises of all kinds, especially health crises, the state is once again being called upon to ensure the protection of freedoms, economic development, and defence against democracy. Indeed, globalisation is not the result of political will, but of the action of financial and economic forces that are not, in principle, democratic. Democracy, as a principle of the legitimisation of the exercise of power, 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 perspective, economic globalisation corresponds in a 'trompe-l'oeil' to the construction of a society without borders. This 'above ground' society exists only in the hands of private economic and especially financial entities. It can also be a prerogative of the elite, which evolves within this framework without

9 Foucher, 2012, p. 7.
10 Council of State, 2015, p. 12.

constituting a political society. These transnational economic and financial structures undermine state structures, thereby weakening democracy[11] and the link between the state, nation, and democracy. By nature, political space cannot be that of the world.[12] Analyses aimed at supporting the development of a 'right without the State'[13] lead in fact to the question of whether such a right would not be, by nature, incompatible with democracy. Democracy and national identity are interdependent.

Democracy is the framework and mode of policy exercises. It supposes, therefore, '*the belonging to a city which is not planetary but implies a history, a language and culture, the delimitation of territories marked by borders the existence of a State which embodies the community and ensures the security*'.[14]

As Alexandre Del Valle notes, Aristotle, Plato, and even Rousseau explained that democracy is impossible within an imperial political unit.[15] Montesquieu demonstrated how Rome perished by granting everyone the right to citizenship.

> For then, Rome was no longer this city whose people had had only one spirit… The people of Italy have become its citizens, each city brought its geniuses, its particular interests… The torn city did not become any more whole, and, as one was a citizen only by a kind of fiction, one did not have any more… the same gods, the same temples, the same burials; one did not see Rome any more with the same eyes; one did not have any more of the same love for the Fatherland; and the Roman feelings were no longer there.[16]

All things being equal, a parallel can be drawn with the EU's claim to building European people. The idea according to which the people would be produced by the law and not the law of the people, supported, in particular, by Jurgen Habermas, constitutes the negation of the democratic principle by placing the legists above the people. Democracy implies, as Slobodan Milacic notes,[17] that politics precede law, the Constitution proceeds from elections, and the people found the law. To say that 'the norm overrides the vote' calls into question the democratic principle itself. The failure of the EU to build a genuine, democratic political space as an extension of the economic space shows that the deconstruction of the people-state-constitution relationship has led to a democratic impasse.[18] Moreover, European law, similar to the European Convention on Human Rights (ECHR), can be applied only through the implementation of state legal instruments.

11 See Zarka, 2016, p. 102.
12 Against the view of Rousseau, 2015, p. 105.
13 See Cohen-Tanugi, 2016.
14 Le Goff, 2016, p. 242.
15 Del Valle, 2014, p. 109.
16 Montesquieu, 1734 p. 72; see the analyses of Manent, 2012, p. 204 et seq.
17 Aix-en-Provence Colloquium, Nov. 2016, 25 years of democratic elections in the East: what gains, what challenges, proceedings forthcoming.
18 Contrary to the thesis supported by Rousseau, 2016, p. 93. et seq.

Thus, democracy, as a principle of the legitimisation of power based on the will of the people, implies the existence of a political society inscribed within borders and formed by people comprising citizens (non-citizens being, by definition, excluded from this political society) linked by a community of destiny and the sharing of common values. As Raymond Aron notes, individuals cannot become citizens of the same state unless they feel that they share a common destiny.[19] Democracy presupposes its existence.[20] 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 proven to be a source of enrichment if it is accompanied by the integration of those who join the national community within the framework of democracy.[21] Thus, people are defined as political entities rather than ethnic entities. In contrast, the deconstruction of the link between people and the state leads to the privileging of communities defined by ethnicity, religion, or language. From this perspective, unless ethnic communities are transformed into political communities, the communitarian conception of society will be radically incompatible with democratic principles. This refers to the existence of a tribal society. National identity is above particular identities; not only can it not be considered discriminatory but also it constitutes a melting pot in which, at the political level, ethnic differences must be ignored. Although this is not always the case in practice, national identity excludes an ethnicised conception of society.

From this perspective, the citizen is part of this political community. Aristotle established a clear link between the citizen, capable of participating in the exercise of deliberative functions, and the city.[22] This citizen cannot be embodied in an atomised individual who would see the political structure only as a debtor of rights and material benefits and who would make other community memberships prevail over membership in the political community; that is, the national community. Thus, it is appropriate to question the possibility of dual nationalities. The acceptance of dual nationality is justified from the perspective of the individual who, having come from elsewhere and integrated into a new society, wishes to establish a link between his community of origin and his community of destiny. It is more challenging to accept if one considers the same individual as a citizen and looks at the interest of the community to which he or she belongs from now on or if one considers not only one's rights but also one's duties. If rights accumulate, there can also be a conflict of duty.[23] Dual nationality, which is debatable in principle, is even more debatable regarding the representative of the nation responsible for expressing its will and ensuring protection.

19 Baudet, 2015, p. 332.
20 See Baudet, 2015, p. 13, p. 16.
21 See Bheres, 2016; Simone, 2016.
22 Aristote, Politique, Livre III-1, p. 443.
23 Cf. Baudet, 2015, p. 342.

2.2. Sharing common values by this political community

In extending the analyses that condition democracy through the existence of a political community, it is appropriate to consider that this political community can only exist insofar as its members share a certain number of values. This 'ethnic' conception is corrected by the analysis according to which this defect of ethnic homogeneity is overcome when '*a community of aspirations*' is formed.[24] Tocqueville develops this link between political community and common values. He considers that

> It is easy to see that no society can prosper without similar beliefs […] because, without common ideas, there is no common action, and without common action, there are still men but no social body. For there to be a society, it is, therefore, necessary that all the minds of citizens should always be brought together and held together by a few principal ideas.[25]

He also introduces a link between these values and democracy by affirming that '*the democracy of the moderns supposes morals, manners, opinions also a certain passion for the citizens to perceive each other*'.[26] The purpose of a constitution is not only to provide for the organisation of power within the state (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 may lead to, fundamental rights are not the only values set forth by the Constitution. Thus, the statement in Article 1 of the Declaration of 1789 that '*men are born and remain free and equal in rights*' is a postulate, which cannot be denied and which 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 character of the republic affirmed in Article 1 of the French Constitution of 1958 was not a statement of rights.

The existence of duties towards the community does not exactly refer to values, if not to the virtues that characterise a good citizen to protect the community's interests. This situation is the case with requirements such as defending one's country, paying taxes, fulfilling one's civic duties, and respecting the environment; other duties are marked by a moral connotation. They do not limit themselves to playing the role of regulators of social life; they refer to a certain conception of society or humans. Thus, Article 4 of the Declaration of 1795 proclaims that '*no one is a good citizen unless he is a good son, a good father, a good brother, a good friend, a good spouse*'. The ideas of fraternity and solidarity (e.g. Article 2 of the Spanish Constitution) or that which primarily places on the family the burden of assistance to the needy (French Constitution of 1848) are part of this logic. The principle of dignity marks a remarkable innovation from this perspective. If this principle can be expressed as

24 Aristotle, p. 445, p. 522.
25 Du principe de la souveraineté du peuple en Amérique, DA II, 15, quoted by Jaume, 2008, p. 105.
26 Jaume, 2008, p. 30.

a subjective right—the right to protect against attacks on one's dignity—it is essentially a philosophical affirmation referring, in Christian tradition, to an ontological conception of man. It implies a duty not to harm the dignity of others, even if they consent to it. This notion justifies the limitations of individual liberty.

More broadly, the ECHR recognises the restrictions prescribed by law as 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 makes extensive reference to these common interests; thus, the common good can justify social distinctions (Article 1); the law has the task of defending actions harmful to society (Article 5); manifestations of freedom of opinion, including religious opinion, must not disturb public order (Article 10); and public necessity can justify dispossession (Article 17). Of course, these collective interests do not refer to values but to the need to base society on the duty to respect common values.

Interestingly, the draft European Constitution, which had the hitherto unfulfilled ambition of creating a political society, made a recurrent reference to the notion of value. This is particularly true of the Preamble, which refers to 'the *cultural, religious and humanist heritage of Europe, from which universal values have developed*…', and of Article I-2, entitled '*the values of the Union*'. If one disregards the fact that the text refers alternately to the universal character of the values of the Union and then to their own character, its purpose is, notably, to construct a new legal order to create, *ex nihilo*, a political community. The authors rely on the existence of common values as the first condition for the existence of such an order and community. In the same sense, the opening sentence of the Charter of Fundamental Rights of the European Union reads as follows: '*The peoples of Europe, by establishing an ever closer Union among themselves, have decided to share a peaceful future based on common values*.

Therefore, it is appropriate to consider that the existence of common values conditions the existence of a political community and, therefore, a democratic regime. Unquestionably, a political community can be founded on common values without resting on democratic legitimacy, as clearly demonstrated by the existence of theocratic regimes. However, 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 has weakened the concept of national identity. Indeed, these fundamental rights are largely defined or interpreted, though the situation amounts to almost the same thing by supranational structures of a jurisdictional nature or even by non-governmental organisations. 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 (the study will return to this notion). If one accepts that one is defined by one's identity and that human rights are considered to have a universalist scope, this identity cannot be dissolved in these rights, even though the rights may be part of this identity. The link between values and identity is that

the national community is neither a coincidence nor a temporary aggregate. It has its roots in the past. '*It constitutes the only organ of conservation for the spiritual treasures amassed by the dead, the only organ of transmission through which the dead can speak to the living*'.[27] This sense recalls the view of Raymond Aron, according to whom individuals cannot become citizens of the same state unless they share a common destiny.[28]

The existence of a political community, the first condition of democracy, implies the recognition of its identity and, thus, otherness regarding what is not. First, it is necessary to determine what constitutes a nation's identity. It is challenging to include this identity in the definition or enumeration of legal criteria. However, there is an echo of it in a constitution: this is the case of language, defined by Jacques Julliard as '*a rallying sign, a culture, a spirit, a form of relationship to the world*'.[29] This is, of course, territory and geography. It is a form of culture, literature, and architecture. Spirituality is religious. To deny the Christian tradition of France or even Europe is to commit to the denial of reality as much as an act of rupture.

National identity is perhaps essentially the history to which books, monuments, and narratives bear witness. Ernest Renan states that a nation is a historical heritage site and a contract for the future. History is primarily the story of '*shared ideals and beliefs, shared trials and sufferings*'.[30] History is the fact that an imaginary world that shapes national identity is built. This conception of history is no longer incompatible with a scientific conception of history than with the artistic perception of a monument with a strict architectural study. However, the approach that claims to be scientific in history often constitutes the perfect negative of the 'national novel'. In reality, it aims to destroy the esteem that a person has in the past by developing repentance that destroys national cohesion and social ties. How can we integrate the new generations and foreigners we welcome into a community that denigrates itself and rewrites history in the glory of those who fight it? From the exaltation of (national) heroes, we moved on to the exaltation of victims (of whom we would be executioners). The pride of our history has been replaced by a desire for revenge on the part of those who consider themselves victims of our behaviour. History includes part of the novel; it is also a science; it cannot be under the cover of scientificity to bend to an ideological vision that is anachronistic.

On a personal level, as on a collective level, only an affirmation of one's identity allows one to know where one comes from, where one is going, who one is, and with whom one is exchanging. It is the loss of the feeling of identity and 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.

27 Weil, 1949; 2016, p. 16.
28 Baudet, 2015, p. 332.
29 *Le Figaro*, June 5, 2015.
30 Goff, 2016.

3. The national identity principle of cooperation and resistance in the framework of supranational structures

The phenomenon of globalisation or internationalisation 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 not universal but aspires to become so. This is the case, for example, of an essentially individualistic conception of fundamental rights and the rewriting of history in light of contemporary and anachronistic conceptions. Similarly, in a more indirect but deeper way, GAFA tends to standardise ways of thinking while creating and developing communities that organise themselves around their own value systems.

By refocusing on the legal field, international or regional law, which is largely constructed by supranational judges and relayed by national judges, will lead to a forced march towards uniformity. Such phenomena contribute to questioning and devitalising national identities. However, this attempt at standardisation has led people and certain states to withdraw from the defence of their national identity.

The challenge facing jurists, in particular, is to articulate the requirements resulting from this movement of internationalisation, to which states have adhered using treaty provisions, and the protection of national identity which justifies the very existence of the state. This study retains the following guidelines: It is necessary to ensure that states are not imposed constraints to which they have not freely adhered and that they retain their free will concerning what falls within the scope of their national identity; moreover, states must be subject to respect for the commitments they have made. More concretely, at the European level, it implies 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 (e.g. questions relating to the conception of the family or religion and access to one's own territory) and what comes under common values (e.g. an independent justice system, respect for the rights of defence, human dignity, and respect for free elections).

It is up to the constituent to set the values of identity and the national judge to ensure that they are respected; it is up to the treaty to set the common values and to the European judges to ensure that they are respected. The question, then, is how to articulate the protection of these two identities. However, the relationship between international law and national constitutional law does not lend itself to a single hierarchy of norms that leads to the creation of a federal constitutional system. Notably, the European Court of Human Rights has followed this logic by defining itself as a constitutional court.

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

Although this study is essentially devoted to the relationship between the states and the EU, it is necessary to consider the institutions of the Council of Europe and the case law of the European Court of Human Rights because the processes have certain points in common, and the judges of the EU often rely on the case law of the European Court of Human Rights to define the concepts to which they refer.

3.1. The temptation of uniformity through the construction of a European identity that replaces national identities

This phenomenon can be observed in the law produced within the framework of the Council of Europe and in the law produced by the EU. In both cases, it is essentially the courts that are in charge, and the tools of this standardisation or substitution are concepts, *a priori* consensual, but whose substance is largely undetermined.

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

The central body of the Council of Europe is the Committee of Ministers, comprising the ministers of foreign affairs of the State parties. However, the Court of Human Rights plays a major role regarding fundamental rights. The Council of Europe has created a multitude of bodies whose role is essentially consultative and who participate in its mission in their specialised fields. This is the case with the European Commission for Democracy and Law, known as the 'Venice Commission'.

Thus, European States are truly framed by a multitude of bodies competent to ensure respect for European values. The combined actions of these bodies create an effective network to protect and promote fundamental rights and European values. In this scheme, the European Court of Human Rights considers itself to be a European neo-constitutional judge.

This case law must be considered in the relations between the states and the EU because if the principle of participation of the Union in the Council of Europe, written in the Treaty, is not (yet) effective, the case law of the Court of Justice of the European Union considers the case law of the Court of Human Rights to interpret the provisions of the Charter of Fundamental Rights of the European Union.

In this sense, the European Court of Human Rights recognises its right to ensure the identification of European values and the dividing line between these European values and the margin of manoeuvre left to the States. It is up to the Court to adapt the rights recognised by the Convention to what it considers to be the evolution of European society, which may lead it, if necessary, to recognise rights not included in the Convention. Further, the Court posits that it must consider any relevant rules of international law applicable to the relations between the contracting parties in interpreting the rights and freedoms recognised by the Convention, which is no longer the sole frame of reference. Finally, the Court freely interprets the principle of subsidiarity in light, in particular, of legislative developments in Member States (i.e.

majority of them or almost all of them), modifying the spirit of the Convention, the substance of which is modified by considering the evolution of national laws.

Intergovernmental bodies have political legitimacy. European judges' legal legitimacy differs in nature. The legitimacy of expert committees such as the Venice Commission, which plays a key role in affirming and defining common values, should also be questioned. The European Court of Human Rights limits states' room for manoeuvring by referring to general concepts that are subject to ideological interpretation. Thus, it regards the restrictions on certain rights recognised by the Convention to respect a necessary goal in a democratic society, which refers, in particular, to pluralism, tolerance, and the spirit of opening up (7 December 1976 n° 5493/72). From this perspective, the Court confuses democracy and the rule of law.[31]

For example, the court's jurisprudence is undoubtedly sensitive to the demands of the LGTB movement and is favourable to theories such as gender. The 'moralizing' role of the Council of Europe is reflected in 'warnings' such as '*sexist stereotypes by the authorities constitute a serious obstacle to the achievement of genuine equality between the sexes, one of the main objectives of the member states of the Council of Europe*'.[32] Relying, in particular, on this case law, the Venice Commission considered that *measures aimed at removing from the public domain the promotion of sexual identities other than heterosexual affect the fundamental principles of a democratic society, characterized by pluralism, tolerance and open-mindedness, and the fair and appropriate treatment of minorities.*[33] However, 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.[34]

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

The notion of values is common in the EU Treaty. Thus, it is a system that is complementary and competitive with national values, which tend to supplement or subordinate the latter. From this perspective, the fate reserved for the concept of 'rule of law' is particularly emblematic.

3.1.2.1. The European Union: a value-creating structure

The European texts refer extensively to the values of the Union. Thus, the Preamble refers to 'the cultural, religious and humanist heritage of Europe, from which have developed the universal values of the inviolable and inalienable rights of the

31 On this distinction Mathieu, 2017.
32 *Juridicic v. Croatia*, February 4, 2021.
33 CLD AD (2013) 022 and notice CDL-AD(2021)050.
34 *Konrad v. Germany,* September 11, 2006.

human person, as well as libertý, democracy, equality and the rule of law'. Article 2 of the Lisbon Treaty refers to the values of the Union, expressed in a general way, which will contribute to extending the competencies of the Union and its intervention in areas related to the sovereignty of the states. Among these values are respect for human dignitý, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidaritý and equality between women and men'.

However, the formulations are ambiguous. These values belong to a common European heritage, which necessarily refers to European States. This notion tends to consider European values as the common denominator of national values and that these European values only exist insofar as they are shared by all EU states. Furthermore, the respect for constitutional identity was affirmed. The result should be a dual system: what comes under a common European identity and what comes under national identities—that is, values specific to a state and not necessarily shared by others (e.g. family and secularism). However, the system does not work that way. The Charter of Fundamental Rights of the European Union defines, in broad terms, common values, and the text of the EU Treaty refers to the ECHR. Consequently, the EU is not only determined by the existence of common values but is also a producer of common values.

The conception of national identity, based on its own values, tends to be replaced by a society without a past but built by the particular affinities of contemporaries, a society built around sexual, linguistic, religious, or other communities. However, this new system of values, disconnected from the national melting pot, is arbitrarily and authoritatively manufactured by European authorities, particularly by judges who are devoid of any national anchorage or democratic legitimacy and who place themselves above national law.

The most important thing in this respect is the broad power of interpretation that judges recognise regarding very general principles such as the rule of law or the principle of non-discrimination. Although there is broad consensus on these values, it is clear that they can refer to very different content.

This is particularly true of the reference to the 'rule of law' (to which this study will return) and the principle of non-discrimination. This principle cannot be absolute, and its application considers the differences in situations that are allowed to be considered (e.g. gender and nationality) and the weight of requirements linked to the general interest. Case law of the European Court of Human Rights established a list of common values defined by substance. Thus, in its decision on 16 February 2022 regarding sanctions against Poland, the Court argued as follows:

> *Once an applicant country becomes a Member State, it joins a legal construct which rests on the fundamental premise that each Member State shares with all the other* Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as set out in Article 2 [TEU]. This premise implies and justifies the existence of mutual trust between the Member States in the recognition of these

> values and, therefore, in the respect of the Union law that implements them ([Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168]). Member States' rights and practices should continue to respect the common values on which the Union is founded.

It adds that

> This premise is part of the specific and essential characteristics of Union law, arising from its very nature, which result from the autonomy enjoyed by that law in relation to the rights of the Member States as well as to international law.

It concludes:

> It follows that respect by a Member State for the values contained in Article 2 TEU constitutes a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State and that the values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the Union as a common legal order. Thus, the Union must be able, within the limits of its powers under the Treaties, to defend those values.

The Court affirms the principle of uniformity in the interpretation of these principles by stating the following:

> Article 2 TEU is not a mere statement of political guidelines or intentions, but contains values which are part of the very identity of the Union as a common legal order, values which are embodied in principles involving legally binding obligations on the Member States. Even if, as is clear from Article 4(2) TEU, the Union respects the national identities of the Member States, which are inherent in their fundamental political and constitutional structures, so that these States have a certain margin of appreciation in ensuring the implementation of the principles of the rule of law, it does not follow that this obligation to produce results may vary from one Member State to another. Thus, for example, even if the Court were called upon to interpret, in the context of an action for annulment brought against a decision adopted under the contested regulation, the concepts of 'pluralism', 'non-discrimination', 'tolerance', 'justice' or 'solidarity', which are contained in Article 2 TEU, in so doing, contrary to what is claimed by the Republic of Poland, supported by Hungary, it would be exercising only the powers conferred on it by the Treaties, in particular by Article 263 TFEU.

The result is that once they have joined the EU, the states are supposed to have accepted all the values set out in the texts (which is perfectly justified) and accept *a priori* the evolving interpretation that the Court of Justice of the European Union is likely to give to the statement of these values. It means that the state is transferring

jurisdiction to the European court, whose interpretation it cannot contest, and the values enshrined in European texts must be considered as matrix principles generating other rules and principles not enshrined in the treaties.

The above decision follows the infringement procedure initiated by the Commission against Poland, which considered that the case law of its constitutional court

> violated the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the binding rulings of the Court of Justice of the Union' and that the Polish Constitutional Court 'no longer meets the requirements of an independent and impartial court established by law'. The European Parliament's resolution notes the 'attacks on the freedom of the media and journalists, migrants, women's rights, the rights of LGBT people and freedom of association and assembly.

This situation is a far cry from defending the 'financial interests of the Union' (which is the normal object of the 'conditionalities' attached to European aid).[35]

3.1.2.2. The rule of law, the 'Trojan horse' of the EU imperium

Our system is a mixed democratic and liberal system; democracy refers essentially to the mechanisms of legitimisation of power, and liberalism refers to the modes of exercise of power, that is, essentially to the control and limitation of power. The principle of respect for the rule of law satisfies the second requirement. The rule of law essentially refers to the idea that the State must respect the rules it sets and that citizens must assert before a judge that these rules have been respected. This is an essential guarantee of arbitrariness. However, the rule of law can refer to respect for substantial provisions at the foundation of the legal system, such as human dignity or the principle of individual freedom. For the rest, it is up to the constituents and legislators to define the rights and freedoms that the judges must guarantee. However, hiding behind this consensual concept, the judge tends to deviate from this function of the guarantor to substantially define the rule of law and impose on political leaders a series of rules and principles that correspond to his idea of the desirable evolution of society. The real question is not whether the scope of the rule of law should be limited but who defines the substance of this rule of law, who decides on the balance between fundamental rights, between the requirements of the general interest and those relating to the protection of individual rights, and who decides on the balance to be respected between respect for private life and freedom of expression. From this perspective, the judge must be a guarantor and not a decision-maker. However, this is no longer the case.

35 Schoettl, 2022.

The rule of law[36] is a formidable instrument for assimilation and standardisation. Respect for the rule of law represents a real constraint on Member States. To make this constraint effective, Regulation 2020/2092 on 16 December 2020 aims to exert financial pressure on Member States that would not respect the concept of the rule of law, as defined by the EU. Based on the idea that violations of the rule of law are likely to affect the sound financial management of European resources, the Commission can extend its power considerably. While corruption may indeed be considered a threat to the proper use of European funds and the principle of protecting citizens against arbitrary action is undoubtedly a common principle of the rule of law, its reach extends beyond this.

Thus, questions on the organisation of powers (whereas, for example, the separation of powers can be conceived as implying the independence of judges or the autonomy of the judiciary, which is not the same thing), the protection of national borders external to the Union, immigration, the treatment of foreign NGOs, or the organisation of higher education are covered under the 'umbrella' of the rule of law, which potentially broadens the competences of the Union. The same can be said of issues such as the place to be assigned to sexual, religious, or other identities. This notion is especially true because the interpretation of the rule of law is unclear. Thus, while Article 2 of the EU Treaty seems to give it its own meaning, distinct from that of other principles (e.g. human dignity, freedom, democracy, equality, and human rights), the European Parliament makes it a matrix principle that includes all the 'values' referred to in Article 2. Thus, the European Parliament resolution of 10 March 2022[37] on the rule of law states that

> In accordance with the regulation on conditionality linked to the rule of law, the rule of law must be understood in the light of the values and principles enshrined in Article 2 of the EU Treaty, in particular fundamental rights and non-discrimination; that the Commission should use all the instruments at its disposal, including the rule of law conditionality regulation, to combat persistent violations of democracy and fundamental rights throughout the Union, including attacks on media freedom and journalists, migrants, women's rights, LGBTIQ people's rights, and freedoms of association and assembly…

and that

> a clear risk of a serious breach by a Member State of the values enshrined in Article 2 of the EU Treaty does not only concern the Member State in which the risk materialises, but has an impact on the other Member States, on their mutual trust, on the very nature of the Union and on the fundamental rights of its citizens under Union law.

36 See Mathieu, 2017.
37 2022/2535(RSP).

It is understandable that the mission entrusted to the Commission, under the control of the European judge, may create friction with values specific to certain States. In reality, the conflicts between certain States and the European structures, notably the courts, do not generally concern the recognition of the values enshrined in the treaty but rather the meaning that should be given to them. In the abovementioned decision on 16 February 2022, the Court of Justice of the European Union established the scope of the concept of the rule of law and the methodology that led to the interpretation adopted. Regarding the reference standards, the Court, per its case law, adopts a broad interpretation of the reference standards. It states:

> The rule of law requires that all public authorities act within the limits set by law, in accordance with the values of democracy and respect for fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union *and other applicable instruments, and under the supervision of independent and impartial courts* (emphasis added).

It also considers the interpretations adopted by many organisations of various types. It states that

> The detection of violations of the principles of the rule of law requires the Commission to make a thorough qualitative assessment. This assessment should be objective, impartial and fair and take 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 report on the rule of law and the scoreboard on justice in the [Union], reports of [OLAF] and the European Public Prosecutor's Office, where appropriate, as well as the conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies, such as the Council of Europe's Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (Venice Commission)], in particular its list of rule of law criteria, the European Network of Presidents of Supreme Judicial Courts and the European Network of Councils for the Judiciary The Commission could, if necessary, consult the European Union Agency for Fundamental Rights and the Venice Commission in order to prepare an in-depth qualitative assessment.

Such a methodology involves a large number of interpreters, before whom the States can hardly defend their perspective and leaves the Court with a very wide margin of manoeuvre. Poland, supported by Hungary, argued as follows:

> The provisions of the contested regulation do not comply with the requirements of clarity and precision which follow from the principle of legal certainty, since that regulation does not clearly specify the requirements which must be met by the Member States in order to be able to retain the funding granted to them from the

> Union budget and that it confers on the Commission and the Council an excessively broad discretion and that the concept of 'rule of law', as defined in Article 2(a) of the contested regulation, is problematic in this respect. This concept could not, as a matter of principle, be the subject of a universal definition, since it would include a non-exhaustive number of principles whose meaning may differ from one State to another, depending on its constitutional characteristics or its own legal traditions. Moreover, this definition would unduly broaden the scope of the said concept as a value of the Union, which would be only one of the values contained in Article 2 TEU, to the other values contained in this provision.

The Court held that

> Although it is true that Article 2(a) of the contested regulation does not specify the principles of the rule of law which it mentions, the fact remains that recital 3 of that regulation recalls that the principles of legality, legal certainty, prohibition of arbitrary action by the executive, effective judicial protection and separation of powers, referred to in that provision, have been the subject of abundant case law of the Court.

Based on this self-reference, the Court first holds that the rule of law is a pre-eminent principle, considering that

> While there is no hierarchy between the values of the Union, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law, and vice versa.

The rule of law becomes an all-inclusive principle with a perimeter that is not predefined.

Thus, while the European Treaty does not grant any competence to the authorities of the EU in matters of judicial organisation of the States, these authorities attribute to themselves, through the principles enshrined in Article 2 of the Treaty, encompassed in the concept of the rule of law, a form of exercising 'the competence of the competence' that is the prerogative of sovereign States[38]. Hence, under the cover of this concept, and more broadly of fundamental rights, a form of insidious federalism is developing that escapes the will of the states. The creature escapes from the creator.

38 Schoettl, 2022.

3.2.3. Diversity of national resistances to the imperium of European Union law

The crises affecting the relationship between national laws and the law of the ECHR, as interpreted by the European Court of Human Rights, and the law of the EU are of the same logic in that they confront ever-greater European integration regarding national sovereignty and constitutional identities. The profound differences between these two supranational orders do not allow for the exact transposition of diagnoses and therapies. Nevertheless, these two systems are marked by the role played by supranational judges in their development, and the norms of reference tend to overlap and homogenise, reinforcing the strength of the whole.

Regarding how the 'friction' between European and national law is legally identified, the most 'brutal' is that which comprises establishing, in a general way, the supremacy of constitutional law over conventional law, including that resulting from supranational jurisdictions. Thus, Russia, relying on its constitutional provisions and the absence of relevant provisions in the Convention refused to apply the decision of the European Court of Human Rights, condemning it for the absence of official recognition of homosexual couples (*Fedotova v. Russia,* July 13, 2021, no. 40792/10).

The resistance of national jurisdictions to the law of the EU has taken several legal forms; we will take only a few recent examples whose diversity and multiplication reflect the importance of the problem. The Polish question is, from this perspective, emblematic. While the European Court of Human Rights (July 22, 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 (Article 6 right to a fair trial) and following the case law of the CJEU aimed at protecting the independence of national courts (e.g. 7 February 2019, C-49/18), the Polish Constitutional Court in a decision on 7 October 2021 ruled that certain provisions of the EU Treaty are incompatible with the Polish Constitution, in particular the provisions of articles 1 (1) and 2 in connection with Article 4 insofar as they oblige a national authority or allow it not to apply a provision of the Constitution. The Court of First Instance contests that integration has been achieved, inter alia, through the interpretation of Union law by the CJEU. The German Constitutional Court has declared itself competent to decide that a European institution has acted beyond its competences under EU law (BverfG 29 April 2021, 2 BvR 1651/15, 2BvR 2006/15).

On 10 December 2021, the Hungarian Constitutional Court ruled that if the exercise of joint competences with the EU is incomplete, Hungary has the right (and, in some cases, the obligation), as per the presumption of reserved sovereignty, to exercise the relevant non-exclusive area of competence of the EU until the institutions of the EU 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 resulted in consequences that raised the question of the violation of the right to identity of persons living in Hungary, the Hungarian state was obliged to ensure the protection of this right within the framework of

its obligation of institutional protection. Finally, the Constitutional Court stated that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government, and state structure was part of its constitutional identity.

If we examine the situation in France, first, the Conseil d'Etat and the Cour de Cassation recognised the superiority of the Constitution over international law in the domestic legal order. In its assembly decision, *Sarran and Levacher* of 30 October 1998, the Conseil d'État ruled that international commitments do not have a higher authority in the domestic legal order than the Constitution: '*The supremacy conferred by Article 55 of the Constitution on international commitments does not apply, in the domestic order, to provisions of a constitutional nature*'. Similarly, in its *Fraisse* decision of 2 June 2000, the plenary assembly of the Court of Cassation, having to rule on the respective legal values of national law and treaties (in this case, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms), considered that the supremacy conferred on international commitments over laws by Article 55 of the Constitution does not apply in the internal legal order to provisions of a constitutional nature. From a second perspective, the French Constitutional Council, like other constitutional jurisdictions, notably Italy and Spain, in somewhat different forms, has reserved the application of secondary European legislation when the principles inherent to constitutional identity were at stake. Article 88-1 of the Constitution states the following:

> The Republic participates in the European Union, which is made up of States that have freely chosen to exercise certain of their competences in common by virtue of the Treaty on the European Union and the Treaty on the Functioning of the European Union.

In June 2004, it deduced that '*the transposition into domestic law of a Community directive is a constitutional requirement*' (June 10, 2004, No. 2004-496 DC). However, it reserves the hypothesis that European law would be contrary to a rule or a principle 'inherent to the constitutional identity of France' (27 July 2006, No. 2006-540 DC). This jurisprudence was reaffirmed by the Constitutional Council's decision No. 2021-940 QPC on 15 October 2021 (Sté Air France), which, with regard to the obligation imposed by European law on air carriers to re-route foreigners whose entry into a member country is refused, identified, for the first time, a principle inherent in the constitutional identity of France and, as such, opposable to European law (i.e. the public monopoly of legal force).

However, in the absence of a constitutional determination for these principles, the French Constitutional Court applied them modestly. Notably, the recognition of the existence of such a principle is in the hands of the constitutional court, as the Constitution does not explicitly refer to such principles. Thus, this jurisprudence constitutes a weapon of dissuasion rather than an efficient tool for dividing competences between what comes under national law and what comes under Union law. Notably,

a principle may be recognised in national and European legal orders without being given the same scope. This is the case with the principle of equality, which, in French law and in principle, does not imply that a difference in situation must necessarily correspond to a difference in treatment. The same can be said of the principle of dignity, which can be conceived of as an objective and a subjective right with different consequences. From another perspective, the Conseil d'Etat has refrained, as a matter of principle, from imposing a veto on the CJEU similar to that imposed by the Karlsruhe Court in monetary matters. Thus, its French Data Network decision on 21 April 2021 is as follows:

> Contrary to what the Prime Minister maintains, it is not up to the administrative judge to ensure that secondary European Union law or the Court of Justice itself respects the division of powers between the European Union and member states. It cannot review the conformity of decisions of the Court of Justice with Union law and, in particular, deprive such decisions of the binding force with which they are vested on the grounds that the Court of Justice has exceeded its jurisdiction by conferring on a principle or an act of Union law a scope exceeding the field of application provided for by the treaties.

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

3.3. The search for mechanisms of conciliation between the respect of the national constitutional identity and that of the common European identity

The following lines only aim to outline, synthetically and approximately, the avenues that could be explored to regulate systemic relations and ensure conciliation between the promotion of European identity and the protection of national identities. Otherwise, it leads towards de facto federalism, which is not assumed and will eventually lead to revolts by citizens who are no longer mere spectators, or a break-up of European structures because of the refusal of certain nations to submit and abdicate their sovereignty.

3.3.1. Redefining the articulation of national and European competences

This definition must be the work of politicians. Indeed, 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 states. To do so, a distinction must be made between what comes under the heading of European identity, which justifies the association of several states, and what comes under the heading of national identity.

Reflections were performed in two directions. Defining national and European competencies more precisely. In fact, it is a matter of reflecting on what the states intend to share. Thus, respect for human dignity, the right to a fair trial, and protection against arbitrariness are unquestionably common values. The same cannot be said about the concept of the family, the definition of marriage, or the place of religion. It should then be admitted that the affirmation of a principle of identity constitutes a reservation for the absolute prevalence of European orders over the national order, a prevalence that is fixed by treaties and is only valid because it is accepted by the national constitutions.

3.3.2. Enforce the principle of subsidiarity

Once this distribution of competences has been established based on work that is essentially political, it will be easier for the European Court of Human Rights to enforce the principle of subsidiarity. This principle implies that only if constitutional protection proves insufficient should the matter be addressed at the European level. Indeed, as Jean Paul Costa, former President of the Court, notes, this principle implies that the task of ensuring respect for the rights enshrined in the European Convention falls primarily on the authorities of the contracting states and not on the Court; the latter intervenes only if the national authorities fail to do so. Thus, in the case of rights or freedoms that belong to the constitutional and conventional corpora, it is appropriate to consider that this protection is first ensured in the constitutional order as far as the review of the law is concerned.

Today, the Court seems to be moving in favour of recognising a principle of subsidiarity on certain so-called 'societal' issues,[39] leaving them to the discretion of the national legislator. However, appreciation of the scope of this principle remains in its hands. Similarly, the Protocol of No. 15 on the principle of subsidiarity assumes, according to the Brighton Declaration, that 'States may choose the manner in which they wish to fulfil their obligations under the Convention'. However, assessment of the scope of this principle remains in the hands of the Strasbourg Court. Similarly, following the same protocol, respect for the margin of appreciation of States was included in one of the recitals of the Preamble to the Convention. This can be a tool in the hands of a national judge or government to assert the ultra vires of the Court.

3.3.3. Moving from an obligation of submission 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 Great Britain to the case law of the European

39 For example, in matters of filiation, ECHR March 22, 2012, No. 45071/09 *Ahrens v. Germany* and No. 23338/09 *Kautzor v. Germany.*

Court of Human Rights concerning the voting rights of prisoners, testifies to the impasse constituted by the requirement of a single vertical relationship between the European courts and the national courts and to the need to find a way to resolve conflicts. Thus, it is conceivable that, regarding relations between courts, national courts could reinterrogate European courts when a conflict arises or is likely to arise. One can also imagine the creation of a conciliating body with flexible functions. For example, in the case of a conflict between the European 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 address recurrent or systemic issues. In the event of non-resolution of conflicts, or in the event that the solution of the conflict would, according to the state concerned, run against a fundamental principle recognised by the constitutional order, it would be advisable to give political authorities the power of the last word on the matter.

3.3.4. Conclusion

It should not be forgotten that although the protection of fundamental rights and freedoms has blossomed in the European melting pot, states remain the natural framework for expressing the sovereignty of the people. However, the whole of this organisation—State, People, Sovereignty—only makes sense in that it has been built from national identities inscribed in constitutions. Supranational systems respond to post-national logic aimed at building a new identity with a universal vocation but are disembodied. It makes large abstractions when it does not try to make a clean sweep of the traditions, customs, histories, and mentalities of people dispossessed, leading individuals to form an entity joined together around history and common projects. If certain forms of supranationality contributed to the maintenance of peace between the peoples, the destruction of the national identities for the profit of a rather artificial common European identity can involve only the bursting of society. Meanwhile, the individualist and community source of conflicts in the sharing of common values will no longer allow for regulation. Europe is rich in diverse national identities and the strengthening of a common identity while respecting these national identities.

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