ARTICLES

THE ITALIAN LEGAL ORDER AND THE EUROPEAN UNION: AN EVOLVING RELATIONSHIP *

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Abstract

The task of this article is a twofold one: descriptive and interpretative. The first intent is to describe the essential facts concerning the relationship between the Italian legal order and that of the EEC, now the EU. The latter has passed its seventy years, which have witnessed development, change and evolution that will be briefly charted in the subsequent paragraphs. This part seeks to lay the groundwork for later discussion; that is, interpretation. It can be helpful to say at the outset – for the sake of clarity – that there are contending theories and the literature is still rapidly evolving. The objective within this part is to render accessible to a wider public the debate within Italian scholarship.

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1. Introduction

My task in this article is a twofold one: descriptive and interpretative. The first intent is to describe the essential facts concerning the relationship between the Italian legal order and that of the EEC, now the EU. The latter has passed its seventy years, which have witnessed development, change and evolution that will be briefly charted in the subsequent paragraphs. This part seeks to lay the groundwork for later discussion; that is, interpretation. It can be helpful to say at the outset – for the sake of clarity – that there are contending theories and the literature is still rapidly evolving. The objective within this part is to render accessible to a wider public the debate within Italian scholarship. It will be seen that the divergence between scholars turns on differences as to the way in which a traditional concept of public law, sovereignty, must be intended, as well as on the role that political and judicial institutions can play, respectively. It is also designed to explain why different scenarios may emerge in the near future.

2. The path towards Europe: *le début*

It can be helpful to begin with two quick caveats. First, from the descriptive purpose of this paper follows the necessity to consider some essential facts that are relevant and significant from a public law perspective. In brief, the empirical implies the historical. In this respect, many accounts of the relationship between the Italian legal order and that of the EEC/EU are based on the analysis of some "significant" judicial decisions.

There is nothing wrong with this, as judicial politics are increasingly relevant. [1] However, on the one hand, the broader institutional, political and social context should not be neglected, especially when there is a "rigid" constitution and political forces take fundamental decisions, as happened in Italy in 1948 and in 1957. On the other hand, judicial decisions regard only a part of our civil, economic, and social life. Other areas are only occasionally affected by judicial decisions. This is the case of Economic and Monetary Union (EMU), which produced salient constitutional implications.

[1] See M. Shapiro, *Courts. A Comparative and Political Analysis* (1981) and A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (2000).

The second caveat concerns the significance of the description that follows. It is well-known that constitutions are distinct cycles, but there are rare moments in which the trajectories of various national constitutions converge. A convergence of this type occurred in the late 1940s, when the constitutions of Italy, Germany and other nations of Europe were transformed. Another one occurred after 1989, when other nations regained full independence. This suggests that neighbour countries often face similar problems. However, their solutions may, and often do, differ, largely, because of significant differences in history, institutions and political preferences.

A) A new constitutional settlement

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

The continuity of the Italian State was assured, notwithstanding the radical discontinuity with the fascist regime (1922-1943). Political parties could certainly have chosen to amend the existing constitution, the *Statuto Albertino*, which had a century of history. But all relevant political actors thought that it was necessary to formalize the foundations of the new liberal and democratic order in a new constitution. They thus chose to break with the earlier regime by replacing the old constitution with fresh constitutional settlement. [2]

The Republican Constitution was thus adopted and entered into force in 1948. It re-introduced the parliamentary regime. At the same time, it laid down a rich bill of rights. Moreover, it broke with our institutional tradition because twenty regions were created, five of which with a special legal status. This implied a repudiation of the traditional centralization, though a real change was not easy to achieve.

[2] For further analysis, see M. Cartabia and N. Lupo, *The Constitution of Italy: A Contextual Analysis* (2022).

B) Constitutional openness

There was discontinuity, too, as far as the external dimension of the State was concerned. This point can be aptly demonstrated by the analysis of three constitutional provisions. First, the primacy of international law was established. In this respect, Article 10 provided that the Italian legal system "shall conform to the generally recognized principles of international law", that is international custom, while treaties would have to be ratified by Parliament. Second, a new clause concerning limitations of sovereignty was established. According to Article 11,

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

This constitutional provision is of fundamental importance for two reasons that are related but distinct. On the one hand, it implies a rejection of the traditional notion of the indivisible nature of sovereignty, as it was conceived after Bodin and Hobbes;[3] that is, sovereignty is no longer regarded as a whole or totality, but rather as a bundle of sovereign powers or functions. It is precisely as a result of this that, under Article 11, the exercise of individual sovereign functions or powers can be transferred to international organizations. On the other hand, though this clause was defined with a view to international bodies, it provided a legal basis that could be, and was, used for European integration.

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

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

[3] See Hobbes, *Leviathan, Or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (1651).

were broken; that is, authoritarian government and autarchy. The similarity with postwar Germany is evident. Both the Italian Constitution and the German Basic Law (*Grundgesetz*) adopted international law as part of the national legal system. [4] The ramifications of these innovative choices will become more evident when discussing the path of European integration.

C) **The choice for Europe**

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

While the emphasis is generally put on the fact that, as a consequence of those political decisions, Italy has been a founding member of both European organizations, other two aspects must be

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[4] A. La Pergola & P. Del Duca, *International Law and the Italian Constitution*, 79 Am. J. Int. L. 598 (1985).

[5] See already J. Monnet, *Mémoirs* (1976). For a different interpretation, A. Milward, *The European Rescue of the Nation State* (1991), for whom the European construction was instrumentally used to rescue the nation-State.

[6] See E. Serra (ed.), *La relance européenne et les Traités de Rome (*1989). On the role played by De Gasperi, see A. La Pergola, *Italy and European Integration: A Lawyer's Perspective*, 4 International and comparative Law Quarterly 259 at 26o (1994) (arguing, however, that De Gasperi had an instrumental approach, because he viewed Italy's participation in European institutions as a kind of insurance against the danger of domestic instability).

highlighted. First, those political decisions were, together with that to join the military alliance based on the North Atlantic Treaty (1949), the fundamental choices made by Italy after 1945. Second, in contrast with the widespread – but wrong – opinion according to which the European construction had an economic dimension, its political character was manifest during parliamentary debates. During his speech at the Senate in 1952, De Gasperi unequivocally affirmed that "in Europe we build a coalition of democracies founded on the principle of liberty". These were not just the words of an official speech. Indeed, when Spain applied for the first time for membership of the EEC, its application was rejected precisely because it did not meet the standards of liberal democracies.

In the following two decades, the choice for Europe, initially promoted by the *élite*, received growing popular support. Left-wing parties' initial hostility to the Communities faded. [7] The public consistently endorsed Italy's active role in the construction of an integrated Europe. Opinion surveys showed that the project of integration – the "ever closer union between European peoples" – found more support in Italy than in the other Member States. It also obtained also the support of the Constitutional Court, after an initial reluctance.

3. Judicial doctrines

At this stage, it is easier to understand the role played by the jurisprudence of the Constitutional Court. Two different phases or stages can be envisaged. They are characterized by two doctrines, respectively; that is, separation and integration. There has not been, however, a radical discontinuity between such phases. Rather, there has been an evolution, as Paolo Barile argued five decades ago in his pioneer work on the "path" of the Constitutional Court with regard to Europe. [8] More recently, the Court has accepted to engage in a closer cooperation with the European Court of Justice.

A) Separation

Since *Van Gend*, the case in which the European Court of Justice affirmed the principle of the direct effect of the Treaty of

[7] La Pergola, *Italy and European Integration: A Lawyer's Perspective* (fn 6), 264.
[8] P. Barile, *Il cammino comunitario della C0rte*, (25) Giurisprudenza costituzionale, 2406 (1973).

Rome, [9] the judicial policy of the Court was characterized by a sophisticated conception of monism.[10] In other words, the legal systems of the Member States and the EC were not regarded as being separate, in contrast with traditional "dualist" theories of international law. [11]

In 1964 the Italian Constitutional Court (ICC) recognized that the article 11 of the Italian Constitution authorized the State to limit its sovereignty. However, its opinion diverged from that of the ECJ in *Costa v. ENEL*. [12] It refused to consider EC law as "higher" than national law. This was manifest in its argument based on the traditional *lex posterior* criterion, according to which subsequent national legislation prevails on previous EEC norms (the Treaty of Roma). The assumption on which this argument was based was, clearly, that there was no primacy of EEC law.

Still ten years later, in 1973, in *Frontini*, the ICC refused the logic of monism embraced by the European Court. It affirmed the traditional criterion according to which *lex posterior derogat priori*. As a consequence of this, ordinary courts (civil, administrative, criminal) could enforce EC law against subsequent and conflicting national legislation only after the ICC itself had authorized them to do so, on a case-by-case approach.[13]

B) Integration (within certain limits)

A discontinuity occurred more than ten years later, in *Granital,* when the ICC accepted that EC law could be directly applicable, without its prior judgment. However, the ICC did not ground this shift in the monism implicit in the approach of the ECJ.

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[9] ECJ, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963). For a 'classic' interpretation of this ruling, see E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int.l L 1 (1981) (arguing that the ECJ created a new constitutional framework). See also, for a retrospective, J.H.H. Weiler, '*Van Gend en Loos': the individual as subject and object and the dilemma of European legitimac*y, 12 I-CON 94 (2014).

[10] See E. Cannizzaro, *The Neo-monism of the European Legal Order*, in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International Law as Law of the European Union* (Brill, 2012), 38.

[11] For further analysis, G. Gaja, *Positivism and Dualism in Dionisio Anzilotti* (1992) 3 Eur J Int'l L 123.

[12] ICC, judgment n. 14/1964, [1964] CMLR, p. 425. On the European side, see ECJ, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

[13] ICC, judgment n. 183/1973, *Frontini* [1974] CMLR, p. 372.

It kept a dualist perspective, affirming that the EC and the national legal orders, though still distinct, were coordinated. [14] Writing extrajudicially, the former President of the ICC observed that:

"the Constitutional Court progressed beyond its intermediate stance by accepting a view of supremacy that an American constitutional lawyer might find similar to that embodied in the supremacy clause of Article VI of the United States Constitution…. The 1984 decision takes the autonomy language of the 1975 decision and carries it to its logical conclusion. Italy's adherence to the European Communities through Article 11 of the Italian Constitution makes Community law applicable in Italy as the law of an autonomous legal order. This Article 11 acceptance of Community law therefore requires that ordinary courts determine whether Community law covers the subject matter dealt with by subsequent internal law. If it does, the Community law takes precedence over the internal law without regard to whether the internal law was adopted before or after the Community law". [15]

In brief, with *Granital*, the ICC accepted the primacy of EEC law over national law and looked at it from the perspective of the decentralized system of constitutionality established in Italy. There is, however, an important exception. The Court has reserved to itself the power to assess the conformity of Community norms with the fundamental principles of the constitutional order and the inalienable rights of the human person. [16]

In conclusion, in 1984 the ICC accepted supremacy. However, as it was argued earlier, the ICC did not repudiate its dualist approach. Nor, as a consequence, did the Court left the Italian Constitution without any protection against any excessive ambition of EC institutions. Indeed, such a protection was re-affirmed, though only for a sort of "*noyeau dur*", including fundamental human rights and the "supreme" principles of our constitutional order; that is, the so called "counter-limits". Although no list of the latter exists, it is clear that, if there was a

[14] ICC, judgment n. 170/1984, *Granital* [1984] CMLR, p. 331. For further analysis, see M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, 12 Michigan Journal of International Law 173 (1990).

[15] See A. La Pergola & P. Del Duca, *International Law and the Italian Constitution* (fn 3), 613-614.

[16] For further remarks, see A. Pace, *La sentenza Granital, ventitré anni dopo* (2007), in www.associazionedeicostituzionalisti.it (for whom there is a "tortuous" path between *Frontini* and *Granital*).

shift in the case-law of the ICC, it was not from denial of supremacy to its full and unlimited acceptance. The ICC choose, rather, supremacy under conditions and limits.[17]

This judicial policy was confirmed, few years later, by another judgment (n. 389/1989) rendered by the ICC. Initially, the Court reiterated what it had affirmed in 1984. Then it made a further step, holding that the Community legal order and the national one were "reciprocally autonomous, but co-ordinated and communicating". As a consequence of this, EC norms which were self-executing had direct effects within the national legal order and both judges and public administrations were required to disapply national rules contrasting with them. [18] More recently, in his ruling n. 20/2019, the ICC has affirmed that the rights recognized and protected by the EU Charter of Fundamental Rights have "constitutional character" and has, accordingly, has delineated a more flexible view concerning its relationship with administrative and ordinary courts when fundamental rights are at stake. [19]

To sum up, the "European" jurisprudence of the ICC has had a gradual and incremental character. It began with the rejection of the supremacy of EC law, on grounds that the two legal orders were separated. Subsequently, it shifted to the recognition that those legal orders were co-ordinated. Eventually, its doctrine is that the relationship between them must be stressed. There is clearly a development, which is inevitable, because the legal order of the EC/EU itself has constantly evolved.

C) Judicial cooperation

A new development has occurred in the last fifteen years; that is, after some decades during which administrative and ordinary courts have increasingly engaged in a judicial cooperation with the ECJ, the ICC, too, has accepted to do so. To begin with, it should be said that the Italian judicial system is not monist. Quite

[17] See M. Cartabia and J.H.H. Weiler, *L'Italia in Europa. Profili istituzionali e costituzionali* (Il Mulino, 2000), 128.

[18] ICC, judgment n. 389/1989, § 4. For further remarks, see M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union* (fn 13), 191 (noting, however, the tension between the Court's doctrine and the results it achieved).

[19] ICC, judgment n. 20/2019, § 4. For further remarks, see O. Pollicino, *Not to be Pushed Aside: the Italian Constitutional Court and the European Court of Justice* (2019), in www.verfassungsblog.de .

the contrary, it is pluralistic, for three reasons. First, there is no established rule of the precedent. As a result, lower courts are not formally bound by the rulings adopted by higher courts, even though they generally respect them. Second, Italy has a dualist system of judicial review, with both ordinary judges (at the top of which there is the Court of Cassation) and specialist administrative courts, including the Council of State and the Court of Auditors. Third, the Constitutional Court has become a key institutional actor. Within this pluralistic judicial systems, divergent interpretations are not at all infrequent, and even conflicts are not rare, especially between the Council of State and the Court of Cassation. All these judges, moreover, cooperate with the ECJ through the mechanism that has been called "jewel of the Crown"; that is, the preliminary reference mechanism.[20]

This procedural device is strategic in many respects. Under Article 267 TFEU, lower courts can send preliminary references to the ECJ, while the highest jurisdictions are required to do so. This furnishes the ECJ with nearly two thirds of all the legal questions it has to solve. It allows the ECJ to involve national courts in the enforcement of EU law, in order to ensure that such law is applied uniformly. Consequently, and ingeniously, it uses the legitimacy and competence of national courts. Whatever the constitutional status of international or supra-national rulings, national governments and parliaments feel incomparably more bound by the ruling of their own courts.[21] Moreover, a preliminary ruling may give to a lower court a better chance to promote an adjustment of legal interpretation, which is impeded by a higher court.

As regards Italian courts, since the 1980's the judicial dialogue between the ECJ and administrative and ordinary courts has gradually intensified. Both quantitative and qualitative aspects deserve mention. Quantitively, in the years 1953-2015, while French judges sent 931 preliminary references to the ECJ, of which 118 came from the *Cour de Cassation* and 99 from the *Conseil d'Etat*, Italian judges sent 1326 preliminary references, of which 132 came from the Court of Cassation and 126 from the Council of State. [22] In sum, there was a greater propensity of Italian judges to use this

[20] P. Craig, *EU Administrative Law* (2007) 285.
[21] See A. Stone Sweet, *The Judicial Construction of Europe*, cit. at 1, 15.
[22] ECJ, *Judicial statistics 1953-2015* (2015), 97-102. For further remarks, see G. della Cananea, *The Global, European and National Dimensions of Administrative Law*, in J.B. Auby (ed.), *The Future of Administrative Law* (2016) 101.

mechanism and, comparatively, Italian administrative judges were more incline to do so than ordinary judges, in view of the latter's wider area of competence. Qualitatively, there is virtually no salient legal question, from public procurements to criminal law, in which national judges refrain from using the preliminary reference procedure, thus making of the ECJ a source of authority alternative to the ICC.

The last remark may explain, among other things, another shift of the ICC's judicial policy. It concerns the use of the preliminary reference mechanism. The ICC has never considered itself as a "court" in the meaning of Article 267 TFEU, for more than one reason: structurally, only one third of its members are professional judges, while two thirds are appointed by political institutions, the President of the Republic and Parliament; functionally, its main power is not to adjudicate disputes either between individuals or between individuals and public authorities, but to check the constitutionality of legislation. Moreover, similarly to other national constitutional courts, the ICC was reluctant to send preliminary references to the ECJ. Affirming that a constitutional court does not seek preliminary ruling raises the question whether this is a matter of law or policy. From a legal point of view, there is no insuperable obstacle to admitting that a constitutional court may be regarded as a court of last resort. This was confirmed when the ICC for the first time sought a preliminary ruling from the ECJ.[23] This suggests that the evasion of references was, rather, a matter of policy.

When the ICC decided to seek a preliminary ruling, it specified that this could be done because there was a dispute between two public authorities, that is to say the State and a Region enjoying a special status, Sardinia. According to the ICC, therefore, a necessity to seek preliminary rulings arises only with regard to inter-institutional disputes (*giudizi in via di azione*), that is to say those that arise either between the State and the regions or between

[23] ICC, order n. 104/2008. For further details, see G. della Cananea, *The Italian Constitutional Court and the European Court of Justice: from separation to interaction*, 15 European Public Law, 523 (2008). See also F. Fontanelli and G. Martinico, *Between Procedural Impermability and Constitutional Openness: the Italian Constitutional Court and Preliminary References to the European Court of Justice* (2010) 346 (arguing that "this decision represents a veritable shift from the procedural impermeability between constitutional procedural law and EC law").

the latter. [24] The second case concerned the complex interaction between the norms aiming at protecting the finances of the EU and the domestic rules concerning the duration of criminal proceedings. Notwithstanding the strong perplexity raised by the Court of Cassation, backed by some prominent constitutional lawyers, about the risk that a national tradition would be infringed, the ICC choose to continue its "dialogue" with the ECJ and its choice furnished an adequate solution.[25] In other words, it choose dialogue instead of standing up as the last defensor of national identity.

The third step regards the right to be silent within the an administrative procedures managed by the financial markets regulatory authority; that is, CONSOB. This requires a slight digression. In US public law, the leading case is *Miranda*, a case which was decided by the Supreme Court almost sixty years ago. The case addressed several questions involving custodial interrogations without the presence of an attorney. In the Italian Constitution, the provision concerning due process in criminal trials (Article 111) can be, and has been, interpreted in two opposite ways. For some, it is a norm concerning criminal trials. For others, this norm is the manifestation of a broader principle of procedural fairness. The ICC has raised doubts as to whether the former interpretation is compatible with Article 6 ECHR, as interpreted by the European Court of Human Rights in *Chambaz*. [26] In a well written preliminary reference (order n. 117 of 2019), it has urged the ECJ to resolve this doubt in a case concerning an offence of insider dealing. AG Pikamae has consistently argued that the solution must be found in the light of the distinction between natural and legal persons, in the sense that the former may be able to invoke the right

[24] See M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. L. Rev. 5 (2009).

[25] On the issues involved with the *Taricco II* saga, there is a burgeoning literature, which is not always perspicuous. The final word has been said by the ECJ in its ruling on Case C-42/17, *MAS*, where it disagreed with the opinion issued by AG Bot, and by the ICC in its ruling n. 115/2018. On the previous approach of the ICC, see O. Pollicino, *From Partial to Full Dialogue with Luxembourg: the Last Cooperative Step of the Italian Constitutional Court*, 10 Eur. Const. L. Rev. 143 (2014). For an analysis of the behaviour of some constitutional courts that affirm their role of ultimate defenders of national identities, see B. Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause* 32 Ybk. Eur. L. 263 (2012).

[26] ECtHR, judgment of 5 April 2012, *Chambaz v. Switzerland* (application n. 116603/04).

to remain silent.[27] The Court has followed the opinion of the AG. It has looked at the provisions of EU legislation in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the EU. It has also referred to Article 6 ECHR, on the assumption that, even though the Convention has not been formally incorporated into the EU legal order, the fundamental rights it recognizes and protects constitute general principles of EU law.[28] Once the Court has held that Articles 47 and 48 include, among other things, the right to silence of natural persons who are charged, it follows from this that punitive penalties could not be lawfully imposed. As the Court has made clear, natural persons cannot be penalized if they exercise the right to remain silent. [29]

4. The constitutionalization of the choice for Europe

A) Variety of national patterns

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

In other countries, such as France, Portugal and Spain, for the first time after many years both political and social forces engaged in a national discussion on the benefits of European integration. Ratification processes, necessary for the new Treaty to enter into force, allowed institutions to consider and resolve several

[27] Opinion of AG Pikamae, delivered on 27 October 2020, Case C-481/19, *DB v Consob*.
[28] ECJ, judgment of 2 February 2021, Case C-481/19, *DB v Consob*, § 36.
[29] ECJ, judgment of 2 February 2021, Case C-481/19, *DB v Consob*, § 58.

issues concerning, among other things, two central concepts of public law such as sovereignty and citizenship, in light of the norms establishing the European Monetary Union (EMU) and the citizenship of the EU. The French case is particularly significant in this respect, because the President of the Republic referred the Maastricht Treaty to the Constitutional Council which, for the first time, affirmed that the Constitution was an obstacle to the ratification of an international agreement. The obstacle was, in particular, the provision of the preamble to the 1946 Constitution (incorporated by the 1958 preamble), according to which "France may consent to limitations of sovereignty necessary for the organization and defense of the peace". The French provision was, therefore, very similar to Article 11 of the Italian Constitution. Political institutions deemed that the decision taken by the Constitutional Council could be implemented by way of a minimal revision of the Constitution and thus added a new provision authorizing the "transfers of competence necessary for the establishment of the EMU" and another concerning citizens. But, after the Danish referendum, the decision was taken to have a referendum in France, too. [30]

B) Constitutional reforms (2001-2012)

Things went differently in Italy, notwithstanding the requests of a referendum allowing the people to express its view about European integration, the usual ratification procedure was used, based on parliamentary approval. But the Maastricht Treaty, with all the complex structure of the EU and the technical contents concerning monetary policy, government budgets, did not receive much attention by most leading politicians, let alone the electorate. While the latter was generally, if not generically, for "Europe", a new party, the Northern League, was against it, an aspect to which we will return in the final part of this article.

Meanwhile, it must be observed that a constitutional theory seeking to accommodate the principles of national sovereignty with the realities of European integration and its new structures and processes remained to be constructed. This task was fulfilled, in part, during the following century, in two stages. The first was the

[30] A. Stone, *Ratifying "Maastricht": France Debates European Union*, 11 French Politics & Society, 70 (1993).

constitutional reform of 2001. The second stage was the constitutional reform that took place in 2012, after the economic and financial crisis that hit Europe.

The constitutional reform of 2001 concerned the relationship between central government and regional and local authorities. When such relationship was transformed, with an unprecedented reinforcement of the regions' legislative powers, it was thought that it was necessary to clarify that not only national legislation, but also regional legislation had to respect EU law. Article 117 of the Constitution was thus amended by a provision according to which any piece of legislation adopted by both the State and the regions must respect the Constitution, the legal order of the Community and international agreements. There was much discussion, in academic circles, as to whether such provision simply confirmed the limits stemming from those three types of legal sources or intended to establish a hierarchy between them.

The debate has not ended, but at least two things are enough clear. The first is that Article 117 supplements Article in ensuring an adequate constitutional foundation for European integration. The other thing is which is clear is that, according to the ICC, only EU law has direct effects and supremacy on national law, with the consequence that administrative and ordinary judges do not apply national provisions in contrast with it, while their contrast with the ECHR must be judged by the ICC itself. Some years after the reform, not only has the ICC confirmed that it is still Article 11 which ensures a "secure foundation" to the law of the EU, but it has also affirmed that the new text of Article 117 deals with only one of the several aspects raised by the relationship between the EU and the national legal order, [31] thus emphasizing continuity.

C) Adjusting to the EMU

For a better understanding of the other constitutional reform, some words should be said about EMU and the crisis that burst out in 2009. When the Treaty of Maastricht had been negotiated its supporters had emphasized the benefits of a single currency (among other things, it would serve to dilute the influence of the German central bank) and enhanced monetary stability. As

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

these issues had a highly technical nature, they received scant attention from the public. Article 11 of the Constitution, seen in conjunction with another clause protecting "saving in all its forms" (Article 47), was regarded as an adequate basis for the transfer of monetary policy to the EU.

Things were very different twenty years later, when the European debt crisis burst out. Even though Italy was not one of the countries that were unable to refinance their government debt and needed external support, the reiteration of financial orthodoxy by EU institutions and the conditions imposed on Greece, which were perceived as socially harsh and unjust, brought to a split between the traditional parties, on the one hand, and the parties and movements that openly criticized the EU, this time backed by some economists, lawyers and political scientists. [32] The parliamentary majority supported all the measures taken by at European level, including the creation of the European Stability Mechanism and the stipulation of the Fiscal Compact. It also supported a constitutional reform. But political opposition to the EMU grew to an unprecedented level, which explains the partial shift of the country's strategy which will be discussed in the next part of this paper.

Meanwhile, it is appropriate to illustrate the new constitutional reform. It concerned various aspect of public budgeting. Article 81 of the Constitution, concerning the State budget, was amended in two ways: a controversial balanced budget provision was introduced and recourse to borrowing was limited, coherently with the prohibition of excessive government deficits.[33] Article 97, too, was amended by a new provision establishing that public administrations must ensure that their budgets are balanced and that public debt be sustainable "in accordance with European Union law". Finally, under Article 119 (1), the obligation to have balanced budgets was imposed on regional and local authorities, with a view to "ensuring compliance with the economic and financial constraints imposed under European Union legislation". Moreover, under Article 119 (7) such public authorities may have recourse to borrowing only as a means of funding investments,

[32] An interesting example is Giandomenico Majone, a political scientist who had previously analyzed the regulatory strategy of the EU: see his book *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?* (2014).

[33] For further analysis, see P. Giarda, *Balanced Budget in the 2012 Constitutional Reform*, 126 Rivista internazionale di studi sociali, 335 (2018).

with the exclusion of current expenditure. The first two provisions are not without difficulties, because the notion of budget cycle used by Article 81 is unclear and the notion of debt sustainability laid down by Article 97 is somewhat enigmatic. It is not easy, therefore, to understand whether and how those provisions could be enforced by the ICC. However, considered as a whole, the new constitutional provisions had two goals; that is, repeating, for emphasis or clarity, Italy's adhesion to the principles upon which EMU is based and, obtaining acceptance of the public debt by the financial markets.

Retrospectively, it can be said that both goals have been achieved, but not without costs. The tighter limits imposed on government budgets and public debt are, to say the least, "not welcome in the political arena", because they limit the political options for those who govern. [34] Moreover, the discontents view them as a sort of Trojan horse for further limitations of sovereignty, which would imply huge economic and social costs.

D) National identity and European integration

Thus far, our analysis has shown three things. First, the choice for Europe has been, together with NATO membership, the fundamental political decision of Italy after 1945. Second, after the initial reluctance of the ICC to recognize the principles of direct effect and supremacy, there has been a significant development in its jurisprudence, with the acceptance of the theory of integration between national legal systems and that of the EC/EU. Third, after many years the Constitution has been amended. The relationship between political decisions and constitutional jurisprudence may thus be considered.

Comparatively, there is more than one way in which politicians can delegate authority to courts. To illustrate, consider the following three institutional settings. In a system based on the principle of parliamentary sovereignty, the courts can be conceptualized as agents of parliamentary institutions. Thus, for example, in the United Kingdom their function has been often described as supervising the executive in order to ensure the respect of parliamentary will, as expressed in codes and legislation. If something goes wrong, in the sense that the courts discharge their powers and duties in ways that are unforeseen and unwanted by

[34] Giarda, *Balanced Budget in the 2012 Constitutional Reform* (fn 18), 346.

elected politicians, Parliament can overrule undesirable judicial decisions by amending legislation, using normal procedures. In a system based on a written and rigid constitution, which may only be amended though special procedures (thus, for example, in Italy, either a two-thirds majority or a popular referendum are required), courts have greater authority, because they can invalidate legislation. They can be viewed as trustee courts, in the sense that they exercise responsibility with respect to the Constitution. However, they are not unbound, because elected politicians may change constitutional provisions, even though this may be costly, in terms of political and social acceptance. Finally, in a treaty-based regime, a court – such as the European Court of Justice and the European Court of Human Rights – enjoys an even greater discretion, because the rules of which it has to ensure the respect can only be amended by a unanimous decision of the contracting states. [35]

As observed earlier, the Italian legal system falls within the second institutional settings. For elected politicians – the principal, to borrow the terminology of economics and political science – it would have been very hard, if not virtually impossible, to rediscuss the principles defined by the ECJ, due to the requirement of unanimity established by EU treaties. It would, however, been easier for elected politicians to contest the solutions envisaged by the ICC, for example by making a reference to national constitutional identity or some other generic concept. However, they did not do so. Quite the contrary, both the constitutional reforms of 2001 and 2012 have further strengthened the ties with the EU, in the former case in the context of a redefinition of the role played by central and regional authorities, respectively, in the latter case with a view to reinforcing the protection of the public interest to sound financial management.

Two concluding remarks look appropriate. First, there is not only a clearly discernible "path" in the jurisprudence of the ICC concerning EC/EU law, but, more generally, a gradual transformation of the relationship between the two legal systems. Even though there is not a clause like the *Europa-artikel* of the German Basic Law, there is an increasing integration between the national legal order and that of the EU. Second, it can be said that

[35] For further discussion of these institutional settings, see A. Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 Indiana J. Glob. Leg. St. 1 (2009).

the Italian constitutional identity has been gradually shaped in close connection with the European construction,[36] with a strong support of the political and cultural *élite*.[37] This point of general interest can be confirmed – *a contrario* - by a quick look at the different state of things which concerns international law, after the controversial judgment issued by the ICC in the German liability case.

E) Counter-limits in another field: international law

Before examining this case, it may be helpful to briefly consider the foundations of the present law and the options at our disposal when thinking about the judicial remedies against the states. All legal systems have to make some fundamental choices about justiciability in actions involving the state and its officers. Within national systems of public law, an option that is diminishingly used is to have a general cloak of immunity. The opposite option is the acceptance of a general principle of justiciability, though the courts act as gatekeepers and thus allow remedies for state action affecting certain interests, but not for others. From the viewpoint of international law, however, states enjoy immunity from suits before domestic courts.[38]

Such privilege was at the heart of the complex dispute that arose at the beginning of the new century. In short, some individuals brought claims against Germany before Italian ordinary courts, seeking reparation for injuries caused by violations of international humanitarian law committed by German occupying forces during the II World War, including those against Italian nationals. Germany instituted proceedings against Italy, requesting the ICJ to declare that Italy had failed to respect the jurisdictional immunity which Germany enjoys. Greece, too, requested permission to intervene in the case. The ICJ endorsed this

[36] For a similar viewpoint, see M. Cartabia and N. Lupo, *The Constitution of Italy*, cit., 27 (analyzing the relationship between the Italian Constitution and the 'composite' European Constitution); F. Fabbrini and O. Pollicino, *Constitutional identity in Italy : European integration as the fulfilment of the Constitution*, EUI working paper n. 2017/06 (with a focus on values).

[37] In addition to the scholarship that will be considered in the next part of this article, see S. Micossi and G.L. Tosato, *L'Unione europea nel XXI secolo. «Nel dubbio, per l'Europa»* (2008) and A. Padoa Schioppa *et al.*, *L'Europa nonostante tutto* (2019).

[38] A. Peters, E. Lagrange, S. Oeter and C. Tomuschat (eds.), *Immunities in the Age of Global Constitutionalism* (2015).

claim. But eventually the Court found that Italy had violated Germany's immunity by declaring enforceable the civil judgments rendered by the courts, [39] although three judges dissented from the majority; that is, judges Cançado Trindade, Yusuf and Gaja (ad hoc judge sitting in this case).

Two years later the ICC was requested by domestic courts to reconsider such immunity in the light of the constitutional guarantee of access to a court.[40] Its starting point was that such guarantee was an absolute one and could not, therefore, be derogated. While the ICJ focused on jurisdictional liability, the ICC focused on another issue; that is, the conflict between the norm of international custom, as interpreted by the ICJ, and the norms and principles of the Italian Constitution, more precisely the "essential principles of the state order", including the principles of protection of fundamental human rights. The threshold has thus been set out is a very high one, because the ICC has reiterated its general doctrine of '*controlimiti*' (counter-limits) to the limitations of national sovereignty stemming not only from generally recognized norms of international law, but also from EU law and the treaties agreed with the Holy Seat.

The conclusion that follows from this doctrine is that, if a fundamental right is infringed, then its role is ensure its protection, whatever the consequences. [41] In practical terms, for the ICC, the national constitution trumps international law.[42] While the judges of the ICJ could, and did, express their dissent, this could not be done by the members of the ICC, because the domestic constitutional framework does not provide for dissenting opinions. However, we now know that the ICC was divided. A former member of the Court has subsequently said that he was even ready to resign from the Court, in order not to be associated with such a "terrible decision", a form of "legal protectionism".[43] Others have pointed out the frequent temptation of constitutional courts'

[39] ICJ, judgment of 3 February 2012, *Jurisdictional immunities of the State* (Germany v. Italy; Greece intervening), § 100.
[40] Article 24 of the Italian Constitution.
[41] ICC, judgment n. 238 of 2013. available in English on the Court's website: https://www.cortecostituzionale.it/
documenti/download/doc/recent_judgments/S238_2013_en.pdf.
[42] C. Tomuschat, *The National Constitution Trumps International Law*, 6 It. J. Public L. 189 (2014).
[43] A. Stone Sweet & G. della Cananea, *Interview with justice Sabino Cassese*, German Law Journal, 2022.

presidents to leave a sort of legacy.[44] What is questionable is that the ICC has failed to give weight not only to international customary norms, but also to the role of the ICJ in ensuring that disputes among nations are peacefully resolved. It is even more questionable because it takes for granted that, when Article 24 of the Italian Constitution refers to access to the courts for the protection of individual rights, it only refers to domestic courts, as distinct from international courts.

5. The legal and political ramifications of closer integration

While the path illustrated thus far is acknowledged by Italian legal scholarship, some of its legal and political ramifications are controversial. The structure of the argument is as follows. It begins with the distinction between facts and interpretations. Then there is discussion of three interpretations that are not only distinct, but also mutually exclusive, in the sense that each excludes or precludes the other. There is, first, the most authoritative interpretation, according to which, after seven decades of European integration, the Italian State is no longer what it was initially. There is, second, the opposite interpretation, which emphasizes the traditional conception of sovereignty. There is still another interpretation, which is based on the distinction between the *acquis communautaire* and new policies.

A) Variety of interpretations

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

In its general terms, the first distinction is relatively easy to understand. Put simply, facts concern what actually happened and can be proven to be effective or real. Whether or not a certain constitutional provision exists, is a matter of fact, not of opinion. Thus, for example, when the Victorian constitutionalist Albert

[44] O. Pollicino, *From Academia to the (Constitutional) Bench: An Heterodox Reading of the Last Move (Decision No. 238/2014) of the Italian Constitutional Court on the Relationship between Constitution and International (Customary) Law*, in *Diritto pubblico comparato ed europeo*, 2015, IV.

Venn Dicey criticized French *droit administratif*, among other things, on grounds that a certain constitutional provision excluded the liability of the servants of the State, he referred to a provision that no longer existed. More generally, an interpretation or opinion that is not based on facts or even prescinds from them is less likely to be taken into account by participants in a discussion. That said, a statement about a fact is not examined only to ascertain whether it refers to something true or real.[45] Their importance or relevance must also be considered. In other words, facts do not just exist, because we must ascribe meaning to them. The importance of context, therefore, must not be neglected.[46]

From a public law perspective, a further caveat is apposite. The relevance and significance of all elements of fact is partly determined by essentially contested concepts;[47] that is concepts which involve widespread agreement, such as democracy and fairness. EU treaties provide an instructing example. According to Article 4 TEU, the Union is founded upon the values of democracy, liberty and respect for the rule of law and fundamental rights. It can be argued that a positive norm is insufficient to determine the content of concepts such as democracy and the rule of law and that their meaning is functionally related to the practice in which these values are sustained. Not surprisingly, therefore, there is variety of opinion about what these values mean, and that of the new members of the EU may differ from the opinion of the founders.[48] However, this argument must be qualified, for more than one reason. First, even before the Maastricht treaty there was a shared

[45] For an excellent analysis of this issue of method, see M. Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press, 1994) 50 (suggesting that, since knowledge is relational, truth or falsity may not be determined outside the social context).

[46] Loughlin, *Public Law and Political Theory* (fn 37), 50 (suggesting that, since knowledge is relational, truth or falsity may not be determined outside the social context).

[47] W.B. Gallis, *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society 167 (1955).

[48] For further discussion, see A. von Bogdandy, *Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States*, in A. von Bogdandy *et al.* (eds.), *Defending Checks and Balances in EU Member States*, Berlin, Springer, 2021, 73. For a different approach, which views the enforcement of values as a political task, rather than legal, and thus calls for dialogue, see O. Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, 11 Hague Journal on the Rule of Law 133 (2019).

understanding between the founders of the Community, in the sense that only liberal democracies could become part of it. Second, as Article 4 existed before the more recent enlargement, the agreement that then existed about certain ramifications of those values – for example, judicial independence - cannot be neglected. Third, Article 4 does not simply acknowledge that those values are shared by the Member States, but also requires the latter to respect them. [49] This is confirmed, among other things, by Article 7 TEU. It is in this sense that the soundness of an interpretative proposition concerning the values upon which the Union is founded must necessarily take into account facts and uses.

B) A new type of State

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

The concept of sovereignty that is embodied in the Italian Constitution, so the argument goes, is no longer that elaborated by Bodin, and Hobbes at the birth of the modern State, let alone that which is taken for granted by the realist school of international relations. For true, in Bodin we find two distinct conceptions of sovereignty, one of which is analytical, because it distinguishes the various sovereign powers (including making laws, declaring war, appointing the highest magistrates), while the other is synthetical, because it views sovereignty as a totality.[50] In Hobbes, instead, it is the latter conception that predominates. Coherently with this conception, many realists have argued that, from the perspective of

[49] See S. Mangiameli, *The Constitutional Sovereignty of Member States and European Constraints: the Difficult Path to European Integration*, in S. Mangiameli (ed.), *The Consequences of the Crisis on European Integration and on the Member States. The European Governance between Lisbon and the Fiscal Compact*, Berlin, Springer, 2017, 198 (discussing the "homogeneity clause").

[50] J. Bodin, *Les six livres de la République* (1576).

international law, what matters is whether internationally agreed norms are enforceable through sanctions or military threats. In contrast with this established school of thought, Abraham Chayes and others have argued that, in the modern world, sanctions and military threats are extraordinary measures. Most of the times, States comply with the norms they have agreed simply because, in a complex and interdependent world, the normal way exercise power is to be members of regional or global legal regimes and be able to influence their decisions. Within such regimes, compliance is assured by other means, including incentives, pressures, and judicial or quasi-judicial mechanisms.[51] This is a managerial and pragmatic approach which explains much of the world we live in. Article 11 of the Italian Constitution perfectly fits within this conceptual framework. As observed earlier, at its roots there is the idea that "a shared sovereignty is not only conceivable and admissible, but also necessary in light of the goals – peace and justice among the peoples of the world – that the State, no State alone, could achieve. Membership of international organizations is thus the only legitimate way to pursue constitutional purposes.

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

There is a rich literature that explores the rationale of EU integration and there are contending theories, including neo-functionalism, intergovernmentalism, and multi-level governance. In the Italian context, both the first and the last theory have gained consent. The central tenet of neo-functionalism, the concept of spill-over, that is to say the idea that integration in one area creates

[51] A. Chayes and A.H. Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (1995).

pressures for integration in other areas, has been appealing to political leaders, seeking to explain why the Communities would secure peace and prosperity, both of paramount importance for a country that adopted a Constitution which refused war as an instrument to solve disputes (Article 11) and that literally had to be reconstructed after 1945. It has been appealing, moreover, to both policymakers and scholars seeking to explain why the single market has been supplemented by common policies, including the single currency. Multi-level governance, with its emphasis on the existence of multiple levels – subnational, national and supranational – of government where authority and policymaking are shared, and thus on interconnection rather than hierarchy, is also appealing to policymakers seeking either to achieve goals that would be precluded without joint action (for example, the protection of the environment or trade agreements with the most powerful States) or to alleviate the costs of unpopular decisions,[52] in the logic "Europe requires us to do so". It has an undeniable appeal, too, for constitutional lawyers who wish to shed light on the role that subnational institutions can play, as well as on judicial dialogues.[53]

Considered together, shared sovereignty and European integration support a theory of the State that emphasizes the dimension of change. The Republican Constitution is regarded, at the same time, as the key element of discontinuity with regard to the previous political regime and as the source of a new order, where might and power are limited by both democracy and law. The emphasis put on limitations of sovereignty explains the diffusion of the idea of "external bounds". Three examples can be instructive. State aids to enterprises, a traditional instrument of administrative action, are not prohibited by the treaties, but are legitimate only if they do not jeopardise competition and it is much preferable that monitoring and surveillance are discharged by a supranational institution, the Commission. Similarly, the

[52] P. Craig, *Integration, Democracy and Legitimacy*, Oxford Legal Research Paper n. 47/2011, 16.
See also J.H.H. Weiler, *The political and legal culture of European integration: an exploratory essay*, *I-CON*, vol. 9, 2011, issues No 3-4, pp. 678-694 (for a discussion of the legal culture of European integration).

[53] See, for example, D. Tega, *The Italian Constitutional Court in its Context. A Narrative* (2021). For a critique of 'multilevel constitutionalism', see G. della Cananea, *Is European Constitutionalism Really "Multilevel"?*, 70 Heidelberg Journal of International Law 284 (2010).

prohibition of excessive government deficits is viewed as an instrument aiming at preventing a government failure, as distinct from the market failures which are cured by public regulation. The fact that it is now the national Constitution that requires public authorities not to run excessive deficits and to ensure debt sustainability confirms that these limits must not be viewed as external impositions but, rather, as requisites of sound governance. Discretion is not excluded, but it is limited by technical considerations and subject to impartial controls, in particular by judges.

Clearly, in contrast with the popular understanding of democracy and input legitimacy, this school of thought emphasizes output legitimacy and the rule of law. It advocates political deference to bureaucratic expertise, judicial wisdom and external bounds deriving from membership of regional organizations as features of the modern State. It argues that a new type of State has emerged, one that is involved in an evolving integration; that is, a State that has renounced to the full and indivisible sovereignty. [54]

C) The defence of national identity and democracy

What has just been said about the first school of thought can be helpful for understanding the other one, though this cannot be simplistically viewed as the opposite. Its main concerns are the preservation of national identity and the defence of democracy in the only area where it has flourished historically; that is, the State. It must be said at the outset, however, that these concerns are not simply distinct, but are also emphasized in the context of different visions of public law and the State. They thus deserve autonomous treatment.

After the Treaty of Maastricht, several national politicians and scholars have highlighted the Union's duty to respect Member States' "national identities, inherent in their fundamental structures, political and constitutional" (Article 4 (1) TEU).[55] In the

[54] S. Cassese, *The Global Polity*, Sevilla, Global Law Press, 2012, 81; A. Manzella, *Lo Stato "comunitario"* (2003), now in *Quaderno europeo. Dall'euro all'eurocrisi* (2005) 35.

[55] See A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identities in the Lisbon Treaty*, 48 Common Mkt. L. Rev. 1 (2011) (suggesting that the identity clause reshapes the relationship between the Union and its States).

Italian context, however, few have referred to national identity in connection with an organicist vision of the social body. Rather, some constitutional lawyers have expressed concern for the threats to which individual rights and equality are exposed. The core of the argument rests on the uniqueness of the framework for civil and social rights, including those relating to health and social security, that has been laid down by the Italian Constitution. There is no particular role in this list for individual freedom, adherence to the rule of law, government transparency, and so forth. These considerations, which are central to the liberal view of the State, are viewed as formalistic features. Hence the radical critique of the limits that stem from membership of EMU, such as the prohibition of excessive government deficits and the primary concern for monetary stability. The negative consequences that follow from these "neo-liberal" policy choices are said to affect, in particular, the protection of health. Some commentators criticize the asymmetry between the economic and the social with these words:

"Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition, and which EU rules constrain or foreclose. If those are now required, there are only two ways to harness them: either by aligning EMU to democratic and social ends or by unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level". [56]

The concern for democracy, which is other pillar of these theories, is expressed in more than one way. While the founders of the European Community saw it as a club of liberal democracies that was the best way to secure peace and prosperity, and legitimacy was thus conceived in terms of outcomes, these commentators assert that the notion of democracy is attenuated or limited. The notion of democracy is directed at the deficit that is said to exist within the EU. While other scholars identify the democratic deficit in the "disjunction between power and electoral accountability" and express concern as to "executive dominance", [57]

[56] M. Dani, E. Chiti et al., *"It's the political economy…!" A moment of truth for the eurozone and the EU*, 19 International Journal of Constitutional Law 309 (2021).
[57] See, however, Moravscik's defence of the EU from the charge of democratic deficit: *In defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 40 Journal of Common Market Studies 603 (2022).

these commentators explicitly address the tension between the technocratic nature of the CEU and its legitimacy. Their main thrust is the mixture of bureaucratic overreach and lack of transparency and accountability, which brings the Union away from the perspective of democratic constitutionalism. [58]

The differences between the first and the second school of thought are profound and can give rise to diverse consequences. Detailed analysis would require an extended chapter in itself. What follows is, perforce an outline of some issues, some of which are more abstract, while others are very concrete.

Consider, first, what is perhaps the crucial point from the perspective of both constitutional law and legal theory; that is, the conception of sovereignty. The phrase "limitations of sovereignty" that is employed by Article 11 of the Constitution can be interpreted in the sense that it allows the transfer of functions and powers to the EU. However, it can be interpreted in a radically different manner; that is, in the sense that EU institutions can be allowed only to exercise functions and powers which still belong to the State. The latter interpretation's underlying assumption is that sovereignty is inalienable similarly to what was argued in France at the epoch of the referendum on the Treaty of Maastricht. The consequence that follows from this is that sovereignty – traditionally intended - has not withered away, but is still at the heart of the constitutional settlement. Thus, for example, the supporters of this theory concede that the powers related to monetary policy are exercised by the ECB *de jure*, not *de facto*, and therefore the acts of the ECB constitute binding determinations of the matters that come within their remit. But, they argue, those powers can, legally, return to the State, to which they belong. This interpretation can be appealing theoretically, but it is not immune from practical difficulties. There is nothing to indicate that these powers can be brought back to the State, if it wishes to remain within EMU. The only possible option is, therefore, a withdrawal from the EU. This is not a threat but, legally, an inevitable consequence. [59]

[58] For further analysis, see E. Chiti & P.G. Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis,* 50 Common Market Law review 683 (2013).

[59] See Chiti & Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis* (fn 49), 707 (criticizing the "politics of fear").

Consider, now, the ratification of EC/EU treaties. For almost three quarters of a century, the legitimacy to the EC/EU has been based on the mechanisms of representative democracy. As a result, governmental negotiation must be followed by parliamentary ratification of the treaties. Factually, Parliament always ratified the treaties and, thus, sanctioned the transfer of functions and powers to Europe. However, the discontents argue that this method is acceptable only from the viewpoint of "formal" legality. What lacks, for them, is a "substantive" legitimacy, because the people should be allowed to express its voice through referendum, as happened in France and the UK. This theory is even more problematic than the previous one, because Article 75 of the Italian Constitution explicitly prohibits referendum concerning international treaties, such as those upon which the EU is founded. [60] The discontents thus reply that nothing prohibits a consultative referendum. In this case, there is a precedent, the consultative referendum held in 1989 on the project to give a constituent mandate to the European Parliament. But there is nothing to suggest that a mechanism that is not provided by the Constitution could be converted into something that the Constitution explicitly prohibits. Nor is it easy to see how Article 75 could be amended, because the very first clause of the Constitution provides that "sovereignty belongs to the people, which exercises with the forms and limits established by the Constitution". In other words, the choice for representative democracy cannot be overturned.

This perhaps explains why some constitutional lawyers recently posed a provocative challenge to the established jurisprudence of the ICC. As observed earlier, this jurisprudence has recognized the increasing integration between the national legal order and that of the EU. The critics contend that the Court should not hesitate to acknowledge the existence of a conflict between EU policies and the rights protected by the Constitution, which are said to be part of the national identity in the sense of Article 4 (1) TFEU. In light of the settled case law of the ICC, it is perfectly legitimate for these constitutional lawyers to pose searching questions concerning the legitimacy of the obligations that stem from EU membership. Moreover, it should not be forgotten that a similar line of reasoning has been used by the ICC

[60] For further discussion, see C. Martinelli, *Referendum in Italy and Ireland: Two Different Ideas of Direct Democracy and Popular Sovereignty*, Diritto pubblico comparato ed europeo on line, 1555 (2022).

in the German liability case, with the consequence that the national Constitution – as interpreted by the ICC – trumped international law. It is by the same token perfectly fitting to subject this analysis to close critical scrutiny, for example by raising the issue concerning liability, because within the EU there is a centralized system of enforcement, which is based on the Commission and the ECJ, as opposed to the international system. This is more especially so given that most of the cases in which the discontents complain about limitations imposed on social rights derive, in fact, from national constitutional provisions, such as those concerning financial balance and debt sustainability. This applies also to a variant to the previous argument; that is, some decisions taken by the institutions of the EU, such as the Stability and Growth Pact (SGP), have gone beyond the treaties and, consequently, unduly limit the exercise of power by national institutions. [61] There are excellent arguments to criticize the choice made with the SGP on grounds of policy. But, in light of Article 126 TFEU, which entrust EU institutions with the power to modify the standards for national budgetary policies, it is hard to see how the SGP can be regarded as extra-legal. A distinct issue is whether Italy should agree to further limitations of its budgetary or financial sovereignty. This issue will be discussed in the next paragraph.

D) *Acquis* v. further integration? The new ESM Treaty

Thus far, we have discussed two groups of theories that concern the European construction, as it developed in the last seven decades or so, in other words, the *acquis*. It is time to consider the perspective of further integration. In this respect, for analytical purposes, two opposite visions of Europe can be delineated. For our purposes here, it suffices to characterize each of them in the briefest terms. There is, first, the vision that is centred on the idea, or perhaps the ideal, of an "ever closer union among the peoples of Europe", to borrow the famous words used by the Treaty of Rome's preamble. The other vision of Europe postulates a greatly enlarged union with less intense ties, a sort of 'club' where the members agree only on few fundamental objectives and principles and do not necessarily wish to change the current state of things. My intent

[61] G. Guarino, *Un saggio di "verità" sull'Europa e sull'euro*, Rivista italiana per le scienze giuridiche 211 (2013) (for the assertion that a sort of "golpe" took place).

here is not to discuss these visions in their entirety, because my views have already been expressed elsewhere. [62] My intent is, rather, to show that the differences between these visions of Europe are so profound that the practical consequences will differ depending upon the framework within which they are considered.

This applies, in particular, to the financial mechanisms existing within and outside the EMU. In this respect, the first school of thought tends to assume that the criteria governing the conduct of monetary policy are based on the "nature of the things". For others, bureaucratic expertise and unrepresentative bodies such as central banks make decisions but are unaccountable. They criticize, a fortiori, the European Stability Mechanism (ESM), which is a body created by a separate international treaty and which lies outside the institutional framework of the EU, which exacerbates problems of complexity and opacity. Diverse opinions characterize the debate concerning the ratification of the new treaty which modifies the ESM. As Italy is the only Member State which has not yet ratified the treaty, this is of importance for the whole EMU. The discussion proceeds in the following manner. As a first step, economic arguments in favour and against the new treaty will be illustrated. Next, a specific legal issue will be considered. Finally, the political ramifications of this debate will be discussed.

There are two main arguments supporting the ratification of the new treaty on the ESM. There is, first, a general argument concerning the banking union. The heart of the argument is that the "banking union remains incomplete, without its cross-border deposit insurance pillar supported by a credible fiscal backstop". [63] As a result of this, the EMU remains exposed to financial shocks, which may threaten its systemic stability, with the further consequence of making bailouts necessary, but in contrast with existing rules. It is readily apparent that the theory of integration which underlies this argument is neo-functionalism, with its strong emphasis on spill over; that is, the idea that integration in one area creates pressures for further integration in the same area or in other

[62] See G. della Cananea, *Differentiated Integration in Europe After Brexit: A Legal Analysis*, in I. Pernice & A.M. Guerra Martins (eds.), *Brexit and the Future of EU Politics. A Constitutional Law Perspective* (2019), 45.

[63] S. Micossi & F. Pierce, *Overcoming the gridlock in EMU decision-making*, CEPS policy insights No 2020/3, March 2020, 1, available at http://aei.pitt.edu/102604/1/PI2020-03_Overcoming-the-gridlock-in-EMU-decision-making.pdf.

areas, and that this would secure prosperity, in the guise of stability. This is even more evident when considering that the next step should be supporting the ESM by way of a public guarantee against sovereign default; that is, a Eurobond. The general argument is supplemented by another that concerns Italy. The size of its public debt is huge [64] and the exposure of some national banks is non negligeable. Hence the necessity to prevent banking crises that may have a negative impact on sovereign debt. In sum, if the reform of the ESM fits well with the EMU members' needs, it does more so with the needs of Italy.

The opposite theory contests both arguments. It contests the advantages that would derive from the reform of the treaty establishing the ESM, because this would transform the ESM from a "manager of sovereign debt into an institution for the prevention, control and management of such crises". [65] More concretely, the ESM would be entrusted with the power to decide whether a country which takes part in EMU and that must seek for external financial support, should restructure its government debt. This risk, it is added, is particularly serious for Italy, precisely in light of its high public debt, which would be exposed to heavy instability. In brief, "the EMU Member State that has the most to lose is Italy". [66]

The contribution of economic science to a better understanding of the advantages and disadvantages, when a government is faced with a difficult strategic decision, may not be underestimated. In a legal analysis it is extremely hard – if not impossible – to weigh up the pros and the cons of such a decision. However, in some respect legal analysis may clear the ground from possible misunderstandings. This is the case of the proposition according to which, if the new treaty is ratified and the ESM is entrusted with new powers and thus makes an agreement with an EMU country, where certain conditions are included, those conditions may be unilaterally and retroactively modified by the ESM board, against the will of the State concerned. This proposition is not legally or politically tenable. It is not legally tenable because

[64] It is "colossal", for Micossi and Pierce, *Overcoming the gridlock in EMU decision-making* (fn 56), 1.

[65] M. Messori, *The flexibility game is not worth the new ESM*, LUISS working paper n. 15/2019, October 2019, available at https://sep.luiss.it/publication-research/publications/m-messori-the-flexibility-game-is-not-worth-the-new-esm/.

[66] Messori, *The flexibility game is not worth the new ESM* (fn 58), 12.

unilateral and retroactive modifications of a bilateral agreement are excluded. It is politically untenable, because there is no reason why a board should have a privileged status against a country that is signatory to a treaty.

That said, the political spectrum is more divided that it ever was. The majority that supported the government led by Mario Draghi was so divided that they decided not to decide about the the new ESM Treaty. The new government, which is based on a Euro-sceptic majority, initially affirmed that it was necessary to wait until Germany's Constitutional Court adopted its ruling on the action brought against the ratification of the new treaty. That ruling was adopted at the end of 2022. The decision with which the NEW government is confronted is a twofold one. On the one hand, they have to come to grips with the question concerning the whole EMU, which now has twenty members; that is, whether the new treaty must be ratified, after which every country may decide whether to use the instruments that it provides. On the other hand, they must clarify whether they intend to avail of the loans at the conditions provided by the new treaty. Logically and legally, the two issues are clearly distinct, and the stakes concerning the former are higher than those regarding the latter, because for the first time Italy might be viewed as obstructing further integration. However, politically the distinction tends to blur in the opinion of the political leaders according to whom approving the ESM changes would "end our national sovereignty". Moreover, the government might be tempted to threat not to initiate the ratification process in order to negotiate on other dossiers, such as the reform of the SGP. This would be, in itself, a change, because it would show the government's intent to operate so as to maximize its (perceived) individual interest regardless of the perspective of an ever closer union between the peoples of Europe, [67] and might run counter the maintenance of the Italy's political position in the core of the EU. Like in Borges' "garden of forking paths", cyclical repetition is not disjointed from differently spreading trajectories. [68]

[67] For a discussion that catches well the assumptions upon which this vision of the EU is based, see
C. Harlow, *A Community of Interests? Making the Most of European Law*, 55 Modern L. Rev. 331 (1992).
[68] JL Borges, *The Garden of Forking Paths*, English translation (1948).

6. Conclusion

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