SCUOLA DI DOTTORATO
UNIVERSITÀ DEGLI STUDI DI MILANO-BICOCCA

Università degli Studi di Milano-Bicocca
Union University Law School Belgrade

PhD program in Legal Science – Cycle XXXVI

Double Degree

Curriculum Law and Pluralism

FRAMING CONSTITUTIONAL IDENTITY IN PLURAL SOCIETIES: THE CASE OF BOSNIA AND HERZEGOVINA AND THE EUROPEAN UNION

Surname: Skrebo Name: Edin

Registration number: 875562

Supervisor: Prof. Stefania Ninatti

Co-supervisor: Prof. Marko Božić

Coordinator: Prof. Antonello Tancredi

ACADEMIC YEAR 2023/2024

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INTRODUCTION

The issue of identity places at the centre of its analysis the profile of the essential and invariable elements of a constitution, which make it unique because it is endowed with certain intrinsic and unrepeatable characteristics compared to other constitutions or legal systems. By following this reading, it is possible to understand how identity can represent the "soul" of a constitution, that is, its deepest essence, and how this very identity also determines its existential dimension. It may seem a hazard to juxtapose ideas such as the *soul* and *existentialism* with a legal concept such as the constitution, but the question raised by the syntagma of constitutional identity in the field of constitutional law seems to precisely have these characteristics. Indeed, among the multiple interpretations that the concept of identity can take, it can be read as the identity of the constitutional text itself and, at the relational level, as the set of those elements and structures that make a constitution unique and different from the others.[1]

An *ante litteram* interpretation of this kind was proposed as early as the III century B.C. by the Greek philosopher Aristotle, who posed the question of what element could define the identity of a *polis*, understood as its essence, as the element that made it unique and different from other cities. In answering this question in Book III of his work *Politics*, Aristotle stated that it was certainly not the walls or other external elements of a city that established its identity, but that it should be sought in its political structures, outlined by the constitution.[2] For this reason, the philosopher argued that «[…] the state is a partnership, and is a partnership of citizens in a constitution, when the form of government changes, and became different, then it may be supposed that the state is no longer the same […]».[3]

Certainly, the way in which the philosopher and the legal culture of ancient Greece understood the term "constitution" is quite different from the way in which scholars today, centuries later, understand it. Nevertheless, it is interesting to note how Aristotle was the first to link the dimension of identity to the concept of constitution, recognizing precisely in the elements that define a constitution the identity of an entire political community. This element, which we would like to mention at the opening in order to set out points that will be developed in greater detail in this work, deserves attention because it provides an important indication of the research perspective that this

[1] This observation is contained in the work of Jacobsohn and Rosenfeld on constitutional identity. Jacobsohn, G. J., *Constitutional Identity*, Harvard University Press, Cambridge, 2010; Rosenfeld, M., *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community*, Routledge, London, 2010.

[2] Aristotle, *Politics*, translated by Jowett, B., Modern Library, New York, 1943, Book III, para. 3.

[3] *Ibidem*.

study intends to adopt. In particular in the part of the thesis devoted to the analysis of the case studies, constitutional identity will be examined as it appears in the constitutions of the systems studied. This initial consideration makes it possible to anticipate that, within the broad debate on the subject of the bearer of constitutional identity,[4] this work will be situated in the furrow of that doctrine which sees the subject of identity as not only closely linked to the text of the constitution but also to its interpretation by constitutional judges.[5]

But if we want to take the argument back to periods closer to our own, the "modern" identity dimension of the constitution can be traced to the origins of constitutionalism itself. That is, as legal systems were confronted with the need for structured governance, early constitutional developments laid the groundwork for the identification of key principles and values. From the Glorious Revolution to the American Constitution and the French Revolution, the first seeds of constitutional identity were sown in the fertile soil of legal and political experimentation and have grown to the present day. Indeed, from the reflections on identity of Carl Schmitt, who devoted an entire chapter to the theme of *Verfassungsidentität*[6] in his work, entitled *The Doctrine of the Constitution*, to the present day, the topic of constitutional identity has become a veritable *topos* of legal literature dealing with public law, especially in the last two decades.[7]

As far as the European continent is concerned, interest in the issue of identity has developed specifically in connection with the relationship between the legal system of the European Union (EU) and the Member States. Indeed, since the adoption of the Treaty of Lisbon and the subsequent amendments to the founding treaties, the issue of identity has developed at the level of national constitutional law as a core of principles and rights that cannot be modified through the constitutional revision process or, with regard to international and supranational systems, as a limit to integration

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[4] Rosenfeld, M., *Deconstructing Constitutional Identity in Light of the Turn to Populism*, in Hirschl, R., Roznai, Y. (eds.), *Deciphering the Genome of Constitutionalism: Essays on Constitutional Identity in Honor of Gary Jacobsohn*, *Cardozo Legal Studies Research Paper*, No. 659, 3.

[5] Gebey, B. A., *The Identity of the Constitutional Subject and the Construction of Constitutional Identity: Lessons from Africa*, in *Faculty of Laws University College London Law Research Paper*, No. 2, 2023, 1-25; King, J., *The Democratic Case for a Written Constitution*, in *Current Legal Problems*; Vol. 72, No. 1, 2019, 1-36; Rosenfeld, M., *Constitutional Identity*, in Rosenfeld, M., Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 758.

[6] Schmitt, C., *Dottrina della costituzione*, Giuffrè, Milano, 1984, 153-155.

[7] In fact, there are numerous studies devoted to the issue of constitutional identity, as well as countless meetings in the form of seminars, conferences and workshops devoted to this specific topic. See Pkhrikyan, A., *The problem of protection of national constitutional identity in integration processes*, in *Bratislava Law Review*, Vol. 3, No. 1, 2019, 182–87; Belov, M., *The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States*, in *Perspectives on Federalism*, Vol. 9, No. 2, 2017, 72-97; Cloots, E., *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal* Philosophy, Vol. 45, No. 2, 2016, 82–98; Trenz, H. J., *In Search of the Popular Subject: Identity Formation, Constitution-making and the Democratic Consolidation of the EU*, in *European Review*, Vol. 18, No. 1, 2010, 93–115; De Búrca, G., *The EU constitution: in search of Europe's international identity*, Europa Law Publishing, Groningen, 2005 *passim*.

and participation in other legal systems.[8] With specific reference to the process of European integration, it is paradoxical (perhaps) that the more national systems have extended their openness clauses to international and supranational law, the more a veritable doctrine of constitutional identity has developed, aimed in various forms and ways at balancing or, in certain cases, containing the effects of such participation.[9] The debate on the relationship between the constitutional system of the nation states and the order of the European Union has had the merit of increasing scholarly interest in the subject of constitutional identity. Similarly, by broadening its geographical horizons, the topic of constitutional identity has also conquered the American debate, one need only think of the contemporary works of Jacobsohn and Rosenfeld.[10]

Despite the amount of written material available and the extensive doctrinal debate that the subject of identity has generated, the concept of constitutional identity remains essentially a contested and difficult concept to define, and no common and shared doctrinal view of the boundaries of this topic has been reached.[11] The reason for this lack of definition is mainly due to the fact that constitutional identity presents itself as an ontologically fluid, even contradictory concept, and as such can be interpreted according to multiple parameters.[12] However, even in the face of such a multiplicity of views, and with regard to the ontological fluidity of the concept itself, it can broadly be said that there is a minimal and widely accepted definition of constitutional identity even in doctrine.

Indeed, the concept of constitutional identity can be broadly defined as the narrow core of values and principles that underlie a constitutional order and define its axiological foundation. Thus, to a first approximation, we could say that constitutional identity is formed in the balancing of constitutional values and principles. The result of this balancing - or «fundamental weighting»[13] - then indicates the specific axiological choice that the system makes at a given moment, and it is this axiological choice that will reveal to us the elements that constitute constitutional identity. If we wish to use a metaphor to fix the concept of identity in a more vivid image, the constitutional order can be

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[8] Ninatti, S., *Identità costituzionale e valori. Note introduttive a margine della giurisprudenza della Corte di giustizia*, in Montanari, L., Cozzi, A. O., Milenković, M., Ristić, I. (eds.), *We, the People of the United Europe. Reflections on the European State of Mind. Atti del Convengno internazionale, Udine 28/29 giugno 2022*, Editoriale Scientifica, Napoli, 2022, 81.

[9] Polimeni, S., *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del "dialogo" tra le Corti*, Editoriale scientifica, Napoli, 2018, 31.

[10] Jacobsohn, G. J., *Constitutional Identity*, 21; Rosenfeld, M., *The Identity of the Constitutional Subject*, 44.

[11] Szente, Z., *Constitutional identity as a normative constitutional concept*, in *Hungarian Journal of Legal Studies*, Vol. 63, No. 1, 2022, 5.

[12] Arnold, R., *L'identità costituzionale: un concetto conflittuale*, in Di Blase, A. (eds.), *Convenzioni sui diritti umani e Corti nazionali*, RomaTrE-Press, Roma, 2014, 149-156; Polimeni, S., *L'identità costituzionale come controlimite*, in *Ianus*, No. 15, 2017, 50.

[13] Weiler, J. H. H., *La Costituzione dell'Europa*, il Mulino, Bologna, 2003, 181.

likened to a tapestry in which the concept of constitutional identity is the thread that weaves together and binds together the various elements that make up the fundamental structure of a system based on certain fundamental values and principles.

This conception of constitutional identity entails a further consideration, according to which a constitution is not simply or exclusively a static legal document, but also the living expression of an axiological approach and of the aspirations that flow from the values and principles underpinning that text. Constitutional identity is inextricably linked to the cultural and historical fabric of a system. Indeed, the drafting of a constitution often reflects the experiences, struggles and idiosyncrasies of a state's constitutional history. But while constitutions are written documents, their interpretation is far from static. The evolution of constitutional identity involves a dynamic process of interpretation, adaptation, and reinterpretation. For this reason, this work will pay particular attention to analysing the key judicial decisions and academic debates that have contributed to the fluid understanding of constitutional identity, highlighting the role of the courts in shaping, and reshaping the contours of identity over time.[14]

Another crucial aspect of constitutional identity lies in the dynamic nature of constitutional texts, which undergo evolution through the amendment process. Whether responding to societal shifts, technological progress, or geopolitical changes, constitutional amendments offer a valuable perspective for exploring how societies navigate the adaptation of their constitutions in the context of the ever-changing socio-historical environment.[15]

However, discussions on constitutional identity must acknowledge the contemporary era characterized by globalization, presenting both challenges and opportunities for this concept. Central to this discourse is how the constitution addresses the tensions between national identity and international norms, while considering the profound impact of globalization on the autonomy of constitutional identities and the emergence of transnational constitutional principles.[16]

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[14] Pfersmann, O., Troper, M., *Dibattito sulla teoria realista dell'interpretazione*, Editoriale Scientifica, Napoli, 2007, 33-41.

[15] See Raj, P., Noorani, M. S., *Constitutional Amendment: A Critical Analysis*, in *International Journal of Legal Science and Innovation*, Vol. 2, No. 3, 2020, 83-115; Ginsburg, T., Melton, J., *Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty*, in *I-CON*, Vol. 13, No. 3, 2015, 686-713; NeJaime, D., *Constitutional Change, Courts, and Social Movements*, in *Michigan Law Review*, Vol. 111, No. 6, 2013, 877-902; Siegel, R. B., *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, in *California Law Review*, Vol. 94, No. 5, 2006, 1321-1419; Lutz, D., *Toward a Theory of Constitutional Amendment*, in *American Political Science Review*, Vol. 88, No. 2, 1994, 355 ff.

[16] See Ngoc Son, B., *Globalization of Constitutional Identity*, in *Washington International Law Journal*, Vol. 26, No. 3, 2017, 463-535; Caramaschi, O., *Il costituzionalismo globale: teorie e prospettive*, Giappichelli, Milano, 2017, *passim*; Ku, J., Yoo, J., *Globalization and the Constitution*, in Ku, J., Yoo, J. (eds.), *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*, Oxford University Press, Oxford, 2012, 1-18; Siino, G. A., *L'Unione europea e le sfide della globalizzazione: tra questione identitaria e deficit democratico*, in Andò, B., Vecchio, F. (eds.), *Costituzione, globalizzazione e tradizione giuridica europea*, CEDAM, Padova, 2012, 67-76; Venter, F., *Globalization of*

In this complex context, how constitutional identity can be a force for unity in plural and often highly fragmented societies is the question that this thesis seeks to address: how can diversity and inclusion intertwine in the fabric of a particular constitutional identity? More specifically, the thesis will examine the constitutional mechanisms that operate in the delicate balance between the recognition of distinct identities within a society and the promotion of a shared sense of belonging through the constitution.

Considering this concise exploration of the components through which the concept of identity can be scrutinized, it can be argued that the study of constitutional identity unveils a multifaceted and evolving concept integral to the institutional and social framework of any community organized under a constitutional order. From its historical foundations to its contemporary manifestations, constitutional identity mirrors the continuous dialogue between a society's past, present, and future, intricately interwoven with the evolution of its constitution.

This concept, in a nutshell, can be defined as the idea that subjects with different interests, personal and religious beliefs and lifestyles can peacefully coexist and participate in the social and political life of a country, while recognising their differences.[17] To put this issue in a different light, it can be generally said that pluralism refers to the existence of different and competing elements within a society, system or organisation. More specifically, in the context of constitutional law, pluralism refers to the recognition and accommodation of different values, beliefs, cultures and interests within a legal and political framework. Thus, a pluralist approach recognises that a society is made up of different groups with different views and values and seeks to ensure that this diversity is considered in the formulation and implementation of laws and policies.[18]

Constitutional Law through comparative Constitution-making, in *Verfassung und Recht in Übersee*, Vol. 41, No. 1, 2008, 16-31; Spadaro, A., *Gli effetti costituzionali della c.d. "globalizzazione". Storia di una "metamorfosi": dalla sovranità dei popoli nazionali alla sovranità dell'opinione pubblica (e della finanza) internazionali*, in *Politica del diritto*, No. 3, 1998, 441-466.

[17] See Callaway, H. G., *The Meaning of Pluralism*, in James, W. (eds.), *A Pluralistic Universe. A New Reading*, Cambridge Scholars Press, Cambridge, 2008, 1-43; Jaklić, K., *Constitutional Pluralism in the EU*, Oxford University Press, Oxford, 2014, 69-101; Pavel, C. E., *Constitutionalism and Pluralism: Two Models of International Law*, in Pavel, C. E. (eds.), *Law Beyond the State: Dynamic Coordination, State Consent, and Binding International Law*, Oxford Academic, Oxford, 2021, 140 ff. In Federalist Paper No. 10 of 1787, James Madison argued in favour of pluralism. In particular, he addressed the fear that factionalism and its inherent political struggles would fatally fracture the new American Republic: only by allowing many competing factions to participate equally in government could this disastrous outcome be avoided. Although he never used this term, Madison had essentially defined pluralism.

[18] Yumatle, C., *Pluralism*, in Gibbons, M. T., *The Encyclopedia of Political Thought*, 2015, John Wiley & Sons, Hoboken, 2015; Grillo, R. D., *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective*, Oxford University Press, Oxford, 1998, 216-236 *passim*; Chandhoke, N., *The Advantages of Plural Societies*, in Chandhoke, N., *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir*, Oxford University Press, Oxford, 2012, 126-157.

Pluralism has become an element that characterises many contemporary societies and has a twofold effect on them. On the one hand, pluralism tends to enrich contemporary societies; on the other hand, it is also a destabilising factor, since the juxtaposition of different world views and conceptions can potentially create fissures, which often have constitutional repercussions.

Contemporary societies grapple with the complexities of migratory phenomena, where the sudden influx of diversity frequently exceeds the capacity of state institutions to manage effectively.[19] Consequently, the question arises: how can the tensions stemming from identity conflicts be reconciled within a legal framework, such as the constitutional one, which inherently embraces pluralism? This challenge becomes increasingly urgent in modern legal systems, where the peaceful coexistence of diverse ethnic, cultural, religious, and political identities within a unified framework is paramount.

The aim of this study is not to provide a definitive answer to these questions, which would be extremely difficult to achieve because of the need to reconcile and evaluate extremely broad and transversal knowledge in a context that is still evolving. Precisely because of the difficulty of such research, we chose to test the theoretical part of the thesis with two case studies: namely identifying and defining constitutional identity within two systems characterised by a highly pluralistic social context, namely the constitutional order of Bosnia and Herzegovina and the European Union. The rationale behind selecting these two legal systems for study is rooted in the intricate and multifaceted nature of their social structures. In this way, it is possible to study the issue of constitutional identity within an order that has at its base a plurality of social identities that can find a point of synthesis within the constitutional order itself. It is precisely because of this social plurality, and since the responses developed by the constitutional orders in question, that the study of these two orders is particularly interesting.

The other element that needs to be explained here, to dispel any doubts on the subject, concerns the reason why two such different legal systems were examined. In fact, Bosnia and Herzegovina is a state - among other things, it is not a member of the European Union - while the EU is a supranational organisation. The reason for such a choice lies not only in the already mentioned particularly evident plural framework that characterises these two systems, but also in their peculiarities in terms of constitutional arrangements. Indeed, as will be seen in more detail in chapter II, the constitution of Bosnia and Herzegovina is an integral part of an international agreement, and

[19] See De Haas, H., *et al.*, *International Migration: Trends, Determinants, and Policy Effects*, in *Population and Development Review*, Vol. 45, No. 4, 2019, 885-922; De la Rica, S., Glitz, A., Ortega, F. (eds.), *Immigration in Europe: Trends, Policies and Empirical Evidence*, in *Discussion Paper*, No. 7778, 2013, 3-77; Franchino, F., *Perspectives on European Immigration Policies*, in *European Union Politics*, Vol. 10, No. 3, 2009, 403-420; Bigo, D., *Immigration controls and free movement in Europe*, in *International Review of the Red Cross*, Vol. 91, No. 875, 2009, 579-591; Stalker, P., *Migration Trends and Migration Policy in Europe*, in *International Migration*, Vol. 40, No. 5, 2002, 151-178.

the constituent power was exercised not within the state but at the international level. This particular way in which the constitution was created also had an important impact on its identity. Indeed, as a constitution produced through a heterodirected constitution-making process, the search for an identity dimension proper to the constitutional order of Bosnia and Herzegovina is made more interesting by the intersection of the international and national dimensions.

As far as the European Union is concerned, it does not have a constitution in the formal sense, but, as a large part of the doctrine argues,[20] it adopts a non-codified, stratified and composite constitution, composed of the text of the Treaties, the European Convention on Human Rights and a large body of case law of the Court of Justice, to which we can also add the concept of *Verfassungsverbund* (constitutional union) and multilevel constitutionalism.[21] These aspects inevitably made the analysis of constitutional identity more interesting in two legal systems which, due to their pluralism, were significantly influenced during the constitutional generative moment. Indeed, the reconstruction of the constitutional identity of the two systems can also be a moment of reflection on constitutional solutions in relation to particularly fragmented societies and historical contexts. In particular, the study of the topic of identity applied to these two legal systems allows, in our opinion, to explore a dimension that has remained under the radar compared to most of the writings and studies carried out so far. In fact, with this research we would like to try to abandon the idea of identity as an element of identification of a homogeneous group around certain values that are in opposition to the values of other groups. Instead, we will try to show that the issue of constitutional

[20] See, *ex plurimis*, Fossum, J. E., Menéndez, A. J., *La peculiare costituzione dell'Unione europea*, Firenze University Press, Firenze, 2012, 99-248; Barber, N. W., Cahill, M., Ekins, R. (eds.), *The Rise and Fall of the European Constitution*, Bloomsbury, London, 2019, 21-34; Beširević, V., *Ustav bez* demosa: *zašto Evropska Unija (ipak) ima Ustav*, in *Pravni Zapisi*, No. 1, 2013, 58-61; Pech, L., *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in *Hague Journal on the Rule of Law*, Vol. 14, 2022, 107-138; Cartabia, M., *"Unita nella diversità": il rapport tra la Costituzione euroopea e le Costituzioni nazionali*, in *Diritto dell'Unione europea*, Vol. 10, No. 3, 2005, 1-31.

[21] The term *Multilevel constitutionalism* was introduced by the German jurist Ingolf Pernice in 1998, as a reaction to the famous ruling of the *Bundesverfassungsgericht* on the Maastricht Treaty (so-called "Maastricht-Urteil"), in which the expression *Verfassungsverbund* was used for the first time. See Pernice, I., *Der Europäische Verfassungsverbund. Ausgewählte Schriften zur verfassungstheoretischen Begründung und Entwicklung der Europäischen Union*, Nomos, Baden-Baden, 2020, 147-195. The theory of multilevel constitutionalism does not merely recognise the *sui generis* nature of the supranational order that has been formed in Europe or the sometimes-disruptive impact of Union law on national constitutional structures; rather, it proposes to conceptualise the process of European integration in terms of constitutional law. The aim, in particular, is to explain how the emergence in the European context of an additional "level of order", of a constitutional nature, can be reconciled with the indisputable persistence of national constitutional orders. Absolutely central, in the articulation of the fundamental propositions of such a theory, is the identification of a foundation of a democratic nature at the basis of European public power. See *ex plurimis* Pernice, I., *Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and Multilevel Constitutionalism*, in Riedel, E. (eds.), *German Reports on Public Law Presented to the XV International Congress on Comparative Law*, Baden-Baden, Nomos, 1998, 40-66; Walker, N., *Multilevel Constitutionalism: Looking Beyond the German Debate*, in Tuori, K., Sankari, S. (eds.), *The Many Constitutions of Europe*, Farnham, Ashgate, 2010, 143; Pernice. I. Mayer, F. C., *La Costituzione integrata dell'Europa*, in Zagrebelsky, G. (eds.), *Diritti e Costituzione nell'Unione europea*, Roma, Laterza, 2003, 47 ff.

identity can be understood as a "catalysing" element of diversity, namely as the expression of a narrow core of values that are widely shared even in plural societies and that are capable of providing the necessary legal basis for peaceful coexistence and thus of bringing together the different "souls" of a society

Another element that we would like to point out here, in order to avoid any doubt, is that the present work does not consider the systems of Bosnia and Herzegovina and the European Union for the purpose of comparison, but as emblematic cases - due to the pluralism that distinguishes them and the particular process of constitutional formation - to be analysed with a view to searching for and identifying legal elements on the basis of which to trace the constitutional identity of the two systems taken as a model, as mentioned above, due to their particular constitutional structure and, above all, due to the plural societies that distinguish these two systems.

More specifically, the research question on which this thesis is based is how, and according to what criteria, the constitutional identity of a constitutional order can be identified in a highly plural society and whose constitution is the result of a particular adoption procedure that cannot be traced back to a domestic procedure but is profoundly determined by international law.

This work seeks to address this question by commencing, in the initial part of the thesis, from a theoretical and doctrinal standpoint. Specifically, it aims to explore, from a public law perspective, the interconnected elements of constitution, identity, and pluralism, and the intricate relationships that emerge among them. This will provide the necessary input for the analysis of the two case studies. The second part of the thesis, on the other hand, is devoted entirely to the reconstruction of constitutional identity within the order of Bosnia and Herzegovina and the European Union, as case studies that can provide important insights into the role of identity in societies characterised by strong pluralism and a particularly complex constitutional history. Moreover, an interesting question that this study will explore concerns the actual role of constitutional identity in relation to the element of diversity. In particular, through a study, first theoretical and then practical, namely as it emerges from the analysis of the two case studies, an attempt will be made to understand whether identity is an element that tends to divide or whether, as will be shown below, it is rather an element that succeeds in recomposing the diversity present in a system into unity through the establishment of general principles and values - almost meta-principles - which, by virtue of their universality at the axiological level, succeed in constituting a catalysing element within a system.

To achieve this, the present work builds on a first part devoted to the theme of the interaction between constitutional identity and plural society within the theoretical and doctrinal debate. In other words, the first part of the thesis aims to frame the two issues that constitute the fundamental elements of this study, namely constitutional identity, and pluralism. Specifically, although limited to the

aspects that are of most interest to the present research, an effort will be made to provide minimal coordinates about the concept of the constitution and, in particular, on the role that identity plays within the constitution. To this end, an endeavour will be made to focus this analysis on the elements that can potentially influence the definition and identification of a system's constitutional identity.

Specifically, the study will be developed by following the "constitutional dynamics" that each system possesses. In fact, particular attention will be paid to the genetic moment of the constitutional text, namely how the exercise of constituent power can influence the system of designating and identifying the values and principles that form the basis of identity. It then seeks to understand how and to what extent positive law defines identity, and then turns to the role that constitutional interpretation plays in defining this identity.

Another element that constitutes an important moment within the "constitutional dynamic" is that of the constitutional revision procedure. In fact, both explicitly, through the provision of special revision procedures or the existence of "eternity clauses", and implicitly, with substantial limits on revision, it is possible to understand what the true axiological core of a constitutional text is and what, as such, potentially defines its identity. This search for "constitutional dynamics" allows us, at a theoretical and doctrinal level, to formulate the guidelines according to which, in the second part of the thesis, the theme of constitutional identity will be explored and defined in the two systems taken as case studies.

In this context, it is appropriate to present the research methodology that will be used to reconstruct constitutional identity within the constitutional orders chosen as case studies. Specifically, in the two chapters devoted to Bosnia and Herzegovina and the European Union, respectively, the present research will try to reconstruct constitutional identity along three basic lines. First, by tracing the generative moment of the two systems, the aim is to highlight the values and principles that the constituents wanted to establish as the axiological basis of the system and thus as the hard core of the constitution, which constitutes an important indication of constitutional identity. Second, the analysis shifts to positive law and to the values and principles that the constitution explicitly enshrines in it. Thus, in identifying constitutional identity, the revision process and its limits will also be examined, as it allows us to understand which values and principles cannot be changed at the risk of altering the spirit of the existing order. Finally, in this reconstruction of the identity of Bosnia and Herzegovina and the European Union, the jurisprudence of the Constitutional Court of the former and the Court of Justice of the latter will also be used. Indeed, the interpretation that these courts give to constitutional texts and their values may constitute privileged points of view for understanding their identity.

In this way, it will attempt to show how constitutional identity moves from an imaginary and constructed element to a concrete component within the two legal systems, and with what

implications in relation to a plural and, to some extent, complex society. As mentioned in this introduction, this research will use the tools available within the constitutional system to reconstruct its constitutional identity.

CHAPTER I

THE CONSTITUTIONAL IDENTITY IN PLURAL SOCIETY

SUMMARY: 1.1. THE SHAPES OF CONSTITUTION: INTRODUCTORY REMARKS; 1.2. THE DIFFERENT CONCEPTIONS OF THE CONSTITUTION: A LOOK AT THE DOCTRINE THROUGH THE HISTORY; 1.3. THE GENERATIVE MOMENT OF THE CONSTITUTION; 1.3.1. THE CAUSES WHICH LED TO HETRODIRECTED CONSTITUTIONS; 1.3.2. THE LEGITIMACY OF HETERODIRECTED CONSTITUTIONS; 1.3.3. THE HETERODIRECTED CONSTITUTIONS: CATEGORISING THE CONCEPT THROUGH SOME HISTORICAL CASES; 1.4. THE PECULIAR CONSTITUTION OF EUROPEAN UNION; 1.5. THE DYNAMICS OF CONSTITUTIONS; 1.6. CONSTITUTIONAL IDENTITY IN DOCTRINE: A GLIMPSE; 1.7. CONSTITUTION AND IDENTITY: WHERE DOES CONSTITUTIONAL IDENTITY COME FROM; 1.7.1. THE SUBJECT OF CONSTITUTIONAL IDENTITY; 1.7.2. THE SOURCE OF CONSTITUTIONAL IDENTITY; 1.7.3. THE METHOD OF IDENTIFYING THE ELEMENTS OF CONSTITUTIONAL IDENTITY; 1.8. CONSTITUTIONAL IDENTITY AS PLURALISM; 1.9. CONSTITUTIONAL IDENTITY IN PLURAL SOCIETY: CONCLUDING REMARKS

1.1. THE SHAPES OF CONSTITUTION: INTRODUCTORY REMARKS

Within the doctrinal debate, the notion of constitution is still a subject of lively discussion due to the multiplicity of meanings that this term can take on: legal as well as historical, sociological, political, and philosophical. For this reason, the concept constitution is often described as polysemantic or polysense, that is, endowed with multiple meanings.[1] Such an idea is confirmed by an analysis of the etymological root of the noun in question. In fact, the term constitution comes from the Latin word *constitutio*, which in turn comes from the verb *constituēre*, meaning «to establish with completeness».[2] Thus, if the Latin adage that *nomina sunt consequentia rerum* applies, we can say that the term constitution has two values at once: that of the act of establishing the general rules of an order, but also that of the receptacle that gathers together the supreme rules of an order, or, in other words, the primary source of an order.

This philological description of constitution shows that it is a polysemic concept, which contains legal, philosophical, historical, political, and sociological elements, and from which it follows that the constitution represents both the act of establishing general rules that are superior to others, and the text itself that contains these rules. However, these conclusions are not exhaustive for a study that analyses the subject of the constitution from a purely legal point of view, and for this reason the following pages will "unpack" the concept of the constitution, break it down into its

[1] Morbidelli, G., Volpi, M., Cerina Ferroni, G., *Diritto costituzionale comparato*, Giappichelli, Torino, 2020, 37-38; Morbidelli, G., Pegoraro, L., Rinella, A., Volpi, M., *Diritto pubblico comparato*, Giappichelli, Milano, 2016, 117-118.

[2] "*Costituzione*" in Vocabolario Treccani; Bartole, S., *Costituzione (Dottrine generali e diritto costituzionale)*, in *Digesto delle discipline pubblicistiche*, IV, 1989; Barbera, A. (eds.), *Le basi filosofiche del costituzionalismo*, Laterza, Bari, 1997; Jellinek, G., *La dottrina generale del diritto dello Stato*, Giuffrè, Milano, 1949, *passim*.

essential elements, to describe its content and, above all, to highlight the elements that are particularly important for identifying and describing its identity.

For these reasons, this first part of chapter will be divided into three main sections: the first will be devoted to reconstructing the main legal concepts that legal doctrine has formulated about the constitution; the second will be focused on the generative moment of the constitution, that is, the modalities and procedures by which constitutional texts can be adopted; and finally, the third will be devoted to the dynamics of the constitution, in particular the procedures and limits of its revision, protection and the elements that determine its functioning in general. We warn from the outset that the reconstruction of the concept of the constitution that we propose to follow here will not be able to cover the entire doctrinal debate on the subject but will focus only on a select set of theories that we consider useful for the purposes of this research.

The decision to divide the analysis of the concept of the constitution into three parts according to the aforementioned scansion is explained by the fact that - as will be seen below - the central elements for the reconstruction and identification of constitutional identity can be found precisely on the basis of the notion attributed to the constitution, in relation to the way in which constituent power is exercised and the choices made by the constituents, or on the basis of constitutional dynamics, namely in relation to those elements that regulate its application, interpretation and revision procedure. Moreover, this need to "unpack" the constitutional theme is explained because it facilitates the understanding of its concept and the institutions that characterise it through a series of historical and logical transitions that have progressively defined the current conception of the constitution.

The concept of constitution that will be considered in this text is the legal notion developed by the doctrine of public law,[3] according to which the constitution is identified with the order of the State and, more precisely, constitutes the primary and superior norm on which the State order is based.[4] Thus, if we consider the constitution from a purely legal point of view, we can take up Kelsen's definition of it, according to which «the constitution consists of those rules which regulate the creation

[3] It is worth mentioning, even if only as an indication, that there are other concepts of the constitution. There is, for example, the deontological conception of the constitution, according to which the constitutional text lays down principles that serve as an ideal model for the organisation of the state; or the sociological-phenomenological conception, which abandons the conception of the constitution as an ideal document in favour of a real conception of the state, namely how it is structured. Finally, to simplify further, there is the political concept, which in some respects anticipates certain legal features, according to which the constitution represents an organisation based on certain principles of political direction.

[4] See, *ex plurimis*, De Vergottini, G., *Diritto costituzionale comparato*, CEDAM, Padova, 2019, 223-224; Mortati, C., *Costituzione (dottrine generali)*, in *Enciclopedia del diritto*, Vol. XI, Giuffrè, Milano, 1962, 139-232; Crisafulli, V., *Costituzione*, in *Enciclopedia del Novecento*, Vol. 1, Istituto dell'Enciclopedia, 1970; Modugno, F., *Il concetto di costituzione*, in *Aspetti e tendenze del diritto costituzionale. Scritti in onore di C. Mortati*, Vol. I, Giuffrè, Milano, 1977, 197-240; ID., *Costituzione (Teoria generale)*, in *Enciclopedia giuridica Treccani*, Vol. XI, 1989, 7; Bartole, S., *Costituzione (Dottrine generali e diritto costituzionale)*, in *Digesto delle discipline giuspubblicistiche*, Vol. IV, 1989; Barbera, A. (eds.), *Le basi filosofiche del costituzionalismo*, Laterza, Bari, 1997, 21-32.

of general legal norms and, in particular, the creation of formal laws».[5] Moreover, Kelsen again adds that the constitution is the fundamental norm itself (*Grundnorm*), which is the original principle of the legal system in so far as it constitutes the norm for the production of other norms.[6]

According to a so-called comprehensive approach, the constitution coincides with a synthesis of the organisational structure of a social group and the organisation of the state community.[7] In the light of this approach, the constitution assumes the role of the discipline of the supreme constituted power, which is reflected in the elements to which the constitution recognises the ownership of power. However, such a theory, which establishes that the constitution coincides with the organisation of the constituted power, leads to an overly general statement, because it is not easy to identify comprehensively what the scope of the subject matter regulated by constitutional legislation actually is.[8] Hence, to ascertain the true essence of a constitution, it becomes imperative to delve into the specific contents of individual constitutions. In particular, the elements of a constitution can be found in its formalised part, namely what is known as the formal constitution, as well as in the texts that can make up a substantive constitution or in constitutional conventions, or again in tacit amendments. This is because the analysis of a constitution cannot be limited to the formal part alone, as this would leave out important and fundamental aspects related to living law.

The constitution, understood in a material and formal sense, introduces another element into the consideration of this concept, namely the importance of the historical evolution of the state form in relation to the constitution. Indeed, it was only with the advent of constitutionalism that the formalisation of the constitution became the very essence of the social and political order. In other words, the constitution began to regulate the form of government in such a way as to recognise and guarantee the rights of citizens in relation to political power and the subjects who exercise it. Moreover, this guarantee came from a kind of self-limitation of political power itself, based on the principle of the separation of powers.[9] In this respect, it is important to recall Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, which explicitly states that «a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all».[10] According to the theory of constitutionalism, therefore, the constitution had to be not only a formalised document, but also contain within it the guaranteeing elements of the

[5] Kelsen, H., *Teoria generale del diritto e dello stato*, Edizioni di comunità, Ivrea, 1952, 126.

[6] *Ivi*, 131.

[7] Romano, S., *L'ordinamento giuridico*, Quodlibet, Macerata, 2018, 21.

[8] De Vergottini, G., *Diritto costituzionale*, 224.

[9] Caruso, C., Valentini, C. (eds.), *Grammatica del costituzionalismo*, il Mulino, Bologna, 2021, 12-27; Matteucci, N., *Organizzazione del potere e libertà. Storia del costituzionalismo moderno*, il Mulino, Bologna, 2016, 191; Fioravanti, M., *Costituzionalismo. A storia, le teorie, i testi*, Carocci Editore, Roma, 2018, 13-67; ID., *Costituzionalismo. Percorsi della storia e tendenze attuali*, Laterza, Roma, 2009; 12-21.

[10] Art. 16 of Declaration of the Rights of Man and of Citizen.

protection of rights and the separation of powers.[11] Interestingly, according to the theory of constitutionalism, the idea of a constitution is of an absolute nature, since in the absence of the two elements provided for in Article 16 of the Declaration of 1789, the existence of a constitution is denied.[12] Such an idea, at least as far as continental Europe is concerned, is closely linked to the historical period that gave rise to this theory. In particular, reference is made to the French Revolution of 1789, which marked a clear break between the previous feudal society, based on privileges and the social system later called the *ancien régime*, and the new bourgeois and liberal society, which had used the document of the formal constitution to establish a new power structure based on the guarantee of freedoms and the limitation of political power to allow the development and emancipation of this new class.[13] With the French Revolution, the constitution became an organic project for the reconstruction of society as a whole, and not just of institutional structures and powers: for the first time, the constitution was defined as the result of the exercise of a superior and potentially unlimited power, the *pouvoir constituant*, usually exercised by assemblies or constitutional conventions.[14] It is worth remembering, however, that even during what historians refer to as the Glorious Revolution of the 1688-89, certain institutions had already developed in England that would later be taken up by theorists of constitutionalism.[15] In particular, it was through parliamentary debate and the struggles between the sovereign and Parliament that concepts such as parliament sovereignty, the separation of powers, the limits of royal power and, as early as the Middle Ages, the protection of liberties against the exercise of arbitrary power by the monarch, were developed in England. The Revolution of the Thirteen American Colonies in 1783 and the subsequent adoption of the Constitution in 1788 were also fundamental in the development of ideas of constitutionalism.[16]

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[11] For an overview of the transition from modern to contemporary constitutionalism see McIlwain, C. H., *Costituzionalismo antico e moderno*, il Mulino, Bologna, 1990, 21 ff.

[12] Matteucci, N., *Costituzionalismo*, in Bobbio, N., Matteucci, N., Pasquino, G. (eds.), *Dizionario di politica*, UTET, Torino, 2004, 201-212; Matteucci, N., *Organizzazione del potere e libertà*, 119 ff; Morrone, A., *Costituzione*, in Caruso, C., Valentini, C. (eds.), *Grammatica del costituzionalismo*, il Mulino, Bologna, 2021, 27-45.

[13] Ghisalberti, C., *Costituzione (premessa storica)*, in *Enciclopedia del diritto*, Vol. XI, Giuffrè, Milano, 1962, 138 ff.

[14] Rebuffa, G., *Costituzioni e costituzionalismi*, Giappichelli, Torino, 2009, 31-57; Matteucci, N., *Lo Stato moderno: lessico e percorsi*, il Mulino, Bologna, 1992, 21-55; Compagna, L., *Gli opposti sentieri del costituzionalismo*, il Mulino, Bologna, 1998, 91 ff.; Barberis, M., *Rivoluzione, Costituzione, Progresso*, il Mulino, Bologna, 1998, 61-88; Vile, M. J. C., *Constitutionalism and separation of the Powers*, Calrendon Press, Oxford, 1967, 113-131.

[15] Floridia, G. G., *La costituzione dei moderni, dal medioevo inglese al 1791*, Vol. I, Giappichelli, Torino, 1991, 141 ff.; Maitland, F. W., *The Constitutional History of England*, Cambridge University Press, Cambridge, 1961, 117 ff.; Stubb, W., *Selected Studies and other Illustrations of the English Constitutional History*, Oxford University Press, Oxford, 1905, 166 ff.

[16] See Abbattista, G., *La rivoluzione americana*, Laterza, Roma, 2021, 12-178; Matteucci, N., *La rivoluzione americana: una rivoluzione costituzionale*, il Mulino, Bologna, 1987, 141 ff.; Lutz, D. S., *The Origin of American Constitutionalism*, Louisiana State University Press, Baton Rouge, 1988, 31-114; Ackerman, B., *We the People. Fondations*, Harvard University Press, Harvard, 1991, 21 ff.; Alexander, L., Posteam, G. (eds.), *Constitutionalism. Philosophical Foundations*, Cambridge University Press, Cambridge, 1998, 121-166.

This brief historical *excursus* has made it possible to identify several concepts which will be analysed in greater detail in the remainder of this chapter, but which, above all, anticipate certain elements about constitutional identity. Indeed, the decision to formalise the constitution in a written text, the need to provide for a division of the powers of the State, such as the defence of the freedoms of the individual citizen, or, again, the idea that the constitution is the expression of the exercise of a constituent power, are all elements that will contribute to the search for and definition of the identity underlying the constitutional text. Another element that deserves this historical clarification is the fact that constitutionalism has given rise to various theories about the constitution and its role in society.

This chapter is divided into two macro-areas. The first part examines the development of the concept of the constitution from a legal and historical perspective. This analysis plays an important role in the definition of constitutional identity, as it allows us to see how the element of identity is situated within the broader historical and doctrinal development of the concept of the constitution. Furthermore, the following sections are devoted to the topic of constitutional dynamics, that is, the elements that characterise the life of a constitution, with particular attention to the generative moment of the constitution and the elements that concern the protection of the constitution and the limits of its revision, as these specific aspects contribute significantly to the identification of the elements that define constitutional identity. The second macro-section of this chapter is specifically dedicated to the question of constitutional identity. An attempt will be made to reconstruct this concept based on the main theories that have been formulated. It seeks to highlight certain specific aspects of identity, such as its source and role within the constitutional order and its relationship with the concept of pluralism.

1.2. THE DIFFERENT CONCEPTIONS OF THE CONSTITUTION: A LOOK AT THE DOCTRINE THROUGH THE HISTORY

At the outset, it is worth recalling that the object of legal science itself, the constitution, is also «the most complex and elusive concept [...] in the whole of legal theory».[17] For this reason, the attempt to sketch a genealogy of the concept of the constitution is an undertaking that goes beyond the scope and possibilities of the present work and would require an entire dedicated study. However, it is worthwhile, within the horizon of a better understanding of the present study of the concept of constitutional identity, to reconstruct the doctrinal debate on the concept of the constitution about those aspects concerning the identification of constitutional identity that will be used in the reconstruction in the legal systems of Bosnia and Herzegovina and the European Union. Indeed, the

[17] Ainis, M., *Dizionario costituzionale*, Laterza, Roma, 2007, 122.

analysis of the different conceptions of the term constitution that will be carried out in this section will make it possible, on the one hand, to trace - albeit in a nutshell - historically the evolution of constitutions from the French Revolution, and thus with the advent of the ideas of constitutionalism, to the present day, and, on the other hand, to reconstruct how doctrine has developed its theories on the subject. It should also be noted that the reconstruction of the concept of the constitution that will be undertaken in this section will be limited to the liberal-democratic concept of the constitution.

Such a reconstruction should make it possible to establish certain fundamental elements for understanding the concept of the constitution and, at the same time, to explain why, in the pages and chapters that follow, it has been decided to explore and reconstruct the identity of certain orders within specific parts and elements of the constitution and the constitutional system. For this reason, the pages of this section are devoted to both a historical and doctrinal reconstruction of the concept of the constitution, to highlight the characteristics of the constitutional texts in relation to the period when they were written and, above all, to highlight the answers that legal-publicist doctrine was able to provide to the constitutional questions of its time. Although the specific aspect of doctrinal development cannot be directly linked to the theme of identity, it is nevertheless possible to discern some elements of it: in particular, regarding the philosophical vision underlying the theory defining the constitution. Indeed, it will be seen below that the doctrinal development of the concept of the constitution is always profoundly linked to the historical development and change of the form of the state.

Already in England, with the Glorious Revolution of 1688-89 and later, as mentioned above, with the American Revolution,[18] concepts such as popular sovereignty, separation of powers and protection of rights were coined and developed.[19] In continental Europe, however, it was the French Revolution that established the concept of constituent power as the ultimate expression of the exercise of sovereignty from which the constitutional text derives its origin and legitimacy, and from which, once the constitution has been adopted by an assembly or convention, the cessation of that power and the creation of a constituted power, decided and conditioned by the constitution itself, are derived.[20]

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[18] See Barbera, A., *Le basi filosofiche del costituzionalismo*, Laterza, Roma, 1997, 3-42; Matteucci, N., *La rivoluzione americana*, 141 ff.

[19] McIlwain, C. H., *Constitutionalism and the Changing World (1917-1937)*, Cambridge University Press, Cambridge, 1939, 34 ff.; Wormuth, F. D., *The Origins of Modern (1940)*, Harper, New York, 1949, 112 ff.; Friedrich, C. J., *Constitutional Government and Democracy*, Blaisdell, Boston, 1950, 21-41; Aleinikoff, A., *Constitutional Law in the Age of Balancing*, in *Yale Law Journal*, Vol. 96, 943 ff.; Cervati, A. A., *Per uno studio comparativo del diritto costituzionale*, Giappichelli, Torino, 2009, 110-155.

[20] The legacy of the French experience was concretised in a democratic theory of the constitution, with some very precise consequences: the constitution does not merely shape and limit a pre-existing power, but itself constitutes and establishes public decision-making powers. Thus, by uniting in the social pact, the individuals derive the new political order from themselves, and the constitution thus generated inevitably acquires a character that is in every sense foundational, not merely organisational, of pre-existing political entities. See Dogliani, M., *Il potere costituente*,

Other elements are added: the constitution, to be such, must not only guarantee the principle of the separation of powers, but also enshrine the protection of individual rights. It is for this reason that the post-revolutionary French constitutions and, in particular, the US Constitution define the first nucleus of constitutions of a guaranteeing character. The constitution is thus considered to be an «organic system of legal norms on which the organisation of the constitutional institutions, the complex of their competences, the recognition of the legal sphere of the individual and the relationship between public authority and individual freedom are based».[21]

During the period roughly coinciding with what is known as the Restoration, namely the time following the fall of Napoleon and the restoration of the ruling dynasties before the French Revolution and the Napoleonic conquests, with the Congress of Vienna, the "garantist" conception of the constitution gave way to a more traditionalist view of the fundamental charter. In fact, if the "garantist" conception saw the constitution as an exercise of the will and a precise value content, the "traditionalist" conception, based on the theories of the *ancien régime*, saw the constitution as a traditionally accepted element because it had been stratified over time by customs and traditions that had regulated and disciplined the social organisation of a given territory for centuries.[22] The "traditionalist" view therefore denied that the constitution was the result of an act of will that derived its legitimacy from the exercise of constituent power; rather, the constitution took on the characteristics of a primordial fact in that it was constituted by a nucleus of rules and behaviours handed down by custom without being specifically and explicitly created by will. Later, during the 19th century, monarchical constitutions took the form of *octroyées*, in which the text was granted by the express will of the monarch, usually under pressure from the bourgeois class represented in parliament.[23]

With the emergence of a more liberal conception of the state, the new understanding of the constitution recovered the idea of the constituent will underlying the constitutional text, thus

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Giappichelli, Torino, 1986, 33 ff.; Pombeni, P. (eds.), *Potere costituente e riforme costituzionali*, il Mulino, Bologna, 1999; Negri, A., *Il potere costituente*, Sugarco, Milano, 1992, 21-38; Silvestri, G., *Il potere costituente come problema teorico-giuridico*, in *Studi in onore di Leopoldo Elia*, Vol. II, Giuffrè, Milano, 1999, 1615-1634; Dogliani, M., *Potere costituente e revisione costituzionale*, in *Quaderni costituzionali*, No. 1, 13-16; Rawles, J., *A Theory of Justice*, Harvard University Press, Harvard, 1971, 118-122.

[21] De Vergottini, G., *Diritto costituzionale comparato*, 229.

[22] In this sense, we recall the critical text of Burke, E., *Riflessioni sulla Rivoluzione francese*, Giubilei Regnani, Cesena, 2020, 229-233.

[23] Ridola, P., *Garanzie, diritti e trasformazioni del costituzionalismo*, in *La sapienza. Dipartimento di Scienze Giuridiche*, 2010, 1-17; Orlando, V. E., *Teoria giuridica delle guarentigie della libertà*, in *Biblioteca di scienze politiche*, 1890, 919-927; Lacchè, L., *Le carte ottriate. La teoria dell'*octroi *e le esperienze costituzionali nell'Europa post-rivoluzionaria*, in *Giornale di storia costituzionale*, No. 18, 2009, 229-254; Brunetti, L., *Percorsi del costituzionalismo tra Ottocento e Novecento: le leggi fondamentali della monarchia e della Repubblica italiana*, in *Quaderni costituzionali*, No. 1, 2011, 120-133; Camerlengo, Q., *Lo spazio costituzionale: un inquadramento teorico*, in *Rivista AIC*, No. 3, 2023, 49-76; Bonzo, C. *et al.* (eds.), *Storia del diritto in età contemporanea*, Giappichelli, Torino, 2023, 1-65.

rediscovering the theme of the constitution as an exercise of the will. However, the "constituent will" is no longer sought in the nation, but in the state itself. This gives rise to the theory of the "positivist" conception, according to which the constituent will comes from the state itself, which is prior to the constitution, that is, already pre-constituted, while the constitution is the result of a will - this time of the state and not of the nation - by which the rules governing the institutions of the state and regulating it are established.[24] However, this "positivist" conception tends to consider only the formal datum, namely the text of the constitution, as the rules in force, without considering what has been defined above as the material datum of the constitution. Such a position, in fact, opened a wide debate in the doctrine and led to the overcoming of this "positivist" theory, since it was unable to explain the role played within a system by those constitutional rules that were not explicitly formalised, but which generally assumed a role within the overall life of the constitutional system. Moreover, another issue that this conception could not explain, and which then affected a large part of the doctrinal jurisprudential debate, concerned the explanation of the supreme role of the constitution within the system, namely the basis for explaining the original supreme role of the constitution.[25]

In the wake of the question of the legitimacy of the constitution, the "decisionist" and the "normativist" conceptions have been developed. According to the first theory, developed by Schmitt, the concept of a constitution must be divided into the "substantive", as a decision of a political nature taken by the holder of constituent power, and the "formal", namely the formalised text of a constitution. According to this theory, therefore, the part of the constitution that prevails is the "substantive" conception, namely the part that manifests itself as having priority in so far as it is the expression of the «supreme decision on the rule of power expressed by the holder of political power»[26]

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[24] On this topic see the considerations of Pozzolo, S., *Neocostituzionalismo e positivismo giuridico*, Giappichelli, Torino, 2001, 21 ff.; Pino, G., *Costituzione, positivismo giuridico, democrazia. Analisi critica di tre pilastri della filosofia del diritto di Luigi Ferrajoli*, in *Diritto e questioni pubbliche*, No. 14, 57-110; Bilancia, F., *Positivismo giuridico e studio del diritto costituzionale*, in *Costituzionalismo.it*, No. 2, 2010, 1-34; Fioravanti, M., *Costituzionalismo e positivismo giuridico*, in *UNAM*, 2008, 1-13; Ridola, P., *Preistoria, origini e vicende del costituzionalismo*, in Carrozza, P., Di Giovine, A., Ferrari, G. F. (eds.), *Diritto costituzionale comparato*, Vol. II, Laterza, Roma, 2014, 737-774.

[25] See Schiavello, A., Velluzzi, V., *Percorsi del positivismo giuridico. Hart, Kelsen, Ross, Scarpelli. Il positivismo giuridico contemporaneo. Una antologia*, Giappichelli, Torino, 2022; Di Marco, C., *Per una lettura della realtà giuridica dei sistemi costituzionali. Giuspositivismo costituzionalista e neocostituzionalismo a confronto*, in *Osservatorio costituzionale AIC*, No. 2, 2018, 1-18; Bin, R., *La costituzione tra testo ed applicazione*, in *Ars interpretandi. Annuario di ermeneutica giuridica*, Vol. 14, 2009, 1-17; Bognetti, G., *Positivismo, scienza giuridica e diritto costituzionale*, in *Rivista di Diritto Pubblico Europea e Comparato*, No. 2, 2023, VII-XVI; Rimoli, F., *L'idea di costituzione: una storia critica*, Carocci editore, Roma, 2011, 121-166.

[26] Schmitt, C., *Dottrina della costituzione*, 258. It should be stressed that the idea, sometimes put forward in a simplistic manner, of the creation *ex nihilo* of the political-legal order by a *pouvoir constituant* free of constraints and free in its purpose, is generally due to the desire to legitimise the revolutionary passage *à l'acte* and the new order thus created in clear opposition to the pre-existing regime and should therefore not be overestimated for our purposes. In this sense, the search for legal limits to the irrepressible power of the constituent power, whether external or internal, may be in vain if one considers, on the one hand, the theoretical and cultural background of the French paradigm centered on "contractualist" theories and the guarantee of individual rights - with an obvious density of values that belies the absolute

and that precedes the decision itself. It follows from this theory that the political decision underlying a constitution is the expression of the strongest political subject, which has managed to prevail over the others and impose its will, without even having to use the concept of popular sovereignty to legitimise its decisions. This view therefore entailed a «clear distinction between a presumed constitutional decision and a positive legal order».[27] Although starting from the same legal problem - the need to identify the basis for the validity of the constitutional text – "normativist" theory finds a different answer, namely it identifies the presupposition of a positive legal order in the basic norm (*Grundnorm*). The leading exponent and theoretician of this conception was Kelsen, according to whom there is a basic norm that establishes the duty of all citizens to follow the binding principle that the constitution is binding. The validity of the constitution within a system is thus derived from this binding nature; in this way, a logical-legal concept is forged on which the positive constitution is based.[28]

However, while the "decisionist" and "normativist" conceptions attempted to explain not only the foundation of the constitution but also its supremacy, another question remained open, namely that of the existence of constitutional rules that were not formalised but nevertheless assumed relevance for the constitutional order. A first attempt to resolve this question was made by Lassalle's theory, which contrasted the written (formal) constitution with the "real" constitution, namely the one given by the form of real and effective relations between the various social forces. Mortati's theory of the "material" constitution was then developed along these lines, according to which there is a tension between the formalised, written, constitution and the political role played by the social forces at the basis of the conception of the constitution. In other words, this theory focuses its considerations on the role played by political forces in establishing the organisational and functional principles essential to the life of a system.[29] According to the "material" conception, therefore, social reality

freedom of the ends of the constituent power - and, on the other hand, the obvious premise of any constitutional law, the obvious premise of any constitutional moment, necessarily laden with promises, aspirations, ideals that are poured into the act that emerges at the end of the process of constitutional creation. More generally, as has been rightly observed, in the concept of constituent power, a certain measure of constitutionality is already conceived and presupposed, which means a delimitation in the face of arbitrary power and domination; an absolute power, on the other hand, does not allow itself to be constitutionalised. See Böckenförde, E. W., *Stato, costituzione, democrazia. Studi di teoria della costituzione e di diritto costituzionale*, Giuffré, Milano, 2006, 136.

[27] De Vergottini, G., *Diritto costituzionale comparato*, 232.

[28] Kelsen, H., *La dottrina pura del diritto*, Einaudi, Torino, 2021, 223 ff.

[29] Lassalle, F., *On the Essence of Constitutions. (Speech Delivered in Berlin, April 16, 1862)*, in *Fourth International*, Vol. 3, No. 1, 1942, 24-31; Goldoni, M., Wilkinson, M. A., *The Cambridge Handbook on the Material Constitution*, Cambridge University Press, Cambridge, 2023; Loughlin, M., *The Constitution of the State*, in Loughlin, M. (eds.), *Foundations of Public Law*, Oxford Academic, Oxford, 2010, 209-237; Grimm, D., *The Concept of Constitution in Historical Perspective*, in Grimm, D. (eds.), *Constitutionalism: Past, Present, and Future*, Oxford University Press, Oxford, 2016, 89-124; Goldoni, M., *From Structure to Integration: The Trajectory of the Material Constitution*, in Join, C. (eds.), *La constitution matérielle de l'Union Européenne*, Pedone, Paris, 2018, 1-19; Goldoni, M., *Material*

plays a decisive role within the constitutional order, in such a way that the social element is profiled as ordered around a core of values that assume constitutional relevance. Such a conception assumes that the original normative principle justifying a constitutional order is the normative force of political will. It is for this reason that the "material" constitutional theory can present itself as the real source of the system's validity, to guarantee the system's unity in terms of the interpretative assessment of existing norms and to fill its gaps.[30] This theory is also significant with regard to the question of identity, since this would be comprehensible on the basis of the material constitution, which identifies its intimate essence. Indeed, formal constitutional provisions are a necessary starting point in the process of interpreting a constitutional order, but it would be limiting to rely on them alone, as many legal institutions may have undergone tacit changes that have altered their actual value.[31]

Throughout history, and especially between the two World Wars, both the "decisionist" and "normativist" conceptions and the theory of the "material" constitution have been taken to their extreme consequences. Indeed, the "decisionist" theory would represent a sublimation of power within the political conflict, whereby the stronger political element would continue to impose its values and social concepts on others. Similarly, with the materialist conception of the constitution, there would be a political predominance of subjects capable of imposing their own vision. "normativist" theory, on the contrary, merely emphasises the fundamental norm that can justify a set of procedural rules that constitute the framework within which any kind of order could be developed. The physiological shortcomings of these theories and, above all, the events of the Second World War, which led to the systematic violation and even denial of the most elementary rights of the individual, gave rise to a value-based conception of contemporary constitutions. This theory places at the centre of the constitutional order the valorisation of the human person, of his or her rights, which also become central to the concept of the state and the legal system. In other words, according to the values conception of the constitution, the state must consider certain values that transcend the state itself and its constitution, as supreme principles and values or meta-principles, which, as such, can be placed above the constitution by virtue of their axiological value. These principles and values are presupposed by the constitution insofar as the constitution presupposes the existence of ethical

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Constitution, in Bellamy, R., King, J. (eds.), Cambridge Handbook of Constitutional Theory, Cambridge University Press, Cambridge, 2023, 1-16; Paul, L. A., *The Pizzles of Material Constitution*, in *Philosophy Compass*, Vol.5, No. 7, 2010, 579-590.

[30] Colón-Ríos, J., *The Material Constitution*, in Colón-Ríos, J. (eds.), *Constituent Power and the Law*, Oxford University press, Oxford, 2020, 186 ff.; Adrian, A., *Many Relations and the Problem of Material Constitution*, in *Aporia*, Vol. 21, No. 1, 2011, 61-72.

[31] Rudder Baker, L., *Unity without Identity: A New Look at Material Constitution*, in *Midwest Studies in Philosophy*, Vol. 23, 1999, 144-165; Coroce, M., Goldoni, M., *From Pluralism to the Material Constitution and Back*, in *The Italian Law Journal*, Vol. 7, No. 2, 2021, 551-555; Arato, J., *Constitutionality and constitutionalism beyond the state: Two perspectives on the material constitution of the United Nations*, in *I-CON*, Vol. 10, No. 3, 2012, 627-659.

principles that constitute the basis of the legitimacy of the state and its law.[32] In order to understand the scope of these principles, it should be stressed that they are shared both by the citizens within a system and by the international community itself. These ethical principles are regarded as legal principles and as such are binding on the system and its members. According to some, they constitute the material constitution in the strict sense and are also enshrined in the formal constitution. Thus, according to this theory, the principles are shared by society and are thus received by the constitution, which gives them a superior and unchanging position within the constitutional order. In this way, a true constitutional morality would be defined, acting as a synthesis between the ethical principles on which society is founded and the political element present in every constitution.

This analysis, albeit synthetic, of the main theories of the concept of the constitution has made it possible to highlight some significant aspects, not only in the field of the constitution, but also to anticipate some concepts related to the theme of constitutional identity. In this respect, it is important to highlight how the "garantist" conception of the constitution has developed a significant influence in constitutional law scholarship. Indeed, it appears that only an organic system, formalised in a text containing guarantees for individuals and the principle of the separation of powers, presupposes the existence of a constitution. In short, according to this view, the purpose of a constitution is to limit the arbitrary action of the government, to guarantee the rights of the governed and to regulate the interventions of the sovereign power.[33] Today, however, the prevailing doctrine has gone beyond this rigidly formalist view, which is still essentially linked to the liberal state, and maintains that the constitution remains a «complex normative body that constitutes the foundation of any state order, regardless of the chosen ideology».[34] Such a definition, characterised by its broader scope, also has important implications for constitutional identity. Indeed, formalisation represents an attempt by those exercising constituent power to establish essential principles within the constitution. However, every constitution is internally permeated by currents that create tensions in the search for stability

[32] Toniatti, R., *Verso la definizione dei valori supremi dell'ordinamento comunitario: il contributo della carta dei diritti fondamentali dell'Unione europea*, in Toniatti, R. (eds.), *Diritto, diritti, giurisdizione. La Carte dei diritti fondamentali dell'Unione europea*, CEDAM, Padova, 2002, 7-11; Modugno, F., *Interpretazione per valori e interpretazione costituzionale*, in Azzariti, G. (eds.), *Interpretazione costituzionale*, Giappichelli, Torino, 2007, 51-81; Zagrebelsky, G., *Diritto per valori, principi e regole?*, in *Quaderni fiorentini*, 2002, 866-871; Azzariti, G., *Interpretazione e teoria dei valori: tornare alla Costituzione*, in Palazzo, A. (eds.), *L'interpretazione della legge allo soglia del XXI secolo*, Edizioni Scientifiche Italiane, Perugia, 2001, 237 ff.

[33] See Strong, G. F., *Modern Political Constitutions*, Sidgwick and Jackosn Ltd, London, 1963, 12; Romano, S., *Lo stato moderno e la sua crisi. Saggi costituzioanli 1909-1925*, Quodlibet, Macerata, 2023, 122-178; Vignudelli, A., *Interpretazione e costituzione*, Giappichelli, Torino, 2011; Ridola, P., *Il costituzionalismo: itinerari storici e percorsi concettuali*, in *Studi in onore di G. Ferrara*; Vol. III, Giappichelli, Torino, 293 ff.; Bellamy, R., *Political Constitutionalism*, Cambridge University Press, Cambridge, 2007, 112 ff.; Bobbio, N., *La teoria delle forme di governo nello storia del pensiero politico*, Giappichelli, Torino, 1976, 99-119.

[34] De Vergottini, G., *Diritto costituzionale comparato*, 229; De Vergottini, G., *Le transizioni costituzionali*. *Sviluppo e crisi del costituzionalismo alla fine del XX secolo*, il Mulino, Bologna, 1998, 21.

between the tendentially static system of provisions laid down in the constitution and the orientations emanating from political forces. It is within this dynamic of constant tension between the formalised character of constitutional texts and social drives that constitutional identity can potentially be identified and studied. Indeed, as will be seen later in this chapter, the theory of identity constructed by Jacobsohn is based precisely on this constant dialogue, if not outright clash, between the values underlying the constitutional text and their application within society. This first observation allows us to anticipate how the issue of identity is closely linked to the conception of the form of the state applied within a legal system and the conception of the constitutional text developed within a given system. For these reasons, this section has attempted to provide a general overview of the concept of the constitution, not so much for the sake of compilation, but to give an idea of how the development of the constitutional idea is closely linked to the theme of identity.

A further element that has emerged from the above examination is the fact that there may be non-formalised or even stratified constitutions – namely those orders in which there is no single document, but rather a series of constitutional acts, decisions and customs that constitute a constitutional order - in which it is nevertheless possible to identify essential principles that underpin the legal order and constitute its fundamental and ineradicable core. Constitutional identity within such an order will be examined in the third chapter of this work, which will focus on the case study of the European Union.

1.3. THE GENERATIVE MOMENT OF THE CONSTITUTION

For a constitution, one of the most important - and often the most delicate - moments is precisely that of its preparation. In fact, historically, the drafting and adoption of a new constitution are moments that coincide with important changes in society: these changes may be historical, they may concern the form of the state, or they may even coincide with the creation of a new state entity.[35] It is precisely in the light of these initial considerations that it is possible to explain why it was decided to devote a special section to the subject of the generative moment of the constitution. While the moment of the adoption of a constitution has a specific relevance from a legal point of view, it is also

[35] See Nania, R., *Il valore della Costituzione*, Giuffrè, Milano, 1986, 21 ff.; Dogliani, M., *Introduzione alla costituzione*, il Mulino, Bologna, 1994, 17-32; Fioravanti, M., *Costituzione*, il Mulino, Bologna, 1999, 41-47; Laneve, G., *Pluralismo e limiti (al potere e per l'altro): declinazioni della costituzione come modo di guardare al mondo*, in *Consulta online*, No. 1, 2019, 481-494; Morey, C. W., *The Genesis of Written Constitution*, in *The Annale of the American Academy of Political and Social Science*, Vol. 1, 1891, 529-557; Ilari, S., *About the Genesis of Italian Republican Constitution*, in *Politico: rivista italiana di scienze politiche*, Vol. LXXXIII, No. 2, 2018, 28-40; Kaczorowski, P., *Epistemology of Constitution*, in Górnisiewicz, A., Szlachta, B. (eds.), *The Concept of Constitution in the History of Political Thought*, De Gruyter, Berlin, 2017, 14-32.

of value regarding the theme of the search for and identification of constitutional identity. Indeed, at the moment of the exercise of constituent power, it is possible to identify certain important elements that then come to define the identity of a constitutional text.[36] Specifically, at the moment of drafting the constitutional document, constituents often deliberately introduce certain principles and values so that these identify and distinguish the "spirit" of the entire constitutional text. In other words, the generative moment of a constitution - especially if it is possible to read the minutes of the various meetings of the constituent assembly - makes it possible to analyse the original will of the constituents, and in particular the principles they had identified as the founding elements of a constitution, and then to analyse how these were transcribed within the constitutional text.

This section will be devoted, on the one hand, to the analysis of the constitutional adoption procedures, defined as "external", to better understand the legal framework in which the constitutional order of Bosnia and Herzegovina is situated. On the other hand, we will trace the main stages of the debate on the European Constitution because of the peculiar process of "constitutionalisation" that has affected the European Union and has come to define its own identity.

One of the peculiarities of the constitutional model that has emerged in the wake of the principles of constitutionalism is that the constitution is first and foremost the result of the will of the people, which - to paraphrase Abbé Sieyès - corresponds to the exercise of the *pouvoire constituant*, namely of an

«original and creative *de facto* power - to which corresponds, in concrete terms, the action of one or more dominant political forces - which consciously wishes to establish [...] the fundamental organisation of society. In the process of codifying the sovereign State, it is transformed from a *de facto* power into a legal order corresponding to the creative will. In establishing a constitution, the constituent defines and delimits the organisation of the state or the order of constituted powers».[37]

However, in relation to this original position on the process of constitutional adoption, the second half of the twentieth century also saw the emergence of situations in which the exercise of constituent power could not be defined as deriving entirely from the will of the people. Indeed, as de Vergottini observed

[36] Roznai, Y., *The sovereign is he who holds constituent power?*, in *Etica e Politica*, Vol. XXIII, No. 3, 2021, 247-260; Loughlin, M., *On constituent power*, in Dowdel, M. W., Wilkinson, M. A. (eds.), *Constitutionalism beyond Liberalism*, Cambridge University Press, Cambridge, 2017, 151-175; Lindahl, H., *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in Loughlin, M., Walker, N. (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, Oxford, 2008, 9-24.

[37] Morrone, A., *Costituzione*, in Caruso, C., Valentini, C. (eds.), *Grammatica del costituzionalismo*, 31.

«the constitutions contained in a formal document [...] may be drawn up by an organ of the system in question, which, through recourse to the constituent decision, offers the most relevant manifestation of the fullness of sovereignty, or by organs of another system, which make a choice and a decision destined to have repercussions on the system to which the decision is addressed, but which lack real constituent power. In the latter case, it is clear that what is called the constitution of a given State does not emerge as an expression of its sovereignty, but of external sovereignties, and will only truly become its constitution when the system to which it is addressed becomes fully sovereign and accepts it as a constitution».[38]

This means that since the middle of the twentieth century, constitutions have developed in which the exercise of constituent power has been partly or even wholly directed and exercised by other state and international orders.[39] Constitutions adopted in accordance with externally exercised

[38] De Vergottini, G., *Diritto costituzionale comparato*, 246. On this same perspective, see also the considerations of Preuss, U., *The Exercise of Constituent Power in Central and Eastern Europe*, in Loughlin, M., Walker, N. (eds.), *The Paradox of Constitutionalism; Constituent Power and Constitutional Form*, Oxford University Press, Oxford, 2007, 222-228.

[39] The exercise of popular sovereignty in the constituent assembly can take place in two ways: directly through the exercise of the referendum, or indirectly through the election of the constituent assembly that will adopt the constitution. The function of constituent assemblies or conventions is the result of the legal theories of constitutionalism and the development of assemblies during the period of revolutions at the end of the 18th century. Within the constitutional process defined as democratic, the institution of the referendum plays an important role. In fact, recourse to referendums can be used both in the pre-constitutional phase and in the constitutional approval phase. In particular, the pre-constitutional referendum has been used to consult the will of the people on the modification of the form of the state or of the government, or even on the independence of a state from the previous federal constraints, as happened in the countries of the former Yugoslavia. Much more common, however, are constituent referendums. These are usually called for the direct approval by the people of a constitutional text drafted by the constituent assembly. In other words, the constituent referendum is a further confirmation of the exercise of popular sovereignty. Indeed, it is from this popular sovereignty that both the constituent power exercised by the assemblies or conventions is derived, but it is also possible, in certain circumstances, to benefit from a subsequent confirmation that the constituent power has been exercised in accordance with the will of the people, and this is tested by means of a popular consultation, which can express itself in favour of or against the text produced by the assembly. A very special case of the constituent procedure is the provisional one. In the face of major changes in the form of statehood, before a new constitutional text is drawn up that succeeds in crystallising this change in the order, it is possible, under certain circumstances, for the final constitution to be preceded by a provisional text that succeeds in transferring the order to the new constitutional structures. Historically, there have been cases where the interim constitution has coincided with the restoration of an earlier abandoned or suspended constitution, or, as in the case of South Africa after apartheid, when a transitional constitution was adopted in 1993 with a fixed time frame to allow for reconciliation and then proceed with the drafting and adoption of a new final constitution. Compared to the case of interim constitutions, it can be said that these documents tend to stand at times of delicate transition. See De Vergottini, G., *Referendum e revisione costituzionale: un'analisi comparativa*, in *Giurisprudenza costituzionale*, No. 2, 1994, 1339-1400; Bartole, S., Grilli di Cortona, P. (eds.), *Transizioni e consolidamento democratico nell'Europa centro-orientale: élites, istituzioni e partiti*, Giappichelli, Torino, 1998, 118-121; Colón-Ríos, J. I., *Constituent Power and Referenda*, in *Contemporary Political Theory*, Vol. 20, No. 4, 2021, 935-940; Beckman, L., *Democratic legitimacy does not require constitutional referendum. On 'the constitution' in theories of constituent power*, in *European Constitutional Law Review*, Vol. 14, No. 3, 2018, 567-583; O'Malley, K., *The 1993 Constitution of the Republic of South Africa - The Constitutional Court*, in *Journal of Theoretical Politics*, Vol. 8, No. 2, 1996, 177-191; Asimow, M., *Administrative Law Under South Africa's Interim Constitution*, in *The American Journal of Comparative Law*, Vol. 44, No. 3, 1996, 393-420; Rinella, A., *Repubblica del Sud Africa: unità e difformità del modello di Stato*, in Carducci, M. (eds.), *Il costituzionalismo "parallelo" delle nuove democrazie*, Giuffrè, Milano, 1999, 212-222; Lollini,

constituent power have thus been defined by the doctrine as "heteronomous"[40] constitutions, namely where the exercise of constituent power has been wholly or partly desired and implemented either by other states or international organisations. This distinction depends on the subject exercising the constituent power.[41] In the case of the internal constituent process,[42] the power to create a new

A., *Constitutionalism and Transitional Justice in South Africa*, Oxford University Press, Oxford, 2011, 199-221.

[40] Morbidelli, G., *Costituzioni e costituzionalismo*, in Morbidelli, G., Volpi, M., Cerina Ferroni, G., *Diritto costituzionale comparato*, Giappichelli, Torino, 2020, 75.

[41] Of the various classifications that constitutional doctrine adopts to order the subject of constitutions, it has been decided here to use the most general one, which is directly linked to the generative moment of the constitutional text, namely based on which subject exercised constituent power. In fact, this first classification seems to logically precede the other possible subdivisions, which are presented as successive. In fact, this division seems all the more necessary if we consider that constitutional law after the Second World War experienced two phenomena that were only apparently different but in fact closely related: On the one hand, the internationalisation of constituent power, according to which the international community increasingly interferes in typically state competences - such as the exercise of constituent power - to the point of encroaching on the sovereign competences of a state; on the other hand, the phenomenon of the constitutionalisation of international law, according to which states strengthen the integration of international law into their domestic legal system by recognising it as having constitutional value. Regarding the distinction between exercising internal and external constitutive power, see the following doctrinal sources: Morbidelli, G., *Costituzioni e costituzionalismo*, 73-76; De Vergottini, G., *Diritto costituzionale comparato*, 241-273. On the subject of the internationalisation of constituent power, see: Dupuy, P. M., *Droit public*, Dalloz, Paris, 2000, 546-547; Franck, Th., *The emerging right to democratic governance*, in *American Journal of International Law*, Vol. 86, No.1, 1992, 46-47; Thierry, H., *L'Etat et l'organisation de la société internationale*, in *L'Etat souverain à l'aube du XXIéme siècle*, colloque de Nancy, Societè française de droit international, Pédon, Paris, 1993, 210-212. On the subject of the constitutionalisation of international law see: Palermo, F., *Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze*, *European Diversity and Autonomy Papers*, No. 2, 2009, 5-9; Maus, D., *L'influence du droit international contemporain sur l'exercice du pouvoir constituant*, in *Le nouveau constitutionalisme, Mélanges en l'honneur de Gérard Conac*, Economica, Paris, 2001, 87 ff.; Pierré-Caps, S., *Le constitutionalisme et la nation*, in *Le nouveau constitutionalisme, Mélanges en l'honneur de Gérard Conac*, 72-74; Bifulco, R., *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, in *Rivista AIC*, No. 4, 2014, 1-30; Garofalo, L., *È in atto un processo di "costituzionalizzazione" del diritto internazionale? Alcune riflessioni*, in Triggiani, E. *et al.* (eds.), *Dialoghi con Ugo Villani*, Vol. II, Cacucci Editore, Bari, 2017, 1205-1212; Cassese, S., *Lo spazio giuridico globale*, Laterza, Roma, 2003, 7-13; ID., *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Giappichelli, Torino, 2009, 10 ff.; Ferrarese, M. R., *Globalizzazione giuridica*, in *Enciclopedia del diritto, Annali*, Vol. IV, 2011, 547 ff.

[42] Even internal constituent power may be subject to external constraints, or rather to limits of an objective nature resulting from membership of supranational international organisations or international treaties, charters and declarations. It can thus be seen that human rights have the potential to place themselves at the apex of a hypothetical pyramid of universal values. In this context, De Vergottini speaks of «principles immanent to the very conception of the State that one wishes to adopt» (De Vergottini, G., *Diritto costituzionale comparato*, 245). Thus, the constituent cannot in any way exempt itself from respecting them, unless it places itself in open conflict with the international community and the universal values of constitutionalism, such as the protection of rights and the separation of powers. A very close example of this limitation is provided by membership of the European Union, where the constitutional rules of the member states and those aspiring to join the Union must be «consistent with the values of the EU, the Charter of Fundamental Rights and the ECHR» (European Parliament resolutions of 1 July 2011, letter C and 3 July 2013, letter D). It is clear from this first possible form of constitutionalisation that the international or supranational constraints to which states are now subject are particularly stringent and capable of imposing themselves on the constituent power, not only through covenant-like constraints, but even through the immanence of certain principles, such as human rights. On this topic, see *ex multis* Grasso, P. G. (eds.), *Il potere costituente e le antinomie del diritto costituzionale*, Giappichelli, Torino, 2006, 33; De Vergottini, G., *Diritto costituzionale comparato*, 245; Morbidelli, G. *et al.* (eds.), *Diritto pubblico comparato*, Giappichelli, Torino, 2016, 157; Weiler, J. H. H., *Diritti umani, costituzionalismo ed integrazione: iconografia e feticismo*, in *Quaderni costituzionali*, No. 3, 2002, 521-536; Rimoli, F., *Universalizzazione dei diritti fondamentali e globalismo*

constitution can be exercised either by a constituent assembly on behalf of the sovereign people,[43] or by a parliamentary assembly, or directly by the people through a *referendum*.[44] Conversely, when the constituent power is exercised or limited in some way by an international authority, in this case we can speak of external constituent power, since it has been subjected to an outward influence called "internationalisation" or "heterodirection".

giuridico: qualche considerazione critica, in *Rivista AIC*, 1 ff.; Paciotti, E. (eds.), *Diritti umani e costituzionalismo globale*, Carocci, Roma, 2011, 201-227; D'Atena, A., Grossi, P. (eds.), *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali*, Giuffrè, Milano, 1-68; Chryssogons, K., Stratilatis, K., *Constituent Power and the Democratic Constitution-Making Process in the Global Era*, in Filibi, I, Cornago, N., Frosini, J. (eds.), *Democracy With(out) Nations? Old and New Foundations for Political Communities in Changing World*, Bilbao, 2011, 49 ff; Pinelli, C., *Conditionality and Enlargement in the Light of EU Constitutional Development*, in *European Law Journal*; Vol. 10, No. 3, 2004, 354-362; Lollini, A., Palermo, F., *Comparative Law and the "Proceduralization" of Constitution-Building Processes*, in Raue, J., Sutter P. (eds.), *Facets and practice of state-building*, Brill, Leiden-Boston, 2009, 301 ff.

[43] Usually, the internal constitutional process begins with the constitutional initiative phase, in which the organs of an order take the initiative to write a new constitution; these organs are usually in opposition to the previous order, but not always; in some cases, the organs of the previous order themselves carry out this task. The second stage is the preparatory stage, in which the constituent assemblies play a very important role. They are elected for the purpose of drafting the constitutional text and are thus an expression of the constituent power, which finds its legitimacy in its election by the citizens. At this stage, the instrument of the referendum can also play an important role, since it can be used as an instrument of popular consultation to define the constitutional text. A very special procedure seems to be the one followed by some Central and Eastern European states, defined as "parliamentary constitution-making", in which the constituent power is exercised by the parliament and according to the procedures sanctioned by the constitution to be replaced; in this system, there is no referendum approval, since the election of the parliament constitutes the legitimation necessary to reject the constitutional text. It is clear how here the constituted power and the constituent power not only meet, but even seem to overlap, with the risk of legitimising parliament for any kind of modification, up to a veritable rewriting of the constitutional text. The final phase, which perhaps most clearly illustrates the democratic nature of the process, is the deliberative phase, in which the proposals and solutions adopted by the constituent assembly are debated; this phase usually ends with a referendum-type vote approving or rejecting the text produced. See *ex multis* Arato, A., *Civil society, constitution and legitimacy*, Rowman and Littlefield Publishers, Lanham, 2000, 142 ff; Cutler, L., *Symposium, Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, in *American University International Law Review*, Vol. 12, No. 1, 1997, 45-143; Elster, J., *Constitutionalism in Eastern Europe: an Introduction*, in *The University of Chicago Law Review*, Vol. 58, No. 2, 1991, 447-482.

[44] De Vergottini, G., *Diritto costituzionale comparato*, 247; Lucioni, C., *Potere costituente e procedure di formazione della* Costituzione, in Ferrari, G. F. (eds.), *Atlante di Diritto pubblico comparato*, UTET, Torino, 2010, 168-169. On the subject of constituent power more generally see *ex multis*: Dogliani, M., *Costituente (potere)*, in *Digesto delle discipline*, IV, UTET, Torino, 1990, 281 ff.; Grasso, P. G., *Potere costituente*, in *Enciclopedia del diritto*, XXXIV, Giuffrè, Milano, 1985, 642 ff; Häberele, P., *Potere costituente*, in *Enciclopedia giuridica Treccani*, IX, 2001; Schmitt, C., *Dottrina della Costituzione*, Giuffrè, Milano, 1984, 69-171; Dogliani, M., *Potere costituente e revisione costituzionale*, in *Quaderni costituzionali*, No. 3, 1995, 7 ff.; Fioravanti, M., *Costituzione: problemi dottrinali e storici*, in Fioravanti, M., *Stato e costituzione. Materiali per una storia delle dottrine politiche*, Giappichelli, Torino, 1993, 109 ff.; Mortati, C., *La costituente. La teoria. La storia. Il problema italiano*, in Mortati, C., *Raccolta di scritti*, Vol. 1, Giuffrè, Milano, 1972; Orlando, V. E., *Studi giuridici sul governo parlamentare*, in Orlando, V. E., *Diritto pubblico generale. Scritti vari coordinati in sistema*, Giuffrè, Milano, 1954, 71 ff.; Romano, S., *L'instaurazione di fatto di un ordinamento costituzionale*, in Romano, S., *Scritti minori*, Giuffrè, Milano, 1950, 154 ff; Jellinek, G., *La dottrina generale del diritto*, Giuffrè, Milano, 1949, 21 ff.

1.3.1. THE CAUSES WHICH LED TO HETERODIRECTED CONSTITUTIONS

Before moving to the classification of heterodirected constitutions and the examination of cases, it is necessary to make some clarifications to better understand the phenomenon we wish to describe. In particular, some preliminary aspects need to be clarified. These include, for instance, the causes that led to the emergence of the exercise of heterodirected constituent power and, consequently, of these constitutions in a given historical period and the reasons for their development to the present day. In addition, the question arises as to the actual legal legitimacy of constitutions that are the result of an external constitutional process.

Regarding the first question, it can be said that, historically speaking, the phenomenon of "heterodirected" constitutions emerged with the end of the Second World War.[45] Indeed, for the first time, the international community, or more precisely the countries that had won the Second World War, found itself in the situation of directly influencing the constituent power of the defeated countries, on which very strict limitations had been imposed in terms of rights, freedoms, and the separation of powers, in order to prevent a new authoritarian turn. Also, the international influence of new organisations such as the UN or the Council of Europe, just to name a few, also had important implications for the drafting of constitutions in other European countries.[46] Thus, the first cause of the internationalisation of constitutions can be found in the particular situation in which the defeated states of the Second World War found themselves, and a second one in the formation of new and increasingly influential international organisations, especially in the field of the protection of rights and freedoms.

As time went on, international organisations became more and more influential within national legal systems. It is enough to recall the clauses opening to international law in some European constitutions, which sanction not only the adaptation of national law to international law, but also the possibility of limiting sovereignty to join international and supranational organisations.[47]

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[45] De Vergottini, G., *Diritto costituzionale comparato*, 247-256; Chryssogons, K., Stratilatis, K., *Constituent Power and the Democratic Constitution-Making Process in the Global* Era, in Filibi, I, Cornago, N., Frosini, J. (eds.), *Democracy With(out) Nations? Old and New Foundations for Political Communities in Changing World*, Bilbao, 2011, 49 ff.; Pinelli, C., *Conditionality and Enlargement in the Light of EU Constitutional Development*, 354.

[46] Cutler, L., *Symposium, Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, in *American University International Law Review*, Vol. 12, No. 1, 1997, 45-143; Elster, J., *Constitutionalism in Eastern Europe: an Introduction*, in *The University of Chicago Law Review*, Vol. 58, No. 2, 1991, 447-482.

[47] To name a few see De Vergottini, G., *Le transizioni costituzionali*, 164 ff.; Feldman, N., *Imposed Constitutionalism*, in *Connecticut Law* Review, Vol. 37, 2004, 857 ff.; Kumm, M., *The Legitimacy of International Law: a Constitutionalist Framework of Analysis*, in *European Journal of International Law*, Vol. 15, No. 4, 2004, 931; Morbidelli, G., *Costituzioni e costituzionalismo*, in Morbidelli, G., Pegoraro, L., Reposo, A., Volpi, M. (eds.), *Diritto costituzionale*, cit., 79; Pegoraro, L., Rinella, A., *Sistemi costituzionali comparati*, Giappichelli, Torino, 2017, 65.

Added to this is the progressive weakening of the state in the "third world".[48] Indeed, the constitutions of the newly independent states of Africa and South-East Asia include entire sections devoted to internationally defined rights and freedoms.

However, if we come to the present day, the presence and consolidation of "heterodirected" constitutions can be explained by the proliferation of serious crisis situations in various parts of the world and the willingness of the developed states to respond to them by means of peacekeeping operations, which today are increasingly carried out within the internal framework of states «in order to directly supervise the establishment of stable and genuinely democratic political regimes»,[49] and which have overshadowed the original *modus operandi* of the international community, in which the primary objective was to oppose belligerent groups while respecting their innermost internal sovereignty.[50] Indeed, it can be concluded that the peace-building interventions of the last thirty years demonstrate how «UN law, if not general international law itself, is now less and less indifferent to the political nature of the choices made by each state».[51] This phenomenon has come to be known as the "internationalisation of constituent power", whereby the international community increasingly takes over some of the sovereign powers of the state, even going so far as to substitute itself for the sovereign people and the organs that represent them. This means that the incorporation of the constituent process into international relations is a stage in the expropriation of constitutional law from its original sphere of competence. This concept is well described by the French scholar Delbez:

> «the internationalisation of a legal relationship - or of a legal situation, that is to say, of a set of relationships - means that this relationship is removed from the domestic law which had hitherto governed it and placed under the aegis of international law, which will henceforth govern it [...]. There is no principle of separation which would allow the configuration of this reserved area to be defined in abstract and general terms. There is therefore no difference in nature between international and domestic matters, and the criterion which allows them to be distinguished is purely formal».[52]

The other aspect that has led to the creation of "heterodirected" constitutions lies in the "constitutionalisation of international law". This is a phenomenon that translates the state's desire to strengthen the integration of international law into its domestic order by recognising its constitutional

[48] Paranjape, N. V., *Indian Legal and Constitutional History*, Central Law Agency, Allahabad, 2015, 111-145.

[49] Dupuy, P. M., *Droit public*, 546.

[50] Maziau, N., *Le costituzioni internazionalizzate. Aspetti teorici e tentativi di classificazione*, in *Diritto pubblico comparato ed europeo*, No. 4, 2002, 1399.

[51] Dupuy, P. M., *Droit public*, 546.

[52] Delbez, L., *Le concept d'internationalisation*, in *Revue Générale de Droit international public*, No. 1, 1967, 5-6.

value.[53] Put in another way, this mechanism allows the adaptation of the constitutional law of states to certain principles or values derived from international law. In this way, the "internationalisation of constitutional law" and the "constitutionalisation of international law" have entailed closer cooperation between the two legal levels (national and international), if not an actual overlap as in the case of the exercise of constitutional power. This can be described as the main cause that led to the creation of heterodirected constitutions, thus answering the first question.

1.3.2. THE LEGITIMACY OF HETERODIRECTED CONSTITUTIONS

The issue of heterodirected constitutions raises the question of the actual legal legitimacy of charters adopted through an external constitution-making process, as constituent power is exercised at the international level[54] and, as such, far removed from the actual exercise of popular sovereignty. This situation makes it appropriate to question the conditions under which sovereignty is exercised and the nature of state power. Indeed, it is generally accepted that sovereignty can be external and internal: on the one hand, the internal sovereignty held by the people or nation, and on the other, international sovereignty, which is the state's own capacity to commit itself through an act of international will, namely to observe only rules to the effectiveness of which the state has expressly consented or by tacit consent.[55] In other words, whenever a state concludes a treaty with another state or an international or supranational organisation, it may limit the conditions under which it can exercise its internal sovereignty through transfers of competences, but it could not undermine its international sovereignty without calling into question its existence as a state. Indeed, international sovereignty is intangible and cannot be limited or expanded in its attributes.[56] On the other hand, the

[53] It should be noted that the incorporation of the content of certain international treaties into the constitutional laws of a country, by virtue of international obligations, does not necessarily imply the suppression or diminution of the political independence of the State, which in this way guarantees compliance with international obligations through the form of constitutional laws under domestic public law. The content of these international treaties is protected in domestic public law by constitutional rigidity. But these provisions are not the constitutive acts of a people. They do not suppress the sovereignty of a state and only use the relative concept of constitutional law in the interest of an international obligation as a technical and formal means to achieve greater validity within the state.

[54] See Tourard, H., *L'internationalisation des constitutions nationales*, LGDJ, Paris, 2000, *passim*; Feldman, N., *Imposed Constitutionalism*, 858 ff.; Palermo, F., *Dichiarazione di indipendenza del Kosovo e potere costituente nella prospettiva della Corte Internazionale di Giustizia: dal pluralismo al formalismo*, in Gradoni, L., Milano, E. (eds.), *Il parere della Corte Internazionale di Giustizia sulla dichiarazione di indipendenza del Kosovo. Un'analisi critica*, CEDAM, Padova, 2011, 179 ff.; Chang, W. C., Yeh, J. R., *Internationalization of Constitutional Law*, in Rosenfeld, M., Sajò, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 1166-1179; De Wet, E., *The Constitutionalization of Public International Law*, in Rosenfeld, M., Sajò, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 1209-1214.

[55] Combacau, J., *La souveraineté internationale de l'Etat dans la jurisprudence du Conseil constitutionnel français*, in *Cahiers du Conseil constitutionnel*, No. 9, 2000, 113-114.

[56] Burdeau, G., *Manuel de droit constitutionnel et institutions politiques*, LGDJ, Paris, 1984, 85.

state, by virtue of its sovereignty, can be allowed to limit or transfer some of its internal powers. It is precisely the characteristic of being sovereign that allows the state to decide to cede part of its internal sovereignty. For this reason, when the state transfers the exercise of its constituent power to an international authority - as happens precisely with heterodirected constitutions - the state does not call into question its international sovereignty, which is intangible, but it modifies «the exercise of its internal sovereignty»,[57] without calling it into doubt. As mentioned above, the decision to cede one's constituent power to an entity of international law constitutes a prerogative proper to a sovereign state. For this reason, it can be concluded that the drafting of a heterodirected constitution does not represent a loss of international sovereignty for the state that adopted it, if anything, it constitutes a limitation or cession of the state's internal sovereignty.[58]

Once the question of the relationship between sovereignty and internationalised constituent power has been resolved, the question of the democratic legitimacy of heterodirected constitutions remains. This stems from the fact that the adoption of a constitution by an international body overshadows the effective participation of the people or other national bodies in the various stages of drafting the constitutional text. This means that the involvement of local citizens in the constitution-making process is usually very limited. This situation therefore calls into question the legitimacy, namely the legal basis, of the constitution. In order to solve this problem, international scholarship has answered the democratic legitimacy issue by resorting to the «fiction of popular consent»,[59] namely by formally stating in constitutional texts that constituent power is exercised on the basis of the will of the people, which in fact exists only on paper, but not in the reality of the constitution-making process.[60] Indeed, the question of the democratic legitimacy of heterodirected constitutions finds a solution in the current development of constitutional law in relation to international law. The idea that a constitution must find its legitimacy solely in the expression of the will of the people appears to be an «archaic and therefore outdated [...] approach».[61] It does not consider the evolution of international law and constitutional law and their interaction. It overlooks the fact that the legitimacy of a constitution no longer rests exclusively on the expressed will of the citizens, but can also, under certain circumstances, be the product of the international community, which «uses the

[57] Maziau, N., *Le costituzioni internazionalizzate*, 1399.

[58] De Vergottini, G., *Diritto costituzionale comparato*, 247.

[59] Maziau, N., *Le costituzioni internazionalizzate*, 1401.

[60] The fact that the international constituent continues to consider the reference to the people or nation as necessary or useful in the process of adopting a constitution is significant of the fact that this document, despite the significant changes that have taken place in constitutionalism, finds its legitimacy precisely in the expression of that popular will. In Schmitt's words, it can be said that «a constitution does not rest on a rule whose exactness would be the reason for its validity. It rests on a political decision emanating from a political being [...]. The constituent power is a political will, namely a concrete political being» Schmitt, C., *Dottrina della costituzione*, 204.

[61] Maziau, N., *Le costituzioni internazionalizzate*, 1402.

resources of international normativity in support of its priorities as expressed in the Charter of the United Nations, whose universal legitimacy is unquestioned».[62] The increasing normativity of international law, and with it the internationalisation of constitutional law, demonstrates that there are no instruments of state power that are not susceptible to internationalisation, even constituent power.[63]

1.3.3. The heterodirected constitutions: categorising the concept through some historical cases

The "external" process can be divided into three sub-categories.[64] Historically, there have been "heteronomous constitutions", where the constitutional text is the result of an external imposition by other states or groups of states. Constitutions resulting from "external constituent processes" have historically arisen in two well-defined cases: when the state has limited its sovereignty following defeat in war, or in the case of colonial territories that have recently gained independence. In both cases, the exercise of constituent power was not only restricted from outside but was also exercised by other states. In fact, the process of forming a new constitution has its origins in acts of sovereignty attributable to a state other than the one that adopts the document.

This has historically been the case in wartime defeats such as Japan and Germany. Indeed, the Japanese constitution[65] was drafted directly by the US occupation forces. In the case of the Bonn

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[62] Maziau, N., *Le costituzioni internazionalizzate*, 1402.

[63] Martinico, G., *Constitutions, Openness and Comparative* Law, in *Estudios de Deusto*, Vol. 67, No. 1, 2019, 111-124; Tzevelekos, V, P., Lixinski, L., *Towards a Humanized International "Constitution"?*, in *Leiden Journal of International Law*, Vol. 29, No. 2, 2016, 343-364; Sauders, C., *The impact of internationalisation on national constitutions*, in Chen, A. H. Y. (eds.), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge University Press, Cambridge, 2014, 391-415; Manga Fombad, C., *Internationalization of Constitutional Law and Constitutionalism in* Africa, in *American Journal of Comparative Law*, Vol. 60, No. 2, 2012, 439-473; Tushnet, M., *The Inevitable Globalization of Constitutional Law*, in *Virginia Journal of International Law*, Vol. 49, No. 4, 2009, 985-1006; Schwarts, H., *The Internationalization of Constitutional Law*, in *Human Rights Brief*, Vol. 10, No. 2, 2003, 10-12.

[64] Two strands of thought can be identified in this categorisation, not very far apart but with variations that are nonetheless noteworthy. On the one hand, De Vergottini advocates a division between "external processes" and "internationally driven processes", which is taken up here. On the other hand, Maziau classifies the experiences of the internationalisation of constituent power as "internationalisation of derived or instituted constituent power", whereby the internal sovereignty of the state is partially limited, since the exercise of constituent power is determined by an international act to which the state has consented. As historical examples, the author cites the minority treaties of 1919-1920 in Central and Eastern Europe, the De Gasperi-Gruber agreements of 1946 between Austria and Italy on the status of Trentino-Alto Adige, and the Good Friday Agreement of 1998 for Northern Ireland. Then there is the "internationalisation of the original constituent power", which is subdivided into "partial internationalization" when the original constituent power is framed by an international authority that monitors compliance with certain principles it has imposed. Conversely, "full internationalization" occurs when the constitutional text is drafted entirely by an international authority.

[65] In the case of Japan, it is possible to speak of a constitution imposed *en bloc* rather than a set of imposed constitutional principles, since the country's constitution was drafted almost in its entirety by an American task force, which came to

Basic Law,[66] on the other hand, the Allies who had defeated Germany did not impose the constitutional text but determined certain choices concerning the form of state and government, which the German Constituent Assembly had to incorporate into the final text.[67]

Subsequently, as the period of decolonisation progressed, and with it the formation of new states in sub-Saharan Africa and Asia, other types of deeply influenced constitutions appeared on the legal-publicist scene, where they were not explicitly granted by the legislative acts of states with colonial possessions.[68] With regard to the constitutions granted by states with colonial possessions

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publish the draft of the revised constitution on 17 March 1946, which was then submitted to the Privy Council for approval, leading to the promulgation of the text by the Emperor on 3 November 1946. The highly dirigiste approach adopted by the Allied High Command can be explained firstly on a political-military level (the Allied occupation of the country did not end until 1952), but above all by the fact that, despite the forced modernisation of the second half of the 19th century, the country had never known a period of liberal democracy, but only a monarchy based on the divine right of the Emperor and on a very strong identity and tradition built up over the centuries. It was therefore clear from the outset that the only way to constitutionally compensate for such an 'arid' background, with a view to establishing a liberal-style democracy, was to artificially transplant a democratic constitution of Western conception from outside. This imposition was not without its critics, especially after the end of the American occupation (1952), when an intense internal debate on the drafting of a new constitutional text was launched, but without any tangible results. On the contrary, with the passage of time, Japan adopted the dictates of the externally imposed constitution to such an extent that reform efforts were severely curtailed and almost disappeared. De Vergottini, G., *Diritto costituzionale comparato*, 247-249.

[66] Following Germany's wartime defeat, the Allies decided with the London Accords what state structure to apply to the new Germany and what the founding principles of this new society, which was in its 'year zero', should be. The constitutional journey of the new Germany began with the presentation by the Western powers to the *Länder-Rat* of the 'Frankfurt Documents' in 1948, which summarised the guidelines to be followed in drafting the new constitutional text. This document did not leave a large margin of autonomy to the German representatives, who met in Bonn in the *Parlamentarischer Rat* for the work, who constantly consulted the Allies during the drafting process, resulting in the completed constitutional text being dismissed in May 1949 and subsequently ratified by the *Länder*, subject to the approval of the Allied forces. Although popular approval by referendum was originally planned, this did not happen. Even though the German case is rightly part of the external model of constitutional production, it emerges that the role played by the deputies of the *Parlamentarischer Rat* was primary, even if subject to strict constraints; it can be said in this regard that German constituent power was characterised by a 'mitigated' external conditioning. The resulting constitutional text, however, was called *Grundgesetz* rather than *Verfassung*, almost as if to imply a certain temporariness, or the presence of a legitimacy deficit that meant it did not deserve the name of constitution. In this case too, part of German doctrine objected to a "defect of origin" (*Geburtsmakeltheorie*) of the German Basic Law, a 'defect' that was certainly reabsorbed by practice, with the results of the first post-war democratic elections and with the adhesion of civil society to the *Treue zur Verfassung* expressed in Article 5 *Grundgesetz*. See Parodi, G., *La Germanie e l'Austria*, in Carrozza, P., Di Giovine, A., Ferrari, G. F. (eds.), *Diritto costituzionale comparato. Tomo I*, Laterza, Roma, 2014, 149-179; Anzon, A., Lauther, J., *La legge fondamentale tedesca*, Giuffrè, Milano, 1997, 18-40; Lanchester, F., *Le costituzioni tedesche da Francoforte a Bonn*, Giuffrè, Milano, 2009, 108-126; Palermo, F., Wöelk J., *Germania*, il Mulino, Bologna, 11-31; Möllers, C., *'We are (afraid of) the people': Constituent Power in German Constitutionalism*, in Loughlin, M., Walker, N. (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 2008, 95-96; Ridola, P., *Stato e Costituzione in Germania*, Giappichelli, Torino, 2016, 21-41.

[67] Bröhmer, J., Hill, C., Spitzkatz, M. (eds.), *60 Years German Basic Law: The German Constitution and its Court Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights*, Konrad Adenauer Stiftung, Bonn, 2012, 67-99; Kommers, D. P., *The Basic Law: A Fifty Year Assessment*, in *German Law Journal*, Vol. 20, 2019, 571-582; Gluck, C., *Japan's Constitution Across Time and Space*, in *Columbia Journal of Asian Law*, Vol. 33, No. 41, 2019, 41-63; Maki, J. M., *The Japanese Constitutional Style*, in *Washington Law Review*, Vol. 43, No. 5, 1968; 893-929; Boyd, J. P., *Reasoning Revision: Is Japan's Constitution Japanese*?, in *Journal of Asia-Pacific Studies*, No. 22, 2014, 47-68.

[68] Cooper Davis, P., *Post-colonial constitutionalism*, in *New York University Review of Law and Social Change*, Vol.

over their colonies, some scholars, such as Romano, have denied that one could really speak of the exercise of constituent power in this case.[69] In reality, these types of constitutions are also the result of significant negotiations between the colonial state and the local political class that is likely to lead the country from colony to newly independent state. Moreover, it should not be forgotten that once the country has become independent and has severed its direct links with the motherland, it can always proceed to revise the constitutional text or even adopt a new one, thus exercising an "internal" constituent power. Generally speaking, if, on the other hand, an independent state accepts the constitution "imposed" by the colonial state, this means that it implicitly adopts that constitution, making it an indigenous constitution and removing any doubt as to its legitimacy.[70]

A further type of constitution resulting from the "external" exercise of constituent power are "internationalised constitutions", which are the result of an international agreement granting a new constitution to a state. An emblematic case of this is certainly the constitution of Bosnia and Herzegovina, which will be analysed in the next chapter. In this case, the state is provided with a new constitution not as a result of the loss or limitation of its sovereignty due to a war defeat, nor as a result of the attainment of full sovereignty. On the contrary, these internationalised procedures are adopted in response to major internal changes in a society, such as the outbreak of war or major political instability. It is precisely the international organisations that intervene, through peacekeeping or state-building procedures, to calm the internal situation and, in the same way, the international agreement reached between the conflicting parties also includes a constitutional text that can further seal the achievement of peace and stability by enshrining certain values to which the formerly conflicting parties can identify.[71]

44, No. 1, 2019, 1-12; Go, J., *Modeling the State: Postcolonial Constitutions in Asia and Africa*, in *Southeast Asian Studies*, Vol. 39, No. 4, 2002, 558-583; Samaddar, R., *Colonial Constitutionalism*, in *Identity, Culture and Politics*, Vol. 3, No. 1, 2002, 1-35.

[69] Romano, S., *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, in Sandulli, A. (eds.), *Lo Stato moderno e la sua crisi. Saggi costituzionali 1909-1925*, Quodlibet, Macerata, 2023, 16-31.

[70] Morbidelli, G., *Costituzioni e costituzionalismo*, 75.

[71] See Saunders, A., *Constitution-Making as a Technique of International Law: Reconsidering the Post-War Inheritance*, in *American Journal of International Law*, No. 07, 2023, 1-58; Peters, A., *Global Constitutionalism*, in Gibbson, M. T. (eds.), *The Encyclopedia of Political Thought*, John Wiley Published, Hoboken, 2015, 1-4; Turner, C., Houghton, R., *Constitution Making and Post-Conflict Reconstruction*, in Saul, M. Sweeney, J. A. (eds.), *International Law and Post-Conflict Reconstruction Policy*, Routledge, London, 2015, 119-140; Ludsin, H., *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, in *University of Pennsylvania Journal of International Law*, Vol. 35, No. 1, 2011, 239-244; Hay, E., *International(ized) Constitutions and Peacebuilding*, in *Leiden Journal of International Law,* Vol.27, No. 1, 2014, 141-168; Gardbaum, S., *Human Rights as International Constitutional Rights*, in *The European Journal of International Law*, Vol. 19, No. 4, 2008, 749-768; Paulus, A. L., *The International Legal System as a Constitution*, in Dunoff, J L., Trachtman, J. P. (eds.), *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge University Press, Cambridge, 2009, 69-109; Dann, P., Al-Ali, Z., T*he Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, in von Bogdandy, A., Wolfrum, R. (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 10, 2006, 423-463.

The case of Bosnia and Herzegovina best illustrate that this internationalised constitutional process does not originate merely in the influence of other states, but precisely in the international organisations, which today are increasingly involved through international missions in areas affected by armed conflict and political instability. These interventions aim to contribute to conflict resolution and social (re)conciliation, to promote state-building and the acquisition of full sovereignty, and to foster the formation of a unified national consciousness.[72] The complex of these operations, usually referred to as "peacekeeping", "peacebuilding", "peace-making", "state-building", "nation-building", is often flanked by activities, modulated in various ways, of international participation in constitution-building and constitution-making processes.[73] In particular, support for constituent processes - which for the UN includes all activities directed at both the drafting and revision of constitutional charters - has by now taken on a central significance in the context of operations to assist constitutional transitions, the building of democratic institutional arrangements, and the realisation of peace and security, both internal and international. Suffice it to think, within the United Nations system, of the interventions deployed by networks, departments and bodies, such as the UN Development Programme (UNDP), the UN Democracy Fund (UNDEF), the UN Department of Political Affairs, the UN Constitutional Assistance (UNCA) and the Rule of Law Coordination and Resource Group, without neglecting the role of the Security Council, the Secretary-General, the High Commissioner for Human Rights and the Special Representatives sent by the UN to individual territories.[74] Added to these bodies are the initiatives of UN member states that have sometimes acted, even militarily, with the declared aim of putting an end to dictatorships or have intervened to sign peace agreements. On the other hand, supporting processes of transition and democratic consolidation is not the exclusive prerogative of the United Nations and its many specialised departments.[75] In the international context, in fact, the role of NATO cannot be underestimated, while, in the more circumscribed European regional dimension, the activities carried out in various capacities, also in favour of non-European states, by the so-called Venice Commission of the Council of Europe, the

[72] Samuels, K., *Post-Conflict Peace-Building and Constitutional-Making*, in *Chicago Journal of International Law*, Vol. 6, 2005, 663 ff.; Dann, P., Al-Ali, Z., *The Internationalized Pouvoir Constituant: Constitution-making under External Influence in Iraq, Sudan and East-Timor, in Max Planck Yearbook of United Nations Law*, Vol. 10, 2010,1035 ff.; Hay, E., *International(ized) constitutions and Peacebuilding*, in *Leiden Journal of International Law*, Vol. 27, No. 1, 2014, 141 ff.

[73] Riegner, M., *The Two Faces of the Internazionalized pouvoir constituent*, 3; Hay, E., *International(ized)* constitutions, 143.

[74] Floridia, G., *Il costituzionalismo "a sovranità limitata*, 7; Piergigli, V., *Diritto costituzionale e diritto internazionale*, 4.

[75] Wolfrum, R., *International Administration in Post-Conflict Situation by the United Nations and Other International Actors*, in *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, 649 ff.; Jones, G., Dobbins, J., *The UN's Record in Nation Building*, in *Chicago Journal of International Law*, Vol. 6, No. 2, 2005, 703 ff.; Maley, W., *Democratic Governance and Post-Conflict Transitions*, in *Chicago Journal of International Law*, Vol. 6, No. 2, 2005, 683-694.

Office for Democratic Relations of the OSCE and the European Union are considered. Finally, it is not uncommon for the states themselves to consult foreign NGOs and experts when adopting or amending constitutional texts. For around a quarter of a century, therefore, external forms of involvement - admittedly rather heterogeneous - in constitution-making processes have been taking place at all latitudes and in the most diverse geo-political contexts.[76] These interventions by the international community in constituent processes do not seem to be diminishing, so much so that the United Nations itself has felt the need in recent years to draw up some strategic guidelines in order to minimise the risks of improvised or ill-conceived operations in the future and to try to make the most of best practices based on successful experiences.[77]

Finally, the third category of constitutions adopted through an "external" constitutional process is the actually very broad and difficult to identify category of "internationally conditional constitutions".[78] This type of constitution is characterised by the fact that the subjects within the State who exercise constituent power remain formally fully autonomous in adopting a new constitution. In substance, however, their activity is subject to constraints imposed by international or supranational law. In reality, these international constraints are not explicitly imposed, but it is the constituents themselves who, in exercising their constituent power, prefer to adhere to certain specific values in order to subsequently favour their own entry into supranational or international organisations.[79] A typical case of internationally conditioned constitutions occurred historically after the fall of the "Iron Curtain", when most of the Central and Eastern European countries, previously under Soviet influence, expressed their willingness to join the Council of Europe, but their accession was made conditional on the adoption of constitutional reforms guaranteeing the protection of fundamental rights and political freedoms.[80] Similarly, the countries that joined the European Union in the great

[76] Sripati, V., *UN Constitutional Assistence Projects in Comprehensive Peace Missions: An Inventory 1989-2011,* in *International Peacekeeping*, Vol. 19, No. 1, 2012, 93.

[77] Lollini, A., *Costituzionalismo e giustizia di transizione. Il ruolo costituente della Commissione sudafricana verità e riconciliazione*, il Mulino, Bologna, 2005, 12 ff.

[78] Morbidelli, G., *Costituzioni e costituzionalismo*, 75.

[79] See Peters, A., *International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile*, in *The Rule of Law in Transnational Context*, Vol. 8, 2023, 61-106; Peters, A., *Constitutional Theories of International Organisations: Beyond the West*, in *Chinese Journal of International Law*, Vol. 20, No. 4, 2021, 649-698; Katz Cogan, J., *Representation and Power in International Organization: The Operational Constitution and Its Critics*, in *The American Journal of International Law*, Vol. 103, No. 2, 2009, 209-263; Panke, D., Hohlstein, F., Polat, G. (eds.), *The constitutions of international organisations: How institutional design seeks to foster diplomatic deliberation*, Cambridge University Press, Cambridge, 2019, 21-34; Wiebusch, M., *The role of regional organizations in the protection of constitutionalism*, in *Institute for Democracy and Electoral Assistance*, No. 17, 2016, 1-62; Böckenförde, M., Hedling, N., Wahiu, W. (eds.), *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance, Stockholm, 2011.

[80] However, within the existing legal systems and in view of the globalisation of law and its institutions, even the exercise of constituent power in international law and, above all, in supranational law, as can be seen in the case of the European Union, is subject to constraints of an objective nature. One thinks, for example, of the role played by

enlargement of 2004 had previously made some, if not all, changes to their constitutional texts in order to comply with the European standards required by the so-called Copenhagen criteria.[81]

1.4. The peculiar constitution of European Union

As regards the constitutional profile of the European Union, the ambitious project of adopting a European Constitution has its roots in the famous *Ventotene Manifesto*, drafted in 1941 by Altiero Spinelli, Ernesto Rossi, and Eugenio Colorni. However, it was only with the major changes in the institutional architecture of the European Economic Community at the turn of the 1980s and 1990s that the need for a European Constitution became increasingly urgent. As early as the 1990s, the European Parliament had repeatedly reiterated the need to provide the Union with a democratic Constitution. Particularly at the beginning of the new millennium, a major debate on institutional reform was seen as indispensable and not to be postponed, not least in the light of the treaty changes that had taken place over the previous decade. In a famous speech at Humboldt University in May 2000, the then German Foreign Minister, Joschka Fischer, stated that the solution to the problem of democracy and the substantial reorganisation of competences both horizontally - namely between the European institutions - and vertically - i.e. between Europe and Member States - could only be achieved through a constitutional re-founding of Europe. This means realising the project of a European constitution, the core of which must be the enshrinement of fundamental rights, human and civil rights, a balanced distribution of powers between the European institutions and a precise demarcation between the European and national levels.[82]

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transcendent principles of natural law, such as human rights, or compliance with certain criteria for accession to the European Union, and the role of international treaties on civil and political rights. Thus, it can be said that even today, "internal" constitutive processes are still subject to certain constraints stemming from the existence of commonly accepted values and principles, at least within so-called Western legal systems. See Pinelli, C., *Conditionality and Enlargement in Light of EU Constitutional Development*, in *European Law Journal*, Vol. 10, No. 3, 2004, 354-356; Zhou, M., *Comparative Analysis of Contemporary Constitutional Procedure*, in *Case Western Reserve Journal of International Law*, Vol. 30, No. 1, 1998, 149-250; Grimm, D., *Constitutionalism: past, present, future*, in *Nomos*, No. 1, 2018, 1-13; Loughlin, M., *The Contemporary Crisis of Constitutional Democracy*, in *Oxford Journal of Legal Studies*, Vol. 39, No. 2, 2019, 435–454; Horsley, T., *Constitutional functions and institutional responsibility: a functional analysis of the UK constitution*, in *Legal Studies*, Vol. 42, 2022, 99-119; Duke, G., *Can the people exercise constituent power?*, in *ICON-S*, Vol. 21, No. 3, 798-825; Kumm, M., *Constituent power, cosmopolitan constitutionalism, and post-positivist law*, in *ICON-S*, Vol. 14, No. 3, 697-711; Colón-Ríos, J. I., *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, in *Osgoode Hall Law Journal*, Vol. 48, 2010, 199- 209.

[81] Morbidelli, G., *Costituzioni e costituzionalismo*, 76; De Vergottini, G., *Diritto costituzionale comparato*, 247-254.

[82] Speech by Joschka Fischer on the ultimate objective of European integration (Berlin, 12 May 2000). See also the consideration of Grimm, D., *Una costituzione per l'Europa?,* in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, Einaudi, Torino, 1997, 339-342.

The prospect of a European constitution, relaunched by Fischer, thus helped to revive the debate on the subject and was also supported by the President of the French Republic, Jacques Chirac, and by the President of the Italian Republic, Carlo Azeglio Ciampi, who on several occasions spoke out in favour of a European constitutional text. The Laeken Declaration, renowned for its significance, was adopted by the European Council in December 2001, after Declaration No. 23 appended to the Treaty of Nice. This declaration underscored the opportune moment for the development of a European constitution.[83] It sanctioned the need to redefine the Union's foundations with a view to the next Intergovernmental Conference, but abandoned «the traditional procedures for amending the Treaties» and called for «an in-depth debate among national parliamentarians and public opinion (political and economic circles, universities, civil society) on the shape of the "Great Union" after enlargement».[84] At Laeken, it was decided to convene a Convention on the future of Europe to provide the Union with a constitutional text.

The Convention began its work in February 2002 and concluded on 18 July 2003, submitting a draft Constitutional Treaty to the European Council.[85] After heated debates, the text of the *Treaty establishing a Constitution for Europe*, approved by the Brussels European Council in June 2004, was solemnly signed by the 25 Heads of State and Government in Rome on 29 October 2004. The Constitutional Treaty consisted of 448 articles and was divided into four parts.[86] In particular, the preamble recalled Europe's cultural, religious, and humanist heritage, which had given rise to the universal values of inviolable and inalienable human rights, freedom, democracy, equality and the rule of law. Here, too, a bridge is being built between the origins of the integration project, recalling the painful experiences which inspired the proponents of the economic communities, and the objectives which the Union continues to pursue to advance along the path of civilisation, progress

[83] Laeken Declaration on the future of the European Union (15 December 2001); Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and *certa* in related acts - Declarations Adopted By The Conference - Declaration on the future of the Union.

[84] Oppermann, T.*, Il processo costituzionale europeo dopo Nizza*, in *Rivista trimestrale di diritto pubblico*, No. 2, 2003, 358.

[85] The Convention had 105 members, including 3 members of the Presidency, 28 government representatives, 56 representatives of national parliaments, 16 members of the European Parliament, 2 members of the Commission and 12 observers from the Committee of the Regions, the Economic and Social Committee and the social partners. The process followed by the Assembly consisted of three stages: Listening to the political world and civil society, responding to the questions posed by the European Council, and drafting a proposal of a constitutional nature. Although the method of drafting is clearly unprecedented compared with previous IGCs, the draft treaty remains a comprehensive revision of its predecessors, and the *pouvoir constituant* remains with the Member States as the "Masters of the Treaties". See Ziller, J., *I concetti costituzionali nella nuova Costituzione per l'Europa*, in *Quaderni costituzionali*, No. 1, 2005, 76.

[86] The first defined the values, institutions, and competences of the European Union; the second incorporated, with limited amendments, the Charter of Fundamental Rights of the European Union; the third was a synthesis of the previous treaties and regulated in detail the policies, subjects and functioning of the Union; the last part contained the general and final provisions.

and prosperity for the benefit of all its inhabitants, including the weakest and neediest. It stated that the Europe that is being built is a Europe that wants to remain a continent open to culture, knowledge and social progress, that wants to deepen the democratic and transparent character of public life and that wants to work for peace, justice and solidarity in the world. The oxymoronic motto "Unity in Diversity" is quoted as if to sum up the attempt, which the Constitutional Treaty does not deny, to build a common political horizon while respecting different national histories and identities.

The European Constitution immediately emerged as an original document, as a result of a constituent process that defies the usual classifications, as is clear from its very name. It brings together two terms that are clearly contradictory: Treaty and Constitution, which, according to the constitutional doctrine of the last two centuries, can hardly be considered comparable. Dieter Grimm himself, who opposed a European constitution, stated that «constitutions give States their legal basis. International institutions, on the other hand, have their legal basis in international treaties. This is what was said in the past. But with the European Union, this distinction seems to be disappearing».[87] This is intended to undermine the line of thought that sees in the Constitution the expression of a unified and self-conscious political community that wants to shape a state organisation of public powers, and in the treaty the typical instrument of cooperation between sovereign states to achieve common goals within the framework of international law. Indeed, the adoption of a constitutional text normally and unambiguously marks the birth of a genuine political community.

However, as is well known, history has taken a different course from that predicted by Europe's founding fathers. The European Constitutional Treaty was lost in the «dangerous sea»[88] of ratifications by the Member States. As soon as they were asked about the European Constitution in referendums, the citizens of some Member States, who had supported the integration process from the outset and had played a decisive role in the drafting of the Constitutional Treaty (France in particular), spoke out against it. On 29 May 2005, 54.7 per cent of French voters said "no" to the Constitutional Treaty, compared to 45.3 per cent in favour. This was followed a few days later by the Dutch voters (with a majority of 61.6%), certainly not without the influence of the French "no" vote. Thus, after two years of uncertainty, the European Council of 21 and 22 June 2007 declared that «the constitutional project, which consisted in repealing all the existing treaties and replacing them with a single text called "Constitution", is abandoned».[89]

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[87] Grimm, D., *Una costituzione per l'Europa?*, 339.

[88] Cartabia, M*., Ispirata alla volontà dei cittadini degli Stati d'Europa*, in *Quaderni costituzionali*, No. 1, 2005, 9.

[89] The Brussels European Council - 21 and 22 June 2007. See Walker, N., *The Burden of the European Constitution*, in *Edinburgh School of Law Research Paper*, No. 20, 2022, 1-12; Martinico, C., *From the Constitution for Europe to the Reform Treaty: a literature survey on European Constitutional Law*, in *Perspective on Federalism*, Vol. 1, No. 1, 2009, 13-40; Kirley-Tallon, E., *The Treaty Establishing a Constitution for Europe: Stalled Ratification and the Difficulty of the European Union in Connecting to its Citizens*, in *Journal of Political Science*, Vol. 35, No. 1, 2007, 95-126; De Burca,

Although forced to come to terms with the failure of the European Constitution and the adoption of the less ambitious Lisbon Treaty, the current of thought in favour of the existence of a European Constitution, which also finds support in the case law of the Court of Justice of the European Union, holds that the European Union already has its own constitution in the substantive sense. In this respect, it is worth noting the statements made by the Court of Justice in the *Les Verts* judgment (and repeated in other subsequent judgments, as will be seen in the following chapters), in which it affirmed that «the European Economic Community is a Community based on the rule of law, in the sense that neither the States which are members of it nor its institutions are exempt from control of the conformity of their acts with the fundamental constitutional charter constituted by the Treaty».[90]

In the European context, however, the debate on the existence or non-existence of a Constitution for the European Union is extremely articulate and still lively. Therefore, only some of the majority theories on this issue will be reviewed here to better frame the context in which the identity of the European Union will then be sought.

Certainly, when approaching the subject of the European constitutional debate, it is inevitable to start from the positions taken by two German scholars at the end of the 1990s. According to the Grimm's opinion, a European constitution cannot exist because there is no European people; on the other hand, Habermas argues that the European Union needs a constitution «in order to revive its ideal breath».[91] A third position, mainly represented by Joseph Weiler, claims - in terms not dissimilar to those used by the Court of Justice - that the European Union already has its own peculiar unwritten constitution, which would risk being "distorted" by the writing of a constitutional charter.[92] In any case, Weiler's theory is conditioned by an overall positive assessment of the European integration process. It is the scholar's conviction that European constitutional federalism constitutes something original, a challenge to the post-Westphalian conceptual tradition. From this perspective, the idea of formalising the "peculiar European Constitution" risks leading to a sclerosis of the best that the integration process has produced; the obsessive search for an "ultimate authority" at the supranational level, according to a demand that can be attributed to a school of thought that combines Kelsen and Schmitt, diverts attention, according to Weiler, from the only true *Grundnorm* of Union law, namely

G., *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, in *Washington and Lee Law Review*, Vol. 61, No. 2, 2004, 555-582; Kiljunen, K., *The European Constitution in the making*, Centre for European Policy Studies, Brussels, 2004, 6-154.

[90] ECJ, *Parti écologiste "Les Verts" v. European Parliament*, C-294/83, 23 April 1986.

[91] Habermas, J., *Una costituzione per l'Europa? Osservazioni su Dieter Grimm*, in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della* costituzione, Einaudi, Torino, 1997, 373.

[92] Weiler, J.H.H., *The Constitution of Europe. "Do the New Clothes have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999, 343 ff.

«constitutional tolerance».[93] In this sense, the complexity of the institutional design, the distinction between political legitimacy and normative force, and the respect for pluralism constitute the European *Sonderweg*, which must be protected against nationalist temptations. While the Union's institutional architecture is certainly open to correction and modification, for example regarding the democratic participation of European citizens, there is no need to rewrite a constitution that has been in existence for decades.[94]

Among the various positions on the subject, it is worth mentioning that of Häberele, who reads the idea of the constitution as a "stage of culture". In his reconstruction, the constitution is nourished by the cultural dimension and is indeed «an expression of a state of cultural development, a means for the manifestation of the culture of a people, a mirror of its cultural heritage and the foundation of its hopes».[95] A study of constitutional institutions limited to the legal dimension, but also understood as a process of social integration, is therefore misleading. Applied to the European Union, cultural studies emphasises the constitutionality of the supranational order and, at the same time, the «relativisation of nation-state constitutions into partial constitutions».[96] Although Häberle is aware of the limits of the process of constitutionalisation of the Union, he believes that the existence of a common European legal culture is the decisive element, and that Europe is therefore an example of a "constitutional community" which, on a conceptual level, derives from this culture - however powerful the economy has been as a driving force for integration. It is therefore necessary to free the concept of the constitution «from its - very German - focus on the State» and to open it up to regional, transnational, and international communities as a further step «on the way to the universal study of the constitution».[97]

Among the theories that have been developed to explain the peculiar constitutional set-up of the European Union, the theory of *multilevel constitutionalism* occupies a special place, which not only recognises the *sui generis* nature of the supranational order that has emerged in Europe, but also proposes to conceptualise the process of European integration in constitutional terms.[98] In particular,

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[93] Weiler, J.H.H., *The Constitution of Europe*, 351.

[94] *Ivi*, 344.

[95] Häberle, P., *Stato costituzionale: I Principi generali*, in *Enciclopedia giuridica*, Vol. IX, Roma, 2001, 2.

[96] Häberle, P., *Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. Il Grundgesetz come Costituzione parziale nel contesto della Unione europea: aspetti di un problema*, in *Diritto pubblico comparato ed* europea, No. 1, 2002, 460.

[97] Häberle, P., *Il costituzionalismo come progetto della scienza*, in *Nomos. Le attualità nel diritto*, No. 1, 2018, 3.

[98] The counterbalance to the theory of *Multilevel Constitutionalism* is the idea of *Verfassungsverbund*, coined by the Federal Constitutional Court in relation to the Maastricht Treaty (*BVerfGE* 89), which marked an important turning point in the debate on the European integration process. Leaving aside the case that gave rise to it, the Karlsruhe Court essentially accepted the applicant's arguments, which were aimed at safeguarding the essential core of the democratic principle in the face of an "uncontrolled" expansion of the competences of the European Union to be established. In fact, the Maastricht judgement allowed the *Bundesverfassungsgericht* to describe its conception of the European order in a

it seeks to explain how the emergence in the European context of a constitutional nature, can be reconciled with the undeniable persistence of national constitutional orders.[99] Absolutely central to this theory is the identification of a foundation of a democratic nature at the basis of European public power: an assertion linked to a "contractualist" conception of law. Although certain aspects of the *multilevel constitutionalism* outlined in the years immediately following the adoption of the Maastricht Treaty have undergone variations, corrections or adaptations in the light of the amendments to the Treaties, the adoption of the Nice Charter and the entry into force of the Lisbon Treaty, the essential core of the same has remained virtually unchanged; indeed, it is believed that the Lisbon innovations have confirmed a substantial continuity with the theoretical approach proposed by the proponents of *multilevel constitutionalism*.

The answer of the doctrine of *multilevel constitutionalism* to the question of the existence and, therefore, the nature of the European Union Constitution lies in the search for a "sufficiently homogeneous basis" in the tradition of Western constitutionalism in order to enucleate a concept of constitution that, once detached from the idea of the state, can accommodate different forms of political organisation, both supra-state and sub-state.[100] In this way, the theory of *multilevel constitutionalism* does not seek to define the essential elements of the fundamental order of the state, but rather to ground the legitimacy of public power on the basis of a "social contract" between individuals in a defined territory.[101] In fact, Pernice's theory of democratic constitutionalism embraces a "post-national" conception of the constitution, according to which national and supranational

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comprehensive argumentation and to point out its limits and deficits, especially regarding democratic legitimacy. At the heart of the Court's reasoning is the valorisation of Article 38 of the Basic Law, which is devoted to the right to vote. The latter is understood not in its purely formal aspect, but as the possibility of authentically influencing the substantive political decisions of representative bodies at the national level. For the Federal Constitutional Court, safeguarding the powers of the *Bundestag,* possibly even against a deprivation of the substantive powers which it has accepted, is an inescapable means of protecting also and above all the democratic principle embodied in the expression of the will of the people through the right to vote. Not only does this imply the establishment of an insurmountable limit to the transfer of sovereign powers to supranational or international organisations; what is decisive, according to the Court, is that the popular legitimation of fundamental political choices is guaranteed even within supranational structures. The judges also emphasise that the competences of the European Union are peremptory competences by virtue of that cornerstone of supranational law, the principle of attribution: it is not a federal state, but an association or union of states (*Staatenverbund*). If the competences are peremptorily enumerated, it is not possible to argue that the competences belong to the European Union; nor is it permissible to extend its competences by interpretation; a strict application of the principle of subsidiarity is required, the Court continues; finally, any automatism is excluded, both in the implementation of Economic and Monetary Union and in the further extension of European competences in general, for which in any case an amendment of the Treaties is required.

[99] Scarlatti, P., *Costituzionalismo multilivello e questione democratica nell'Europa del dopo-Lisbona*, in *Rivista AIC*, No. 1, 2012, 4 ff.

[100] Mayer, F.C., Wendele, M., *Multilevel Constitutionalism and Constitutional Pluralism*, in Avbelj, M., Komárek, J. (eds.), *Constitutional pluralism in the European Union and beyond*, Hart Publishing, Oxford, 2012, 129.

[101] Pernice, I., Mayer, F. C., *La Costituzione integrata dell'Europa*, in Zagrebelsky, G. (eds.), *Diritti e Costituzione nell'Unione europea*, Laterza, Roma, 2003, 45 ff.

institutions, complementary to each other, are the inescapable tools for meeting the challenges of the globalised world. Thus, the constitutions of the European Union and of the Member States form the «elements of a single, composite or integrated constitutional system»[102] or, more simply, together they constitute the European constitution. The two levels of public authority «influence each other, involving individual citizens or subjects of law themselves in several dimensions».[103] The Constitution of the European Union, according to this theory, is therefore not a static text, as the official result of a constituent act set in time and subsequently subject only to more or less limited changes and developments of an eminently interpretative nature, as in classical constitutional theory; rather, there is a «permanent constituent process».[104] Thus, the European Constitution is a work in progress, subject to treaty revisions, dynamic interactions between jurisdictions, and the evolving interpretation of European norms in the jurisprudential dialogue between the Court of Justice, national constitutional courts, and ordinary courts.

Leaving aside the different and often conflicting theories on the Constitution of the European Union, there is one aspect on which there is consistent agreement, namely the existence of a slow but progressive "constitutionalisation" of the European Union order. In other words, the Court of Justice, through its activism, «has sought to "constitutionalise" the Treaty, namely, to design a constitutional framework for [...] Europe».[105] In fact, this constitutional framework that the Court of Justice has drawn up in relation to the Union's order can be summarised in four "cardinal points" that have been historically reaffirmed and then developed within the Community order.

The first point established by the European judges was the principle of "direct effect", introduced in 1963 by the famous *Van Gend en Loos* judgment - a standpoint subsequently confirmed by the *Costa v. ENEL* (1964) and *Lütticke* (1965)[106] judgments - according to which the content of the Treaties not only produces effects in respect of the Member States and the Community institutions, but also confers rights on the citizens of the Member States themselves.[107] Thus, Community legal norms which are sufficiently clear and detailed and which do not need to be

[102] Pernice, I., Mayer, F. C., *La Costituzione integrata dell'Europa*, 49.

[103] *Ibidem*.

[104] *Ivi*, 50.

[105] Mancini, G. F., *Democrazia e costituzionalismo nell'Unione europea*, il Mulino, Bologna, 2004, 40-41.

[106] ECJ, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, 5 February 1963; ECJ, *Flaminio Costa v E.N.E.L.*, C-6/64, 15 July 1964; ECJ, *Alfons Lütticke GmbH v Commission of the European Communities*, C-4/69, 28 April 1971.

[107] The reason for this decision can be explained in terms of the desire to ensure respect for the principle of legality. The Court wanted to ensure that no Member State could plead its failure to comply with European law in such a way as to frustrate the legitimate expectations of EU citizens.

transposed by subsequent and further implementing measures by the States are to be regarded as equivalent to national legislation and are therefore directly applicable.[108]

The second cornerstone in the process of "constitutionalising" the European Union is the primacy of EU law over national law. This principle is a real peculiarity in the context of international treaties. The Court of Justice intervened to make the law of the European Union more akin to a federal order than to an international order with the *Costa v. ENEL* judgment, in which the judges declared that, by creating a Community for an indefinite period, endowed with its own organs, personality and effective powers resulting from a limitation of competences or a transfer of powers from the States to the Community, the States limited their sovereign powers and thus created a body of law binding on their citizens and on themselves.[109] This decision of the Court of Justice meant that in the event of an antinomy between Community law and the law of the Member States, the antinomy was resolved in favour of the former.

The third "cardinal point" defining the nature of the "constitutionalisation" of the European Union was the principle of "implied powers". In fact, the Court of Justice, starting with the *Commission v. Council* decision of 1971, had established the principle that where the Community is endowed with internal competence, this must implicitly include an external power to conclude treaties, capable of binding not only the Community itself but also the Member States.[110]

The fourth and last cornerstone of the European Union's constitutional system is the recognition of the principles of fundamental rights. In fact, the founding Treaties of the Communities did not contain a section on the protection of rights and freedoms. However, since the 1969 judgment in *Erich Stauder v. Stadt Ulm, Sizialamt*, the Court of Justice has established the principle that the constitutional traditions common to the Member States[111] and the international human rights conventions to which they are parties constitute parameters for the judicial review of Community measures.[112]

Even if - as this brief reconstruction has shown - there is no doctrinal consensus on the existence or non-existence of a constitution for the European Union, it is difficult to deny the

[108] With regard to this first consideration, it should be noted that the Court of Justice took a further step in its judgment in *Yvonne Van Duyn v. Home Office*, in which it gave direct effect to the provisions of directives which had not been transposed into the domestic law of the Member States within the prescribed period, although the requirements of the *Van Gend en Loos* judgment remained in force. See ECJ, *Yvonne Van Duyn v. Home Office*, C-41/74, 4 December 1974.

[109] ECJ, *Flaminio Costa v E.N.E.L.*, C-6/64, 15 July 1964.

[110] ECJ, *Commission of the European Communities v Council of the European Communities*, C-22/70, 31 March 1971.

[111] The common constitutional heritage can be defined as the set of constitutional traditions of Western Europe and is identified with a set of principles and values established in liberal constitutionalism, such as the democratic principle, individual liberty, cultural and political traditions and the rule of law.

[112] ECJ, *Erich Stauder v City of Ulm - Sozialamt*, C-29/69, 12 November 1969. Aa a general principles of Community law.

existence of a slow and steady process of "constitutionalisation" which,[113] as it has developed, has given this order an increasingly constitutional dimension and, indirectly, less and less resemblance to the international treaties from which it derives.[114]

In conclusion, this section has attempted to reconstruct, albeit briefly and without claiming to be exhaustive, the main features of the contexts that led to the adoption of the respective constitutions of Bosnia and Herzegovina and the European Union. Indeed, this generative moment of the Constitution has an important impact on the choices made by the constituents in drafting the text. Indeed, as will become clearer in the following pages, the identity of a constitutional text may already be fully or partially fixed at the moment of constitution-making, namely when the principles and values on which a constitutional order is to be built are formalised. On the other hand, in the case of constitutional texts that have been adopted under significant external constraints or influences, it is also possible to trace the elements of the constitutional text's identity. In fact, very often - and this will become clearer in the analysis of the Bosnian and Herzegovinian case study - heterodirected constitutional processes are based on general values and principles of liberal constitutionalism, such as those of the protection of fundamental rights and freedoms, precisely in order to create a widely shared substratum of values and, therefore, suitable for the reconstruction and re-founding not only of a democratic and pluralist system, but also of the society to which this system is to be applied. In this regard, the manner in which constituent power is exercised becomes a key point of reflection: whether it is exercised "within" or "outside" the specific constitutional framework, or whether it evolves through a gradual process of "constitutionalisation". Understanding the development of a constitutional identity at a particular time and in a particular way requires examination through historical, sociological, and legal lenses in order to identify the guiding principles that shaped it.

[113] See Bast, J., *The Constitutional Treaty as a Reflexive Constitution*, in *German Law Journal*, Vol. 6, No. 1, 2005, 1433-1452; Brunkhorst, H., *A Polity without a State? European Constitutionalism between Evolution and Revolution*, in Eriksen, E. O., Fossum, J. E., Menéndez, A. J. (eds.), *Developing a Constitution for Europe*, Routledge, London, 2004, 90-108; Peters, A., *The Constitutionalisation of the European Union – Without the Constitutional Treaty*, in Riekmann, S. P., Wessels, W. (eds.), *The Making of a European Constitution Dynamics and Limits of the Convention Experience. Dynamics and Limits of the Convention Experiences*, VS Verlag, Wiesbaden, 2006, 35-67.

[114] See Grimm, D., *Una costituzione per l'Europa?*, in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, Einaudi, Torino, 1997, 339-367; Habermas, J., *Una costituzione per l'Europa. Osservazioni su Dieter Grimm*, in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, Einaudi, Torino, 1997, 369-375; Fioravanti, M., *Un ibrido fra trattato e costituzione*, in Paciotti, E. (eds.), *La costituzione europea. Luci e ombre*, Meltemi, Sesto San Giovanni, 2004, 17 ff.; Pasquinucci, D., *Pensare l'inedito: una Costituzione per l'Unione europea*, in *Contemporaneo*, Vol. 5, No. 3, 2002, 601-607. Critically, see: Grimm, D., *Trattato o Costituzione?*, in *Quaderni costituzionali*, No. 1, 2004, 163-165.

1.5. The Dynamics of constitutions

The previous section was devoted to the generative moment of the constitution and the characteristics that result from the exercise of constituent power. This section is devoted to exploring what might be called the dynamics of a constitutional text, focusing on those aspects related to the practical functioning and application of the constitution. On the one hand, the constitution has the intrinsic characteristic of stability, since it is adopted through the exercise of constituent power to regulate the activities of the state, of the citizens and the relations between them for the present and the future. On the other hand, although the element of stability of the constitution - as a superior source that lays down the rules of a state - remains fundamental, it is possible to affirm that the constitutional text can be subject to revision or change. Moreover, the elasticity of the constitutional text can also make its evolutionary interpretations possible. It is precisely the element of changeability that, for reasons that will be explained below, constitutes an antithetical moment to the adoption of a constitution, but also a very important element of analysis for reconstructing the identity of a constitution. Indeed, in the pages of this section, an attempt will be made to outline, in general terms, the characteristics that distinguish constitutional revision processes and the limits that they may encounter. Moreover, in the context of the dynamics that affect a constitution and that can be significant for an analysis of identity, the moments of crisis and rupture of the constitutional text are also dense with meaning. Insofar as the discipline of constitutional emergency can contribute to the reconstruction of identity by fixing its structural and inviolable elements. This assertion can also be applied to the procedures for protecting the constitutional text. Indeed, it is precisely through the protection offered to the constitutional text by constitutional jurisprudence, or even through the right of resistance, that the elements that define the essence of a constitutional order can be identified. For these reasons, the following section will attempt to identify briefly, within the dynamics of the constitution, the elements that will then be used in detail to identify and reconstruct the constitutional identity of the two case studies proposed in chapters two and three of this work.

With regard to the constitutional amendment process, it must be said that it differs from the adoption of a new constitution in that the core of values and principles on which the constitution is based should potentially remain unchanged.[115] In other words, when a constitutional revision procedure is adopted, there is no exercise of constituent power, but rather a power that remains within the limits of the constituted powers, namely enshrined in the constitution itself. If, on the other hand, the changes to the constitutional text go so far as to affect the fundamental institutions, then formally there is a revision procedure, but in substance there is a "covert" exercise of constituent power and a

[115] De Vergottini, G., *Diritto costituzionale comparato*, 288-289.

new constitution is put in place which is in a discontinuous relationship with the previous one, which precisely ceases to be effective.[116] This characteristic of the revision process suggests that there is an unchangeable core in every constitution which determinate its essence, its foundation. It is precisely because of this fact that it is possible to understand that, in the identification of constitutional identity, an important aspect is covered precisely by the analysis of the procedures and, above all, the limits of the revision of the constitutional text. Indeed, from these two elements it is possible to trace the axiological core that the constituents wished to imprint on the constitution and, by extension, the principles and values that define the identity of the constitutional text, insofar as they are unchangeable.[117]

To begin with the description of the various constitutional amendment procedures most common today, it must first be said that a revision procedure can only exist in relation to rigid constitutions, since they require a special, aggravated procedure to be amended.[118] The procedure for revising a constitutional text can be adopted by different bodies, even within the same constitution. In fact, if we want to summarise the main constitutional revision procedures, they can be classified as those entrusted to a specially convened assembly, which has the exclusive task of managing this procedure.[119]

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[116] See Barile, P., *La Costituzione come norma giuridica. Profilo sistematico*, Barbera Editore, Firenze, 1951, 21 ff.; de Vergottini, G., *Referendum e revisione costituzionale: una analisi comparativa*, in *Scritti in onore di Alberto Predieri*, Vol. II, Giuffrè, Milano, 1996, 749-806; Dogliani, M., *Potere costituente e revisione costituzionale*, in *Quaderni costituzionali*, 1995, No. 1, 76 ff.; Dogliani, M., Bin, R., Martinez Dalmau, R., *Il potere costituente*, Editoriale scientifica, Napoli, 34-55; Calamo Specchia, M., *La costituzione tra potere costituente e mutamenti costituzionali*, in *Rivista AIC*, No. 1, 2020, 266-295; Böckeförde, M., *Constitutional Amendment Procedures*, International Institute for Democracy and Electoral Assistence (IDEA), Stockholm, 2017, 6-21; Barile, P., De Siervo, U., *Revisione della Costituzione*, in *Novissimo digesto italiano*, Vol. XV, Torino, 198, 777 ff; Barak., A., *Unconstitutional Constitutional Amendments*, in *Israel Law Review*, Vol. 44, No. 3, 2011, 321-341; Albert, R., *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, in *Queen's Law Journal*, Vol. 41, No. 1, 2015, 143-206.

[117] Oliver, D., Fusaro, C. (eds.), *How Constitutions Change. A Comparative Study*, Oxford University Press, Oxford, 2011, 114-133; Ferioli, E., *I procedimenti di revisione costituzionale*, Dupress, Bologna, 2008, 301-314.

[118] In the case of flexible constitutions, it becomes difficult to frame the existence and content of constitutional identity in the wake of the argument made here. Indeed, the possibility of fully amending the constitutional text with an ordinary law automatically makes it difficult to formulate a hard core of values that underpin the constitution. See Stephenson, S., *The Challenge for Courts in a Moderately Rigid Constitution*, in *Melbourne University Law Review*, Vol. 44, No. 3, 2021, 1043-1076; Pasquino, P., *Flexible and Rigid Constitutions. A Post-Kelsenian Typology of Constitutional Systems*, in López-Guerra, C., Maskivker, J. (eds.), *Rationality, Democracy and Justice. The Legacy of Jon Elster*, Cambridge University Press, Cambridge, 2015, 85-96; Benz, A., *Balancing Rigidity and Flexibility: Constitutional Dynamics in Federal Systems*, in *West European Politics*, Vol. 36, No. 4, 2013, 726-749; Palermo, F. (eds.), *La "manutenzione" costituzionale*, CEDAM, Padova, 2007, 323-344; Bryce, J., *Costituzioni flessibili e rigide*, Giuffrè, Milano, 1998, 6-112; A., *Potere costituente, rigidità costituzionale, autovincoli legislativi*, CEDAM, Padova, 1997, 166-189.

[119] Fasone, C., *The "due process" of constitutional revision: which guidance from Europe?*, in *Studi polacco-italiani di torun*, Vol. XVII, 2021, 153-171; Roznai, Y., *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, Oxford, 2017, 155-178; Closa, C., Kochenov, D., *Introduction. How to Save the EU's Rule of Law and Should One Bother?,* in Closa, C., Kochenov, D. (eds.), *Reinforing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge, 2016, 1-12; De Visser, M., *A Critical Assessment of the Role*

In most countries, the constitutional amendment procedure is carried out by the ordinary legislative assembly, with the parliament itself exercising the power of revision.[120] However, there are many variations on parliamentary approval. For example, some jurisdictions provide for two votes in the assembly at different times to confirm the existence of a real will to amend. Or there may be a procedure whereby the revision initiative phase is initiated by the Parliament, followed by the dissolution of the same Assembly to allow the newly elected Assembly to initiate and complete the amendment adoption phase.[121] Another element that can be included in the constitutional revision procedure managed by the Parliamentary Assembly is the provision for an approval referendum for the adoption of amendments, which in some legal systems may be possible on the basis of the majority obtained in Parliament, as is the case in the Italian legal order,[122] or is always necessary regardless of the majority obtained. Federal legal systems, instead, often provide for the adoption of constitutional amendments with the participation of the federal units that make up the State. This is the case, for example, in the United States, Germany, Austria and Switzerland, where a revision procedure cannot take place without the direct or indirect involvement of the federal units.[123] To conclude this examination of review procedures, in some cases they may be mixed, namely they may provide for several procedures at the same time or alternatively.[124]

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of the Venice Commission in Processes of Domestic Constitutional Reform, in *The American Journal of Comparative Law*, Vol 63, No. 4, 2015, 963–1008.

[120] See Faraguna, P., *On the Identity Clause and Its Abuses: 'Back to the Treaty'*, in *European Public Law*, Vol. 27, No. 3, 2021, 427–446; Albi, A., *The Central and Eastern European Constitutional Amendment Process in light of the Post-Maastricht Conceptual Discourse: Estonia and Baltic States*, in *European Public Law*, Vol. 7, No. 3, 2001, 433-454; Holmes, S., Sunstein, C., *The Politics of Constitutional Revision in Eastern Europe*, in Levinson, S. (eds.), *Responding to Imperfection. The Theory and Practice of Constitutional Amendment*, *Princeton University Press*, Princeton, 2015, 275-306; Closa, C., *Between a rock and a hard place: the future of EU treaty revisions*, in *Swedish Institute for European Policy Studies*, No. 2, 2014, 1-12; De Witte, B., *Treaty Revision Procedures after Lisbon*, in Biondi, A., Eechhout, P. Ripley, S. (eds.), *EU Law after Lisbon*, Oxford University Press, Oxford, 2012, 107-127; O'Broin, P., *How to Change the EU Treaties. An Overview of Revision Procedures under the Treaty of Lisbon*, in *Centre for European Policy Studies*, No. 215, 2010, 1-8.

[121] See Rodean, N., *Upper Houses and Constitutional Amendment Rules. In search of (supra)national paradigm(s)*, in *Federalismi.it*, No. 9, 2018, 1-34; Weis, L. K., *Constitutional amendment rules and interpretative fidelity to democracy*, in *Melbourne University Law Review*, Vol. 38, No. 240, 2014, 241-280; Dixon, R., *Constitutional Amendment Rules: A Comparative Perspective*, in *Public Law and Legal Theory Working Papers*, No. 347, 2011, 96-111; Gambino, S., D'Ignazio, G. (eds.), *La revisione costituzionale e i suoi limiti. Fra teoria costituzionale, diritto interno, esperienze straniere*, Giuffrè, Milano, 2007, 19-44; Viviani Schlein, M. P., *Rigidità costituzionale. Limiti e graduazioni*, Giappichelli, Torino, 1997, 199-228; May, J. C., *Constitutional Amendment and Revision Revisited*, in *The Journal of Federalism*, Vol. 17, No. 1, 1987, 153-179; Brooke Graves, W., *Currrent Trends in State Constitutional Revision*, in *Nebraska Law Review*, Vol. 40, No. 1, 1961, 560-574.

[122] Art. 138 of Italian Constitution.

[123] Art. V of Constitution of United States of America; art. 79 of German Basic Law; art. 128 Constitution of Austria; art. 195 of Switzerland Constitution.

[124] Morbidelli, G., *Costituzioni e costituzionalismo*, 107.

When considering the nature of revisions, it's important to distinguish between total and partial amendments. At first glance, total revisions may appear contradictory, as they seemingly oppose the assumption that complete revisions could be deemed improper, constituting an overreach of the people's authority. However, in the evolution of constitutionalism, the exercise of popular sovereignty has been subject to regulation. Consequently, modern constitutions often include provisions explicitly permitting the comprehensive alteration of their content.[125] It must be added, however, that in the context of constitutions that provide for the possibility of total revision, particularly complex and clear procedures are required and, in any case, the doctrine considers that there are implicit limits to the revision of the constitutional text, namely with regard to the values and principles on which it is based.[126]

Changes to the constitution can also be made "tacitly", namely without the adoption of a predetermined procedure for revising the constitutional text. "Tacit" constitutional change can occur in the face of an interpretive evolution of the constitution itself.[127] In this case, there is a "tacit" revision of the constitution through the broad interpretation that the judges of the Constitutional Court can give to constitutional provisions. In fact, even the constitution is in constant flux, subject to the evolution of customs, of the society it is supposed to regulate, of legal relations and of international relations. In fact, even the ratification of international and supranational treaties can lead to "tacit" changes in the constitution.[128] In this respect, we can take as an example the law of the European Union, which has affected the competences of the States provided for in the constitution and which has been modified with the accession to the Union. In fact, the establishment of the European order has given the Union's institutions specific legislative and judicial powers, which have also had a profound impact on the form of government described in the constitutions of the Member States.[129]

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[125] An article expressly dedicated to the possibility of amending the entire constitutional text is provided for in: Switzerland (art. 193); Austria (art. 44); Venezuela (art. 347); the Netherlands (art. 211); Bulgaria (art. 158); Spain (art. 168); Paraguay (art. 289); Uruguay (art. 331); Nicaragua (art. 193); Costa Rica (art. 196).

[126] Gigliotti, A., *L'ammissibilità di revisione costituzionale dal contenuto organico o eterogeneo*, in *Rivista AIC*, No. 4, 2017, 1-17; Piergigli, V., *Revisione costituzionale e partecipazione popolare: uno sguardo comparato*, in *Federalismi.it*, No. 2, 2016, 1-31; de Vergottini, G., *Diritto costituzionale comparato*, 288 ff.; Contiades, X. (eds.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, London, 2013, 1-7; Morbidelli, G., *Costituzioni e costituzionalismo*, 75-89.

[127] Wheare, K. C., *Modern Constitutions*, Oxford University Press, Oxford, 1966, 231.

[128] Olivito, E., *La retorica delle modifiche tacite e il diritto costituzionale esistenziale. Un'ipotesi di studio preliminare*, in *Costituzionalismo.it*, No. 2, 2023, 26-53; Law, D. S., *Constitutional Drafting and Revision*, in Law, D. S. (eds.), *Constitutionalism in Context*, Cambridge University Press, Cambridge, 2022, 87-182; Manetti, M., *Le modifiche tacite al disegno costituzionale del procedimento legislativo*, in *Quaderni costituzionali*, No. 3, 2021, 531-549; Noronha, L., *A Methodological Critique on Constitutional Amendment Theory*, in *Leviathan. Notes on Political Research*, No. 11, 2015, 88-120; Albert, R., *Constitutional Amendment by Constitutional Desuetude*, in *The American Journal of Comparative Law*, Vol. 62, No. 3, 2014, 641-686.

[129] See Duff, A., *Constitutional Change in the European Union. Towards a Federal Europe*, Springer, Berlin, 2022, 103-118; Garben, S., *The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union*, in

Also unwritten sources assume a pivotal role in the nuanced discourse surrounding the "tacit" modification of the constitutional framework. They serve to either complement the existing legal structure, as observed in the formation of customs, or to regulate individual interactions among constitutional actors, thereby exemplifying their autonomy through what are commonly referred to as conventions. Customs, in particular, are characterised by the fact that they are a kind of unwritten constitution. Hence, customs may serve either an interpretative function for the written constitutional text or prescribe specific behavior for constitutional entities, commonly referred to as permissive customs.[130]

The subject of constitutional amendment process cannot be considered closed without first analysing the question of the limits of the revision process itself. Indeed, as we have shown above, constitutions may be subject to limits on revision in terms of the competent bodies and the procedural methods to be adopted: in this case we speak of formal limits. There are also substantive limits, namely those which concern respect for the core of the constitution. This second category of limits can be further subdivided into three types: temporal, circumstantial and substantive.[131] Specifically, temporal limits are those which impose temporal constraints on the exercise of the power of constitutional review, so that no constitutional amendment can be adopted before a certain period has elapsed. In this respect, we can recall the case of the Portuguese Constitution, which stipulates that a constitutional revision can only be carried out after five years have elapsed since the last amendment.[132] Of particular interest, moreover, is the substantive limitation, wherein procedures are barred during emergencies or any situation jeopardizing the stability and autonomy necessary for revision power exercise. This limitation is pivotal, as it safeguards against hasty amendments during crises that could undermine the constitutional order, ensuring the requisite period for thoughtful deliberation typically associated with consequential decisions such as constitutional revisions.[133]

European Constitutional Law review, Vol. 13, No. 1, 2017, 23-61; Dawson, M., de Witte, F., *Constitutional Balance in the EU after the Euro-Crisis*, in *The Modern Law Review*, Vol. 76, No. 5, 2013, 817-844; Claes, M., *The Europeanisation of National Constitutions in the Constitutionalisation of Europe: some observations against the background of the constitutional experience of the EU-15*, in *Croatian Yearbook of European Law and Policy*, No. 3, 2007, 1-38; Rasmussen, H., *The Convention Method*, in *European Constitutional Law Review*, Vol. 1, No. 1, 2005, 141-147.

[130] Fichera, M., Pollicino, O., *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, in *German Law Journal*, Vol. 20, 2019, 1097-1118; Cuskelly, K., *Customs and Constitutions: State recognition of customary law around the world*, Iucn, Bangkok, 2011, 21-34; Ramsey, M. D., *The Limits of Custom in Constitutional and International Law*, in *San Diego Law Review*, Vol. 50, No. 867, 2013, 867-904; Hood Phillips, O., *Constitutional Conventions: Dicey's Predecessors*, in *The Modern Law Review*, Vol. 29, 1966, 137-147.

[131] Morbidelli, G., *Costituzioni e costituzionalismo*, 99-103.

[132] Art. 284 of Constitution of Portugal.

[133] Albert, R., *Constitutional Amendments. Making Breaking, and Changing Constitutions*, Oxford University Press, Oxford, 2020, 30 ff.; Albert, R., *Amending constitutional amendment rules*, in *International Journal of Constitutional Law*, Vol. 13, No. 3, 2015, 655-685; Longo, A., *Tempo, interpretazione, costituzione. Premesse storiche*, Editoriale

The substantive limits of constitutional revision deserve a separate discussion, as it is now widely accepted doctrine that there are parts of the constitution that cannot be amended.[134] Such a theory is particularly confirmed when substantive limits to constitutional revision are provided for and made explicit in the constitutional text itself. Indeed, many existing constitutions contain unchangeable provisions or "perpetuity clauses", which explicitly state that certain provisions of the constitutional text may not be subject to the revision process under any circumstances, as to do so would distort the principles and values that the voters have placed at the foundation of a constitutional order.[135] This interpretation gains further credibility from the existence of "eternal clauses" within constitutions. These clauses transcend individual provisions, instead embodying the overarching values and principles upon which the entire system is founded. About the question of constitutional identity, the existence of such limits - all the more so when they are eternity clauses concerning specific principles - can be a valuable tool for identifying and reconstructing the identity of a constitution. In addition to explicit substantive limits, however, there may also be implicit limits, namely limits that affect the substance of the constitution but are not explicitly crystallised in the constitutional text. Indeed, most scholars agree that the constitution is not amendable in its key norms or principles, i.e., the core that determines its foundation, even if this is not explicitly enshrined in a perpetuity clause. This theory is based on the assumption that the constitution, by its very nature and its fundamental place in the legal system, contains supreme principles or values around which the constitutional process itself has evolved, so much so that one speaks of a "super-constitution".[136] In

Scientifica, Napoli, Vol. I, 2013, 144-156; Luciani, M., *Dottrina del moto delle Costituzioni e vicende della Costituzione Repubblicana*, in *Rivista AIC*, No. 1, 2013, 1-18.

[134] See Ladu, M., *Oltre l'intangibilità dei principi fondamentali: la revisione "silenziosa" dell'art. 9 Cost.*, in *Federalismi.it*, No. 1, 2023, 39-56; Zei, A., *La trasformazione dei limiti alla revisione costituzionale nell'ordinamento austriaco. Una riflessione corroborante contro l'erosione democratica del costituzionalismo liberale*, in *Percorsi costituzionali*, No. 3, 2021, 863-882; Faraguna, P., *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Franco Angeli, Milano, 2015, 21 ff.; Bonfiglio, S., *Sulla rigidità delle Costituzioni. Il dibattito italiano e la prospettiva comparata*, in *Diritto Pubblico*, No. 1, 2015, 115; Pace, A., *I limiti alla revisione costituzionale nell'ordinamento italiano ed europeo*, in Lanchester, F. (eds.), *Costantino Mortati, Potere costituente e limiti alla revisione costituzionale*, CEDAM, Padova, 2017, 51-67; Carnevale, P., *La revisione costituzionale nella prassi del "terzo millennio". Una rassegna problematica*, in *Rivista AIC*, No. 1, 2013, 1-23; Gambino, S., *Sui limiti alla revisione della Costituzione nell'ordinamento italiano*, in *Rivista de Direitos e Garantias Fundamentais*, No. 8, 2010, 74; Gambino, S., D'Ignazio, G. (eds.), *La revisione costituzionale e i suoi limiti*, 388 ff.

[135] See Hein, M., *Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism*, in *European Journal of Law Reform*, Vol. 21, No. 3, 2019, 226-242; Weintal, S., *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory*, in *Israel Law Review*, Vol. 44, No. 3, 2011, 449-497; Weinrib, J., *Constitutional reform*, in Weinrib, J. (eds.), *Dimensions of Dignity. The Theory and Practice of Modern Constitutional Law*, Cambridge University Press, Cambridge, 2016, 166 ff.; Muniz-Fraticelli, V. M., *The Problem of a Perpetual Constitution*, in Gosseries, A., Meyer, L. H. (eds.), *Intergenerational justice*, Oxford University Press, Oxford, 2009, 377-410; Sanford, L., *The Political Implications of Amending Clauses*, in *Constitutional Commentary*, No. 981, 1996, 107-123.

[136] Witkowski, Z., Serowaniec, M., *Eternity clause – a realistic or merely an illusory way of protecting the State's*

fact, there are principles in every constitution which, if changed, do not lead to a revision of the constitution, but precisely to the exercise of constituent power and thus to a new constitution. «Amendments of this kind would indeed constitute a revolutionary fact because they would substantially alter the identity of the constitutional order».[137] In other words, the power of revision cannot touch the essence, the core of the constitution, because if it did, it would become the exercise of constituent power, since it would exceed the limits set by the constituted power.[138] In particular, the notion of a constitution understood in a material rather than a formal sense, as a table of widely shared values, acquires particular relevance in this respect. However, it is precisely because of the absence of explicit provisions that implicit material limits are difficult to identify, which is why the core of "supreme principles" that underpin a constitution are identified through the interpretation of constitutional courts. Indeed, the role of constitutional jurisprudence in identifying the substantive limits of constitutional revision is also an essential element in identifying constitutional identity. Suffice it to recall, for example, the sentence No. 1146 form 1988 of Italian Constitutional Court. Regarding the legal order of the European Union, as will be seen in more detail in the third chapter of this thesis, the role of the Court of Justice in explicitly delineating the existence of immutable and incompressible elements of European identity has been equally important.[139]

A particular aspect related to the dynamics of constitutions is the question of constitutional "rupture" and "suspension". Indeed, constitutional orders do not exist outside the temporal dimension, but are firmly anchored in the social and historical dynamics of the system they regulate. For this reason, even constitutions are subject to elements of continuity and discontinuity. In this case, under certain circumstances, there may be ruptures or derogations from certain provisions of the constitution. In fact, a "rupture" consists in the non-application of one or more provisions of the

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Constitutional Identity?, in *Studi polacco-italiani di Torun, Vol. XVII*, 2021, 173-185; Faraguna, P., *Unamendability and Constitutional Identity in the Italian Constitutional Experience*, in *European Journal of Law Reform,* No. 3, 2019, 329-344.

[137] Morbidelli, G., *Costituzioni e costituzionalismo*, 101.

[138] See Velasco-Rivera, M., *The Scope and Limits of the Juridical People*, in *Etica and Politica*, Vol. XXIII, No. 3, 2021, 275-282; Ragone, S., *The "Basic Structure" of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, Vol. 11, No. 3, 2019, 327-340; Marshfield, J. L., *Forgotten Limits on the Power to amend State Constitutions*, in *Northwestern University Law Review*, Vol. 114, No. 1, 2019, 67-147; Carrozza, P., *The Paradox on the Future of Constitutional Reform*, in *The Italian Law Journal*, Special Issues, 2017, 91-103; MacFarlane, E., *The Unconstitutionality of Unconstitutional Constitutional Amendments*, in *Manitoba Law Journal*, Vol. 45, No. 1, 2017, 198-218.

[139] See Vanoni, L. P., Vimercati, B., *Identity Politics and Constitutional Disagreement: The Rise of the "New" Populisms and Nationalisms in the Fragmented European Landscape*, in *Eurojus*, No. 2, 2021, 44-65; Faraguna, P., *Taking Constitutional Identities Away from the Courts*, in *Brooklyn Journal of International Law*, Vol. 42, No. 2, 2016, 492-574; Śledzińska-Simon, A., *Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland*, in *ICON-S*, Vol. 13, No. 1, 2015, 124-155; Zagor, M., *Judicial Rhetoric and Constitutional Identity: Comparative Approaches to Aliens' Rights in the United Kingdom and Australia*, in *Public Law Review*, Vol. 19, No. 4, 2008, 1-10.

constitution, either permanently or only temporarily, in the presence of certain circumstances in which the generally applicable provision is derogated from. Specifically, the constitution remains intact, but in the case of a breach, certain provisions are removed from the normal and generally applicable constitutional regime. The "rupture" of the constitution itself can take place at different levels. Indeed, a "rupture" may occur when constitutional harmony is broken by a constitutional law that alters the normal revision process with respect to a particular circumstance.[140] In this regard, it should be noted that even a "rupture", which thus represents a constitutional amendment, is subject to the same express and implied substantive limits as the normal revision process. In some cases, it may be the text of the constitution itself that provides for an exception to its own provisions for certain subjects or circumstances.[141] Finally, there are the so-called "authorised" suspensions, in which the derogation from certain provisions of the Constitution is optional, namely it is not imposed, but its application is left to the availability of state bodies. The suspension of the constitution, on the other hand, although in some respects close to a breach, is characterised by the fact that it is always temporary and concerns the whole or a large part of the constitutional text. Usually, the application of that part of the constitution which regulates the distribution of powers between the various organs of the state, or that part which enshrines fundamental freedoms, is suspended with a view to extraordinary situations of crisis, such as war, state of siege or crisis. In these cases, the ordinary constitutional regime is replaced by an emergency regime which derives its justification for existence precisely from the extraordinary circumstances to which it is called upon to respond.[142] In fact, according to the doctrine, the justification for suspending the constitution is to be sought in the principle of necessity, which becomes a source of law and legitimises *ex se* the adoption of an extraordinary regime and the suspension of the ordinary one in order to preserve it. In other words, the constitution is suspended precisely to preserve it in the face of events and circumstances that could undermine its basic structure or the principles on which it is based.[143]

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[140] Motzo, G., *Disposizioni di revisione materiale e provvedimenti di "rottura" della costituzione*, in *Rassegna di diritto pubblico*, 1964; Bon Valsassina, M., *Le rotture della costituzione nell'ordinamento statunitense*, CEDAM, Padova, 1961, 89 ff.; Friedrich, C. J., *Constitutional Reason of State. The Survival of the Constitutional Order*, Brown University Press, Providence, 1957, 22.

[141] An emblematic case is that of the 12th transitional and final provision of the Italian Constitution, which enshrines the prohibition of the reconstitution of the Fascist Party, thus effectively derogating from Article 49 of the same Constitution, which guarantees the right to political association. «It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party. Notwithstanding Article 48, the law has established, for not more than five years from the implementation of the Constitution, temporary limitations to the right to vote and eligibility for the leaders responsible for the Fascist regime» of Transitional and Final Provisions of Constitution of the Italian Republic.

[142] Morbidelli, G., *Costituzioni e costituzionalismo*, 121-124; Morrison, T. W., *Suspension and the Extrajudicial Constitution*, in *Cornell Law Faculty Publications*, Vol. 107, No. 88, 2007, 1533-1617.

[143] Indeed, as the case of the Weimar Republic has shown, where in 1933, on the basis of Article 48 of the Constitution, a decree was issued for the protection of the people and the state, which allowed the Nazi regime to take root, the suspension of the Constitution can also become a means of overthrowing the established order.

Both the "rupture" of the constitution and the "suspension" can be read as important dynamic moments of the constitution that can reveal its identity. In the case of the "rupture", for example, the substantive limits of revision apply here as well, which can thus fix the concepts and values that underpin the constitutional order. The suspension regime, on the other hand, demonstrates the extent to which the fundamental elements of a constitution can withstand the torsions of emergency situations or circumstances.[144]

This section has attempted to focus on some fundamental elements of the "life" of a constitution in order to show how the dynamics that affect a constitutional text are also important in defining its identity. Indeed, by analysing the peculiarities of the amendment procedure and, in particular, its explicit and implicit limits, it is possible to reconstruct the principles and values that underpin a constitutional order and, as such, determine its identity. Similarly, within the constitutional dynamic, the interpretation given to the constitutional text by the constitutional courts plays an important role. Indeed, in relation to the question of the implicit substantive limits of constitutional revision, the role that constitutional jurisprudence plays in their identification and, by extension, in constitutional identity itself, has been mentioned. Finally, the last part of this section has been devoted to the issue of constitutional breach and suspension, precisely because these are issues that are closely linked to the fundamental elements of the constitutional order, which cannot be breached at the risk of collapsing the constitutional order in force, or which must be protected by the use of suspension in emergency and extraordinary circumstances. In conclusion, this section has been focused to reconstructing some of the fundamental elements of constitutional dynamics to demonstrate the link between the "life" of a constitution and its identity.

1.6. CONSTITUTIONAL IDENTITY IN DOCTRINE: A GLIMPSE

In the preceding sections, we have attempted to provide a general - albeit synthetic and non-exhaustive - overview of certain aspects that characterise the concept of the constitution, in order to highlight some moments and constitutional features that may be relevant for the identification and reconstruction of the elements that constitute the constitutional identity of a system and that will be used in the analysis of the case studies.

As far as this section is concerned, it opens the second part of the first chapter, which is devoted to the question of constitutional identity. Specifically, the theme of identity will be examined from the perspective of scholarly analysis, exploring its defining characteristics and various

[144] Cerina Feroni, G., Morbidelli, G., *La sicurezza: un valore valore superprimario*, in *Percorsi costituzionali*, No. 1, 2008, 31-44.

definitions. The following pages will then identify some specific aspects of constitutional identity and the ways in which its content can be identified in the constitution. For these reasons, this section acts as a hinge between the first part of this chapter, which is devoted to the subject of the constitution in general, and the following part, which is devoted to identity and its relationship to the concept of the constitution. The purpose of this second part of the chapter is to outline a theoretical framework of these concepts, which will be later applied in the part devoted to case studies of Bosnia and Herzegovina and the European Union order.

It has already been stated in the introduction to this work that the subject of constitutional identity remains a concept that is still widely debated within academia and on which no unambiguous definition has been reached, which is why there are still many problematic aspects associated with the topic of identity. This is confirmed not only by the diversity of theories that have been constructed on the subject of identity, but also, and above all, by the same diversity of approaches to the question of who is the actual bearer of constitutional identity: the people, the constitution or state institutions. It can therefore be said that even before the difficulty of defining the concept of identity, there is uncertainty about the boundaries within which the subject itself is developed. Nevertheless, most scholars agree that the concept of constitutional identity is closely linked to the constitutional order of a state. However, the concept of constitutional identity can be interpreted in different ways depending on the method of analysis used and the subject matter itself. Generally speaking, however, the scholars seem to have addressed the issue of constitutional identity in relation to some specific cases, which can be summarised in a few points that we will analyse below.

The first, and perhaps most extensive, debate revolves around the question of European identity. Indeed, the concept of constitutional identity emerged within the European legal discourse following the adoption of the Treaty of Lisbon.[145] This development aimed at fostering greater European integration and expanding the competences of the European Union into areas previously shielded from external influence, which had largely been the prerogative of the individual Member States. The amendment of the Treaties in 2007, coupled with the introduction of the obligation to uphold the national identity of Member States (Art. 4(2) TEU), led to the incorporation of identity-related terminology into the decisions of national constitutional or supreme courts across Member States. These courts began employing identity as a tool to impede further European integration, thereby seeking to safeguard aspects of Member States' sovereignty.[146]

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[145] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, (2007/C 306/01).

[146] Bonelli, M., *National Identity and European Integration Beyond 'Limited Fields'*, in *European Public Law*, Vol. 27, No. 3, 2021, 538; Cloots, E., *National Identity in EU Law*, Oxford University Press, Oxford, 2015, 113-126; Fligstein, N., Polyakova, A., Sandholtz, W., *European Integration, Nationalism, and European Identity*, in *Journal of Common Market Studies*, 2011, 1-34.

In fact, even before the Treaties of Lisbon recognised the obligation of the institutions of the Union to respect the national identities of the Member States, national courts had already begun to develop the issue of constitutional identity as a constraint on European integration, albeit under different names, demonstrating that the question of primacy in the relationship between Community law and national law has always been an issue of tension, just as it is today. An early, albeit indirect, allusion to constitutional identity emerged in the *Frontini* judgment of the Italian Constitutional Court in 1973. This landmark decision introduced the concept of counter-limits, asserting that while Italy's national sovereignty was constrained by its membership in the then European Economic Community, the authority of the European Community could not extend «so far as to violate the fundamental principles of our constitutional order or the inalienable rights of man».[147] Almost at the same time, the German Federal Constitutional Court, in its famous Solange I judgment of 1974, stated that the delegation of powers to the European Community had to be seen in the overall context of the German Basic Law, which meant that it must not affect the fundamental structure and identity of the Constitution.[148] It is in this context of the debate on European integration that the issue of European constitutional identity has developed the most, so much so that it has transcended the boundaries of legal bodies and has also been used as a political argument. Indeed, some governments critical of certain European policies have invoked the concept of identity to oppose the potential expansion of European Union competences.

Within the doctrinal debate, the issue of constitutional identity has also developed in terms of the relationship between the values and principles contained in constitutions and international law and international organisations. In particular, scholars have been concerned with the extent to which constitutional principles may be relevant to the issue of the integration of international law, especially with regard to international courts.[149] In this context, the topic of constitutional identity has been developed as a counterbalance to the extension of international jurisdiction and, above all, with regard to the role and extension of constitutional principles. Regarding this last aspect, the analogy between the theses used in the field of international law and those developed on the subject of European integration is significant.

Even before it became a topical issue in the context of European integration, the theme of constitutional identity had already been analysed by German public law doctrine at the turn of the two world wars. In fact, Schmitt and Bilfinger delved into the issue of constitutional identity as an

[147] Constitutional Court of Italy, No. 183, 1973.

[148] *BVerfGE* 37, 271 (1974) (*Solange I*).

[149] Ziegler, K. S., *The Relationship between EU Law and International Law*, in Patterson, D., Soderston, A. (eds.), *A Companion to EU and International Law*, Wiley-Blackwell, Hoboken, 2016, 42-61; Gianelli, A., *International Law Within the EU Customary International Law in the European Union*, in Cannizzaro, E., Palchetti, P., Wessel, R. A. (eds.), *International Law as Law of the European Union*, Brill, Leiden, 2012, 91-110.

implicit constraint on constitutional evolution. They specifically pondered whether a constitution retains its essence despite revisions, or if the process of amendment alters it to such an extent that it essentially becomes a new constitution, establishing a discontinuous relationship with the original text.[150] The notion of constitutional identity in German constitutional thought has thus been used, at least in relation to formal constitutional amendments, as a kind of doctrine that searches for the basic structure of the constitutional order and represents an insurmountable limit to the constitutional revision process.[151] In this sense, questions of identity have been approached as the identity of the constitutional text itself, as a purely normative concept.[152] The German Federal Constitutional Court has embraced the concept of constitutional identity, defining it as a legal principle that encapsulates the essence of the constitution. According to this view, constitutional identity remains immutable and impervious to alteration through subsequent constitutional revisions. This perspective has been particularly relevant in the context of European integration.[153]

While German doctrine has sought identity within the constitution itself, American scholars have gradually extended the subjects of this identity to include the people or nation, creating a kind of collective identity that is both expressed in the constitutional text and a defining element of that constitution.[154] In this way, it is possible to observe how the concept of identity can be sought not only in the provisions of the constitution, but also in the national identity of the people subject to this constitution. In other words, the concept of identity is defined on the basis of the relationship between a national culture and its own constitution, which determines the legal relations in that society, to the extent that «[c]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and regulates culture».[155] In this way, constitutional identity no

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[150] Schmitt, C., *Dottrina della costituzione*, 187; Bilfinger, C., *Verfassungsfrage und Staatsgerichtshof*, in *Zeitschrift für Politik*, Vol. 20, 1931, pp. 81-99.

[151] See Bast, J., *Don't Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, in *German Law* Journal, Vol. 15, No. 2, 2014, 167-181.

[152] Millet, F. X., *Constitutional Identity in France*, in Calliess, C., van der Schyff, G. (eds.)., *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge, 2019, 134-152; Polzin, M., *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power*, in *International Journal of Constitutional Law,* Vol. 14, No. 2, 2016, 411-438.

[153] See Bobić, A., *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford University Press, Oxford, 2022, 129 ff.; Wendel, M., *The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany*, in *European Public Law*, Vol. 27, No. 3, 2021, 465-496; Poli, S., *The German Federal Court and its first ultra vires review: a critique and a preliminary assessment of its consequences*, in *Eurojus*, No. 2, 2020, 224-240; Suh, C-K. P., *The German Federal Constitutional Court between National Constitutional Identity and Regional Integration*, in *Ritsumeikan Law Review*, No. 31, 2014, 171-180; Bast, J., *Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, in *German Law Journal*, Vol. 15, No. 2, 2014, 167-181.

[154] Jacobsohn, G. J., *Constitutional Identity*, 21 *passim*; Rosenfeld, M., *The Identity of the Constitutional Subject*, 44 *passim*.

[155] Post, R., *The Supreme Court 2002 Term. Forward: Establishing the Legal Constitution: Culture, Courts and Law*, in *Harvard Law Review,* Vol. 117, No. 4, 2003, 8.

longer rests exclusively on normative concepts, but also on factors that may even pre-exist from the moment a constitution is written. Thus, defining constitutional identity becomes a considerably more intricate endeavor, as it involves integrating not only elements of positive law but also dynamics that may lie outside the realm of legal principles. These dynamics, being potentially extraneous to legal frameworks, present a challenge in reconciling with the certainty that law inherently seeks to establish. Moreover, there may be points of friction between the concept of national identity and constitutional identity, which could lead to conflicts between law and politics. In particular, the issue of national identity risks becoming a political weapon, used to distinguish those who belong to the community from those who are outside it: according to a binary logic of "us" and "them". In this case, the issue of identity risks becoming particularly divisive, as values and principles are used for political purposes underlying a division of the community, rather than to identify an identity shared by the majority of society.

About the main theories defining the concept of constitutional identity, it seems appropriate to start precisely from the definition of constitutional identity (*Verfassungsidentität*) given by Carl Schmitt in his *Doctrine of the Constitution*. At the end of the 1920s, the German scholar had linked the concept of constitutional identity to the subject of the constitutional revision process. Specifically, Schmitt had stated that a genuine revision is a change in the constitutional text in which «the identity and continuity of the constitution as a whole remain guaranteed».[156] Conversely, a revision of the constitutional text that does not take into account its intrinsic identity would, by definition, not be a mere or genuine revision, but the source of a «new constitution»[157] that would replace the previous text. Broadly speaking, it can be said that Schmitt's theory of constitutional identity was developed in relation to the implicit limits of constitutional revision, or, rather, in relation to the core of values that form the basis of a constitution, the modification of which in constitutional revision would entail the exercise of a new constituent power and no longer a constituted power. In this theory, which has also been taken up by other contemporary scholars,[158] it is assumed that the power of constitutional revision is also «implicitly limited by nature»[159] in substance and not only in form and procedure

[156] Schmitt, C., *Dottrina della costituzione*, 145. Regarding the essence of identity Schmitt states that «a "*superlegalite constitutionelle*", which is raised not only above the usual simple laws, but also over the written constitutional laws, and excludes their replacement through laws of constitutional revision. […] it is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy», in Schmitt, C., *Dottrina della costituzione*, 167-168.

[157] Schmitt, C., *Dottrina della costituzione*, 167.

[158] Roznai, Y., *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford University Press, Oxford, 2017.

[159] *Ivi*, 156.

terms. In this way, the theorisation of the concept of constitutional identity accepts the existence of substantial and implicit limits (contained in the nature of the constitution itself) which effectively prohibit the exercise of the power of revision, even if exercised in accordance with the prescribed formal procedures, which purports to alter the identity underlying the constitution. In a concise summation of Schmitt's notion of constitutional identity, we find that identity emerges within the context of the constitutional revision process as a substantial constraint safeguarding the essence of the constitution. It's important to note that this simplification is made for the sake of clarity and convenience. According to the theory formulated by Schmitt, the constitution thus contains a core of implicitly immutable principles that embody the identity of the constitution itself.[160]

Still within the German doctrinal debate, but closer to the present, it is interesting to consider the formulation of the concept of constitutional identity by the philosopher Jürgen Habermas. In his theory of *Verfassungspatriotismus*, Habermas also deals with the concept of constitutional identity, but he does not use it as an autonomous concept, but as a corollary in support of constitutional patriotism.[161] According to this theory, the elements that determine constitutional patriotism are the same as those that constitute the identity of a constitution, namely a set of values and principles that not only form the basis of a constitution but also constitute its unifying element for the population, thus creating a convergence between the elements of national and constitutional identity.[162] Habermas explores, within the broader framework of constitutional patriotism, the element of identity as a point of contact between the identity expressed in a constitution based on the principles of constitutionalism and national identity, in such a way as to create a convergence of values within society that coincide with those of constitutionalism and thus succeed in creating a sense of belonging that transcends ethnic, religious or political differences. In other words, the purpose of constitutional patriotism is to identify the elements that determine a citizen's «political attachment to the state»,[163] which come to

[160] Critically, see Guastini, R., *La costituzione senza identità*, in *Liber amicorum per Pasquale Costanzo*, Consulta Online, 2020, 1-8.

[161] Habermas, J., *Citizenship and National Identity: Some Reflections on the Future of Europe*, in *Praxis International*, Vol. 12, No. 1, 1-19; Fossum, J. E., *Deep diversity versus constitutional patriotism: Taylor, Habermas and the Canadian constitutional crisis*, in Ethnicities, Vol. 1, No. 2, 2001, 179-206. For an account regarding the criticism, see Breda, V., *The Incoherence of the Patriotic State: A Critique of Constitutional Patriotism*, in *Res Publica*, Vol. 10, No. 3, 2004, 247-265; Gatti, R., *Patriottismo costituzionale e oltre*, in *Filosofia politica*, No. 1, 2018, 77-94; Habermas, J., *L'inclusione* dell'altro, Feltrinelli, Milano, 2013, 21 ff.; Ruiz Miguel, C., *Il patriottismo costituzionale*, in *Diritto pubblico comparato ed europeo*, No. IV, 2005, 1569; Müller, J. W., *Seven Ways to Misunderstand Constitutional Patriotism*, in *Notizie di Politeia*, Vol. 96, No. XXV, 2009, 20-24; Müller, J. W., *Constitutional Patriotism*, Princeton University Press, Princeton, 2008, 21 ff.; Müller, J. W., *Origins of Constitutional Patriotism*, in *Contemporary Political Theory*, No. 5, 2006, 286 ff.

[162] See expressly Michelman, F. I., *Morality, Identity and "Constitutional Patriotism"*, in *Denver Law Review*, Vol. 76, No. 4, 1998, 1009-1028; Müller, J.W., *A "Thick" Constitutional Patriotism for the EU? On Morality, Memory and Militancy*, in Eriksen, E. O., Joerges, C., Rödl, F. (eds.), *Law, Democracy and Solidarity in a Post-national Union*, Routledge, London, 193-212.

[163] Mezzanotte, M., *Patriottismo costituzionale e percorsi democratici nell'Unione europea*, in *Forum di Quaderni*

coincide with the values embodied in liberal-democratic constitutions, thus transcending any kind of exclusively national culture.[164] In Habermas's theory, therefore, the constitutional identities of the orders that have adopted the principles of liberal-democratic constitutionalism are almost identical in terms of the axiological elements that determine them; what really changes are the different interpretations and understandings of these constitutional principles on the basis of different constitutional cultures.[165]

Looking at the main definitions of the concept of constitutional identity, we cannot overlook the American doctrine and, in particular, the books of Rosenfeld and Jacobsohn. Indeed, the two academics' work occupies a special place in any work on identity. To summarise their positions on identity here, it can be said that Rosenfeld argues that constitutional identity derives from the very fact of having a constitutional order, which may be codified or unwritten, and from the content of the constitution.[166] This concept can be expressed more clearly in Rosenfeld's words that

«three distinct general meanings of constitutional identity emerge. First, there is an identity that derives from the fact of having a constitution – polities with a constitution differ from those that do not; secondly, the content of a constitution provides distinct elements identity – a federal constitution sets up a different kind of polity than one establishing a centralized unitary state; and thirdly, the context in which a constitution operates seems bound to play a significant role in the shaping of its identity – different cultures envision fundamental rights in contrasting and even sometimes contradictory ways».[167]

In order to arrive at these three types of meaning and to identify the elements that compose the concept of constitutional identity, Rosenfeld proposes the use of a dialectical process between the two elements that constitute identity, namely "sameness" and "selfhood", with the aim of «unifying all those who are included in a single constitutional order».[168] In this perspective, "sameness" represents equality among orders in the elaboration of the limits of constitutional revision, while "selfhood" represents singularity in the affirmation of the peculiarities of individual states to the outside world in the inter-order relations proper to supranational and international integration.[169] To

Costituzionali, 2013, 1.

[164] Müller, J. W., *Three Objections to Constitutional Patriotism*, in *Constellations*, Vol. 14, No. 2, 2007, 197 ff.

[165] In this direction, see the considerations of Polzin, M., *Constitutional Identity as a Constructed Reality and a Restless Soul*, in *German Law Journal*, Vol. 18, No. 7, 1600.

[166] Rosenfeld, M., *Constitutional Identity*, in Rosenfeld, M., Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, 758; Rosenfeld, M., *The Identity of the Constitutional Subject*, 21 ff.

[167] Rosenfeld, M., *Constitutional Identity*, 765.

[168] Rosenfeld, M., *The Identity of the Constitutional Subject*, 27.

[169] Faraguna, P., *Constitutional Identity in the EU-A Shield or a Sword?*, in *German Law Journal*, Vol. 18, No. 7, 2017, 1625-1627.

delineate the three categories of significance and discern the constituent elements of constitutional identity, Rosenfeld advocates for a dialectical approach, engaging the interplay between two core components of identity: "sameness" and "selfhood". This approach aims to unify all participants within a singular constitutional framework. Within this paradigm, "sameness" signifies equality among orders, particularly in defining the bounds of constitutional revision. Conversely, "selfhood" embodies the uniqueness of individual states, asserting their distinctiveness in the context of supranational and international integration. Expanding on this initial framework, Rosenfeld emphasizes that constitutional identity also arises from complex processes observable across different constitutional phases: the inception of constitution-making, the interpretative phase of the constitutional text, and the ongoing process of constitutional construction.[170] In this theory, it is the dynamic moment of the constitution that determines the content of identity. Indeed, «constitutional identity appears first and foremost as a deficiency to be overcome through a discursive process based on three main tools: negation, metaphor and metonymy».[171] By these three elements, it can be said that "negation" serves the subject of identity to deny its pre-constitutional identities, such as national identity.[172] This vacuum, according to Rosenfeld's theory, is filled by the concept of "metaphor", which provides a means of constructing a positive identity by emphasising similarities with the constitutional subject.[173] As for the last element, that of "metonymy", it serves to make the subject of constitutional identity both congruent and alien to national identity.[174] The dialectical process created between the elements of "negation", "metaphor" and "metonymy" makes it possible to «rework pre-constitutional and extra-constitutional identities into a useful, flexible and adaptable constitutional identity».[175] To summarise Rosenfled's theory for the sake of clarity, it can be said that it focuses precisely on describing how a constitutional identity can be formed in order to facilitate the creation of a functional and peaceful constitutional order. It turns out that the American scholar tends to distinguish between constitutional identity on the one hand and those identities that pre-exist the constitution itself on the other. In Rosenfeld's words, «all constitutions depend on the elaboration of a constitutional identity that is distinct from national identity and all other relevant pre- and extra-constitutional identities».[176] In this way, the constitutional identity contains a fair balance between the national identity and the other identities present in a given community, in such a way as to ensure

[170] Rosenfeld, M., *Constitutional Identity*, 759.
[171] *Ibidem*.
[172] Rosenfeld, M., *The Identity of the Constitutional Subject*, 48-49.
[173] *Ivi*, 51.
[174] *Ivi,* 53.
[175] Rosenfeld, M., *Constitutional Identity*, 759.
[176] Rosenfeld, M., *The Identity of the Constitutional Subject*, 10

its widest acceptance and sharing.[177] This collective identity is ideally defined by a process of synthesis between the different identities present in a society and any conflicts and tensions that may arise within a community.[178] In Rosenfeld's theory, constitutional identity manifests itself as a process of synthesis between different identities, thus reducing the weight within society of those identities that are divergent and therefore potentially conflictual.[179]

Coinciding with the publication of Rosenfeld's work in 2010, the American scholar Jacobsohn also published his book about constitutional identity. To summarise Jacobsohn's theory here, the scholar interprets constitutional identity as the set of elements that gives a particular constitutional order its unique character and encapsulates its core. To this initial description of a predominantly axiological and descriptive character, Jacobsohn adds a definition of a normative character to the concept of constitutional identity. Specifically, he argues that constitutional identity is the essential element that traces within a constitutional system the substantive limits of the constitutional revision process.[180] In other words, the American scholar takes up - albeit reworking - the concept of constitutional identity as a substantive limit to the constitutional revision process already elaborated by Schmitt in order to trace the elements that determine whether one is faced with the exercise of a constituted power or a constituent power. According to this theory, constitutional identity occupies a central position within the constitutional order, serving as a pivotal point that delineates permissible changes from those conflicting with the spirit and essence of the constitution's foundational elements. These core principles, inherent to the constitution's inception, remain immutable unless there is a deliberate intent for radical transformation within the existing constitutional framework.[181] In the light of this theory, therefore, the concept of constitutional identity is composed of a descriptive element, in which identity constitutes the core based on the values and principles that distinguish one constitution from the others; and of a normative element, in which these values constitute its substantive limit with regard to the revision process. Based on these assumptions, Jacobsohn then attempts to describe how it is possible to trace and define the constitutional identity of a constitution. In attempting to provide such an answer, the American scholar notes that constitutional identity is essentially the result of a dialogical process of the disharmonic constitution.[182] In other words, the definition of constitutional identity is to be sought in the usually disharmonic dialogue between the parts that make up the constitution. In fact, in Jacobsohn's theory, the origin of identity is the result

[177] Rosenfeld, M., *Constitutional Identity*, 761.

[178] *Ibidem*.

[179] Rosenfeld, M., *Modern Constitutionalism as Interplay between Identity and Diversity*, in Rosenfeld, M. (eds.), *Constitutionalism, Identity, Difference and Legitimacy*, Duke University Press, Durham, 1994, 3-36.

[180] Jacobsohn, G. J., *Constitutional Identity*, 44.

[181] *Ivi*, 361-397.

[182] Jacobsohn, G. J., *Constitutional Identity*, in *The Review of Politics*, Vol. 68, No. 3, 2006, 132.

of "experience", namely the constitutional history of a country, which determines its identity on the basis of a continuous movement that runs through the constitution and society, which the author defines as "disharmony", which «manifests itself either in the disjuncture between a constitution and a society or between commitments internal to a constitution».[183] For Jacobsohn, therefore, constitutional identity derives from the dialogue between the discordant elements present within a legal system, which can be manifested either as tensions between society and a constitution or between the founding elements of a constitutional text. In the light of this position, Jacobsohn denies that identity «exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in the culture of a society and waiting to be discovered».[184] In other words, constitutional identity does not have the characteristics of an abstract concept divorced from the reality of positive law,[185] but neither does it have its roots in a national tradition that the constitution is supposed to crystallise. On the contrary, Jacobsohn argues that

> «a constitution acquires an identity through experience […] and identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past».[186]

On the basis of these considerations, it is possible to understand how constitutional identity, as understood by Jacobsohn, is a concept in constant flux and in a permanent search for balance with regard to the disharmony between the founding principles of a constitution and the society in which this constitutional text is adopted.[187] The conflict between the constitution and society, and between the parts of the constitution itself, and the constant search for balance between these two elements is the fuel that keeps the concept of identity alive, which could not exist without a dialogical process: constitutional identity thus emerges from the practice of a disharmonic constitution.[188] To conclude this brief overview of the concept of constitutional identity as it is elaborated in Jacobsohn's theory, we would like to highlight some points that constitute its essence. In particular, for the American scholar, the concept of constitutional identity takes on a dynamic rather than a static dimension, since it serves to analyse and describe the evolution and modification of a constitution and to define its

[183] Jacobsohn, G. J., *Constitutional Identity*, 149.

[184] *Ivi*, 7.

[185] For a critical analysis on the actual concept of constitutional identity see Guastini, R., *La costituzione senza identità*, 1-2.

[186] Jacobsohn, G. J., *Constitutional Identity*, 7.

[187] Adugna Gebeye, B. *The Identity of the Constitutional Subject and the Construction of Constitutional Identity: Lessons from Africa*, in UCL Research Paper Series, No. 2, 2023, 3-4.

[188] For a brief survey of the above theories see Jacobsohn, G. J., *How to think about the reach of constitutional identity*, in *Comparative Constitutional Studies*, Vol. 1, No. 1, 2023, 6-28.

basic elements. It is precisely the question of how to know the constitutional identity of a constitution that lies at the heart of Jacobsohn's entire work, in which he argues that identity does not exist as a mere doctrinal formulation or as a national tradition that the constitution must preserve. On the contrary, identity emerges from a dialogical process between discordant elements of the constitution and political elements expressed by society, and it is only through the balancing of these positions that identity can be identified. For Jacobsohn, therefore, constitutional identity is shaped not only by the jurisprudence of constitutional and supreme courts, but also by the political process itself, as a process of shaping a constitutional identity marked by disharmonies.[189]

Before concluding this section devoted to the presentation of some doctrinal formulations on the concept of constitutional identity, and prior to moving on to the following sections, which will instead deal with the analysis of the relationship between identity and constitution, it is worth highlighting some aspects that are relevant to this work and to the way in which the role of constitutional identity is understood in the two legal systems analysed in the following chapters. Indeed, in both Rosenfeld's and Jacobsohn's reflections, constitutional identity contributes to creating a synthesis between the different elements of society and the principles underlying the constitutional order itself. Their aim is «to show how the concept of constitutional identity [...] can provide additional legal, political and sociological tools for understanding, overcoming and managing the challenges of diversity in political life in a plural society».[190] While Jacobsohn emphasizes the discordant constitution, analyzing the constitution's interplay with itself and society, Rosenfeld directs attention toward the identity of the constitutional subject, examining the relationship between individuals and the constitution. Despite these differing starting points, their objectives converge remarkably: both seek to identify the elements fostering unity between a constitutional order and its society. In their theories, identity contributes to the creation of a form of unity and synthesis within a plural society, rather than as a potentially divisive element. In other words, the two American scholars see constitutional identity as the element of synthesis capable of tracing a common vision of the values and principles on which not only the constitution is based, but by which society can fully recognise itself. Of course, this process is not easy, but it is based on a constant search for a balance between different bodies and values. Therefore, it can be said that the theory of identity they construct seeks a constant balance between constantly changing elements.

[189] Jacobsohn, G. J., *Constitutional Identity*, 351.

[190] Adugna Gebeye, B. *The Identity of the Constitutional Subject*, 5. See also Jacobsohn, G. J., *Constitutional Identity*, 136-213; Rosenfeld, M., *The Identity of the Constitutional Subject*, 147-185.

1.7. CONSTITUTION AND IDENTITY: WHERE DOES CONSTITUTIONAL IDENTITY COME FROM

This and the following sections will be devoted to reconstructing the main features that the theme of identity assumes in relation to the constitution. While various attempts have been made to define constitutional identity, the concept largely persists as an abstract notion, at times even lacking precise definition. Consequently, interpretation of constitutional identity may fluctuate, influenced by the legal context in which it is examined. As a result, perceptions of this concept may diverge depending on the geographical and legal frameworks in which it is considered. Indeed, an analysis of majority scholars works shows that there is no consensus among scholars even as to who or what can be the object of identity.[191] For this reason, the subject of identity lends itself very well to a conceptual overview of its main elements, to define its scope and thus also its application. This section and those that follow aim to reconstruct the concept of identity within the constitutional framework. This will be achieved by breaking it down into three key points, each encapsulated by a fundamental question.

These sections will attempt to answer the following issues: a) whose constitutional identity is referenced when discussing the concept of identity, b) what is the source of constitutional identity, c) who determines its content.[192] Trying to find an answer to these questions is fundamental because, on the one hand, it means taking a certain stance on the fundamental issues surrounding the concept and, on the other, it means setting out, at a theoretical level, the ways in which one will attempt to reconstruct constitutional identity within the systems that will be used as case studies. In fact, with the theoretical definition that will be outlined in this and the following sections, it will also be easier to understand the methodological approach that has been followed in attempting to identify constitutional identity in the systems of Bosnia and Herzegovina and the European Union.

1.7.1. THE SUBJECT OF CONSTITUTIONAL IDENTITY

From a strictly lexical point of view, the expression constitutional identity leaves no doubt about who or what is the subject of the identity. Indeed, it seems clear that the concept of identity applies to the constitution as a document governing a legal system. Nevertheless, the same conclusions about who is the subject of identity are not so widely accepted within the legal-publicist

[191] Szente, Z., *Constitutional identity as a normative constitutional concept*, in *Hungarian Journal of Legal Studies*, Vol. 63, No. 1, 2022, 5; Polzin, M., *Constitutional Identity as a Constructed Reality and a Restless Soul*, in *German Law Journal*, Vol. 18, No. 7, 1608.

[192] We have decided to re-propose this partition on constitutional identity by taking up the categorisation provided by Szente, Z., as it allows us to analyse some specific aspects of constitutional identity, which will then be concretely declined within the case studies proposed in the following chapters.

debate.[193] The lack of a common view among scholars about the subject of constitutional identity is understandable given the variety of subjects to which it can be applied. Indeed, the constitution itself, constitutional practice or interpretation, the principles and values underlying the constitutional text, the nation or population, or the political community, to name but a few, can be identified as subjects of constitutional identity. However, if we confine ourselves to the considerations of the majority of scholars, the concept of identity can basically be related to two different subjects.

Some scholars believe that the term constitutional identity refers precisely to the constitutional text. Thus, they apply a strictly formal conception of the term and hold that the essence of a constitution is to be found in the text of the constitution, among the provisions and their interpretation by the courts.[194] The concept of constitutional identity as a distinctive element of the constitution is a theory that has developed historically, particularly within the European scholar's debate. Indeed, as the preceding pages have shown, even in Schmitt's theory constitutional identity was necessarily read as a corollary of the constitutional text itself.[195] Without a constitution, therefore, we cannot even speak of identity, because the essential element of a constitution lies precisely in its provisions. Thus, according to Schmitt's theory, the fundamental element of a constitution, which is called identity, is to be found in those principles and values which define its essence, and which cannot be subject to revision or change, otherwise a new constitution with new values and principles will replace the previous text.

Several constitutional and supreme courts of European countries have also intervened to feed the conception of identity as closely connected with the constitutional text. In this direction, building upon the theory of counter-limits discussed in previous sections, the Italian Constitutional Court made its inaugural intervention in the *Frontini* case, and the German Federal Court also addressed this matter in the *Solange I* case.[196] More recently, for example, the German Federal Constitutional Court has developed the concept of the revision of European Union acts *ultra vires*, in order to protect precisely the values enshrined in the Basic Law in the eternity clause (*Ewigkeitsklauseln*) established

[193] Rosenfeld, about the concept of constitutional identity, states that «is an essentially contested concept as there is no agreement over what it means or refers to» in Rosenfeld, M., *Constitutional Identity*, 756. In very similar words, Jacobsohn also stated that the concept of constitutional is far from clear and argues that «clarifying the concept of constitutional identity should engage the interest of constitutional theorists» in Jacobsohn, G. J., *Constitutional Identity*, 361.

[194] See Allezard, L., *Constitutional identity, identities and constitutionalism in Europe*, in *Hungarian Journal of Legal Studies*, Vol. 63, No. 1, 2022, 58-77; van der Schyff, G., *Parameters of EU and Member State Constitutional Identity: A Topic in Development*, in *European Yearbook of Constitutional Law*, Vol. 4, 2022, 89-110; Klug, H., *Constitutional Identity and Change*, in *Tulsa Law Review*, Vol. 47, No. 1, 2011, 41-49; Faraguna, P., *Taking Constitutional Identities Away from the Courts*, in *Brooklyn Journal of International Law*, Vol. 41, No. 2, 2016, 492-573.

[195] Schmitt, C., *Dottrina della costituzione*, 187.

[196] Italian Constitutional Court, No. 183/1973; *Solange I*, *BverfGE* 37, 291, 29 May 1974; *Solange II*, *BverfGE* 73, 339, 22 October 1986.

by Article 79.[197] Other constitutional courts have also moved in this direction, like the Czech one, which, echoing German case law, referred to the eternity clauses stated in Article 9 of the constitution, stating that «the constitutional order of the Czech Republic, in particular its material core, must prevail»[198] over European law.

On the other side, the US academia in particular has identified identity not only within the constitutional text, but also as the identity of the people, or rather the attitude and relationship that the people have towards their constitution.[199] US theorists, in particular, seek the elements of constitutional identity in a constant search for balance between "disharmonic"[200] forces expressed in society and in the way in which the values underpinning the constitution are understood. Or, according to other scholars, constitutional identity derives from the void created in society with respect to the constitutional text, which must be filled by means of a discursive process divided into three phases: "negation", "metaphor" and "metonymy".[201] Within this theoretical construction, it is society that searches for the elements of its own identity in terms of how they are received in the constitution and, above all, how they develop and change over time. In both formulations the subject of identity is the people, while the constitution assumes the role of an instrument or an element against which the principles and values that a society develops in each period can be linked. The most critical problem that can arise from considering the people or the nation as the subject of constitutional identity is its transformation into a national identity. In this case, the historical, religious, linguistic, or ethnic factors that identify a people in a given territory become the elements that identify the population on the basis of certain criteria to be crystallised in the constitution. In other words, the dominant element of identity becomes the national one, while legal principles and values, which are

[197] Polzin, M., *Emotion and the Vertical Separation of Powers: Ultra-Vires Review by National (Constitutional) Courts, and EU and International Law*, in *ICL Journal*, Vol. 16, No. 3, 2022, 285-325; Anagnostaras, G., *Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss*, in *European Papers*, Vol. 6, No. 1, 2021, 801-829.

[198] Constitutional Court of the Czech Republic, 19/08, 85., 26 November 2008.

[199] The leading scholars who have taken up this theory and defined its main characteristics are, as described above, Jacobsohn and Rosenfeld. See Jacobsohn, G. J., *Constitutional Identity*, *passim*; Jacobsohn, G. J., *How to think about the reach of constitutional identity*, 6-28; Jacobsohn, G. J., *Constitutional Identity*, 361-397; Jacobsohn, G. J., *Rights and American Constitutional Identity*, in *Polity*, Vol. 43, No. 4, 2011, 409-431; Rosenfeld, M., *Constitutional Identity*, *passim*; Rosenfeld, M., *Modern Constitutionalism as Interplay between Identity and Diversity*, 3-36; Rosenfeld, M., *The identity of the constitutional subject*, in *Cardozo Law Review*, Vol. 16, 1995, 1049-1109. See also Greene, J. P., *The Constitutional Origins of the American Revolution*, Cambridge University Press, Cambridge, 2011, *passim*; Kommers, D. P., *Constitutions and national Identity*, in *The Review of Politics*, Vol. 74, No. 1, 2012, 127-133; Klug, H., *Constitutional Identity and Change*; in *Tulsa Law Review*, Vol. 47, No. 1, 2011, 41-50; Lopatriello, G., *Constitutional Identity, by Gary Jeffrey Jacobsohn*, in *Osgoode Hall Law Journal*, Vol. 49, No. 3, 2012, 601-603; Han, Z., *Introduction*, in Han, Z. (eds.), *The Constitutional Identity of Contemporary China. The Unitary System and Its Internal Logic*, Brill, Leiden, 2019, 1-25; Tushnet, M., *How do constitutions constitute constitutional identity?*, in *International Journal of Constitutional Law*, Vol. 8, No. 3, 2010, 671-676.

[200] Jacobsohn, G. J., *Constitutional Identity*, 149.

[201] Rosenfeld, M., *The Identity of the Constitutional Subject*, 48-49; Rosenfeld, M., *Constitutional Identity*, 759.

usually those that determine a constitution, become subordinate to national identity. Such a situation entails the risk of a possible gap between the values crystallised in a constitutional text and those that the population constructs for itself, often based on contingent factors or, in any case, of a political rather than a legal nature.

In this scenario, there looms a perilous prospect of the constitutional identity concept being misappropriated.[202] Specifically, there's a concern that the notion of identity might be exploited for overtly political ends, potentially fostering division within society. This could manifest as a dichotomy between those who align with national values, thereby claiming membership in the nation, and those who are perceived as outsiders for not adhering to these values. The gravest peril inherent in invoking constitutional identity, framed as the identity of the people, is its potential to exacerbate societal discord by serving as a tool to rally specific political factions rather than maintaining its intended role as a neutral element. Ideally, constitutional identity, rooted in legal principles enshrined within the constitutional framework, should serve as a unifying force, synthesizing diverse societal perspectives into a cohesive whole.[203] However, the risk of abusive or aberrant exploitation of this concept, particularly in increasingly diverse and pluralistic societies, necessitates caution. Therefore, it seems prudent to confine the application of identity strictly to the constitutional text and its adjudication by constitutional and supreme courts, mitigating the potential for misuse and safeguarding societal harmony.

1.7.2. THE SOURCE OF CONSTITUTIONAL IDENTITY

As mentioned in the previous section, the majority of legal doctrine is divided between those who consider that the subject of constitutional identity is the constitution itself and those who instead identify the people as the subjective element of this identity. Moreover, it has been said that in this thesis - as will be seen in more detail in the selected case studies - the research and description of constitutional identity will be carried out within the constitutional text and since the jurisprudence of

[202] Scholtes, J., *Abusing Constitutional Identity*, in *German Law Journal*, Vol. 22, 2021, 534-556; Kelemen, R., D., Pech, L., *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, in *Cambridge Yearbook of European Legal Studies*, Vol. 21, 2019, 59-74; Fabbrini, F., Sajó, A., *The dangers of constitutional identity*, in *European Law Journal*, Vol. 25, 2019, 457-473.

[203] For a critique of the juxtaposition of the principles of constitutionalism and constitutional identity see Adugna Gebeye, B. *The Identity of the Constitutional Subject*, 5-7. See Oomen, B., *Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands*, in *Revue interdisciplinaire d'études juridiques*, Vol. 77, No. 2, 2016, 235-263; Rosenfeld, M. (eds.), *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Duke University Press, Durham, 1994, *passim*; Moș, A. G., *Illiberalism and Constitutional Identity. A Critique from a Multilevel Perspective*, in *Pécs Journal of International and European Law*, No. 1, 2022, 22-44; Walter, M., *Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 72, No. 2, 2012, 190 ff.

the Constitutional Court and the Supreme Court. Indeed, such an approach makes the identification and study of constitutional identity firmly rooted in positive law and less subject to transitional and political considerations. Nevertheless, regarding the analysis of the source of constitutional identity, this section will take up the two main interpretative directions on the subject of identity and attempt to analyse how the source of constitutional identity is determined by the constitution and how it is determined by the people.

The idea that constitutional identity lies in the constitutional text itself is a very practical approach, since in this case the constitution itself will clearly be the source of constitutional identity. According to this interpretation, therefore, constitutional identity is what «makes this constitution that constitution».[204] However, the claim that constitutional identity resides in the constitutional text may be misleading, or at least partially misleading, for two reasons which we shall now examine, and which deserve to be better identified.

Firstly, it seems to be widely accepted that not all provisions contained in a constitution have the same axiological value and therefore do not define its core. Indeed, this consideration is confirmed by the fact that constitutions can be amended. Therefore, if all the provisions of a constitution were considered essential, a revision procedure, even a partial one, could never be adopted, except by amending the whole constitution. For this reason, it can be said that not all the provisions of a constitution define its identity, but it is more correct to say that it is the principles and values that a constitution emphasises that define its essence. It is possible to understand that «not every 'change *in* the constitution' entails a 'change *of* constitution'[…]».[205] In fact, the elements of a constitution's identity are those which, once changed or even partially affected, entail a total revision of the constitution, since with this change the basis of the values and principles that governed the previous order has been altered.[206] Thus, according to the textual approach, the identity of a constitution can be said to lie in its core of values and principles that determine its essence.

Second, the claim that constitutional identity resides in the constitutional text, understood as a material, written text, would imply that systems that do not have a formalised constitution - such as the United Kingdom or the European Union - cannot have an identity of their own unless it is crystallised in a specific document. Such a conclusion would be manifestly erroneous, since, as shown above, the elements of identity are to be found in those values and principles that underlie the whole constitutional order: whether formalised in a specific written text or derived from a set of

[204] Martí, J. L., *Two different ideas of constitutional identity: identity of the constitution v. identity of the people*, in Saiz Arnaiz, A., Alcoberro Llivina, C. (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge, 2013, 22.

[205] *Ivi*, 22.

[206] Martí, J. L., *Two different ideas of constitutional identity*, 22.

constitutional customs or a stratification of documents and decisions that determine its essential content.[207]

After having clarified that in the textual conception of constitutional identity the essence of the constitutional text is encapsulated in the values and principles underlying a constitution, and that these principles can be expressed in a formalised constitutional text as well as in a set of customs or stratified elements, it is now appropriate to introduce a further element, namely that of the interpretation of the constitutional text. In fact, every legal provision is subject to interpretation and not even the constitution is an exception to this rule, hence «it is the norms, not just the words, what embodies the essence of a constitution and can be seen a s its identity. Any constitution is a text plus a set of crystallised practices».[208] The values and principles that form the basis of a constitution and thus define its essence are derived from the text of the constitution, but are also the result of an interpretation, usually jurisprudential, that clarifies its deeper meaning.

For instance, in stratified systems such as that of the European Union, the interpretation of principles and values by the courts is an essential element in tracing their identity. The interpretation of the principles underlying a constitution is also important because «the very identity of the Constitution – the body of textual and historical materials from which norms are to be extracted and by which their application is to be guided – is […] a matter that cannot be objectively deduced or passively discerned in a viewpoint-free way».[209]

In order to understand the principles and values underlying a constitution, the presence or absence of perpetuity clauses, in addition to the interpretation of constitutional provisions by the courts, can be a valuable clue. Indeed, the fact that certain provisions of the constitution are unchangeable, thanks to the presence of an eternity clause that protects them from revision, is a good indicator «of how essential they seem to be».[210] The fact that, in drafting the Constitution, the founding fathers decided to make certain parts of it immutable is an indication of how important these provisions are for the resilience of the whole constitutional system. This shows precisely that not all provisions define the essence of the constitutional text, but that the identity of a constitution must be sought in the interpretation of these provisions and regarding the limits of the revision procedure. For this reason, constitutional identity derives from a core of values and principles which are expressed and protected by the constitution itself and which enjoy special protection because they are considered

[207] Rosenfeld, M., *Constitutional Identity*, 764.

[208] Martí, J. L., *Two different ideas of constitutional identity*, 24.

[209] Tribe, L., *A Constitution We Are Amending: In Defence of a Restrained Judicial Role*, in *Harvard Law Review*, Vol. 97, 1983,

[210] Martí, J. L., *Two different ideas of constitutional identity*, 27.

essential to the entire legal order and their modification would entail a radical change in the constitutional order.[211]

Otherwise, constitutional identity can also be interpreted as the identity of the people to whom a constitution refers. Indeed, a constitutional text is the source that identifies a people in each territory and to which the people are subject. For this reason, it can be argued that constitutional identity has the people as its main subject, since the constitution seeks to crystallise the essential elements that define a society and hold it together. Indeed, as Tushnet argues in one of his studies, «the preamble to the Irish Constitution, like the preamble to the United States Constitution, raises questions about who 'the people' are who govern themselves in modern constitutionalist system».[212] Some scholars, such as Rosenfeld, have argued that the source of constitutional identity is the people themselves, and that identity is the result of a collective identity of the people subject to a constitution.[213] In this case, then, identity is the result of certain essential characteristics of a people which are crystallised in a constitution and which define its essence, and this is where the source of identity should be sought.

Another argument about where to look for the source of constitutional identity is the so-called deeply constitutive view of constitutional identity. According to this theory, it is the text of the constitution itself that defines the identity of the people, whereby «the constitutional identity would be the identity of the people that are constituted by the constitution, and according to very parameters, singled out by it».[214] However, there is a logical problem with such a theory. Indeed, in this way the constitution should logically be placed before the people whom the constitutional text defines and creates, but in this case, this would be a logical stretch. Moreover, in the face of a radical change in the constitutional text, there would also be a change in the people and their identity as a result of what the constitutional text establishes. The opposite of this theory is the one according to which constitutional identity derives from a precise will that the people wanted to express in the constitution. The people form the constitutional authority, which is distinguished from the other poles by its characteristics and gives a certain identity to its constitution. In this case, the source of identity can be found in the people,[215] but it is then expressed in the constitution that the same people wanted to give themselves. This type of identity is therefore characterised by being «persistent or pervasive, and independent from a particular constitutional enforced at particular time».[216] In this way, it is

[211] Polzin, M., *Constitutional Identity as a Constructed Reality and a Restless Soul*, in *German Law Journal*, Vol. 18, 2017, 1595-1616.

[212] Tushnet, M., *How do Constitutions Constitute Constitutional Identity*, 673.

[213] Rosenfeld, M., *Constitutional Identity*, 758.

[214] Martí, J. L., *Two different ideas of constitutional identity*, 32. In a similar vein, Justice Kennedy stated that «our self-definition as a nation is bounded up with the Constitution» in *The New Yorkes*, on 12 September 2005.

[215] Rosenfeld, M., *Constitutional Identity*, 758.

[216] Martí, J. L., *Two different ideas of constitutional identity*, 33.

possible to solve the logical problem of the previous theory, where the identity of the constitution is derived from the will of the people.

Another theory is that of the "moral approach", according to which the source of constitutional identity would derive from certain moral and political principles which are widely shared by the people and which, as such, are enshrined in the constitution, thus creating a kind of "constitutional patriotism" of identity, as Habermas argues.[217] In this case, «the people constituted by, and subject to, such a constitution would also be identified by such values and principles».[218] However, even this theory poses a specific problem, namely that of the effective reconcilability of values, especially when they are multiple in a fragmented society. An analysis of some of the theories that identify the source of constitutional identity as coming from the people has shown that it is extremely difficult to define the essence of a people and to fix it in a constitution.

In conclusion, to briefly review the elements discussed in this section, the source of constitutional identity can come from the constitution itself or from the people subject to that constitution. Regarding the first theory, the source of identity would derive from a set of values and principles that are embedded as the foundation of a constitutional order. In other words, a constitution is based on a core of values that can be protected by special immutability clauses and, as such, cannot be changed in a constitutional revision, since this would entail a radical change in the entire constitutional order and, above all, in the values that were originally placed at the centre of this order. In the process of identifying these principles, the interpretation of constitutional provisions by constitutional or supreme courts can also play an important role, which, as has happened in Italy, can identify, and establish a core of "supreme principles"[219] which thus become the true immaterial spirit of the constitution.

Regarding the second thesis analysed in present section, it is argued that the identity of a constitution must be sought in the identity of the people subject to a given constitution. However, such a position can create difficulties in identifying the source of identity, because it can vary depending on how it is defined. Indeed, identity can be understood as national, that is, based on certain values of a historical, religious, linguistic, or even ethnic nature; or it can be an identity that the constitution itself gives to the people, after having crystallised it in a written text; finally, it can be

[217] Habermas, J., *The Postnational Constellation. Political Essay*, MIT Press, Cambridge, 2001

[218] Martí, J. L., *Two different ideas of constitutional identity*, 34.

[219] «The Italian Constitution contains certain supreme principles that cannot be subverted or modified in their essential content even by constitutional revision laws or other constitutional laws. These are both the principles that the Constitution itself explicitly provides for as absolute limits to the power of constitutional revision, such as the republican form (Article 139 of the Constitution), and the principles that, although not expressly mentioned among those that cannot be subjected to the constitutional revision procedure, belong to the essence of the supreme values on which the Italian Constitution is based» in Italian Constitutional Court, No. 1146 of 15 December 1988, para. 2.1.

understood as the identity that the people, at a given moment, define within the constitution. Each of these visions has specific limitations, but they share a common problem: how to reconcile the different values and principles that are necessarily present in any organised society. Perhaps this is precisely the great limitation of the idea of a constitutional identity that comes from the people, because not only does it run the risk of being subject to sudden changes brought about by contingent political elements, and thus of being abused for purely political purposes, but above all it runs the risk of becoming a "bone of contention" that creates deep rifts within society between different visions that are often incompatible.[220] In this case, there is a real risk that the Constitution and its fundamental principles will be deprived of their role as a common and shared "table of values" within an organised society.[221]

1.7.3. The method of identifying the elements of constitutional identity

This section - having already examined the concept of constitutional identity from a doctrinal point of view and attempted to identify the subject of identity and its source - is devoted to a concrete consideration of how it is possible to identify the elements that define constitutional identity. It should be noted at the outset that this will not be a complete exploration, but will be confined to the subject of methods of recognising identity within the theoretical conception of constitutional identity as the founding element of a constitution, namely where the subject of identity is the constitution itself, in order to illustrate the method of analysis used in the two case studies that will be presented in chapters II and III of this work. It should be remembered, moreover, that even in the approach described here, there will be some simplifications or schematizations that will be useful to be able to establish at least some fixed points regarding a subject that, as we have seen, is still widely debated in doctrine.

In general, the logical antecedent of the concept of constitutional identity lies in the theoretical approach that divides the text of a constitution into two elements.[222] On the one hand, the essential core of a constitution, identified in the principles and values that constitute its axiological foundation

[220] See Mindus, P., Goldoni, M., *Between democracy and Nationality: Citizenship Policies in the Lisbon Ruling*, in *European Public Law*, Vol. 18, No. 2, 351-371; Lebeck, C., *National Constitutionalism, Openness to International Law and Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC*, in *German Law Journal*, Vol. 7, No. 11, 2006, 907-945.

[221] See Ruggeri, A., *I principi fondamentali dell'ordinamento costituzionale tra interpretazione storicamente orientate e revisioni a finalità espansiva*, in *Consulta Online*, No. 2, 2022, 580-598; Headling, N., *The Fundamentals of a Constitution*, in *Institute for Democracy and Electoral Assistance*, October 2016, 1-8; Pino, G., *I diritti fondamentali nel prisma dell'interpretazione giuridica*, in Alpa, G., Roppo, G. (eds.), *La funzione civile del giurista. Studi in onore di Stefano Rodotà*, Laterza, Roma, 2013, 97-121; Dossetti, G., *I valori della Costituzione*, in Dossetti, G. (eds.), *I valori della Costituzione*, Istituto Italiano per gli Studi Filosofici, Napoli, 2005, 19-41.

[222] As already described more extensively in sections 1.2 and 1.5, this theory was formulated in the late 1920s by the scholar Schmitt, C., *Dottrina della costituzione*, 112 ff.

and thus determine its identity, and, on the other hand, the elements that are defined as constitutional laws and that usually determine the relationships within the form of government or, more generally, the elements that guarantee the proper functioning of the constitutional system and the state apparatus. According to this interpretation, it is possible to locate constitutional identity in a core of well-defined principles and values that form the basis of the constitution and which, if modified during constitutional revision, would entail a complete change of the original constitution, which would thus be replaced, since its essence would be altered. On the contrary, again according to this doctrinal interpretation, constitutional laws would constitute the part of the constitution that can be subject to the constitutional review procedure since an amendment of these provisions would not result in an improper exercise of constitutional power.[223]

Based on these considerations, it is possible to identify a first appropriate method for identifying the principles and values that determine the identity of a constitution. This is the analysis of the constitutional revision procedure and, above all, its limits. Indeed, the existence of a specific procedure for amending the constitutional text and the existence of both explicit and implicit limits to revision are elements that can be decisive in determining identity. If the constitution provides for explicit limits on the revision of certain provisions, this implies that the constituents have wished to give them a special and superior role within the constitutional order of the country and that they therefore constitute the principles and values that determine the identity of a constitution. Two types of limits to the constitutional review procedure can be identified: substantive and procedural.[224]

As far as the substantive limits to revision is concerned, it can be said that it creates a hierarchy within the constitutional text, whereby certain provisions are expressly excluded from the amendment procedure and, as such, assume a hierarchical position of super-constitutional principles and values that cannot be changed, since their revision would constitute an alteration of the legal order. The existence of such a provision, which usually takes the form of an eternity clause, can provide significant indications of the principles and values that constitute the identity of a constitution. Indeed, as will be analysed in detail in the two case studies, one of the elements used to reconstruct the constitutional identity of Bosnia and Herzegovina and the European Union was precisely the identification of the existence of substantive limits to the constitutional revision process and thus the definition of the principles and values that shape their constitutional identity.

In terms of how substantive limits to constitutional revision are identified, they can be divided into two main categories. On the one hand, substantive limits may be explicitly provided for in the

[223] Grewe, C., *Methods of Identification of National Constitutional Identity*, in Saiz Arnaiz, A., Alcoberro Llivina, C. (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge, 2013, 39.

[224] «The limits of the power of [constitutional] revision result from the concept [...] of revision» in Schmitt, C., *Dottrina della costituzione*, 145.

constitution in the form of eternity clauses, in which case the identification of constitutional identity is also facilitated by the presence of clear and precise indications.[225] If, on the other hand, the constitution does not contain precise indications of the principles and values that are not subject to constitutional amendment, this does not mean that a constitution does not possess its own identity, since the absence of a specific provision in this direction can be replaced by the interpretation that the constitutional or supreme court can give to the provisions of the constitution and their value within the constitutional order.[226]

Regarding the procedural limits of constitutional revision process, two macro-categories can be distinguished: on the one hand, the total constitutional revision procedure and, on the other hand, the partial one. About the former, the identification of the elements constituting its identity is not to be sought in the constitutional text, which does not provide explicit information, but in the jurisprudence of the constitutional or supreme court, which, through its interpretation of the constitutional text, comes to define the principles and values on which the constitutional text is based. In this specific case, therefore, the elements that define the identity of a constitution are to be sought in the jurisprudence of the courts, as they provide the necessary elements to identify the core and essence of the constitution through the interpretation of its provisions.[227] Partial revisions, on the other hand, implicitly affirm the existence of constitutional elements that cannot be revised and, as such, potentially define its identity. On the other hand, it is more difficult to identify the essential elements of a constitution on the basis of the analysis of a purely formal revision procedure, since this only indicates the elements necessary for a constitutional revision to take place, but does not explicitly indicate the existence of substantive limits: what is relevant in terms of the formal procedure is precisely the mere modality that allows for the revision of the constitutional text and will therefore not be adopted in the case study chapters.

A further method of identifying constitutional identity within a legal system is to follow the axiological indications that the constituents wished to enshrine in the preamble. Indeed, for those constitutions that provide for a preamble, it can be a privileged vantage point for understanding the values and principles that the constituents wished to place at the heart of the constitution. In fact, preambles can serve two different functions within a constitution. On the one hand, they can serve to

[225] As far as the member states of the European Union are concerned, it can be recorded that the constitutions of Germany, France, Italy, Greece, Portugal, Romania, and the Czech Republic contain clauses in their constitutional text that set substantial limits to the revision procedure. See European Commission for Democracy Through Law (Venice Commission), *Report on Constitutional Amendment*, Study No. 469/2008, CDL-AD(2010)001; Halmai, G., *Internal and external limits of constitutional amendment sovereignty*, in *European University Institute*, 20101-29; Grimm, D., *Constituent Power and Limits of Constitutional Amendments*, 2-3.

[226] Grewe, C., *Methods of Identification of National Constitutional Identity*, 41.

[227] Morbidelli, G., *Costituzioni e costituzionalismo*, 76; De Vergottini, G., *Diritto costituzionale comparato*, 247-254.

situate the constitutional text within a particular historical period, thus illustrating the reasons that led to the drafting of the constitution and the relationships or discontinuities with the past. On the other hand, as mentioned above, preambles may serve to illustrate the legal reasons and principles that the constituent wished to place at the heart of the constitutional order, and which thus also guide its interpretation by constitutional or supreme courts. A further distinction that can be made about the concept of the preamble as a "table of values" underpinning a constitution is that between preambles with "sovereignist" and "constitutionalist" content.[228] Indeed, some constitutions contain in the preamble information about the elements of the state. This information usually concerns details of the territory, the capital, the language, the state symbols, the citizenship and, in some cases, even the religion and the historical origin of the country.[229] In this type of preamble, it is possible to identify above all the elements that make up the identity of the nation, namely of the people, rather than those relating to the constitution.

On the other hand, there are preambles whose content includes the affirmation of certain principles typical of constitutionalism, such as democracy, the rule of law, pluralism, the protection of fundamental rights and freedoms, the separation of powers and human dignity. This type of preamble, which therefore has a strictly constitutional content, makes it possible to identify the elements that constitute the basis and inspiration of the constitution itself. In other words, preambles that have a typically constitutional content, such as those that identify the elements of liberal constitutionalism that determined their creation, constitute an important contribution to identifying the identity of the constitution itself. Moreover, these are legal values that enjoy a well-established tradition, at least in the Western legal world, and as such they identify the values and principles on which a society can be constituted, even if it is permeated by diversity and value pluralism.[230] Indeed,

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[228] See Frosini, J. O., *Mere dichiarazioni o fonti costituzionali? Uno studio comparato dei preamboli alle Costituzioni dei Paesi dell'ex Jugoslavia*, in Montanari, L. (eds.), *L'allargamento dell'Unione europea e le transizioni costituzionali nei Balcani occidentali: una raccolta di lezioni*, Editoriale Scientifica, Napoli, 2022, 123-141; Longo, F., *Struttura e funzioni dei preamboli costituzionali. Studio di diritto comparato*, Giappichelli, Torino, 2021, 21-191; Bassini, M., *Una tassonomia per riscoprire ratio e valore dei preamboli alle costituzioni. A proposito di W. Voermans – M. Stremler – P. Cliteur, Constitutional Preambles. A Comparative Analysis, Edward Elgar, 2017*, in *Diritti Comparati*, 30 April 2018; Frosini, J. O., *Constitutional preambles: More than just a narration of history*, in *University of Illinois Law Review*, Vol. 2, 2017, 603-628; Orgad, L., *The Preamble in Constitutional Interpretation*, in *International Journal of Constitutional Law*, Vol. 8, No. 4, 2010, 714-738; Ginev, D., *The Context of Constitution. Beyond the Edge of Epistemological Justification*, Springer, Berlin, 2006, 93-131; Tejada, J. T., *Funzioni e valore dei preamboli costituzionali*, in *Quaderni costituzionali*, No. 3, 2003, 509 ff.

[229] See the case of Hungary or Ireland, which refer explicitly to religion. See Balázs, F., *The National Avowal: More than a Conventional Preamble to a Constitution*, in Fejes, Z., Szente, Z., Mandák, F. (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development*, Éditions L'Harmattan, Paris, 11-24; Arato, A., Miklósi, Z., *Constitution Making and Transitional Politics in Hungary*, in Miller, L. E. (eds.), *Framing the State in Times of Transition*, United States Institute of Peace, Washington, 2010, 350-390; Whyte, G., *Religion and The Irish Constitution*, in *UIC Law Review*, Vol. 30, No. 3, 1997, 725-746.

[230] Tushnet, M., *How do constitutions constitute constitutional identity?* 671-676; Fichera, M., Pollicino, O., *The*

as will be seen in Chapter II of this work, the study and analysis of the Preamble to the Constitution of Bosnia and Herzegovina has been fundamental in defining the elements that constitute its identity.

Another element that can contribute significantly to the reconstruction of constitutional identity is that of the historical moment of the constitution's establishment. Indeed, analysing the exercise of constituent power and the manner or peculiarities in which it took place can contribute significantly to defining the elements that mark the identity of a constitution. As in the case of Bosnia and Herzegovina, for example, where constituent power was heavily internationalised, leading to the establishment of certain principles of international humanitarian law, such as the protection of freedoms, human rights, and the preservation of human dignity, as principles capable of uniting a population exhausted by the divisions created by the armed conflict around widely shared values.

The way constituent power has been exercised can thus also provide valuable indications of the principles that define a constitution's identity and the reasons for them.[231] In addition, the identity of a constitution, especially when it refers to the time of the drafting of the text, can also assume a programmatic role for the order that the constitution has subsequently defined through the exercise of constituent power. Indeed, in this case, identity coincides with the axiological aspirations that the constituents placed in its provisions: identity coincides with what the constitution aspires to become, rather than what it is at that moment.

This aspect highlights another element of constitutional identity, namely its dynamism. Indeed, identity begins with stable elements, but can evolve and change over time. The view of constitutional identity as a concept that expresses programmatic aspirations is particularly visible with respect to those countries in transition that have undergone major «constitutional transformations that fundamentally change the character of the constitutional system».[232] Such an approach to constitutional identity will be visible in the following chapter on Bosnia and Herzegovina, where the voters have enshrined in the constitution a "promise of constitutional identity", namely an identity based on values and principles derived from constitutionalism and international law, with which local

Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?, in *German Law Journal*, Vol. 20, 2019, 1097–1118; Polzin, M., *Constitutional Identity as a Constructed Reality and a Restless Soul*, 1601.

[231] See Doyle, O., *Populist constitutionalism and constituent power*, in *German Law Journal*, Vol. 20, No. 2, 2019, 161-180; Lindahl, H., *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in Loughlin, M., Walker, N. (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, Oxford, 2008, 9-24; Kaushal, A., *Constituent Power: Political Unity and Constitutional Plurality*, in *National Journal of Constitutional Law*, Vol. 37, No. 2, 2017, 91-117.

[232] Szente, Z., *Constitutional identity as a normative constitutional concept*, 8. See also Schnettger, A., *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Calliess, C., van der Schiff, G. (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge, 2020, 9-38.

society can identify beyond its ethical and religious differences, thus creating a discontinuity with the previous situation of division created by the war.

The methods for identifying the identity of a constitution summarised in these pages may be manifold, but we have chosen to describe only those that are used in the context of the search for identity in the systems proposed as case studies. In particular, one of the main methods of identifying the identity of a constitution has been that linked to the constitutional revision process and its limits. Indeed, the existence of substantive and procedural limits to constitutional revision makes it possible to identify the principles and values that constitute the essence of the constitution. Similarly, constitutional preambles can provide important clues to the identity of a constitution, as they describe the elements that inspired and guided the constituents in drafting the text and that constitute its essence. Moreover, another method of identifying the identity element of a constitution can be found in the study of the exercise of constituent power, since it is at the moment of the drafting of a constitution that it is possible to understand the elements that influenced the drafting of the constitutional text. In conclusion, the previous pages have also shown that the definition of constitutional identity is not only through the study of the mere normative text - which, let us remember, can also be non-formalised, as is the case of the European Union - but also through the interpretation that the constitutional and supranational courts give to it. This is a further illustration of how and why it is so difficult to define constitutional identity, given that the characteristics of each constitution and the circumstances in which it was drafted are very different.

1.8. CONSTITUTIONAL IDENTITY AS PLURALISM

It remains to address the question of the role that the concept of constitutional identity plays in a pluralistic society. This question is important because it allows us to illustrate, on the one hand, why we have chosen to identify the subject of constitutional identity in the constitution itself and, on the other hand, why the systems of Bosnia and Herzegovina and the European union have been chosen as case studies. So far, two of the key concepts that are the subject of this chapter, namely constitution and identity, have been examined, but there is still a lack of insight into how these two concepts can be developed in an increasingly plural world and thus in relation to a society that is increasingly permeated by different worldviews and visions of reality. To better understand the challenges that pluralism poses to the question of constitutional identity, it seems appropriate to begin this section with a minimal definition of the concept of pluralism and, therefore, of its main declinations.

Pluralism is a concept that can take on different forms and meanings depending on the subject that can be given to it. For this reason, a definition is outlined below which is as broad as possible to

cover the main forms of this concept. The pluralism - albeit in a substantially different meaning from that used by contemporary scholars, but with a character that can still be defined as common - was already recognised by Aristotle in his *Politics* as an essential element of ancient Greek democracy, to be contrasted with Plato's monism.[233] In modern times, the term pluralism, «derived from the noun adjective "plural"»,[234] was taken up in the eighteenth century by Wolff and Kant, who wanted to affirm the existence of a plurality of senses. However, it was not until the 20th century that a political and legal theory of the concept of pluralism developed.[235]

To summarise some elements of this legal and political concept, it can be said that pluralism maintains that people with different beliefs, ideals, cultures and ways of looking at things can nevertheless coexist in the same society and participate on an equal footing in the democratic process within state institutions.[236] Another characteristic of the pluralist concept is that it is only its exercise and application within a system that leads citizens to negotiate concrete solutions that contribute to achieving the "common good" of society as a whole. This is evidenced by the fact that the underlying premise of the pluralist conception is that people with different interests, beliefs and lifestyles can peacefully coexist and participate in the political process, recognising that different competing interest groups can share power. In this sense, pluralism is seen as a key element of democracy, since it enshrines an agreement, which may also be formalised in a constitution, whereby the different elements that make up a society consider themselves bound to participate in the social and political life of a system according to the same pre-established rules, for the good of their own group and, indirectly, of the community as a whole. Indeed, although he did not use the term pluralism, James

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[233] Aristotle, *Politics*, Chapter II.

[234] Matteucci, N., *Pluralismo*, in *Enciclopedia Treccani delle scienze sociali*, 1996.

[235] The literature on such a multifaceted topic is truly vast, *ex plurimis*, see Bentley, A. F., *Il processo di governo: uno studio delle pressioni sociali*, Giuffrè, Milano 1983; Bobbio, N., *Le ideologie e il potere in crisi*, Le Monnier, Firenze 1981; Cotta, S., *La nascita dell'idea di partito nel secolo XVIII*, in *Il Mulino*, No. 3, 1959, 445-486; Dahl, R. A., *Prefazione alla teoria democratica*, Einaudi, Torino, 1994, Dahl, R. A., *Poliarchia. Partecipazione e opposizione nei sistemi politici*, Franco Angeli, Milano, 1981; Dahl, R. A., *I dilemmi della democrazia pluralista*, il Saggiatore, Milano 1988; Dahl, R. A., *La democrazia e i suoi critici*, Editori Riunti, Roma 1990; Eisfeld, R., *Il pluralismo fra liberalismo e socialismo*, il Mulino, Bologna, 1976; Glass, S.T., *The responsables society: the ideas of the English guild socialist*, MW Books, London 1966; Hirschman, A. O., *Le passioni e gli interessi*, Feltrinelli, Milano 1979; Hirst, P. Q. (eds.), *The pluralist theory of the State: Selected writings of G.D.H. Cole, J.N. Figgis and H.J. Laski*, Routledge, London, 1990, 112-133; Kaiser, J., *La rappresentanza degli interessi organizzati*, Giuffrè, Milano 1993, 44 *passim*; King, P., *Toleration*, Routledge, London 1976, 21-73; Lively, D. E., *The constitution and race*, Praeger, New York, 1992 88 *passim*; MacIver, R., *Governo e società*, il Mulino, Bologna 1962; Matteucci, N., *Alexis de Tocqueville. Tre esercizi di lettura*, il Mulino, Bologna, 1990; ID., *Lo Stato moderno*, il Mulino, Bologna, 1993; Pizzorno, A., *I soggetti del pluralismo. Classi, partiti, sindacati*, il Mulino, Bologna, 1980, 44-56; Rawls, J., *Liberalismo politico*, Nuova Cultura, Milano 1994, 109-135; Raz, J., *The morality of freedom*, Oxford University Press, Oxford, 1988, 191-203; Raz, J., *Practical reason and norms*, Princeton University Press, Princeton, 1990; Rescigno, P., *Persona e comunità*, il Mulino, Bologna, 1966; Truman, D. B., *The governmental process*, Praeger, New York, 1988, 44 *passim*; Walzer, M., *Spheres of justice: a defence of pluralism and equality*, Basic Books, New York 1983, 33 ff.

[236] Longley, R., *What Is Pluralism? Definition and Examples*, in ThoughtCo, 19 December 2023.

Madison, in Federalist Paper No. 10, had already expressed his fears that "factionalism" and its inherent political struggles would fatally fracture the new American republic: only by allowing many competing factions to participate equally in government could this disastrous outcome be avoided.[237] Looking more closely at the political meaning of the term pluralism, it can be declined according to a number of key principles. Scholars of the last century had noted that the main characteristic of the government in which the principles of pluralism were applied was the absence of a single centre of power, but rather that political power was shared among more or less large interest groups. This was also expressed in the characteristic of the large political autonomy of the groups and their large independence in the political sphere. This competition between groups inevitably leads to the development of balancing mechanisms that create a balance between the positions of the various elements that characterise society and confront each other in the political arena. However, this construction would not be possible if there were no consensus on the "rules of the game" according to which the order is to be constructed. In other words, the different groups within a society agree to bring their different views of the world and society into the political arena, accepting regular and open elections, the right to vote, majority rule, political equality, freedom of speech, the right of assembly and the other rules that make peaceful and orderly politics of a democratic nature possible.[238]

This general view of the concept of pluralism has tried to show how its main characteristic is to create a political, legal and social environment that is capable of accepting and processing the different cultures, world views, ideals and values that may exist in a society, bringing them back not so much to a single vision, but to a core of rules that govern society, and is capable of creating an environment in which these diversities coexist by clashing at the political level, without trying to cancel each other out or marginalise other members of the group. In simple terms, pluralism is the theory that accepts the diversities present in a society not as elements to be suppressed, but as intrinsic features of the society itself, to be valued and reconciled within the system.[239]

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[237] Madison, J., *Federalist No. 10. The Union as a Safeguard against Domestic Faction and Insurrection*, in Hamilton, A., Jay, J., Madison, J. (eds.), *The Federalist Papers*, Snova, New York, 39-44.

[238] Longley, R., *What Is Pluralism?*

[239] There are many theories and concepts that can be applied to the concept of pluralism, and in particular to the different forms that pluralism can take. In this section, however, we will briefly describe the different faces of pluralism that are more relevant to its concrete applications within the orders under analysis. As already mentioned, political pluralism assumes that pluralism helps to reach a compromise that enables decision-makers to know and deal fairly with different competing interests. This means that the different elements that make up a society commit themselves, on the basis of an agreement usually provided for in the constitution, to respect certain common values and to resolve their issues politically in such a way as to achieve both the good of their own group and the common good of society as a whole. In the words of Norberto Bobbio, we can conclude that pluralism, in its political sense, can be defined as the concept that «proposes as a model a society composed of several groups or centres of power, even in conflict with each other, which are assigned the function of limiting, controlling, opposing [...] the dominant centre of power» (Bobbio, N., *Pluralismo*, in Bobbio, N., Matteucci, N., Pasquino, G. (eds.), *Il Dizionario di Politica*, UTET, Torino, 2004, 700). In addition to the political sphere, pluralism accepts diversity in other spheres of society, which are today the most challenging and fraught with tension, such as the cultural and religious spheres. In a society that calls itself truly pluralistic, both cultural and religious pluralism derive from an implicit acceptance of pluralism on an ethical or moral basis, namely on the theory that

This general description of the concept has attempted to describe in broad terms the features that characterise the issue of pluralism, highlighting those aspects that intersect most closely with the issue of constitutional identity. Indeed, in a society increasingly permeated by religious, cultural, political, linguistic, and ethnic differences, the theory of pluralism seeks to synthesise these differences in order to create a society that is as open as possible and not based on the idea of a monism of values. In other words, pluralism sees society and reality as inherently made up of a plurality of elements, which may also differ from each other, but which cannot be denied. Moreover,

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although different values may always conflict, «all remain equally right and accepted» (Longley, R., *What Is Pluralism?,* 1). As far as the concept of cultural pluralism is concerned, it can be explained by the fact that the diversity of cultures can easily give rise to different social models, which in turn can be expressed in different legal systems. Attempting to give a definition, albeit limited to the elements that are of most interest for the present work, it can be said that cultural pluralism expresses a state in which different groups, divided on cultural grounds, manage to coexist within the same society, tolerating each other and without any particular conflicts. Moreover, the idea of cultural pluralism implies that even minority groups within a society dominated by a certain cultural vision can participate actively and fully in the social and institutional life of the country, while maintaining their own cultural characteristics and traditions, without having to change them in order to be accepted. Indeed, for the idea of cultural pluralism to work within a given order, it is still necessary for the traditions and cultural practices of a minority group to be accepted by the majority of society. Otherwise, minority groups may find it particularly difficult to participate in the social and institutional life of a country. This is evidenced by the fact that in many legal systems where society is characterised by a plurality of cultural and traditional elements, it is necessary to enact special laws capable of ensuring the effective exercise of the cultural rights of minority groups. The issue of cultural pluralism is, moreover, closely linked to the concept of multiculturalism (see Chabod, F., *L'idea di nazione*, Laterza, Bari, 1961, 44-67; Tuccari, F., *La nazione*, Laterza, Roma-Bari, 2000; Campi, A., *Nazione*, il Mulino, Bologna, 2004, 33 passim.), whereby a concept has emerged that accepts the presence of multiple cultures and cultural systems in a single territorial or national context, as opposed to the idea of cultural homogeneity, as the presence of a single cultural system in a specific context. Indeed, since the first half of the twentieth century, with the gradual transformation of European states into areas of immigration, the homogeneity of European societies has been challenged by the presence of minorities with principles, values and customs that differ from those of the majority. In the second half of the twentieth century, this phenomenon was consolidated, also due to the increase in migratory flows from very heterogeneous social and cultural contexts, and led to the development of constitutional and international norms aimed at guaranteeing and protecting cultural diversity (For a reconstruction of the great migration transition that took place in Europe during the 20th century see Corti, P., *Storia delle migrazioni internazionali*, Laterza, Roma-Bari, 2003, 99-118; Bade, K. J., *L'Europe en mouvement. La Migration de la fin du XVIIIe siècle à nos jours*, Seuil, Paris, 2002, 133-211; Bardet, J. P., Dupâquier, J. (eds.), *Histoire de Populations de l'Europe. III. Les temps incertains 1914- 1998*, Fayard, Paris, 1999, 332-356). If we want to briefly describe what is meant by multiculturalism, we can use the words of Beck, who defined it as «[...] a strategy of social approach to otherness, which, both theoretically and politically, introduces respect for cultural differences into the national spirit» (Beck, U., *Lo sguardo cosmopolita*, Carocci, Roma, 2005, 112). Inevitably, the issue of cultural pluralism intersects with that of religious pluralism, as religious affiliation can often profoundly influence one's cultural approach to other members of society and one's worldview (Massimo, I., *Libertà religiosa e pluralismo culturale: un'analisi critica della giurisprudenza*, Edizioni Scientifiche Italiane, Napoli, 2022, passim; Petrosino, D., *Pluralismo culturale, identità, ibridismo*, in *Rassegna Italiana di Sociologia*, Vol. XLV, No. 3, 389-418). Religious pluralism occurs when members of different faiths and beliefs coexist peacefully within the same society. More generally, religious pluralism accepts the idea that there can be different religious worldviews and that these are all valid, without any one belief system dominating the others. Thus, in contrast to exclusivism, namely the notion that only one faith can be the bearer of "truth", religious pluralism presupposes that there is constant dialogue and respect between different religious groups in order to create a religiously based interaction that can guarantee the exercise of public and private religious practices. It should be made clear that religious pluralism is not to be confused with religious freedom, which on the contrary refers to the fact that religion and its practices are protected by the law of a state, and that therefore there is no need for an "ecumenical" vision between the different faiths, creating a vision of diversity between religion and culture coexisting in a common society(Longley, R., *What Is Pluralism?*, 1; For an in-depth view of the religious theme in relation to constitutional law, see the works of Benigni, R. (eds.), *Diritto e religione in Italia. Principi e temi*, Roma Tre Press, Roma, 2021, *passim*, Mancini, L., Milani, D. (eds.), *Pluralismo religioso e localismo dei diritti*, Giuffrè, Milano, 2023, *passim*; Marchei, N., *Pluralismo religioso e integrazione europea: le nuove sfide,* in *Stato, Chiesa e pluralismo confessionale*, No. 3, 2019, *passim*; Zuanazzi, I., *La convivenza tra Stati e Religioni: profili giuridici*, in *Lessico di etica politica*, Vol. 3, No. 2, 2012, 32-41).

the pluralist conception is based on the idea that there are no absolute truths; on the contrary, this theory seeks to reconcile differences precisely from a position of neutrality. On closer inspection, however, there may appear to be a contradiction between the theory of pluralism and the concept of constitutional identity. Indeed, pluralism, as mentioned above, is based on the idea of the existence of multiple identities that can nevertheless coexist within a society. Conversely, the theme of identity is rooted in the equality of an order or society with itself and in its singularity, that is, in the notion that it possesses characteristics that make it unique with respect to other orders or societies.[240] In other words, the concept of constitutional identity seems to be at odds with the idea that different souls can coexist in a society, since identity would be the search for those elements that make a constitution or a people unique in relation to others, thus excluding the minority elements of society.[241]

On the contrary, by examining the case studies of Bosnia and Herzegovina alongside the European Union order, this study endeavors to illustrate that the notion of constitutional identity is not inherently at odds with pluralism. Rather than negating its foundations by favoring one particular identity to the exclusion of others, constitutional identity can accommodate diverse identities. We contend that not only is the coexistence of pluralistic values and constitutional identity feasible, but it is also preferable, serving as a means of synthesizing various societal conceptions and perspectives. Central to this argument is the premise that identity, when rooted in the constitution, can encompass principles and values that transcend political, social, linguistic, and religious differences. In this context, constitutional identity acts as a unifying force amidst societal diversity. It serves as a catalyst for embracing the multiplicity of identities inherent in today's increasingly pluralistic societies In fact, according to the approach that will be adopted in the following pages, constitutional identity is interpreted as the core of values and principles contained in the constitutional text and developed by the jurisprudence of the constitutional and supreme courts to reflect the "lowest common denominator" capable of synthesising the different souls present in a society. From this perspective, it could be said that the greatest challenge of contemporary constitutionalism lies precisely in its ability to create a legal environment capable of responding to the various instances present in the society it is called upon to govern. For this reason, the issue of constitutional identity seems to us

[240] Jacobsohn, G. J., *Constitutional Identity*, 21 ff.; Rosenfeld, M., *The Identity of the Constitutional Subject.*, 2010, 134 ff.

[241] See Jacobsohn, G. J., *How to think about the reach of constitutional identity*, 6-28; Jacobsohn, G. J., *Constitutional Identity*, 361-397; Jacobsohn, G. J., *Rights and American Constitutional Identity*, 409-411; Rosenfeld, M., *Constitutional Identity*, *passim*; Rosenfeld, M., *Modern Constitutionalism as Interplay between Identity and Diversity*, 3-36; Rosenfeld, M., *The identity of the constitutional subject*, 1049-1050; Greene, J. P., *The Constitutional Origins of the American Revolution*, *passim*; Kommers, D. P., *Constitutions and national Identity*, 127; Klug, H., *Constitutional Identity and Change*, 41-50; Lopatriello, G., *Constitutional Identity, by Gary Jeffrey Jacobsohn*, 601-603; Han, Z. (eds.), *The Constitutional Identity of Contemporary China*, 4; Tushnet, M., *How do constitutions constitute constitutional identity?*, 671.

today to be the most appropriate for building and maintaining this pluralistic environment. In fact, the purpose of identity should not be to define who "we" are and who the "others" are.

On the contrary, it should be able to provide the axiological foundations of a juridical nature that not only allow the different groups in society to recognise each other, but also guarantee this very plurality. The now classic principles of constitutionalism, such as the rule of law, the separation of powers and the protection of rights and freedoms, constitute the ideal humus on which to cultivate such an idea of constitutional identity, which is as inclusive as possible. In other words, we see constitutional identity as the bridge between an increasingly plural and multicultural society and the idea of constitutionalism. Indeed, in our view, it is constitutional identity that succeeds in expressing the values and principles that act as a glue within a plural society, and that succeeds in catalysing this diversity by creating the conditions for the peaceful coexistence of different groups in a society and respect for their diversity. In fact, identity takes on an axiological character of a legal nature, going beyond the concept of identity based on individual national traditions or national identities. The strength of a truly constitutional identity lies precisely in its ability to represent the different souls present in a society on the sole basis of widely shared values and principles of a legal nature.

1.9. CONSTITUTIONAL IDENTITY IN PLURAL SOCIETY: CONCLUDING REMARKS

This chapter has attempted to provide a doctrinal analysis - albeit limited to some specific elements - of the concepts of constitution and constitutional identity. Specifically, regarding the idea of the constitution, this concept has been developed by attempting to show how, beginning with the French Revolution and the birth of constitutionalism, it has evolved in doctrine along a historical path and what characteristics it has acquired. Then, to highlight the elements that can potentially define the identity of a constitution, we have attempted to analyse, again from a doctrinal point of view, two very important moments in the constitutional landscape.

On the one hand, we have tried to show how the generative moment of a constitution can influence the definition of its identity. Indeed, the moment of drafting and adopting a constitution highlights the principles and values that the framers wanted to place at the basis of the constitutional text; or the principles and values that were imposed from outside on a constituent assembly for various historical, political, or sociological reasons.

On the other hand, we have also analysed the dynamic moment of the constitution, namely the time point of the amendment of the constitutional text. The process of constitutional change, and in particular its limits, is an important point of observation for the legal scholar in search of the elements that constitute the identity of a constitution. In fact, the existence of an aggravated procedure

for amending the constitutional text and the existence of substantive limits are important indicators of the principles and values that the electorate wished to protect from any amendment. We wanted to analyse these two specific elements from a doctrinal point of view because they will then be used in chapters II and III of this thesis as a basis for research on how to identify constitutional identity in practice.

The concept of constitutional identity, on the other hand, has also been analysed from a doctrinal perspective, in order to highlight its fundamental elements and its historical development. In particular, we have tried to relate the concept of identity to that of constitution in order to identify certain elements that will be used in the study of constitutional identity within the two case studies. Firstly, we have tried to define the subject of constitutional identity, explaining why - in order to search for the element of identity in pluralist orders - we believe that the constitution itself is the subject of identity, since this is the only way in which it is possible to link the element of identity to principles that are truly legal and capable of acting as a connecting element between the diversities present in societies. Secondly, the concept of constitutional identity was analysed from the point of view of its sources. That is, we sought to identify the elements within a constitutional text that can provide a valid point of reference for identifying and reconstructing identity.

Once we had identified the main features of the notion of constitution and constitutional identity, we also addressed the issue of pluralism, trying to highlight its peculiarities and the relationship that this concept weaves with that of constitutional identity. In particular, constitutional identity in a plural society refers to the distinctive set of values, principles and norms embedded in a nation's constitution that reflect and accommodate the diversity of its population. Plural societies are characterised by the coexistence of different ethnic, cultural, religious, and linguistic groups, each with its own identity. In such a context, the maintenance of a constitutional identity becomes crucial to promote unity, respect diversity and ensure the protection of individual and group rights.

Indeed, with this research we would like to try to abandon the idea of identity as an element of identification of a homogeneous group around certain values that are in opposition to the values of other groups. Instead, we will try to show that the issue of constitutional identity can be understood as a "catalysing" factor of diversity, namely as the expression of a limited core of values that are widely shared even in plural societies and that can provide the necessary legal basis for peaceful coexistence, thus creating an aggregation of the different souls of a society.

More specifically, the research question on which this thesis is based is: how and according to which criteria can the constitutional identity of a legal system operating in a highly plural society be identified? In particular, we will seek to understand whether identity is an element that tends to divide or whether, as this work will attempt to demonstrate, it is rather an element that succeeds in

recomposing into unity the diversities present in a system through the affirmation of general principles and values, which, by virtue of their universality at an axiological level, succeed in constituting a catalysing element within a system. In fact, this chapter constitutes a kind of doctrinal introduction and explanation of the choices of analysis made in the following chapters. In other words, it acts as a "hinge" between this first chapter, which seeks to identify the main concepts of this study, and the analysis of constitutional identity that will be carried out in the following pages. We have tried to explain why constitutional identity must be sought in the constitutional text and in the interpretation of that text by the judges of the constitutional and supreme courts, because in this way there is no risk of confusing the "real" identity elements of a constitution with those that relate to certain characteristics of the population subject to that constitution, such as language, religion, history or ethnicity. Indeed, an interpretation of constitutional identity based on the elements of law, and in particular those derived from constitutionalism, makes it possible to understand how it is possible to speak of identity even in a plural society. Constitutional identity, understood in this way, constitutes the aggregate element present in a constitutional order, since it is based on principles and values that are widely shared beyond the differences that may exist within society.

In conclusion, this chapter has sought to provide the doctrinal coordinates which will then be applied to the analysis of the two case studies proposed below. But we have also explained why the subject of identity deserves to be analysed in the context of orders characterised by a pluralistic society. In fact, we believe that identity is the fundamental element capable of uniting and recombining the diversity present in a society around principles and values that are universal in content and that form the basis for peaceful coexistence. What we have attempted to do in this theoretical description of the concept of constitutional identity is to show that identity can today be the pivot by which individual and community pluralism can be guaranteed, not only in an increasingly pluralist society, but also in the face of a concept of state and constitutional order that increasingly has to come to terms with the extension of its legal boundaries and must relate to supranational structures

CHAPTER 2

WHEN CONSTITUTIONAL IDENTITY MEETS INTERNATIONAL LAW: THE CASE OF BOSNIA AND HERZEGOVINA

2. INTRODUCTION

The subject of constitutional identity contains both the fascination of defining the deep roots of a legal order and all the difficulties that such research can entail. Indeed, the topic still raises many definitional doubts among legal scholars as to its actual content, as well as conflicting interpretations as to the subject of this identity and how it should be identified.[1] However, the charm and difficulties of identifying identity are heightened when dealing with a particularly complex constitutional system.

This chapter attempts to reconstruct and define the constitutional identity of Bosnia and Herzegovina. This endeavour is particularly complex, not only because of the definitional difficulties mentioned above, but also for specific reasons. In fact, the study of the constitutional system of Bosnia and Herzegovina raises the delicate issue of "internationalised constitutional systems",[2] namely those

[1] On these definitions and the issues that legal doctrine has raised in this direction, we refer to the first chapter of this thesis, where the subject has been examined in depth and where numerous bibliographical indications have been provided for each of the topics only mentioned here.

[2] *Ex multis* see De Vergottini, G., *Le transizioni costituzionali*, 164 ff., Piergigli, V., *Diritto costituzionale e diritto internazionale: dalla esperienza dei procedimenti costituenti eterodiretti alla UN policy framework assistance*, in *Rivista AIC*, No. 1, 2015, 2; De Vergottini, G., *Diritto costituzionale comparato*, 237-244; Maziau, N., *Le costituzioni internazionalizzate*, 1413; Feldman, N., *Imposed Constitutionalism*, in *Connecticut Law* Review, Vol. 37, 2004, 857 ff.; Kumm, M., *The Legitimacy of International Law: a Constitutionalist Framework of Analysis*, in *European Journal of*

legal contexts in which constituent power is the result of a direct application of international law. Indeed, the constitutional system of this Balkan country is characterised by the fact that it is the result of a "heterodirected" (or "heteroimposed") constitutional process, an aspect that makes the identification of constitutional identity particularly difficult, as the drafting of the constitutional text stems from a series of international agreements in which the role of local actors has been limited. This led some scholars to speak of the «total internationalisation of the constitution of Bosnia and Herzegovina».[3] Moreover, the same ethnic structure of Bosnian-Herzegovinian society, characterised by a pronounced claim to identity of the various groups living there,[4] has had a significant influence on the constitutional text and the State structure itself.[5] This plural composition of the Bosnian-Herzegovinian population inevitably leads to difficulties in identifying the values and principles on which the country's constitutional order is based, considering the different views of the peoples living there. Maybe also for these reasons, at least until now, legal scholarship has only marginally addressed the constitutional identity of Bosnia and Herzegovina,[6] allowing the present work to

International Law, Vol. 15, No. 4, 2004, 931; Floridia, G., *Il costituzionalismo "a sovranità limitata" tra paradosso e necessità*, in Orrù, R., Sciannella L. G. (eds.), *Limitazioni di sovranità e processi di democratizzazione*, Giappichelli, Torino, 2004, 7; Samuels, K., *Post-Conflict Peace-Building and Constitution-Making*, in *Chicago Journal of International Law*, Vol. 6, 2006, 663 ff.; Dann, P., Al-Ali, Z., *The Internationalized Pouvoir Constituant: Constitution-Making under External Influence in Iraq, Sudan and East Timor*, in *Max Planck Yearbook of United Nations Law*, Vol. 10, 2006, 423; Riegner, M., *The Two Faces of the Internazionalized pouvoir constituant: Independence and Constitution-Making Under External Influence in Kosovo*, in *Goettingen Journal of International Law*, No. 2, 2010, 1035 ff.; Grewe, C., Riegner, M., *Internationalized Constitutionalism in Ethnically Divided Societies. Bosnia-Herzegovina and Kosovo Compared*, in *Max Planck Yearbook of United Nations Law*, Vol. 15, 2011, 1 ff.

[3] Maziau, N., *Le costituzioni internazionalizzate*, 1413. See also Nikolić, P., *I sistemi costituzionali dei nuovi Stati dell'ex-Jugoslavia*, Giappichelli, Torino, 2002, 189-192; Bataveljić, D., *Mutamenti giuridico-costituzionali nei Paesi in transizione con particolare riferimento ai Paesi dell'ex-Jugoslavia*, in Gambino, S. (eds.), *Costituzionalismo europeo e transizioni democratiche*, Giuffrè, Milano, 2003, 197-210; Woelk, J., *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, CEDAM, Padova 2008, 21 *passim*.

[4] There are many works on the ethnic composition of Bosnia and Herzegovina. Here, wishing to simplify, we refer to a few studies that can provide an insight into the changes that occurred between the pre- and post-war periods. *Ex multis* see Žíla, O., *Ethno-demographic development in Bosnia and Herzegovina in 1971-1991 and its propensity for ethnic conflict*, in *Acta Universitatis Palackianae Olomucensis-Geographica*, Vol. 44, No. 1, 2013, 5-25; Gunnarsson Popović, V., *Who is Bosnian? Ethnic Division in Bosnia and Herzegovina and its Implications for a National Identity*, Försvarshögskolan, Stockholm, 2019, 16-27; Babović, M., *et al.* (eds.), *Population Situation Analysis in Bosnia and Herzegovina*, SeConS Report, 2020. For a more detailed discussion of minorities, see this article: Katz, V., *The Position of National Minorities in Bosnia and Herzegovina before and after the Breakup of Yugoslavia*, in *Studia Środkowoeuropjskie I Balkanistyczne*, Vol. XXVI, 2017, 193-204. For the results of the last census in Bosnia and Herzegovina, see the data supplied by the Institute for Statistics of Bosnia and Herzegovina.

[5] Keil, S., Perry, V. (eds.), *State-Building and Democratization in Bosnia and Herzegovina*, Routledge, London, 2015, 15-39; Džihić, V., Wieser, A*., Incentives for Democratization? Effects of EU conditionality on democracy in Bosnia and Herzegovina*, in *Europe-Asia Studies*, Vol. 63, No. 10, 2011, 1803-1825; Keil, S., *Building a Federation within a Federation-the curious case of the Federation of Bosnia and Herzegovina*, in *Le Europe en Formation*, Vol. 64, 2014.

[6] Piergigli, V., *Bosnia and Herzegovina: in Search for the Constitutional Identity?*, in Benedizione, L., Scotti, V. R. (eds.), *Proceedings of the conference. Twenty years after Dayton. The constitutional transition of Bosnia and Herzegovina*, LUISS Accademy, Roma, 2016, 123-129; Miraščić, Dž., Begić, Z., *Pravna priroda bosanskohercegovačkog pluralnog društva i najznačajnije specifičnosti njegovog savremenog ustavnog uređenja*, in *Ustavno parvo Zahodnega*

analyse an area that has been not yet academically "explored": at the same time this last observation makes particularly difficult to study this topic, due to the lack of established doctrinal footholds about Bosnian-Herzegovinian identity.

Against this background, the objective of this chapter is to reconstruct the constitutional identity of Bosnia and Herzegovina, as a plural society with elements with a tendency towards disintegration. This aim raises two questions in order to identify the specific aspects of the constitutional identity of the Balkan country. The first question is whether it is possible to reconstruct and define the identity of a legal system that is the result of a heterodirected constitutional process, and how to recognise the identity of an internationalised constitution.

After clarifying the main objective of this chapter and the questions it seeks to answer, it seems appropriate to provide the reader with a legend to indicate the crucial aspects that this text will address in the following pages. In pursuit of this objective, an exploration into the constitutional history and evolution of the Bosnian and Herzegovinian constitution will be presented. This endeavor aims to offer insights into crucial aspects that bear significance for an accurate interpretation of the pertinent legal framework. In addition, in this first part will examine the relationship between identity and constituent power, and the specific questions of the legitimacy of the constitution adopted by Bosnia and Herzegovina after the Dayton Agreement and its relationship with the previous constitution of 1993. This allows us to understand not only how identity can be defined and developed in such legal contexts, but also how it has been influenced by the way in which the constitution was adopted. Although the first part of the chapter does not deal directly with the issue of identity, it is indispensable for understanding the dynamics that shape and define the constitutional identity of Bosnia and Herzegovina, as they constitute its logical-legal antecedent, without which it would not be possible to understand why and how this identity developed within the constitutional text. Moreover, the first part of the chapter is essential for understanding the particular and complex constitutional history of the country, without which it would be difficult for the reader to orient himself and thus to perceive and understand the real difficulty in reconstructing and defining the constitutional identity of Bosnia and Herzegovina.

The second part of the chapter is devoted to the reconstruction and identification of the constitutional identity of Bosnia and Herzegovina. Specifically, this will be divided into several stages, each of which will deal with specific elements. This second part of the chapter focuses on the analysis of the constitutional text. Indeed, to identify the elements that define the identity of Bosnia

Balkana, No. 11, 2009, 73-96; Zgodić, E., *Ustavni patriotizam za Bosnu i Hercegovinu*, in Mutapčić, E. (eds.), *Zbornik radova naučnog skupa. Ustavno pravni razvoj Bosne i Hercegovine (1910-2010)*, Pravni fakultet Univerzitet u Tuzli, Tuzla, 2011, 257-268; Karan, S., *Oblik državnog uređenja Bosne i Hercegovine*, in *Godišnjak fakulteta pravnih nauka*, No. 4, 2014, 156-167.

and Herzegovina, the study will focus on the preamble of the constitution, its provisions and its annexes, as a "map document" in order to grasp the clues necessary to identify the country's constitutional identity. The reason why this analysis is based on positive law lies in the fact that it was the framers themselves who defined, often explicitly, in the constitutional text the values and principles that form the basis of the country's legal system and bind the work of the state in its internal and external relations. As will be seen in the following pages, this is evident in each of the parts of the Bosnia and Herzegovina constitution. In fact, the principles on which the constitutional order of the country is based are explicitly stated in the preamble and are then applied and protected in the normative part and the annexes of the constitution. Similarly, as will be described in more detail below, the very process of constitutional revision and its limits provide important information about the values that form the basis of the constitutional order of Bosnia and Herzegovina and thus enjoy special protection from change, which other values do not. However, the reconstruction of constitutional identity does not only concern the study of positive law, as an important role is also played by the jurisprudence of the Constitutional Court, and although it is to be anticipated that this Court has not adopted the language of identity, in some of its decisions it has made important contributions to the identification of the values that are at the core of the constitutional order of the country and, as such, constitute its identity.

2.1. The study in the constitutional order of Bosnia and Herzegovina: the stages

The constitutional order of Bosnia and Herzegovina has been the subject of a considerable number of writings and studies, especially in the period from 1995.[7] So much so that the attention paid to this country by academics can be divided into three main periods.

The first studies on the Bosnian-Herzegovinian legal system dealt mainly with the question of the legitimacy of the adoption of the new constitution, given that the current constitutional text is an annex to an international agreement, namely the General Framework Agreement for Peace in Bosnia and Herzegovina.[8] Subsequently, after the main questions of legitimacy had been exhausted, the doctrine focused on the specific solutions of the legal architecture defined by the new constitution. In particular, scholars focused on the type of government, which was strongly influenced by the ethnic

[7] See, *inter alia*, Woelk, J., *La transizione costituzionale della Bosnia Erzegovina*, 2008, *passim*; Kuzmanović, R., *Il Costituzionalismo della Bosnia-Erzegovina fra nuovo sistema mondiale e transizione*, in Gambino S. (eds.), *Costituzionalismo europeo e transizioni democratiche*, Giuffrè, Milano, 2003, 211-228; Кузмановић, Р., *Уставно право,* Апеирон, Бања Лука [Kuzmanović, R., *Ustavno Pravo*, Apeiron, Banja Luka], 2002, 201, *passim*.

[8] Yee, S., *The New Constitution of Bosnia and Herzegovina*, in *European Journal of International Law*, No. 7, 1996, 176-192; Gaeta, P., *The Dayton Agreement and International Law*, in *European Journal of International Law*, No. 7, 1996, 147-163.

factor. Similarly, the presence of different ethnic groups influenced the vertical form of statehood, with the creation of a federal state, where ethnic and territorial elements coexist.[9]

The third "wave" of interest in the constitutional order of Bosnia and Herzegovina within the public law doctrine occurred in the first decade of the 2000s. Then, a possible amendment of the constitutional text seemed imminent and was strongly advocated by the international community and the European Union.[10] However, the revision did not take place and even this strand of scholarly interest faded. Following the latest (unsuccessful) attempts at revision, interest in the constitutional affairs of the small Balkan country has become increasingly rare, except for a few pronouncements by the local constitutional court - a situation that more or less continues today.[11]

The purpose of the above-mentioned division is not only to trace the interests expressed by the legal doctrine on Bosnia and Herzegovina, but also to inquire the reasons hidden in the fact that there are no monographs or more extensive studies dealing with the issue of the constitutional identity of Bosnia and Herzegovina, as if the doctrine has been (un)interested in the topic of the constitutional identity of this country. In other words, there has been no specific treatment of the issue of constitutional identity in the sense of that concept which defines the fundamental core of an order and in which certain constitutional provisions can outline its supreme purposes and values,[12] which together imbue the order with its typical content, enunciate the essential and inalienable aspects of the form it was intended to take, and provide the supreme interpretive criterion for all other provisions that make up the constitution.[13]

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[9] Keil, K., *Multinational federalism in Bosnia and Herzegovina*, Ashgate, Farnham, 2013, 53-95; Trnka, K., *Specifičnosti ustavnog uređenja Bosne i Hercegovine*, in *Journal for Constitutional Theory and Philosophy of Law*, No. 9, 2009, 44-71; Bahcheli, T., Noel, S., *Imposed and proposed federations: issues of self-determination and constitutional design in Bosnia-Herzegovina*, *Cyprus, Sri Lanka and Iraq*, in *The Cyprus Review*, Vol. 17, No. 1, 2005, 13-36; Sebastián, S., *Constitutional Engineering in Post-Dayton Bosnia and Herzegovina*, in *International Peacekeeping*, Vol. 19, No. 5, 2012, 597-611.

[10] Bieber, F., *Bosnia-Herzegovina: Slow Progress towards a Functional State*, in *Southeast European and Black Sea Studies*, Vol. 6, No. 2, 2006, 43-64; Toal, G., O'Loughlin, J., Djipa, D., *Bosnia-Herzegovina Ten Years after Dayton: Constitutional Change and Public Opinion*, in *Eurasian Geography and Economics*, Vol. 47, No. 1, 2006, 61-75; Clarke, H. L., *Ten Years of Unfinished Change in the Constitutional Structure of Bosnia and Herzegovina*, in Gelazis, N. (eds.), *The Tenth Anniversary of the Dayton Accords and Afterwards: Reflection on Post-Conflict State – and Nation-Building*, Woodrow Wilson International Center for Scholars, 2006, 61-69.

[11] See Mujanovic, J., *Bosnia and Herzegovina's eroding Dayton constitutional order*, in *Journal for Labour and Social Affairs in Eastern Europe*, No. 2, 2020, 145-164; Costa, M., *Da Dayton a Bruxelles? L'evoluzione della condizionalità pre-adesione dell'Unione europea e gli effetti della nuova strategia applicati nei confronti della Bosnia ed Erzegovina*, in *Federalismi.it*, No. 11, 2016, 1-27; Banning, T., *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, in *Goettingen Journal of International Law*, Vol. 6, No. 2, 2014, 261-302; Szasz, P. C., *The Question for Bosnian Constitution: Legal aspects of Constitutional Proposals Relating to Bosnia*, in *Fordham International Law Journal*, Vol. 19, No. 2, 1995, 363-407.

[12] Mortati, C., *Articolo 1*, in Branca, G. (eds), *Commentari della Costituzione. I principi fondamentali*, Zanichelli, 1975, 5 ff, in this sense, the author does not explicitly speak of constitutional identity, but of 'fundamental principles' or 'supreme principles'.

[13] *Ibidem*.

Due to this observation to address the issue of constitutional identity in Bosnia and Herzegovina, it is necessary to analyse certain fundamental aspects in order to understand its content. A preliminary step in this study will be accordingly devoted to the analysis of "internationalised constitutions" and, more specifically, to the constitutional history of the country.

2.2. The heterodirected Constitution of Bosnia and Herzegovina: Geneva and New York Accords of September 1995

As mentioned in the previous chapter, Bosnia and Herzegovina is an emblematic case of an "internationally guided constitutional process". In fact, the constitution-making process is the result of a series of international agreements reached within the broader framework of the international order. Indeed, the current constitution of Bosnia and Herzegovina is included in Annex IV of the General Framework Agreement for Peace, also known as the Dayton Agreement. However, the structure of the constitutional text and the basic principles and values contained therein are merely the result of certain international agreements previously drawn up between the parties to the conflict and the international community. Therefore, to understand certain choices made by the constituents, which later became an integral part of the current constitution, it is necessary to take a step back to September 1995. That is, when two international agreements on the general principles of the future constitution of Bosnia and Herzegovina were reached and signed. These were the Geneva Agreement and the New York Agreement.[14]

The first agreement was reached in Geneva on 8 September 1995[15] by the Foreign Ministers of the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, and representatives of the international community meeting in the Contact Group.[16] The second agreement - called "Further Agreed Basic Principles"[17] to emphasize the connection with the previous one - was reached by the same Ministers and international representatives in New York on 26 September 1995. The two international agreements are particularly important because they outline

[14] Šarčević, E., *Ustav iz nužde. Konsolidacija ustavnog prava Bosne i Herzegovine*, Rabic, Sarajevo, 2010, 21-34; Szasz, C., *The question for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, in *Fordham International Law Journal*, Vol. 19, No. 2, 1995, 363-373.

[15] Agreed Basic Principles, Geneva, 8 September 1995.

[16] The Republic of Bosnia and Herzegovina was represented by Foreign Minister Muhamed Sacirbey; Mate Granić, for the Republic of Croatia; and Milan Milutinović, for the Federal Republic of Yugoslavia. The Contact Group was formed in April 1994 with the aim of renewing international efforts to resolve the conflict in Bosnia and Herzegovina. It was composed of diplomatic representatives of five States: France, Germany, Russia, United Kingdom, and United States. See Leigh-Phippard, H., *The Contact Group on (and in) Bosnia. An exercise in conflict mediation?*, in *International Journal*, Vol 53, No. 2, 1998, 306-324; Chollet, D., *The road to the Dayton Accords*, Pelgrave Macmillan, London, 2005, 31-47; Holbrooke, R., *To end a War*, Modern Library, New York, 1999, 133-141 and 169-184.

[17] Further Agreed Basic Principles, New York, 26 September 1995.

the essential content of the future constitution of Bosnia and Herzegovina, which was then drafted during the peace negotiations that ended with the Dayton Agreement.

It is certainly not possible here to examine the content of the two agreements in their entirety, but it is possible to mention some aspects that are particularly interesting in relation to the aims of the present chapter. In particular, the Geneva Agreement can be remembered for having established some fundamental aspects of the current state and institutional structure of Bosnia and Herzegovina. Indeed, two of the key issues to be resolved were the legal status of the country at the international level and the extension of its national borders.[18] As a result of this delicate issue, the Agreement provides that Bosnia and Herzegovina will continue to exist as a sovereign state within the borders internationally recognised by the United Nations in 1992.[19] In this way, the agreement also confirmed that the war did not undermine the sovereignty of the state and that the borders of the state are intangible. On the other hand, regarding the internal order of Bosnia and Herzegovina, the Geneva Agreement introduced the greatest novelty. It recognised the existence of two "entities",[20] the Federation of Bosnia and Herzegovina[21] and the *Republika Srpska*,[22] whose administrative boundary coincided with those of the war front.[23]

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[18] See Misha, G., *The fall of Yugoslavia: the third Balkan war*, Pinguin Books, London,1992, *passim*; Little, A., Silber, L., *Yugoslavia: Death of a Nation*, Pinguin Books, London, 1997, *passim*; Pirjevec, J., *Le guerre jugoslave: 1991-1999*, Einaudi, Torino, 2001, 232-289; Marzo Magno, A., *La guerra dei dieci anni. Jugoslavia 1991-1999*, Il Saggiatore, Milano, 2001, *passim*; Shoup, P. S., Burg, S. L., *The war in Bosnia-Herzegovina: ethnic conflict and international intervention*, Sharpe, London, 1999, 21 *passim*; Rumiz, P., *Maschera per un massacro. Quello che non abbiamo voluto sapere della guerra in Jugoslavia*, Feltrinelli, 2014, 79 ff.

[19] Art. 1, *Agreed Basic Principles*, Geneve, 8 September 1995. That is, the maintenance of the borders as defined during World War II by the Anti-Fascist State Council for the People's Liberation of Bosnia and Herzegovina (ZAVNOBIH) at its first meeting on 25 November 1943. On the Badinter Commission see Pelllet, A., *The Opinion of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples*, in *European Journal of International Law*, No. 3, 1992, 178-185; Pomerance, M., *The Badinter Comission: The Use and Misuse of the International Court of Justice's Jurisprudence*, in *Michigan Journal of Internatonal Law*, Vol. 20, No. 1, 1998, 31-58; Radan. P., *The Badinter Arbitration Commission and the Partition of Yugoslavia*, in *Nationalities Papers*, Vol. 25, No. 3, 1997, 537-557; Craven, M. C. R., *The European Community Arbitration Commission on Yugoslavia*, in *British Yearbook of International Law*, Vol. 66, No. 1, 1995, 333-413.

[20] Art. 1, *Agreed Basic Principles*.

[21] The Federation of Bosnia and Herzegovina was formed as a result of the Washington Agreement between the Republic of Bosnia and Herzegovina and the Republic of Croatia, which put an end to the confrontation between the Bosnian and Croat-Bosnian components in Bosnia and Herzegovina. Marko, J., *Ustav Federacije Bosne i Hercegovine*, in Ademović, N., Marko, J., Marković, G. (eds.), *Ustavno parvo Bosne i Hercegovine*, Konrad Adenauer Stiftung, Sarajevo, 329-334.

[22] Savić, S., *Republika Srpska poslje Dejtona*, Pravni Fakultet u Banja Luci, Banja Luka 1999, 78; Marković, G., *Ustav Republike Srpske*, in Ademović, N., Marko, J., Marković, G. (eds.), *Ustavno parvo*, 385-390.

[23] Article 2 of the Geneva Agreement specifies (para. 1) that the extent of the Federation of Bosnia and Herzegovina shall correspond to 51 per cent of the state territory and the remaining 49 per cent shall belong to *Republika Srpska*. However, the basic agreement leaves a window open for further agreements between the parties regarding possible territorial changes. The Entities will continue to exercise their functions according to their respective Constitutions, provided these are amended in such a way as to comply with the basic principles of this Agreement (para. 2). Furthermore, the Entities are entitled to establish special, parallel relations with neighbouring states, in accordance, however, with the

The main feature of the New York Agreement is that it sets out the main elements of the form of government for the future constitution of Bosnia and Herzegovina. It provides for the establishment of a Parliamentary Assembly, two-thirds of whose members will be elected in the territory of the Federation of Bosnia and Herzegovina and one-third in the *Republika Srpska*. It is also stipulated that all decisions of this legislative body will be taken by a majority of at least one third of the voters in each entity, to guarantee both territorial and ethnic components. Regarding the executive, it is interesting to note that the New York Agreement pays particular attention to the presidency and defines its composition and voting procedures in a fairly precise and pre-determined manner.[24] In addition, the new arrangement also provides for a supreme judicial body: «a Constitutional Court with jurisdiction to decide all questions arising under the Constitution of Bosnia and Herzegovina as it will be revised in accordance with all agreed basic principles».[25] It is interesting to note that one of the distinguishing features of the Bosnia and Herzegovina's legal system from the outset has been the central role played by the international standard of human rights protection. Indeed, the Geneva Agreement places the utmost respect for human rights at the center of the drafting of the basic principles of the new constitution.[26] Similarly, as regards the form of government, it should be noted that, apart from some adjustments and clarifications, it remains virtually unchanged from the final constitutional text.

In conclusion, the analysis of the two agreements – albeit developed only in its essential lines – has made it possible to illustrate the strong bond that exists in international constitution-making processes between the organs of the international community and local constituents. In fact, the

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sovereignty and territorial integrity of Bosnia and Herzegovina (para. 3). Paragraph (4) closing Article 2 of the Agreement stipulates that the entities, by adopting this document, undertake to hold elections at all levels (state, entity and local) under the supervision of international observers. Furthermore, they undertake to adopt and obey international human rights standards. In particular, to guarantee freedom of movement and to allow displaced persons to regain their right to housing or to be justly compensated. The third article of the Geneva Accord lists a number of obligations that the entities assumed with the adoption of this document. The first obligation for the entities (para. 1) was to appoint a Commission for Displaced Persons to enable refugees to return to their residences and regain the right to their homes or be justly compensated if they did not. The establishment of a Human Rights Commission (para. 2) to oversee the respect and application of human rights principles. The creation of public enterprises (para. 3) that can manage infrastructure; as well as the formation of a Commission for the preservation and protection of historical monuments (para. 4). The article closes with a commitment by the two entities to develop and apply the arbitration system to resolve disputes that may arise between them (para. 5).

[24] «A Presidency, two thirds of which will be elected from the territory of the Federation, and one-third from the territory of the Republika Srpska. All Presidency decisions will be taken by majority vote, provided, however, that if one-third or more of the members disagree with a decision taken by the other members and declare the decision to be destructive of a vital interest of the entity or entities from which the dissenting members were elected, the matter will be referred immediately to the appropriate entity/entities parliament. If any such parliament confirms the dissenting position by a two-thirds vote, then the challenged decision will not take effect», art. 6, para. 2, *Further Agreed Basic Principles*, New York, 26 September 1995.

[25] Art. 6, para. 4, *Further Agreed Basic Principles*.

[26] Art. 2, para. 2, *Agreed Basic Principles*.

constitution of Bosnia and Herzegovina is the fruit of agreements reached at the international level not only in its form, but also in its content, which was established based on intensive diplomatic activity conducted by the Contact Group. Moreover, the case of Bosnia and Herzegovina demonstrates the increasing involvement of international organisations in drafting the constitutions of those countries where there is a war or strong political tensions.

2.3. General Framework Agreement for Peace and its structure

The Dayton Peace Agreement, which ended the war in Bosnia and Herzegovina in November 1995, was not the only attempt by the international community and Western countries to end hostilities.[27] In fact, during the work of the Peace Conference for the Former Yugoslavia in 1992, the first plans for the administrative division of the country were proposed in order to avoid the outbreak of war.[28] However, the armed conflict started in the same year and the first peace plan for Bosnia and Herzegovina was the one drawn up by Lord Carrington and the Portuguese Cutileiro,[29] which envisaged the division of the country into districts on the basis of ethnicity in order to distribute local power among the various ethnic groups and ensure their continued coexistence, without changing the original borders of the Bosnian-Herzegovinian state.[30] The Carrington-Cutileiro plan initially met with formal success among the interested parties,[31] but was later rejected explicitly by some politicians and implicitly by others, with the formation of autonomous entities, such as the Serbian and later the Croatian, which were in open opposition to what the plan envisaged.[32] In January 1993, in an attempt to mediate between the three warring parties, UN Special Envoy Cyrus Vance and European Community representative Lord Owen drew up a peace plan, known as the Vance-Owen peace plan, which proposed the partition of Bosnia into ten semi-autonomous regions divided along

[27] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina,* 26-28; Herman, T., *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*, in *International Journal on World Peace*, Vol. 16, No. 4, 1999, 89-91; Cutts, M., *The Humanitarian Operation in Bosnia, 1992-1995: dilemmas of negotiating humanitarian access*; in *Working Paper UNHCR*, No. 8, 1999, 1-25.

[28] See Pellet, A., *The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples*, in *European Journal of International Law*, No. 3, 1992, 182-183; Pomerance, M., *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, in *Michigan Journal of International Law*, Vol. 20, No. 1, 1998, 31-58.

[29] Bieber, F., *Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans*, in *Europe-Asia Studies*, Vol. 63, No. 10, 2011, 1783-1802.

[30] Little, A., Silber, L., *Yugoslavia*, 258-264.

[31] The President of the Presidency of the Republic of Bosnia and Herzegovina, Alija Izetbegović, at first viewed the plan positively, but then changed his opinion on it, claiming that any division, operated on any basis, of Bosnia was to be ruled out *ab origine*.

[32] Little, A., Silber, L., *Yugoslavia*, 258-264.

ethnic lines.[33] Despite the initial expectations created by this plan, which were also justified by the support of the Bosniacs, Bosnian Serb and Bosnian Croat leaders, the plan was rejected by the National Assembly of the *Republika Srpska*.[34] The peace plan that most closely anticipated the Dayton Peace Agreement was the Owen-Stoltemberg plan, drawn up in the summer of 1993,[35] which envisaged the division of Bosnia and Herzegovina into three territorial entities, each led by the numerically dominant ethnic group. The plan was rejected in the same summer by the Government of the Republic of Bosnia and Herzegovina, which saw in such a clear-cut tripartite division, along such distinct ethnic lines, the end of Bosnia and Herzegovina as a unitary state and thus the mutation of its borders as guaranteed by the Badintern Commission.[36] Between 1994 and 1995, the Contact Group played a crucial role, first in bringing hostilities between Bosniacs and Bosnian Croats to an end with the Washington Agreement of March 1994, and in creating the Federation of Bosnia-Herzegovina, which would later become one of the two constituent entities of the country under the Dayton Peace Accords. The Contact Group's more forceful intervention and the authorisation of UNPROFOR[37] to use force succeeded in persuading the parties to come to the negotiating table. In reality, it was also the changing balance of power on the ground that determined the will of the parties.[38]

The Dayton Agreement was negotiated at Wright-Patterson Air Force Base in Dayton, Ohio, which was the most suitable location for a dense meeting of the warring parties. The conference was led by the United States, in the person of Secretary of State Warren Christopher and Deputy Secretary of State Richard Holbrooke, who played a key role in concluding the peace accords. The conference, which took place from 1 to 21 November 1995 and was attended by Slobodan Milošević as President of Republic of Serbia, Alija Izetbegović as President of Republic of Bosnia and Herzegovina, and Franjo Tuđman as President of Republic of Croatia, «confirmed that the Bosnian war was not just a

[33] Little, A., Silber, L., *Yugoslavia*, 276-290; Owen, D., *Balkan Odyssey*, Phoenix, London, 1996, 34 *passim*; Holbrooke, R., *To End a War*, 21-60.

[34] The president of *Republika Srpska*, Radovan Karadžić, was under heavy pressure from the president of Federal Yugoslavia, Milošević, and the Montenegrin Bulatović, to approve the plan with his own paraphernalia. Milošević had every interest in achieving peace, as it would have meant an end to the economic sanctions that the United Nations had imposed on Federal Yugoslavia because of the extensive material, human and political support given to the Bosnian Serb insurgents, and it would have meant Milošević's redemption as a politician in the eyes of the international community.

[35] Little, A., Silber, L., *Yugoslavia*, 258-259.

[36] Pomerance, M., *The Badinter Commission*, 44; Pellet, A., *The Opinions of the Badinter Arbitration Committee*, 182.

[37] Acronym for United Nations Protection Force, an armed intervention force of the United Nations, established by UN Security Council Resolution No. 743 in February 1992, in order to create the conditions for achieving a stable and lasting peace in the area of the former Yugoslavia.

[38] See: Trnka, K., *Daytonski ustavni poredak protiv tradicionalnih vrijednosti bosansko-hercegovačkog društva i države*, in Mutapčić, E. (eds.), *Ustavno pravni razvoj Bosne i Hercegovina (1910-2010)*, Univerzitet u Tuzli, Tuzla, 2011, 240-243.

civil war, as the international community had long claimed»,[39] but a much more complex conflict in which external forces had exploited the country's ethnic diversity for mutual territorial gains. In his introductory speech at the first session, Christopher highlighted what were to be the key points of the talks: the achievement of a stable and lasting peace; the preservation of the sovereignty and integrity of the Bosnian and Herzegovina state, but articulated internally into two entities, one with Serb majority and the other with Croat-Bosniacs majority; the establishment of a special status for the city of Sarajevo as the country's capital; the defence and respect of human rights; and the apprehension of those guilty of war crimes. The Dayton Peace Agreement, concluded on 21 November 1995, has, as already mentioned, a double function for Bosnia and Herzegovina: on the one hand, it represents the efforts of the international community and the parties involved to put an end to the bloodiest conflict Europe has seen since the end of the Second World War; on the other hand, it is also the international agreement that provides Bosnia with a new constitution (Annex IV).

The General Framework Agreement for a Peace in Bosnia Herzegovina consists of a framework agreement and eleven Annexes,[40] each of which constitutes an international treaty. The

[39] Pirjevec, J., *Le guerre jugoslave*, 520.

[40] The structure of the Agreement is as follows: Annex 1-A, Agreement on Military Aspects of the Peace, in which the Republic of Bosnia and Herzegovina, the Bosnian Serb Republic and the Federation of Bosnia and Herzegovina, as signatories and parties to the Agreement, undertake to make the ceasefire permanent and to withdraw behind the entity lines.

Annex 1-B, Agreement on Regional Stabilisation, in which Croatia and the Federal Republic of Yugoslavia, as the states which played a decisive role in the war, undertake to lay a solid foundation for the restoration of relations between the peoples of the region and to work for their security, and also undertake to review and destroy part of their respective armaments.

Annex 2, Agreement on Inter-Entity Boundaries and Released Issues, outlines and establishes the internal state divisions between the Federation of Bosnia and Herzegovina and the *Republika Srpska* and sanctions the use of international arbitration to resolve the issue of the city of Brcko and its province.

Annex 3, the Agreement on Elections, determines the manner in which the first post-conflict elections will be held, describes the role of the OSCE during the elections and the functions of its observers, and stipulates that future elections will be held in accordance with the Election Law to be adopted by the State Parliament. Annex 4, entitled "Constitution", is the new Constitutional Charter of Bosnia, which would enter into force upon the signing of the Paris Peace Agreements and automatically replace the previous Constitution of 1993.

Annex 5, the Agreement on Arbitration, commits the Federation of Bosnia and the *Republika Srpska* to resolve all outstanding issues through the instrument of arbitration as the sole and accepted means of conflict resolution. The Agreement on Human Rights, Annex 6, contains a long list of rights recognised as intangible and inalienable, the establishment of a judicial body called the Human Rights Chamber, and the introduction of the figure of the Ombudsman.

Annex 7, the Agreement on Refugees and Displaced Persons, was considered by the parties and international mediators to be one of the fundamental pillars, if not the most important, for the reconciliation of the peoples of Bosnia and Herzegovina and the rebuilding of a multi-ethnic society as it existed before the war. The annex contains a special clause for refugees and displaced persons, guaranteeing them the free return to their homes and the restitution of property stolen after 1991, with the support and assistance of the authorities of the two entities present in the country. It also provided for the establishment of a Special Commission for Refugees and Displaced Persons, with the assistance of the UNHCR, in order to make the implementation of the Annex possible and effective.

Annex 8, Agreement on the Commission for the Preservation of National Monuments, provides for the establishment of an ad hoc Commission, composed of experts from the *Republika Srpska* and the *Federacija Bosne i Hrecegovine* and two members appointed by the Director-General of the United Nations Educational, Scientific and Cultural Organisation,

parties to the Agreement were: the Republic of Bosnia Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia; next to these three states were: US President Clinton, French President Chirac, British Prime Minister Major, German Chancellor Kohl, Russian Prime Minister Chernomyrdin and the special negotiator of the European Community, González.

Having analysed the brief history of the General Agreement, it seems interesting to dwell on some of its unique features, which stem from the complexity of the peace negotiations and the difficulty of finding a stable and accepted balance between conflicting interests. One notable fact is the presence of the Republic of Croatia and the Federal Republic of Yugoslavia as parties to the General Peace Agreement and as guarantors in some of its annexes, two states that were not *de jure* parties to the conflict but that *de facto* played a major role in supporting the Bosnian Croats and Bosnian Serbs militarily and politically throughout the conflict.[41] This clearly illustrates «the multifaceted nature of the conflict, in which ethnic, religious, political and military elements are closely intertwined»[42] and perhaps best explains why the Dayton Agreement has so many peculiarities with respect to the general rules of international law.[43]

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to determine the number of monuments of historical and artistic interest and to undertake to preserve and protect them.

Annex 9, Agreement on Bosnia and Herzegovina Public Corporation, concerning the development of infrastructure to rebuild the country's economy, which was brought to its knees during the war.

The Agreement on Civilian Implementation, Annex 10, is particularly interesting because it provides for the establishment of the Office of the High Representative for Bosnia and Herzegovina, which is charged with implementing all civilian aspects of the Peace Agreement. The figure of the High Representative had and still has an important role within the Bosnian state organisation, especially after the transfer of the so-called "Bonn Powers" in 1997.

The final annex, the Agreement on the International Police Task Force, provides for the establishment of an international police force whose activities will be coordinated by the Office of the High Representative. The Task Force would be responsible for monitoring, observing and inspecting the correct application of the law, training local law enforcement personnel and monitoring the law enforcement performance of the Bosnian authorities, to name but a few of its tasks.

[41] «The Croatian side of the Federation was mainly under the direct control of Croatia, as confirmed by Croatia itself in its unilateral declarations referring to personnel and organizations in Bosnia and Herzegovina under its control» in Gaeta, P., *The Dayton* Agreement, 159.

[42] Gaeta, P., *The Dayton* Agreement, 149.

[43] With regard to the parties to the agreement, it is interesting to analyse the particular relationship that existed during the peace talks between the members of the Serbian delegation, which consisted of three members from the *Republika Srpska*, two of whom were politicians and one of whom was a military officer, and three members from the Federal Yugoslavia, led by Milošević. Initially, the agreement stipulated that the representatives of the *Republika Srpska* would be its President Karadžić, General Mladić and Parliament President Krajišnik, but when, a few weeks into the negotiations, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued an arrest warrant against the first two, Vice-President Koljević and General Tolimir were appointed in their place, significantly strengthening Milošević's position within the delegation (see Holbrooke, R., *To End a War*, 229-238). So much so that he came to be seen as the main architect of the peace agreements and earned himself the nickname of 'legal representative' of the Bosnian Serbs; further confirmation of this can be found in the fact that every document signed during the negotiations by the representatives of the Bosnian Serb Republic was countersigned by Yugoslav Foreign Minister Milutinović. Furthermore, in Articles I and II of the General Framework Agreement, when Yugoslavia and Croatia are mentioned, the words "the Parties and the Entities they represent" are added. See: Holbrooke, R., *To End a War*, 231-232.

The official entry into force of the treaties also has important aspects, as the peace treaties were paraphed by the parties on 21 November 1995 in Dayton, during the closing ceremony of the peace conference, and then signed in a solemn ceremony in Paris on 14 December 1995. The different value of the two moments is explained by the Peace Treaty itself, since Article II states that «the initialing of each signature block of the General Framework Agreement and its Annexes today expresses the consent of the Parties and the Entities they represent to be bound by this Agreement».[44] Instead, the exact date of entry into force of the treaties, the so-called *dies a quo*, coincides with the signing of the treaties in Paris.[45] The peace process was entirely driven by US diplomacy, and many of the solutions adopted, especially in the legal and political fields, came precisely from the US legal culture; suffice it to think of the adoption of a constitution with a scansion very similar to that of the US.[46] Moreover, the signature of the United States, France, Russia, Germany, the United Kingdom and the European Community itself places them in the position of "witnesses" to the conclusion of the peace treaties and their entry into force, but «without assuming the obligation to ensure compliance with them».[47] This demonstrates that the signature of these states holds primarily political significance,[48] rather than imposing a direct obligation for active involvement in ensuring treaty compliance.[49] Conversely, the commitments stemming from the signatures of Croatia and the Federal Republic of Yugoslavia under the General Framework Agreement appear to be more extensive and distinct. Not only do they serve as guarantors of the entire Agreement, but they are also direct signatories to Annexes 1-B and 10. These annexes respectively address military matters and the delineation of borders between the two entities. Consequently, Croatia and the Federal Republic of Yugoslavia bear a heightened responsibility to uphold these two crucial annexes. Given their subject matter, these annexes represent the pivotal issues at the heart of the entire conflict. In fact,

«by approving these two Agreements, and only by approving them, Croatia and the Federal Republic of Yugoslavia have also assumed the obligation to ensure compliance with the two Agreements *vis-à-vis* the *Republika Srpska* and the Federation of Bosnia and Herzegovina»,[50]

[44] Art. 2 of Agreement on Initialling the General Framework Agreement.

[45] Gaeta, P., *The Dayton Agreement*, 150. Evidently, this division into two moments corresponded to the attempt of European countries, especially French President Chirac, «to appear as contributors to the peace process and to give Europe an officially recognised role» in Gaeta, P., *The Dayton Agreement*, 150.

[46] Yee, S., *The New Constitution*, 179.

[47] Gaeta, P., *The Dayton Agreement*, 154

[48] *Ibidem*.

[49] *Ibidem*.

[50] *Ivi*, 154-155.

once again demonstrating that the role of guarantor played by the two countries «naturally derives from the influences exercised by Croatia and the Federal Republic of Yugoslavia over parts of the Federation of Bosnia and Herzegovina and the *Republika Srpska* respectively».[51]

An exception to the general rule on the interpretation of international treaties is that the interpretation of treaties is normally left to the parties who signed them. The General Framework Agreement, on the other hand, shows that in addition to the signatory parties, the Commander of IFOR[52] and the High Representative,[53] two bodies created by the General Framework Agreement, have the ultimate authority to interpret agreements concerning military and civil aspects respectively.

The political context and the inherent difficulties of the negotiations resulted in a peace agreement with unique features,

«including the modalities of concluding the agreements and their entry into force, the special relationship between the Federal Republic of Yugoslavia and the *Republika Srpska* in the treaty-making phase, the authority in the field of treaty interpretation, the legal personality of the insurgents and the constitutional process».[54]

To bridge the gap between the parties after three years of bloody war, it was necessary to build an apparatus of international and regional guarantees to ensure the real success of the peace agreement at all levels, not just on paper. To this end, it was necessary to directly involve Croatia and Federal Yugoslavia as guarantors (recall in particular their direct accession in Annexes 1-B and 10 of the General Framework Agreement), as the only forces capable of determining the will of the Bosnian Croat and Bosnian Serb components. IFOR's commitment to military compliance was also crucial, as

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[51] Gaeta, P., *The Dayton Agreement*, 155. On this point, see also Costalli, S., Moro, F. N., *The Dynamics of Violence in the Bosnian War: A Local- level Quantitative Analysis*, in *Occasional Papers Università degli Studi di Siena*, No. 24, 2010, 3-30; Zwierzchowski, J., Tabeau, E., *The 1992-95 War in Bosnia and Herzegovina: Census-based multiple system estimation of casualties undercount*, in *Conference Paper for the International Research Workshop on 'The Global Costs of Conflict' The Households in Conflict Network (HiCN) and The German Institute for Economic Research (DIW Berlin)*, 1 February 2010, 1-25; Ramet, S., P., *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to Ethnic War*, Routledge, London, 2002, 203-252; Campbell, D., *MetaBosnia: narratives of the Bosnian War*, in *Review of International Studies*, Vol. 24, No. 2, 1998, 261-281.

[52] «The IFOR Commander is the final authority in theatre regarding interpretation of this Agreement on the military aspects of the peace settlement, of which the Appendices constitute an integral part», art. XII of Agreement on the Military Aspects of the Peace Settlement (Annex 1-A).

[53] «The High Representative is the final authority in theatre regarding interpretation of this Agreement on the Civilian Implementation of the Peace Settlement», art. V of Agreement on the Civil Implementation of the Peace Settlement (Annex 10). The prominent position taken by the High Representative regarding the interpretation of this Annex is further confirmed by UN Security Council Resolution 1031 of 15 December 1995, where paragraph 27 states that «the High Representative is the final authority in theatre regarding interpretation of Annex 10 on civilian implementation of the Peace Agreement».

[54] Gaeta, P., *The Dayton Agreement,* 163.

was the role that the High Representative for Civilian Affairs played and continues to play in the Agreement, in addition to the sanction mechanisms provided for in UN Resolution No.1022.[55]

2.4. Constituent power and constitutional identity in Bosnia and Herzegovina

«Just as each constitution is unique in the way it produces constitutional identity, the making of each constitution is a singular historical event».[56] The constitution of Bosnia and Herzegovina is no exception to this statement either, where the exercise of heterodirected constitutional power is a direct consequence of the armed conflict that afflicted the country in the 1990s.

This historical consideration opened - especially in the period immediately following the adoption of the constitutional Charter - some doubts about the actual exercise of constituent power in Bosnia and Herzegovina.[57] In particular, summarizing the issue to a few major aspects, the doctrine has expressed its perplexities with respect to the actual exercise of a constitution-making process of a democratic nature, on one side, and the nature of constitutional amendment or adoption *ex novo* (of the constitution) with respect to the previous 1993 constitution of *Republika Bosne i Hercegovine*, on the other.

In general, the creation of a constitution plays a «crucial role in determining the corresponding constitutional identity»[58] and in the case of the legal order of Bosnia and Herzegovina, this statement appears in all its concreteness.

Indeed, the determination of how the constituent power was exercised, especially considering the two issues raised above, presents itself as crucial for reading the entire system of constitutional values introduced there with the 1995 constitution. This is because the IV Dayton Annex stands in discontinuity with the previous constitutional text, especially regarding the form of state and government. Moreover, the ouster of the people's constituent power with respect to the drafting of the 1995 constitution clearly determined its identity. It can be concluded that numerous norms of the constitution, to be accepted across the board by different ethnic groups, are characterised by their generality and abstractness, so much so that they have affected the very functionality of state

[55] Gaeta, P., *The Dayton Agreement,* 162.

[56] Rosenfeld, M., *The Identity of the Constitutional Subject*, 185.

[57] Gerbasi, G., *La Costituzione internazionalizzata della Bosnia-Erzegovina e il difficile equilibrio tra sovranità etnica e diritti fondamentali della persona*, in Gambino, S. (eds.), *Europa e Balcani. Stati, culture, nazioni*, CEDAM, Padova, 2001, 291-293; Kuzmanovic, R., *Il costituzionalismo della Bosnia-Erzegovina fra nuovo sistema mondiale e transizione*, in Calamo Specchia, M., *et al.* (eds.), *I Balcani occidentali. Le costituzioni della transizione*, Giappichelli, Torino, 2008, 211-228.

[58] Rosenfeld, M., *The Identity of the Constitutional Subject*, 185.

institutions.[59] In fact, the constitutional text is nothing more than the result of the compromise between the main warring parties reached in Dayton.[60]

The objective was to establish a "lowest common denominator" that would reconcile the conflicting interests of the three ethnic groups at war. The Bosniacs aimed to maintain Bosnia and Herzegovina as a robust, multi-ethnic, and centralized state, within its pre-war borders. In contrast, the Bosnian Croats and Bosnian Serbs aimed to secure maximum autonomy, if not outright secession, and therefore sought central state institutions with enough flexibility to allow for significant decision-making power.[61] Additionally, they aimed to ensure their influence over state institutions through collective participation rights and the right to veto. As will be discussed in the following pages, this situation had a significant impact not only on shaping the system of government and statehood but also on defining the values and principles that constitute the identity of the constitutional Charter of Bosnia and Herzegovina. [62]

2.4.1. THE "(NON)DEMOCRATIC ORIGIN" OF THE CONSTITUTION OF BOSNIA AND HERZEGOVINA (OR THE PROBLEM OF DEMOCRATIC LEGITIMACY)

The preamble of the constitution of Bosnia and Herzegovina - which introduces the subsequent constitutional provisions - closes with a short, but clear statement: «Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows»[63]. In the intent of the constitutional framers this statement, which, among other things, closely resembles the famous «We the People» of the constitution of the United States of America,[64] was to indelibly mark the expression of the popular sovereignty of the peoples of Bosnia and Herzegovina, as a sort of *imprimatur* that they were to confer on the new constitution.[65]

Notwithstanding the affirmation of the peoples' will to self-determine through a new constitution, this did not automatically confer democratic *status* on the text in question. The fact that the constitutional Charter was an annex to an international treaty and that it was adopted by international actors, rather than by constitutional assembly or parliament assembly elected by citizens,

[59] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 28.
[60] Marko, J., *Friedenssicherung im 21. Jahrhundert: Bosnien und Herzegowina als europäische Herausforderung*, in Ginther, K. (eds.) *et al.*, *Völkerrecht und Europarecht. 25 sterreichischer Völkerrechtstag*, Wien, 2001, 55-87.
[61] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 28.
[62] *Ibidem*.
[63] Preamble of Constitution of Bosnia and Herzegovina.
[64] Yee, S., *The New Constitution of Bosnia and Herzegovina*, 176.
[65] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 25.

has, if anything, fuelled doubts about the constitution's real and effective democratic nature.[66] These doubts are further compounded by general considerations about the country's constitution. In fact, the content of the new constitution does not necessitate any particular form of popular expression for its adoption. Specifically, the constitution's entry into force does not require ratification through a referendum. Nor does it explicitly require ratification by the legislature of the Republic of Bosnia and Herzegovina, the Parliamentary Assembly of the Federation of Bosnia and Herzegovina or the Parliamentary Assembly of the *Republika Srpska*.[67] Rather, the new constitution came into effect automatically «upon signature of the Framework Agreement»[68] by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia.

However, this original democratic *deficit* can be interpreted as having been reabsorbed thanks to the approval, by the parliamentary assemblies of the Federation of Bosnia and Herzegovina and Republika Srpska, of the Peace Agreement,[69] of which the constitution is one of the annexes. Therefore, we would be faced with an approval of an indirect nature, namely through ratification by the parliaments of the entities of the Dayton Agreement and thus also of the constitution that forms an integral part of it.[70] Another form of approval of the text can be found in the declarations provided at the foot of Annex 4 of the General Framework Agreement by the representatives of the two constituent territorial entities and the Central Government of Bosnia and Herzegovina. Indeed, the parties solemnly affirm therein that they approve the new Charter as the constitutional text of the country.[71] While, in the declaration of the Government of the Republic of Bosnia and Herzegovina and the *Republika Srpska*, the representatives merely stipulated the above, the declaration annexed by the newly formed Federation of Bosnia and Herzegovina took a further step. In summary, the

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[66] Maziau, N., *Le costituzioni* internazionalizzate, 1413; Nikolić, P., *I sistemi costituzionali dei nuovi Stati dell'ex-Jugoslavia*, 189-190; Bataveljić, D., *Mutamenti giuridico*-costituzionali, 188.

[67] Hyden, R. M., *Bosnia: The Contradictions of 'Democracy' without Consent*, in *East European Constitutional Review*, No. 2, 1998, 47 ff.

[68] Art. XII Const. Bosnia and Herzegovina.

[69] See Yee, S., *The New Constitution of Bosnia and Herzegovina*, 178; Šarčević, E., *Die Schlußphase der Verfassungsgebung in Bosnien U Herzegowina*, Leipzig, 1996, 57 ff.; Šarčević, E., *Verfassungsgebung und 'konstitutives Volk': Bosnien-Herzegowina zwischen Natur und Rechtszustand*, in *Jahrbuch des öffentlichen Rechts der Gegenwart*, No. 50, 2001, 493-532; Šarčević, E., *Völkerrechtlicher Vertag als 'Gestaltungsinstrument' der Verfassungsgebung: Das Daytoner Verfassungsexperiment mit Präzedenzwirkung?*, in *Archiv des öffentlichen Recht (AöR)*, 3, 2001, 297-339.

[70] Yee, S., *The New Constitution of Bosnia and Herzegovina*, 181.

[71] «The Republic of Bosnia and Herzegovina approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement. For the Republic of Bosnia and Herzegovina. Declaration On Behalf of The Federation of Bosnia and Herzegovina: The Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens, approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement. For the Federation of Bosnia and Herzegovina Declaration on Behalf of The Republika Srpska: The Republika Srpska approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement. For the Republika Srpska», Declaration on Behalf of The Republic of Bosnia and Herzegovina, Annex IV, General Framework Agreement for Peace.

representatives approved the new constitution «on behalf of the constituent people and citizens», [72] emphasizing some form of popular mandate to accept the constitutional Charter. This could be seen as a way of seeking further democratic legitimization or expressing it explicitly, in this case obtained by the granting of the popular mandate to the representatives of the Federation of Bosnia and Herzegovina. Part of the doctrine[73] held that a certain degree of democratic legitimacy of the constitutional procedure could be found in these declarations, whereby the democratic legitimacy of the constitution should not be sought in its generative moment, but downstream, so to speak, that is, in the declarations of the representatives of the warring factions, elected by those who, with the promulgation of the constitution, would take the name of constituent peoples. However, the question of the democratic nature of the constitution-making process, at least as posed by some scholars,[74] cannot be examined by the same yardstick as a constitution resulting from the work of the indigenous constituent power. In fact, the genesis of the Bosnian-Herzegovinian constitutional Charter and its basic principles can be found in two international agreements, Geneva and New York, later made effective with the drafting of Annex 4 of the General Framework Agreement for Peace, which means that this text is the result of a constituent process of total "heterodirection",[75] and in which it is impossible or, at least, sterile to try to discern the democratic nature of the same through the typical characteristics of internal and autochthonous constituent processes.

The dual nature of the constitution of Bosnia and Herzegovina is also relevant in confirming the above: on the one hand, a constitutional text of the country and on the other hand, an annex to an international agreement. After all, questioning the democratic nature of this constitution would be tantamount to questioning the work, but also the nature itself, of the international organisations and countries that made it possible to reach a peace agreement between the warring parties, first and foremost the United States; as well as the signatory countries and guarantors of the General Framework Agreement, among them France and England.[76] In the context of the democratic nature of the way constituent power was exercised in Bosnia and Herzegovina, the objection was raised that

[72] Declaration On Behalf of The Republic of Bosnia and Herzegovina, Annex IV, General Framework Agreement for Peace.

[73] In particular: Yee, S., *The New Constitution of Bosnia and Herzegovina*, 180-181.

[74] Кузмановић, P., *Уставно право* [Kuzmanović, R., *Ustavno pravo*], 567-572; Nikolić, P., *I sistemi costituzionali*, 190-192; Kuzmanović, R., *Il costituzionalismo della Bosnia Erzegovina*, 211-228.

[75] Maziau, N., *Le costituzioni* internazionalizzate, 1413; Piergigli, V., *Diritto costituzionale e diritto internazionale*, 2 ff.

[76] See Dmičić, M., *Ustavnopravno rješenje o Bosni I Hercgovini kao specifičnoj i složenoj državi ili državnoj zajednici*, in Kuzmanović, R., *Spomenica akademiku Gaši Mijanoviću*, Akademija nauka i umjetonosti srpske, Banja Luka, 2011, 181-216; Marković, G., *Ustav Bosne i Hercegovine*, in Gavrić, S., Banović, D., Krause, C. (eds.), *Uvodo u politički sistem Bosne i Hercegovine – izabrani aspekti*, Fondacija Konrad Adenauer, Sarajevo, 2009, 57-84.

the country received a new constitution without prior popular debate, which would have somehow legitimised it politically.[77]

A further issue that arises in the debate on constitutional adoption in Bosnia and Herzegovina is that the external constituent power has actually «destroyed the unity of the people of the Bosnian state».[78] This is because it deprived the state of its constitutional characteristics and encouraged the disintegration of the state community through the formation of micro-communities centered on ethnic features common to individual groups, but not to the entire population of the country.[79] As a result, the holders of constituent power no longer appear to be the citizens collectively, but rather the ethnic groups themselves, whose representatives negotiated the constitution.[80] The recognition of the centrality of the ethnic factor within the constitutional order of Bosnia and Herzegovina significantly influenced the structure and identity construction of the Charter when the Dayton constitution came into effect. Against this background, it can be argued that the manner of adoption of the constitutional text of Bosnia and Herzegovina goes beyond the question of its democratic character due to very specific historical and contingent reasons. The process of drafting and adopting the constitution, as well as its content and applicability, must necessarily be understood within an extremely difficult and complex historical context.[81] Several factors had to be taken into account in the attempt to bring peace to the region and the country, such as the geographical distribution, the military balance of forces, the political conflicts between the potential mediating forces, the availability of sources of pressure and rewards, as well as humanitarian activities in the war-affected area and the handling of war crimes. Given these circumstances, exercising an internal constituent power was unrealistic, so the adoption of a new constitution at the same time as the peace plans were being drawn up became the preferred option. This enabled the creation of shared legal solutions, at least in their essential parts, and took advantage of the propitious moment for agreement and mediation between the warring parties.[82] It can be argued that the lack of an "ordinary" and indigenous constitutional process is not a limitation,

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[77] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 31.

[78] Šarčević, E., *Verfassungsgebung und 'konstitutives Volk': Bosnien-Herzegowina zwischen Natur und Rechtszustand*, in *Jahrbuch des öffentlichen Rechts der Gegenwart*, Vol. 50, 2001, 497.

[79] Šarčević, E., *Verfassungsgebung und 'konstitutives Volk',* 502.

[80] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 31.

[81] Марковић, Г., *Уставни лавиринт. Апорије уставог система Босне и Херцеговине*, Службени Гласник, Београд [Marković, G., *Ustavni lavirint. Aporije ustavnog Sistema Bosne i Hercegovine*, Službeni Glasnik, Beograd], 2021, 45.

[82] See Steiner, C., *Geneza i legitimnost Ustava Bosne i Hercegovine*, in *Status, Magazin za političku kulturu i društvena pitanja*, No. 9, 2006, 156-160; Šarčević, E., *Dejtonski ustav: karakteristike i problemi*, in *Status, Magazin za političku kulturu i društvena pitanja*, No. 13, 2008, 153-168; Trnka, K., *specifičnosti ustavnog uređenja Bosne i Hercegovine*; 2009, 45 ff.; Mijanović, G., *Siste zaštite ustavnosti I zakonitosti u Republici Srpskoj*, in Morait, B., Popović, M. (eds.), *Izgradnja I funkcionisanje pravnog Sistema Republike Srpske*, Pravni fakultet Univerziteta u Banjoj Luci, Banja Luka, 1997, 111 ff; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 48-49.

or worse, an obstacle to the legitimacy of the constitutional text.[83] From a material perspective, the constitution adopted at Dayton received an important contribution in its drafting and approval from the representatives of the majority of the country's population, although not within a Constituent Assembly.[84] In fact, the constitutional text received approval from the parliamentary assemblies of the Republic of Bosnia and Herzegovina[85] and the entities, although not expressly provided for either by the peace agreement or by the last transitional provision of the constitution (Art. XII).[86] However, it should be noted that the approval came from a reduced number of members due to the defection of Serbs components since 1992.[87]

2.4.2. Constitutional Amendment or New Constitution

Continuing the historical analysis of Bosnia and Herzegovina's legal system, an important question to be resolved is the relationship between the constitution adopted in Dayton and the previous text adopted in 1993. A first answer to this issue can be found in the constitutional text itself. But not without some further considerations, as will be seen below. Article XII, the closing provision of the constitutional text of Bosnia and Herzegovina, states that the constitution «shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina».[88] Based on this textual data, several considerations arise that shed light on the adoption and legitimacy of the constitution. In the following pages, we will examine these considerations in detail.

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[83] Steiner, C., *Geneza i legitimnost Ustava Bosne i Hercegovine*, 158.

[84] *Ibidem*.

[85] Sl. List RBiH, No. 49/1-995.

[86] See Yee, S., *The New Constitution of Bosnia and Herzegovina*, 177-179; Šarčević, E., *Ustav iz nužde*, 320; Hayden, R. M., *Focus: Constitutionalism and Nationalism in the Balcans*, in *East European Constitutional Review*, Vol. 59, 1995, 59-68; Hayden, R. M., *Constitutional Nationalism in the Former Yugoslav Republics*, in *Slavic Review*, Vol. 51, No. 4, 1992, 654-673.

[87] The Assembly of Socialist Republic of Bosnia and Herzegovina was elected in first multi-party elections held in 1990. The Assembly had the mandate to continue its functions until the peace agreement on Bosnia and Herzegovina was reached and implemented (Constitutional Law of 30 March 1994, art. 4, *Official Gazette of RBiH,* 6 Apr. 1994,127). That Assembly consisted of two chambers, one with 130 members and the other 110 (*Official Gazette of SRBiH,* 19 Dec. 1990, 1263). After the Serb members abandoned the Assembly, 161 members remained. The Assembly at a joint session approved the Dayton Peace Agreement on November 30, 1995, with 85 members present and voting in favour. On December 12, 1995, the Assembly at a joint session passed a Constitutional Law on Amendments and Additions to the Constitution (*Official Gazette of RBiH,* 20 Dec. 1995, 540), with 92 members voting in favour. Accordingly, less than a two-thirds majority of the remaining members voted in favour at either session. If the total members of the 1990 Assembly were counted, no simple majority existed at these sessions; see: Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 30.

[88] Art. XII, Constitution of Bosnia and Herzegovina.

Firstly, it is worth noting that the provision outlines the entry into force of the constitution after the signing of the General Framework Agreement on December 14, 1995, in Paris. This implies that the constitution officially came into effect on that date, following the signing of the peace treaty by all parties involved in the negotiations.[89] Additionally, the next paragraph of the same article allows a three-month period for the entities to ensure their conformity with the constitution in accordance with Article III, 3), b).[90] This provision requires both entities and local administrative units to comply with the newly adopted constitution, which will replace any constitutions and laws (of both entities and the Republic of Bosnia and Herzegovina) that are incompatible with its contents.[91]

Secondly, the first paragraph of Article XII of the constitution of Bosnia and Herzegovina states that the text is a «constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina».[92] Therefore, it can be concluded that the Annex IV of the Dayton Agreement is essentially an amendment, albeit an extensive one, that modifies the previous constitutional text which came into effect in 1993. As explained earlier, the signing of the General Framework Agreement made these amendments fully effective.

However, upon closer examination of this provision, it becomes clear that the process of amending the previous text does not follow the constitutional amendment procedure outlined in the constitution itself.[93] In order to understand why it is not possible to speak of a genuine amendment, it is necessary to examine what the constitution of the Republic of Bosnia and Herzegovina provided for in terms of constitutional revision procedure.[94] The 1993 constitution, which was adopted after Bosnia and Herzegovina declared independence from the Socialist Federal Republic of Yugoslavia, involved a revision of the 1974 constitution of the Socialist Republic of Bosnia and Herzegovina. The reform of the previous socialist constitution primarily entailed the introduction of a multi-party system, the adoption of a market economy, and the incorporation of certain liberal-democratic rights.[95] Returning to the main topic, it is important to note that the constitution of the Republic of

[89] Szasz, P.C., *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, in *Fordham International Law Journal*, Vol. 19, No. 2, 1995, 360.

[90] Art. XII, 2) Constitution of Bosnia and Herzegovina.

[91] «The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities», art. III, 3), b), Const. Bosnia and Herzegovina.

[92] Art. XII, Constitution of Bosnia and Herzegovina.

[93] Yee, S., *The New Constitution of Bosnia and Herzegovina*, 177.

[94] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 30; Inglis, S., *Re/Constructing rights: The Dayton Peace Agreement, international civil society development, and gender in postwar Bosnia-Herzegovina*, in *Columbia Human rights Law Review*, Vol. 30, 1998, 86.

[95] See Trnka. K. (eds.), *Ustavnost Bosne i Hercegovine kroz historiju*, Universitas Studiorum Saraievoensis, Sarajevo,

Bosnia and Herzegovina provided internal regulation regarding the possibility of amending its content in Part Four, Article 268. Reading this provision, it is clear that the first paragraph lists the groups entitled to propose amendments to the constitutional text, which include the parliamentary groups within the Assembly of the Republic (the legislative body), the Presidency of the Republic (the executive body), the Government of the Republic and thirty members of the Assembly of the Republic.[96] Based on the initial explanation of the constitutional revision procedure, the amendments adopted with the Dayton constitution were not proposed by any of the parties mentioned. Instead, as described earlier, these revisions were proposed and adopted as part of an international agreement. However, this criticism alone cannot determine whether the 1995 constitution should be considered an amendment or not, as the Presidency of the Republic, represented by President Alija Izetbegović, actively participated in the negotiations, and drafting of the constitutional text. It is worth noting, however, that the general features that were ultimately incorporated into the 1995 constitution resulted from an agreement among three foreign ministers of three independent states.

Another factor that raises doubts as to the actual existence of an amendment procedure with respect to what is contained in Annex IV of the General Framework Agreement is the fact that Article 268 states that the proposed amendment must «be drafted by the Assembly at the joint session of the Assembly»[97] and not without having previously submitted the proposed amendment to the citizenry in good time.[98] In this way, the content of the proposed amendment to the constitution can be made known and civil society can be included in the debate. As well as, thus, extending the time for its approval, as a guaranteed procedure. Subsequently, after the text of the constitutional amendment has been submitted for debate in the Assembly of the Republic and after the Constitutional Affairs Committee of the same has pronounced its «confirmation on the amendment of the Constitution»,[99] the text is submitted to a vote. The Assembly of the Republic in joint session decides[100] on the proposed amendment to the constitution and it is only adopted «if two-thirds of the total number of

2022. On the changes and 'cleaning up' introduced with the 1993 Constitution, see: Šarčević, E., *Ustav i politika. Kritika etničkih ustava i postrepubličkog ustavotvorstva u Bosni i Hercegovini*, Vijeće Kongresa bošnjačkih intelektualaca, 1997; Appicciafuoco, L., *La promozione dello stato di diritto nei paesi dei Balcani occidentali: il ruolo dell'Unione* europea, in Montanari, L., Toniatti, R., Woelk, J. (eds.), *Il pluralismo nella transizione costituzionale dei Balcani: diritti e garanzie*, Università degli Studi di Treno, Trento, 2010, 95-97; Montanari, L., *Il principio di rule of law e la tutela dei diritti nei Balcani occidentali*, in Montanari, L., Toniatti, R., Woelk, J. (eds.), *Il pluralismo nella transizione costituzionale dei Balcani: diritti e garanzie*, Università degli Studi di Trento, Trento, 2010, 208-212.

[96] Art. 268, para. 1 Constitution of Republic of Bosnia and Herzegovina.

[97] Art. 268, para. 2 Constitution of Republic of Bosnia and Herzegovina.

[98] *Ibidem*.

[99] Art. 268, para. 3 Constitution of Republic of Bosnia and Herzegovina.

[100] The Assembly of Republic of Bosnia and Herzegovina consisted of two chambers, one with 130 members and the other 110; see *Official Gazette of SRBiH,* 19 Dec. 1990, at 1263.

the deputies of every chamber or of the Assembly vote in favor of it».[101] Once the amendment to the constitution has been passed by an absolute majority of the members of both chambers of the Assembly of the Republic, the Assembly in joint session adopts the Act of Proclamation of the Amendment to the constitution.[102]

In the light of the described constitutional revision procedure and the fact that the current constitution of Bosnia and Herzegovina is part of an international peace treaty, it can be concluded that the procedural formalities of amendment provided for in the previous republican constitution were not followed, but rather were completely disregarded, with another procedure for the adoption of the constitution. In fact, the 1995 constitution was the clear result of a "heterodirected" constitution-making process under the General Framework Agreement for Peace.[103] Moreover, the fact that the Assembly of the Republic of Bosnia and Herzegovina voted, in a joint session, in favor of the signing of the Dayton Agreement and, also, adopted a Constitutional Act on Amendments and Additions to the Constitution cannot be concluded that this was done in full compliance with the procedure laid down in Article 268. In fact, the Constitutional Amendment Act was adopted by ninety-two deputies in joint session, a *quorum* below that required, bearing in mind that the two chambers, before the start of the war, consisted of 110 and 130 deputies. Considering these facts, it can be concluded that the constitution adopted at Dayton is not an amendment to the previous constitution.[104] But, rather, a new document with which the country was endowed during the peace negotiations. In addition, it seems interesting to point out that the provision of Article 268 closes by stating that amendments to the constitution can only be made through constitutional amendments or through constitutional laws. This means that the international nature of the act by which the new 1995 constitution was adopted did not comply with the forms imposed by the previous text. Therefore, this further shortcoming also shows that we are not, in fact, faced with a mere amendment to the previous constitutional text, but with a new constitutional text, which stands in a discontinuous relationship with the previous document. Thus, all the old institutions, both political and legal, disappeared with the previous constitution, while a new order, a new internal territorial arrangement, and a new form of government were introduced with the new constitution.[105]

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[101] Art. 268, para. 3 Constitution of Republic of Bosnia and Herzegovina.

[102] The Assembly at a joint session approved the Dayton Peace Agreement on November 30, 1995, with 85 members present and voting in favour. On December 12, 1995, the Assembly at a joint session passed a Constitutional Law on Amendments and Additions to the Constitution (*Official Gazette of RBiH,* 20 Dec. 1995, 540), with 92 members voting in favour; *Sl. List RBiH*, No. 49/1-995.

[103] Trnka, K., *Specifičnosti ustavnog uređenja Bosne i Hercegovine*, 47-49.

[104] As reported in Yee, S., *The New Constitution of Bosnia and Herzegovina*, 178.

[105] *Ibidem*.

In the Bosnia Herzegovina's case, the replacement of the previous constitution with the Dayton Annex IV - and thus not an amendment as claimed in Article XII - can be explained and better understood based on the "theory of necessity".[106] That is to say, in special circumstances, characterised by difficulties or serious crises, it may be necessary to sacrifice formal procedures to achieve a certain result that could not otherwise be achieved.[107] Indeed, according to "revolutionary theory", the people can always change their government to meet the needs of the nation. Both the "necessity theory" and the "revolutionary theory"[108], therefore, militate in favor of the new constitution of Bosnia and Herzegovina, as they can legitimize its text.[109] Transferring these considerations from the theory to that of Bosnia and Herzegovina, it can be concluded that the constituents in Dayton used a *fictio iuris*, claiming that the new constitution represented a mere amendment of the previous text, rather than a new text.[110] As evidenced by the fact that the amendment did not follow the procedures laid down in the 1993 constitution and the fact that it constituted a new form of government: with institutions and values different from the previous ones.[111] Therefore, it is realistic to say that the Dayton constitution «amends and renders ineffective»[112] the constitution of the Republic of Bosnia and Herzegovina, without any action by the competent authorities and without the procedures provided by the previous constitution.[113] Therefore,

[106] See Berman, H. J., *Diritto e rivoluzione. Le origini della tradizione giuridica* occidentale, il Mulino, Bologna, 1983, 21-44; Ferrara, G., *Il diritto come* storia, in Azzariti, G. (eds.), *Interpretazione* costituzionale, Giappichelli, Torino, 2007, 5 ff.; McIlwain, C., *Costituzionalismo antico e moderno*, il Mulino, Bologna, 1990, 13 ff.; Aron, R., *Introduction à la philosophie politique: démocratie et révolution*, Le Livre de Poche, Paris, 1997, 200 ff.; Rebuffa, G., *Costituzioni e* costituzionalismo, Giappichelli, Torino, 1990, 8 ff.; Pace, A., *Potere costituente, rigidità costituzionale, autovincoli legislativi*, CEDAM, Padova, 1997, 109 ff.; De Fiores, C., *Rivoluzione e Costituzione. Profili giuridici e aspetti teorici*, in *Costituzionalismi.it*, No. 2, 2018, 145-169.

[107] Fioravanti, M., *Rivoluzione e costituzione. Saggi di storia costituzionale*, Giappichelli, Torino, 2022, 101 ff.; Piazza M., *Libertà, potere, costituzione. Saggi su rivoluzione, potere costituente e rigidità costituzionale*, Aracne, Roma, 2012, 79 ff.

[108] A similar analogy can be found in the relationship between the US Constitution and the Articles of Confederation. In fact, the Constitution stipulated that it would come into force when the ratifying conventions of the nine states ratified it, while the Articles of Confederation required that any amendment be first 'approved by a Congress of the United States and afterwards confirmed by the legislatures of each state'. The break of the US Constitution with the ratification procedure under the Articles of Confederation was thus twofold: both in terms of who had the power to ratify and the voting requirements. In defense of the Constitution, some referred to the theories of necessity and revolution, while others emphasized the motives of revolution. In this regard, authoritative scholars have argued that the founding of the United States was unconventional and that the abandonment of the amendment procedure under the Articles is best characterized as 'revolutionary reform'. See Madison, J., *Federalist No. XLIII*, in Hamilton, A., Jay, J., Madison, J. (eds.), *The Federalist Papers*, Nova Science Publisher, 2018, 191-198; Madison, J., *Federalist No. XL*, 173-178; Ackerman, B., Neal, K., *Our Unconventional Founding*, in *The University of Chicago Law Review*, Vol. 62, No. 2, 1995, 487.

[109] Yee, S., *The New Constitution of Bosnia and Herzegovina*,179.

[110] Steiner, C., *Geneza i legitimnost Ustava Bosne i Hercegovine*, 2006, 158.

[111] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 30.

[112] *Ibidem*.

[113] *Ibidem*.

it can be concluded that the constitution of Bosnia and Herzegovina does not «spring from internal legal structures» and therefore has «little organic basis in Bosnia and Herzegovina itself».[114]

In conclusion, as far as the genesis of the constitution is concerned, it is true that the procedures and competences within the constitutional revision procedure of the 1993 constitution were not respected. Therefore, one of the main objections relates precisely to the insufficient democratic legitimacy, which, as a rule, is acquired through the participation of competent constitutional bodies representing a people as sovereign. However, the constitution of Bosnia and Herzegovina - from a substantive point of view - was approved by the representatives of the majority of the population, although the Constituent Assembly was not convened. We must consider that both the entity parliaments and the Parliament of the Republic of Bosnia and Herzegovina, the latter elected in accordance with the 1993 constitution, expressed their approval of the constitutional text through a vote.[115] In fact, it can be concluded by arguing that a "revolutionary substitution"[116] of the constitution of the Republic of Bosnia and Herzegovina with the text drafted in Dayton, during the peace talks, took place in Bosnia and Herzegovina.[117]

2.4.3. The nature of the constitution of Bosnia and Herzegovina

This first part of the chapter - devoted to the constitutional history of Bosnia and Herzegovina and, more generally, to the problems associated with this legal order - concludes with a final reflection on the nature of the constitution of the Balkan state, in order to identify some essential elements before proceeding with the analysis of the constitutional text and the attempt to reconstruct the identity of the constitutional order of Bosnia and Herzegovina.

One of the most interesting theories on the nature of the Bosnian and Herzegovinian constitutional Charter is the one formulated by Marković in his latest monograph,[118] taking up some

[114] Inglis, S., *Re/Constructing rights*, 86.

[115] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 33.

[116] Marko, J., *Fünf Jahre Verfassungsgerichtsbarkeit in Bosnien und Herzegowina: Eine erste Bilanz*, in Funk, B. (eds.) *et al.*, *Der Rechsstaat vor neuen Herausforderungen. Festschrift für Ludwig Adamovich zum 70*. Geburtstag, 2002, 387.

[117] Without extending the field of research to the other countries that made up the Socialist Federal Republic of Yugoslavia, but only to place this issue in a broader perspective. It can be said that - to use Gambino's words - the constituent and/or constitutional revision procedures used in these countries were characterised by being 'largely unconstitutional' with respect to the prevailing system. This was also the case in Bosnia and Herzegovina. Where, however, the Constitution is the result of a hetero-directed constitution-making process, an aspect that further complicates the issue. On this point, see: Gambino, S., *Transizioni costituzionali e forma di stato. Alcune riflessioni a partire dall'esperienza jugoslava*, in Ferrara, G. (eds.), *Studi in onore di Gianni Ferrara*, Vol. II, Giappichelli, Torino, 2005, 315-345.

[118] Gambino, S., *Transizioni costituzionali e forma di stato*, 45-46.

of the theorisations of other authors,[119] according to which the constitution in question is a clear example of an *octroyée* constitution.[120] The author argues, in fact, that the text adopted in Dayton is indeed part of an international agreement (General Framework Agreement for Peace), but it is also a "granted" document, because it was "imposed" on the citizens and constituent peoples of Bosnia and Herzegovina by the actors of the peace treaty.[121] Marković, departing from a purely historical conception of *octroyée* constitutions, but taking the semantic meaning of the French term *octroyer* as his primary one, defines the constitution of Bosnia and Herzegovina as *octroyée* on the basis that any constitution that does not constitute a genuine expression of the will of the people can be defined as such. Indeed, aware of the fact that historically octroyed constitutions[122] are those that are «the result of a self-restraint on the part of the Sovereign, who grants the constitution, which then formally constitutes an expression of the latter's constituent power even if there is popular pressure behind it»,[123] Marković argues that in this case the decisive issue lies not in who adopts the constitution, but in the way, this is done. Therefore, he concludes that the constitutional Charter of Bosnia and Herzegovina is *octroyée* because the citizenship did not participate directly in its drafting or implementation. It is not only Marković who uses the historical category of the "granted" constitution. For example, other authors, aware of the inherent limitations of this theory, which is excessively tied to a specific historical moment, argue that the Charter of Bosnia and Herzegovina constitutes an «atypical *octroyée* constitution».[124] The atypical fact, in this theory, would be that it is a constitution "granted", but not by a sovereign, but by US diplomacy,[125] where the intervention of citizens and, more broadly, local actors has been almost non-existent. The theory of the constitution of Bosnia and Herzegovina as an *octroyée* act raises an important issue - that of the lack of direct involvement of the citizenry in the drafting and, later, adoption of the Charter - however, it seems to come to erroneous conclusions regarding the definition of the legal nature of the country's constitution, with respect to its adoption. Indeed, such a definition seems to constitute an anachronism that has no real justification for existing. In particular, the category of *octroyée* constitutions occupies an important

[119] Petrov, V. Simović, D., *Funkcije modernog ustava. Primer dejtonskog ustava*, in Pejanović, M., Šehić, Z. (eds.), *Dejtonski mirovni sporazum i budućnost Bosne i Hercegovine*, Akademija nauka i umjetnosti Bosne i Hercegovine, Sarajevo, 2016, 79-84.

[120] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 45.

[121] *Ivi*, 45.

[122] Lacchè, L., *Le carte ottriate. La teoria dell'*octroi*, e le esperienze costituzionali dell'Europea post-rivoluzioonaria*, in *Giornale di storia costituzionale*, No. 18, 2009, 229-254.

[123] Morbidelli, G., Pegoraro, L., Reposo, A., Volpi, M., *Diritto costituzionale italiano e comparato*, 77-78.

[124] Ђорђевић, С., Ивковић, Н., *Босна и Херцеговина - Уставна држава?*, in Лукић, Р. В. (eds.), *Дванаест година Дејтонског мировног споразума*, Правни факултет Универзитета у Источном Сарајеву, Источно Сарајево [Đordjević, S., Ivković, N., *Bosna i Hercegovina – Ustavna država?*, in Lukić, R. V. (eds.) *Dvadeset godina Dejtonskog mirovnog sporazuma*, Pravni fakultet Univerziteta u Istočnom Sarajevu, Istočno Sarajevo], 2017, 281.

[125] *Ivi*, 282.

part of the space and timeframe of constitutionalism in the age of the Restoration[126] and as such seem, objectively, difficult to place outside of that historical context.[127]

Furthermore, the constitution of Bosnia and Herzegovina is not the result of its "granting" by a sovereign but constitutes an annex to an international agreement in which the representatives of the parties to the conflict actively participated. In the final analysis, based on what has just been said, it does not even seem possible to speak of an "atypical *octroyée*" constitution - where atypicality would consist in the granting of the Charter by US diplomacy, rather than by a Sovereign - since the role and will of the representatives of Bosnia and Herzegovina was decisive in the adoption of the constitution and, more generally, of the peace agreement.

There have also been other theorisations on the nature of the country's constitution. Some argue that the constitutional Charter can be defined as an "imported Constitution".[128] According to this theory, the constitutional text drafted in Dayton would be nothing more than a document imported from outside and adopted in Bosnia and Herzegovina by virtue of the signing of the peace agreement. This consideration does not seem to be completely acceptable, since the argument of "importation" implies that the Charter adopted following the signing of the peace treaty was not a document specially drafted during the talks, but rather the mere application of an already existing Charter adopted elsewhere and only transposed to the Bosnian and Herzegovinian legal system. Obviously, as explained at length in the previous paragraphs, this is not the case with the IV Dayton Annex.

In conclusion, based on the aforementioned, the Charter of Bosnia and Herzegovina is a clear example of a "heterodirected" constitution, where the constituent power has been largely guided by the international community and international diplomacy. Indeed, in this case, the constitution was not adopted by other states, as in the case of the Basic Charter of Germany or Japan but was prepared or defined in its essential elements by international organisation, to make up for «the insufficiency of consensus that can peacefully and spontaneously mature within the communities concerned with the [...] subsequent validity»[129] of the constitution. Precisely this seems to have been the case in Bosnia and Herzegovina, where it would not have been possible to exercise internal constituent power, due to the ongoing conflict and the divergences of the various groups on the nature and subsequent structure to be conferred on the state. For these reasons, it seems logical to conclude that the nature of the constitution of Bosnia and Herzegovina, with respect to its adoption, should be defined as the result of a heterodirected constitutional process.[130]

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[126] Lacchè, L., *Le carte ottriate. La teoria dell'*octroi, 229.

[127] Biscaretti di Ruffia, P., *Carte costituzionali*, in *Enciclopedia del diritto*, Vol. VI, Giuffrè, Milano, 1960, 340-342.

[128] Miljko, Z., *Ustavno uređenje Bosne i Hercegovine*, 59.

[129] De Vergottini, *Diritto costituzionale comparato*, 244.

[130] See Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 81; Šarčević, E., *Ustav iz nužde*, 117; Szasz, C., *The question for a Bosnian* Constitution, 368; Yee, S., *The New Constitution of Bosnia and Herzegovina*,

2.5. Constitutional identity of Bosnia and Herzegovina in the light of the constitutional text

Constitutional identity, at the national level, can be broadly defined as the nucleus of principles and values that underpin a constitutional system and cannot be subject to an ordinary constitutional revision procedure.[131] In other words, if these principles and values were to be changed through an amendment procedure, this would not be a simple revision of the constitution, but rather the writing of a new constitutional text, which stands in discontinuity with the values and principles enshrined in the previous text.[132] Considering that the task of this work is also to reconstruct and identify the constitutional identity within the constitutional order of Bosnia and Herzegovina, this section will indicate the lines of research that will be developed in the second part of the chapter.

As already anticipated, the second part of the chapter will be concerned with the reconstruction of the constitutional identity of Bosnia and Herzegovina on various levels of analysis. Firstly, the text of the constitution will be analysed, which already contains important indications of the values and principles that the constituents wished to lay at the foundation of the country's constitutional order. In particular, the analysis of the constitutional text in search of the elements that identify the identity of this text will gradually develop on several levels. In fact, the first step in reconstructing and identifying the elements that define the identity of the constitution can be found within the Preamble,

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176-179; Gaeta, P., *The Dayton Agreement and International Law*, 147-150; Oellers-Frahm, K., *Restructuring Bosnia and Herzegovina*, 188 ff.; O'Brien, J. C., *The Dayton Constitution of Bosnia and Herzegovina*, 332 ff.; Slye, R. C., *The Dayton Peace Agreement*, 3; Floridia, G. G., *Il costituzionalismo "a sovranità limitata"*, 6; Piergigli, V., *Diritto costituzionale e diritto internazionale*, 2; De Vergottini, G., *Le transizioni* costituzionali, 164; Feldman, N., *Imposed Constitutionalism*, 857 ff.; Dann, P., Al-Ali, Z., *The Internationalized Pouvoir Constituant*, 1035 ff.; Hay, E., *International(ized) constitutions and Peacebuilding*, 142; Maziau, N., *Le costituzioni internazionalizzate*, 1399; Tourard, H., *L'internationalisation des constitutions nationales*, 143 ff.

[131] See Ninatti, S., *Identità costituzionale e valori*, 81; Tripkovic, B., *Constructing the Constitutional Self: Meaning, Values, and Abuse of Constitutional Identity*, in *Union University Law Review*, No. 2, 2020, 359-383; Drinóczi, T., *The identity of the constitution and constitutional identity: Opening up a discourse between the Global South and Global North*, in *Iuris Dictio*, No. 21, 2018, 63-80; Ruggeri, A., *Teoria della Costituzione, identità costituzionale e salvaguardia dei diritti fondamentali*, in *Dirittifondamentali.it*, No. 3, 2022, 1 ff.; Polimeni, S., *L'identità costituzionale come controlimite*, in *Ianus*, No. 15, 2017, 49-90.

[132] See Schmitt, C., *Dottrina della costituzione*, 140-168; Scholtes, J., *Abusing Constitutional Identity*, in *German Law Journal*, No. 22, 2022, 534-543; Roznai, Y., *Constitutional Amendments. The Limits of Amendment Powers*, Oxford University Press, Oxford, 2017, 71-102; Halmai, G., *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective. The Role of Constitutional Courts in Constitutional Design*, in *Wake Forest Law Review*, Vol. 13, No. 38, 2016, 101-135; Marbury, W. L., *The Limitations upon the Amending Power*, in *Harvard Law Review*, Vol. 33, No. 2, 1919, 223-235; Kirchof, P., *Die Identität der Verfassung*, in Kirchof, P., Isensee, J. (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 2005, C. F. Müller, Heidelberg, 2005, 261 ff.; Polzin, M., *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, in *International Journal of Constitutional Law*, Vol. 14, No. 2, 2016, 411-438; Kostadinov, B., *Constitutional Identity*, in *Iustinianus Primus Law Review 3*, No. 1, 2012, 1-22.

where the constituents established certain values on which the constitutional order is based, and which inspire the entire legal system. Likewise, within the dispositions of the constitution there are provisions that provide important indications that confirm the centrality of the values and principles expressly placed at the foundation of the system within the preamble. In this direction, the centrality that fundamental rights and freedoms assume within the constitutional structure is clear. These find special defence in the courts and, above all, constitute the content of the "eternity clause" that cannot be subject to any kind of revision. It can be said, therefore, that the values that the preamble lays down as the foundation of the constitutional order and that are declined in freedoms and rights are, then, confirmed within the dispositions of the constitution. Hence, the fundamental values and principles not only find a special position within the system from a topographical point of view and because of the special protection guaranteed to them by the jurisdictional power, but also because they are expressly protected by an eternity clause, which renders them precisely intangible with respect to any changes. In the further reconstruction of constitutional identity, a central role is also assumed by the annexes to the constitution, as the centrality of human rights and fundamental freedoms as constituent elements of identity is also confirmed within them. However, a study devoted to the reconstruction of constitutional identity would not be complete without devoting a section to an analysis of the jurisprudence of the Constitutional Court and, more generally, to the role of the courts in defining constitutional identity. In the specific case of Bosnia and Herzegovina, however, important elements on the identification of the values that define constitutional identity do not come so much from the jurisprudence of the Court, which, we anticipate, has never expressly adhered to the lexicon of identity, but rather from the competences that are attributed to constitutional courts. Indeed, the role that the Constitutional Court has in defending the values of freedom and human rights is largely indicative of what elements constitute this identity. Having outlined, the structure and line of research that this second part of the chapter will follow, it is worth anticipating that the case of Bosnia and Herzegovina is particularly significant in the reconstruction of constitutional identity. Indeed, here, the theme of identity coincides with that of the new foundations on which society was to be reconstructed following the conclusion of the conflict. This aspect is significant because it allows us to show how diversity within the country's society was recomposed through a legal instrument. Specifically, the constituents identified in the principles defining constitutional identity the elements capable of uniting the country's different souls, demonstrating how the theme of identity can be an instrument of synthesis of diversity, rather than a theme of division and confrontation. This observation is further confirmed, as will be seen in the following pages, by the very structure and protective measures that the constitution itself provides for these values that determine identity.

2.5.1. The Preamble: first steps towards defining the constitutional identity of Bosnia and Herzegovina

This section, which analyses the content of the constitution, starting with the preamble, is intended to provide important elements on the principles and values that underpin the constitutional identity of Bosnia and Herzegovina.[133] The preamble is made up of ten "lines" or "paragraphs" which recall and explicitly set out the principles, values, and objectives which the constitution was adopted to pursue and defend. The preamble to the constitution provides many insights into the legal system of Bosnia and Herzegovina, but only those aspects that are most relevant to the identification of identity will be examined below.

Right at the beginning of the text, it is stated that the legal order of Bosnia and Herzegovina is based on and inspired primarily by respect for human dignity, freedom and equality.[134] Indeed, this choice seems to be a clear response to the brutality of "ethnic cleansing"[135] and the violence that occurred during the conflict, which culminated in the genocide in Srebrenica in 1995.[136] As a confirmation of the importance of these values in the Bosnian and Herzegovinian legal system, paragraph 8 of the preamble recalls that the constitution is directly inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments. The aim is to enshrine the highest level of protection of internationally guaranteed rights and freedoms, thus placing the protection of human rights and freedoms at the top of the constitutional order. This is confirmed by the content of the preamble in paragraph seven, which enshrines the determination of

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[133] The constitutional text consists of a preamble, a normative part - itself consisting of twelve articles divided into sections and paragraphs - and two annexes. See Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 50.

[134] First paragraph of the Preamble of the Constitution of Bosnia and Herzegovina. It is interesting to observe - with due historical, legal and temporal differences - how the same scansion of values can be found in the German Basic Law of 1949, which is characterised by being an example of a heterodirected Constitution. Which begins, in the first three articles of the text, by sanctioning precisely the intangibility of human dignity (Art. 1), the centrality of personal freedom (Art. 2) and affirming the principle of equality before the law (Art. 3). On this point, see Lanchester, F., *Le costituzioni tedesche da Francoforte a Bonn*, Giuffrè, Milano, 2009, 61 ff.; Ridola, P., *Stato e costituzione in Germania*, Giappichelli, Torino, 2021, 12 ff.; Berardo, F., *Breve storia dei Grundrechte nel costituzionalismo tedesco*, Marcovalerio, Torino, 2005, 51-53.

[135] See Sekulić, T., *Violenza etnica. I Balcani tra etnonazionlaismo e democrazia*, Carocci, Roma, 2002, 19 ff.; Kivimäki, T., Kramer, M., Pasch, P., *The Dynamics of Conflict in the Multi-ethnic State of Bosnia and Herzegovina. Country Conflict-Analysis Study*, Sarajevo, 2012, 18-38; Mulalić, M., *Ethnic Cleansing, Genocide and Demographic Changes in Bosnia and Herzegovina*, in *Journal of Balkan and Black Sea studies*, Vol. 2, No. 2, 2019, 57-81.

[136] ICTY, Appeals Chamber, *The Prosecutor v. Radislav Krstić*, IT-98-33A, 19 April 2004; ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadžić*, MICT-13-55-A, 20 March 2019; ICTY, Appeals Chamber, *The Prosecutor v. Ratko Mladić*, MICT-13-56-A, 8 June 2021; see: Nettelfield L. J., Wagner, S. E., *Srebrenica in the Aftermath of Genocide*, Cambridge University Press, Cambridge, 2013, 1-30.

the constitutional order to guarantee full respect for international humanitarian law. Obviously in the context of post-war situation, the second paragraph states that the constitution is dedicated to peace, justice, tolerance, and reconciliation.

Again, the reason for this choice is largely due to the historical-political situation in which the content of the constitution was defined, and in terms of what were (and remain) the goals and purposes towards which the entire system must be directed.[137] It is interesting to note that, in addition to the goal towards which the system should be directed, the framers also indicated the best way to achieve it. That is, by adopting the democratic procedures that best safeguard peaceful relations within a pluralistic society. Finally, other principles and values, which are placed at the top of the constitutional order, include the commitment to guarantee the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina.

The preamble to the constitution does not provide a clear and precise definition of the principles and values that underpin the entire constitutional order, [138] but it does set out a framework of values within which the organs of the State and the citizens themselves must move to implement them. [139] To these considerations must be added that the absence of a clear definition of each of the principles proclaimed in the preamble of the constitution must be read in the light of the historical and political circumstances in which the text in question was adopted. Indeed, the representatives of the constituent peoples[140] involved in the Dayton peace talks had strong differences of opinion, first and foremost on the nature of the state of Bosnia and Herzegovina and the legal and institutional structure to be conferred upon it. For this reason, the constituent peoples preferred to resolve the "open questions" on the institutional set-up to be adopted with the new constitution and to leave in the preamble a set of values and supreme principles by which the state order should be inspired: thus,

[137] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 50.

[138] This is due, firstly, to the fact that the constituents, at the time they were intent on drafting the constitutional text, probably had a different conception of these principles and values and, for this reason, decided to lay down certain general principles that could be shared in their broadest sense, but without specifically defining their content. Secondly, one cannot expect from a preamble the theoretical or philosophical definition of certain principles and values that are enunciated as founding the constitutional order. Inasmuch, it is logically to be expected that such content is defined by the constituents in the normative part of the Constitution and subsequently by the legislature in the adoption of legislative acts. See Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 51.

[139] This consideration is understandable, moreover, if one thinks of the fact that principles and values that are rigidly defined may subsequently burden, if not expressly impede, the development of the constitutional system. Inasmuch, the legislature would find itself extremely limited in the exercise of its functions within an overly defined legal and value framework that, therefore, leaves no room for political decisions. This would obviously severely limit the idea of the Constitution as a supreme and general legal act, which regulates the essential principles of the legal system.

[140] The last paragraph of the preamble to the Constitution of Bosnia and Herzegovina defines the Bosniacs, Croats and Serbs as the "constituent peoples" of Bosnia and Herzegovina. These three peoples constitute the three main ethnic groups in the country.

leaving the definition of these principles to be done on a case-by-case basis. Perhaps also in view of the greater stability and maturity of state institutions: first and foremost, the Constitutional Court.

Examination of the preamble has shown that it enshrines certain principles, such as respect for freedom, rights, and equality, which are at the core of the constitution of Bosnia and Herzegovina; however, in order to understand whether these values are truly binding, it is necessary to examine whether the preamble is an integral part of the constitution and therefore whether it is binding within the constitutional framework of the country. Regarding the formal value of the preamble, the judges of the Constitutional Court recalled that on the basis of Article 31(1) of the Vienna Convention on the Law of Treaties, preambles and annexes to international treaties form an integral part of them.[141] For this reason, the judges, adopting deductive reasoning, ruled that the preamble to the constitution of Bosnia and Herzegovina constitutes an integral part of the constitutional text, the latter being an annex to an international treaty,[142] such as the General Framework Agreement for Peace.[143] After this initial consideration, followed by a reconnaissance of the case law of other constitutional courts on the matter,[144] the judges affirm that the preamble assumes the same formal value as the constitution

[141] This issue, along with others of crucial importance for the entire constitutional order of the country, was addressed in the third ruling that makes up the U 5/98 judgment of 1 July 2000.

[142] Constitutional Court of Bosnia and Herzegovina, U 5/98-III, para. 19. In its decision, the Court also invoked the jurisprudence of other constitutional courts. In particular, it is worth mentioning here the reference to the decision of the Supreme Court of Canada in the case Reference re Secession of Quebec 20 August 1998 (in particular paragraphs 49 to 54), in which the judges stated that the preamble contains constitutional principles that 'support and maintain the text relating to the constitution: they are unstated vital postulates on which the text is based [...]. Although these fundamental principles are not explicitly made part of the constitution by any written provision, except, in some respects, by oblique reference in the preamble to the constitutional law, it would be impossible to conceive of our constitutional structure without them. Principles dictate important elements of the architecture of the Constitution itself and are as such its lifeblood [...]. The principles help to interpret the text and describe the sphere of competence, the scope of rights and duties and the role of our political institutions'. Wanting, however, to provide a quick overview of the positions of legal-publicist doctrine - particularly local - on the formal value of the preamble, there are two strands of thought: the first majority and the second minority. For most scholars, the affiliation of the Preamble with the Constitution is to be traced - in addition to the reasons enumerated by the Constitutional Court in its 2000 decision - on the basis of the fact that the text of the Preamble is located, in the original drafting of the document, below the heading 'Constitution of Bosnia and Herzegovina'. This topographical feature of the Preamble therefore places it, from a formal point of view, within the constitutional text and not outside it. On this point, we refer, among others, to: Јовичић, М., *О уставу. Теориско-компаративна студија*, Савремена администрација, Београд [Jovičić, M., *O ustavu. Teorisko-komparativna studija*, Savremena administracija, Beograd], 1977, 124; Марковић, Р., *Уставно право*, Правни факултет Универзитета у Београду, Београд [Marković, R., *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd], 2014, 40-41. On the other hand, some authors argue that the preamble is not formally part of the Constitution of Bosnia and Herzegovina. This consideration would derive from the fact that the last paragraph of the preamble, after defining who the constituents are, states that what follows is the text of the Constitution. Thus, according to this interpretation, the constitutional text follows the preamble, thus excluding it from the Constitution. On this point see: Кузмановић, Р., *Уставно право* [Kuzmanović, R., *Ustavno pravo*], 306.

[143] Marko, J., *United in Diversity?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina*, in *Vermont Law Review*, No. 3, 2006, 533; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 52; Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 37.

[144] It also recalls the two Conseil Constitutionnel rulings: DC 70-39 of 19 June 1970 and DC 71-44 of 16 July 1971.

in that it constitutes a "logical whole" with the other dispositions of the constitution,[145] in that it contains the principles on which the constitution is based.[146] Indeed, the content of the preamble was created on the same basis of ideas and values that guided the constituents in drafting the text.[147] Moreover, the two parts were adopted by the same body, based on the same procedure and in the same historical-legal context. Furthermore, it is emphasised, that the preamble is subject to the same amendment procedure as the Constitution provides for the other dispositions,[148] which leads to the conclusion that the preamble is preceptive in nature. The Constitutional Court has ruled that the preamble has a preceptive value and that the constitutions and laws of the entities that make up the federal state, as well as state laws, must comply with it.[149] In fact, the preamble[150] contains legal principles on which the country's constitutional system is based and not «political, moral and religious ideas which the Constitution is intended to promote»[151] and, as such, does not prescribe any precise rules, is devoid of legally relevant content.[152] On the contrary, the preamble of the constitution of Bosnia and Herzegovina was adopted to emphasise the essential values on which the legal system of the state is based. In other words, it contains the values that form the basis of the system itself. Here, too, as already pointed out about the formal value of the preamble, the judges of the Constitutional Court, in their decision, referred to the jurisprudence of other courts: in particular, the jurisprudence of the French Constitutional Council,[153] the Supreme Court of Canada[154] and the Supreme Court of the United States,[155] to sanction the preceptive nature of the preamble.[156]

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[145] Constitutional Court of Bosnia and Herzegovina, U 5/98-III, para. 23.

[146] *Ivi*, para. 24.

[147] *Ibidem*.

[148] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 52; Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 38; Кузмановић Р., *Уставноправне теме*, Академија наука и умјетности Републике Српске, Бања Лука [Kuzmanović, R. *Ustavne teme*, Akademija nauka I umjetnosti Republike Srpske, Banja Luka], 2014, 133-134.

[149] Constitutional Court of Bosnia and Herzegovina, U 5/98-III, para. 25.

[150] On the value of paremboles in general, see: Frosini, J. O., *Changing Notions of Democracy: A Comparative Analysis of Constitutional Preambles*, in Filibi, I., Cornago, N., Frosini, J. O. (eds.), *Democracy With(out) Nations?*, University of Basque Country Press, Bilbao, 2011, 83-108.

[151] Kelsen, H., *Teoria generale del diritto e dello Stato*, Edizioni di comunità, Ivrea, 1963, 265

[152] *Ibidem*.

[153] Conseil Constitutionnel: DC 70-39 of 19 June 1970 and DC 71-44 of 16 July 1971. On this point, see: Constantinesco, V., Pierré-Caps, S., *Droit constitutionnel*, Press universitarie de France, Paris, 2010, 448-449.

[154] Supreme Court of Canada Reference re Secession of Quebec 20 August 1998; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island 18 September 1997. In these two cases, the Supreme Court of Canada has held that the preamble must be used for the interpretation of constitutional provisions, as it has the task of filling normative gaps in them.

[155] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 53.

[156] Decision U 5/98-III of the Constitutional Court of Bosnia and Herzegovina also contains two dissenting opinions on the issue of the nature of the preamble to the Constitution. In particular, Judge Zvonko Miljko held that preambles rarely enjoy preceptive force and only in cases where they contain (precise) legal norms can they enjoy such a nature. In the case of the preamble of the Constitution of Bosnia and Herzegovina, it contains excessively vague and undefined

In conclusion, in line with the words of the Court, it can be stated that the preamble of the constitution of Bosnia and Herzegovina is an integral part of the constitutional text, and has a fully preceptive character.[157] Moreover, in the context of the legal order of the Balkan country, the preamble is endowed with a special importance. It represents the «ten commandments»[158] that the State and citizens of Bosnia and Herzegovina must observe to live together peacefully in a heterogeneous society that has been traumatised by armed conflict.[159] For this reason, the preamble was intended by the framers to be the supreme catalogue of values and goals that would leave an indelible and lasting mark on the constitution and the future of Bosnia and Herzegovina.[160] Among these values, respect for and protection of human rights and freedoms are at the core of the constitutional order.[161] Indeed, they are the ideal basis on which the voters wanted to rebuild not only the country's society, but the entire constitutional system of Bosnia and Herzegovina. The importance of the Preamble in the reconstruction of the constitutional identity of Bosnia and Herzegovina is explained in the light of the values it enshrines. Indeed, it states that the principles of respect for fundamental freedoms, human rights and equality are the elements on which the entire legal system must be based and, as such, constitute the core values of the constitution.

provisions and, therefore, should be concluded by declaring the absence of preceptive character. However, Miljko, pointed out in his dissenting opinion, that the preamble contains constitutional principles, which may be useful in the Court's interpretation of the Constitution. On this point, we refer in more detail to: Miljko, Z., *Ustavno uređenje Bosne i Hercegovine,* 71. Judge Snežana Savić, in his dissenting opinion, stated that the preamble constitutes an integral part of the constitutional text, but, at the same time, denied its preceptive nature. Taking up the theory formulated by Hans Kelsen, according to whom the preamble expresses the political, moral, and religious ideas that are intended to be promoted by the Constitution, he considered the content of the preamble of the Constitution of Bosnia and Herzegovina to be of a distinctly political, rather than normative-legal nature, and therefore, as such, not legally binding. On this point, see: Kelsen, H., *Teoria generale del diritto e dello Stato*, 265-266; Савић, С., *Преамбула Устава Босне и Херцеговине*, in *Правна ријеч* [Savić, S., *Preambula Ustava Bosne I Hercegovine*, in Pravna riječ], No. 27, 2011, 23-38. Фира, А., *Енциклопедија уставног права бивших југословенских земаља*. *Том IV Уставно право Босне и Херцеговине*, Српска академија наука уметности, Агенија 'Мир', Нови Сад [Fira, A., *Enciklopedija ustavnog prava bivših jugoslavenskih zemalja*, *Tom. IV, Ustavno parvo Bosne i Hercegovine*, Srpska akademija nauka I umetnosti, Agenija "Mir", Novi Sad], 2002, 63.

[157] Constitutional Court of Bosnia and Herzegovina, U 5/98-III, paras. 24-25.

[158] Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 38.

[159] *Ibidem*.

[160] *Ibidem*.

[161] «Based on respect for human dignity, liberty, and equality, Dedicated to peace, justice, tolerance, and reconciliation, Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society, […] Guided by the Purposes and Principles of the Charter of the United Nations, Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law, Determined to ensure full respect for international humanitarian law, Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments […]», Preamble of Constitution of Bosnia and Herzegovina.

2.5.2. The dispositions of the Constitution of Bosnia and Herzegovina

In the preamble, the framers set out the principles and values that should guide Bosnia and Herzegovina. For this reason, it can be said that the preamble represents a sort of "map" for reading the other provisions of the constitution of Bosnia and Herzegovina,[162] namely what, according to Kelsen's theory, are «constitutional norms in the strict sense».[163] In this way, it will be possible to analyse how the principles enshrined in the preamble have been declined and elaborated in the rest of the constitution. This section will present and examine the provisions that contain the values that constitute the basic elements of the legal order of Bosnia and Herzegovina and determine its identity. Obviously, there are several provisions in the constitutional text that can help in the reconstruction of

[162] The dispositions of the Constitution of Bosnia and Herzegovina consists of twelve articles, marked by progressive Roman numerals. Each article bears a heading that defines its content. It is interesting to note that each constitutional provision, within it, regulates a specific constitutional subject, or rather, a segment of the constitutional subject. In fact, the individual constitutional subjects (general principles, rights, form of government, etc.), which in most (European) constitutional texts are usually dealt with in several articles, which, in turn, make up chapters or parts, in the constitutional system of Bosnia and Herzegovina these are regulated in a single article. each of the twelve articles, which make up the normative part of the Constitution, constitutes a 'chapter' regulating a specific subject. Article I, bearing the heading 'Bosnia and Herzegovina', defines the main characteristics of the Bosnian-Herzegovinian State, such as the form of the State, the principles governing the system, the seat of the capital and the symbols of the State, and citizenship. Article II, on the other hand, deals with the subject of human rights and fundamental freedoms: where these are listed and their protection, including international protection, is defined. Article III governs the important matter of the division of competences between the central state and the entities; it also determines the specific ways in which state competences can be increased over those formally listed in the Constitution. Chapter IV onwards deals with the subject of the form of government. More specifically, this chapter regulates the Parliamentary Assembly of Bosnia and Herzegovina, defining its composition in two chambers, its internal structure and voting procedures, as well as, of course, its powers. Article V is devoted to the Presidency of Bosnia and Herzegovina and the Council of Ministers, organs exercising executive power. The Constitutional Court is regulated in Article VI, providing for its composition, working procedures, as well as jurisdiction and competences. Articles VIII and IX are devoted to economic and financial matters at the central state level. Specifically, the first of these articles regulates the subject matter of the Central Bank of Bosnia and Herzegovina, providing information on its composition, powers, and purpose. The second, on the other hand, regulates the financial apparatus of the State, such as the manner of approving the annual budget and the distribution of tax revenues between the State and the Entities. Article IX, with the heading 'General Provisions', regulates a peculiar aspect, especially found in post-conflict societies. In fact, this provision refers to the 'lustration' procedures within the public administration, in order to avert the presence of persons involved with war crimes. The tenth article is devoted to the constitutional revision procedure and the enunciation of what are the formal limits to this procedure. Article XI, entitled 'Transitional Agreement', refers to the text of the Second Annex to the Constitution of Bosnia and Herzegovina, which contains the transitional provisions between the previous order and the one created with the adoption of the Dayton Constitution. Closing the "normative" part of the Constitution is Article XII, which determines the manner of entry into force of the Constitution and the relationship with the previous order and, in particular, with the obligation for the Constitutions of the entities to adapt to the new constitutional order. Moreover, the individual articles of the Constitution - being drafted in such a way as to regulate segments of the constitutional subject matter in their entirety - are characterised by being rather broad in their content and, for this reason, internally subdivided into 'paragraphs', punctuated by Arabic numerals in progressive succession, and 'sections', recognisable by being designated by letters. For this reason, the individual 'paragraphs' and 'sections' contain constitutional provisions that define the constitutional subject matter dealt with within the individual article.

[163] Kelsen, H., *Teoria generale del diritto e dello Stato*, 265.

the elements of the country's constitutional identity, but in this specific section, special attention will be paid to Article II of the constitution, while the other provisions will be examined in the following pages.

The first article of the constitution states that «Bosnia and Herzegovina shall be a democratic state governed by the rule of law and by free and democratic elections».[164] This first provision is in clear logical continuity with the conviction, expressed in the preamble, that democratic institutions of government promote and create the best conditions for the establishment of peaceful relations in a pluralistic society.[165] This statement is doubly important for the reconstruction of the identity of the Balkan country's legal system. On the one hand, it establishes the democratic principle, in the form of free and periodic elections and respect for the rule of law, as a fundamental element of the constitution and the entire state structure of Bosnia and Herzegovina. On the other hand, it also provides further useful information for the present research, as it is established that a system based on the values of democracy is the best means of creating optimal conditions for the reconstruction of peaceful social relations in a pluralistic society such as that of Bosnia and Herzegovina. This aspect is significant because it highlights the close link between the principles that underpin the country's constitutional identity and the values on which the new constitution was intended to (re)establish the largely divided and war-torn society. This observation highlights the dual nature of Bosnia and Herzegovina's constitutional identity, which is at once a founding element of the constitutional structure and a "beacon" for the society that this document seeks to reconstruct.

However, the principles of democracy would not be effective if respect for rights were not guaranteed. In the light of this statement, it is easier to understand why the constitutional framers wished to guarantee human rights and fundamental freedoms a primary role in the constitutional construction of the country. In fact, after defining the basic elements of the State, the framers devoted an entire article to the protection of rights and freedoms. In particular, Article II of the constitution begins by stating that «Bosnia and Herzegovina [...] shall ensure the highest level of internationally recognised human rights and fundamental freedoms».[166] This statement is significant because it enshrines the State's commitment not only to respect rights and freedoms in general, but specifically to ensure the highest level of internationally guaranteed rights and freedoms, going far beyond the mere guarantees contained in the constitution.[167] This commitment to ensuring the highest level of

[164] Art. I, para. 2, Constitution of Bosnia and Herzegovina.

[165] Preamble, para. 3, Constitution of Bosnia and Herzegovina.

[166] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

[167] Art. II, para. 3, Constitution of Bosnia and Herzegovina: «All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: a. The right to life. b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment. c. The right not to be held in slavery or servitude or to perform forced or compulsory labor. d. The rights to liberty and security

protection of rights and freedoms is reflected in several ways in Article II of the constitution. In fact, in the often-quoted paragraph, the framers of constitution have provided for a specific instrument of a judicial nature for the protection of these rights and freedoms, as it is stated that «to that end, there shall be a Human Rights Commission for Bosnia and Herzegovina […]».[168] This means that, in addition to the Constitutional Court, which already has specific and extensive competences in the field of the protection of rights and freedoms - as will be seen in more detail in the following sections - the framers provided for the creation of an *ad hoc* court with the task of ensuring the highest level of protection of rights and freedoms on the basis of the highest standards of international law. It is therefore significant that the central role of rights and freedoms has not remained a mere statement on paper but has been embodied in mechanisms equipped with specific instruments. This affirmation is further reaffirmed in paragraph 6, which declares that the State, defined in its elements as «[…] all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms […]».[169] In other words, every organ of the State and the federal entities that make it up must apply and conform to the highest standards of protection of rights and freedoms in order to guarantee this core of values on which the entire legal construction of the State is based. The previous provision is echoed, albeit with a slight variation in the aims of the provision, in Article II, paragraph 8, of the constitution, which states that «all competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies […]; the International Tribunal for the Former Yugoslavia […]; and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law».[170] With this provision, however, the framers did not only wish to safeguard the rights and freedoms guaranteed by international law, but also to constitutionalise the obligation of national institutions to cooperate with international authorities in order to monitor the effective application of the guarantee of rights and freedoms.

However, as mentioned above, there are other elements in Article II of the constitution that provide important indications on the role of rights within the legal system of Bosnia and Herzegovina and, therefore, on the elements that determine its constitutional identity. Indeed, the centrality of rights and freedoms within the constitution is enshrined in the fact that «the rights and freedoms set

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of person. e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. f. The right to private and family life, home, and correspondence. g. Freedom of thought, conscience, and religion. h. Freedom of expression. i. Freedom of peaceful assembly and freedom of association with others. j. The right to marry and to found a family. k. The right to property. l. The right to education. m. The right to liberty of movement and residence».

[168] Art. II, para. 3, Constitution of Bosnia and Herzegovina.

[169] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

[170] Art. II, para. 8, Constitution of Bosnia and Herzegovina.

forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina».[171] This provision has a disruptive effect on the entire constitutional and legal structure of the system, since it states that the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols are directly applicable, so that it is not even necessary for the state to be a member of the Council of Europe. This was indeed the situation in the country after the constitution came into force. In fact, Bosnia and Herzegovina was not yet a member of the Council of Europe - it would become a member in 2002 - but based on the constitution, the ECHR and its Protocols were already directly applicable within the state system. Such a provision is important because it confirms that the highest international standards for the protection of rights and freedoms are indeed set within the legal system, in this case with the direct application of the provisions of the ECHR. However, the Constitution goes even further, stating that, precisely to guarantee the highest level of protection, the content of the ECHR «shall have priority over all other law»[172] of the BiH legal system. As will be seen in the following pages, this statement has given rise to different interpretations by academics and, subsequently, by domestic courts.[173] It is important to understand, however, that this supremacy of the ECHR should be limited to ordinary laws and not to the provisions of the constitution. The role of the European Convention for the Protection of Human Rights is another element in the reconstruction of the constitutional identity of Bosnia and Herzegovina. This provision confirms the central and irreplaceable role of human rights and fundamental freedoms in the legal construction of the country's legal system. Indeed, rights are the fulcrum around which the entire constitutional structure revolves and, as such, constitute the very elements of the country's constitutional identity.

In addition to the protection of rights and freedoms as elements of the constitutional identity of Bosnia and Herzegovina, there is also the principles of equality and non-discrimination. In fact, the very first paragraph of the preamble states that the new order established by the Dayton constitution is based on respect for human dignity, liberty, and equality. The second paragraph of Article II states that «the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».[174] In fact, the above-mentioned provision shows how the elements of the country's constitutional identity are interconnected and intertwined, so that the guarantee of the

[171] Art. II, para. 2, Constitution of Bosnia and Herzegovina.
[172] Art. II, para. 2, Constitution of Bosnia and Herzegovina.
[173] On this point see section 2.8 of this chapter.
[174] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

enjoyment of fundamental rights and freedoms cannot be fully implemented unless respect for the principle of equality between citizens is also guaranteed. In the light of this observation, it can be said that the constitutional identity of Bosnia and Herzegovina is presented as a chain: in which human rights, fundamental freedoms, the principle of fairness and non-discrimination, the democratic principle, respect for the rule of law, human dignity and freedom are the interconnected links that form this chain. Moreover, each of these links has the task of forming the ideal basis on which the constitutional identity is founded and of promoting the conditions for «[…] peace, justice, tolerance, and reconciliation».[175]

Another factor that contributes to the reconstruction and identification of the elements that define the constitutional identity of Bosnia and Herzegovina, and which can be found in Article II of the constitutional text, comes from paragraph 7. This provision stipulates that «Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution».[176] Explaining what is laid down in this provision, it can be stated - as will be described in more detail in the following pages - that the protection of rights and freedoms is not only through the direct application of the European Convention for the Protection of Human Rights and Freedoms, but also through Bosnia and Herzegovina's adherence to other international treaties concluded for the protection of rights. It is significant that, as in the case of the ECHR, the country becomes a signatory to the international treaties listed in Annex I of the constitution by a provision of the latter and not by the express will of the country's institutions. In other words, international treaties become part of the State's legal system by the express will of the Constitution itself and produce effects within the system.

The purpose of this section was to show how the principles that were enshrined in the preamble of the constitution and placed as the inspiration for the entire order of Bosnia and Herzegovina then found their dimension in the text of the constitutional. Specifically, this section has focused on the analysis of the first two articles of the constitution, and especially the second one, which the constitutional framers dedicated entirely to human rights and fundamental freedoms. Indeed, the analysis of the content of this provision made it possible to understand to what extent the protection of rights and freedoms became part of the value system of the constitution of Bosnia and Herzegovina. It turned out that the protection of rights and freedoms, originally conceived as an indispensable prerequisite for the reconstruction of a pluralistic society and as a legal instrument for overcoming the trauma of war, gradually became a fundamental element of the constitutional structure itself and thus of the country's identity, and together with the principle of fairness and non-

[175] Preamble, para. 2, Constitution of Bosnia and Herzegovina.

[176] Art. II, para. 7, Constitution of Bosnia and Herzegovina.

discrimination, the principle of democracy, the principle of respect for the rule of law, human dignity and freedom, formed a core of values capable of creating a kind of synthesis with regard to ethnic differences. Thus, the values and principles on which the constitutional identity of the two orders is based have the characteristic of being meta-principles capable of creating the broadest possible platform of values, potentially overcoming ethnic divisions.

2.5.3. The Annexes to the Constitution of Bosnia and Herzegovina

The constitution of Bosnia and Herzegovina also contains two annexes.

The Annex I is particularly important because it introduces into the constitutional order of Bosnia and Herzegovina the main international conventions and agreements on the protection of fundamental rights and freedoms, thus guaranteeing the highest level of their protection.[177] In fact, the first Annex is entitled "Additional human rights conventions to be applied in Bosnia and Herzegovina". The second annex, on the other hand, concerns “Transitional Arrangements”. Specifically, these are a set of provisions that essentially represent the coherent continuation of the continuity of the international personality of Bosnia and Herzegovina under Article I of the constitution. [178] In fact, several interim bodies - such as the Joint Interim Commission - are regulated

[177] Art. II, para. 7, Constitution of Bosnia and Herzegovina.

[178] Annex II was fundamental to the social life and organisation of the State in the period between the entry into force of the constitutional text (14 December 1995) and the establishment of the new State institutions. The same applies to the new legal order of the State, i.e. the period that can be defined as the transition between the previous order and the one outlined in the Dayton Constitution. To briefly summarise its content, the Annex consists of five points. The first provides for the establishment of an Interim Joint Commission with the mandate to discuss practical issues relating to the implementation of the Constitution, the General Framework Agreement for Peace in general and its annexes, with a view to making recommendations and useful proposals for the implementation of these documents. The second point concerns the continuity of laws. Specifically, it is stipulated that all laws, regulations and procedural rules in force on the territory of Bosnia and Herzegovina at the time of the entry into force of the Constitution shall remain in force, unless they are in conflict with the Constitution, until a competent governmental body of Bosnia and Herzegovina decides otherwise. Similarly, judicial and administrative proceedings pending at the time of the entry into force of the Constitution shall be continued or transferred to other courts or authorities of Bosnia and Herzegovina in accordance with the legislation governing the jurisdiction of such courts or authorities. The fourth point of Annex II to the Constitution then stipulates that until replaced by new agreements or laws, the government offices, institutions and other bodies of Bosnia and Herzegovina shall operate in accordance with the laws in force. The Annex concludes with a provision on international treaties and, in particular, on their legal fate, since only the Republic of Bosnia and Herzegovina, as an internationally recognised state, could enter into international obligations and sign treaties. In particular, this point of the Annex must be read in conjunction with Article XI of the Constitution and Article I as an affirmation of the international continuation of the legal personality of Bosnia and Herzegovina, which has never ceased to exist since its international recognition in 1992. Because of these premises, the provision in the Annex stipulates that "any treaty ratified by the Republic of Bosnia and Herzegovina between 1 January 1992 and the entry into force of this Constitution [14 December 1995] shall be notified to the members of the Presidency within fifteen days of their taking office; any treaty not notified shall be denounced". Furthermore, within six months of the first convocation of the Parliamentary Assembly of Bosnia and Herzegovina, at the request of any member of the Presidency, the Parliamentary Assembly shall consider the denunciation of any other such treaty.

in order to resolve questions on the implementation of the constitution between the entities and the central State institutions. Or, again, issues on international treaties are regulated. However, for the purpose of identifying the constitutional identity of Bosnia and Herzegovina, this annex does not appear to provide significant information, so only the first annex, which is very important for this purpose, will be examined.

Usually, the role of annexes within the broader framework of a country's constitutional order is to provide a more detailed response to certain issues dealt with in the normative part of the constitutional text, without, however, overburdening the text with other superfluous provisions.[179] In other words, the function of the annexes is to elaborate in a comprehensive manner the constitutional matters already regulated in the normative part of the constitution.[180] This consideration is confirmed by the fact that within the constitutional order of Bosnia and Herzegovina no less than two constitutional provisions have the same content of the annexes. In fact, the content of Article II of the constitution, which regulates the subject of fundamental rights and freedoms, is found also in Annex I. In this way the framers of constitution wanted to strengthen and expand the content of the constitutional provision on human rights and its protection. This is confirmed *a fortiori* in Article XI of the constitution, where the provision refers directly to the content of the Second Annex of the constitution.[181] As for the specific content of the annex, it contains a list of fifteen international legal instruments for the defence of human rights.[182]

With the introduction of this document, therefore, the framers wished to extend the protection and guarantee of human rights and fundamental freedoms - already enshrined in Article II of the constitution - to the highest international standards established over time by various conventions.[183]

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[179] See: Марковић, Р., *Уставно право* [Marković, R., *Ustavno parvo*], 42; Орловић, С. П., *Уставно право*, Правни факултет Универзитета у Новом Саду, Нови Сад [Orlović, S. P., *Ustavno parvo*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad], 2018, 31.

[180] Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 38; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 56.

[181] «Transitional arrangements concerning public offices, law, and other matters are set forth in Annex II to this Constitution», art. XI Constitution of Bosnia and Herzegovina.

[182] 1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 4. 1957 Convention on the Nationality of Married Women: 5. 1961 Convention on the Reduction of Statelessness; 6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 8. 1966 Covenant on Economic, Social and Cultural Rights; 9. 1979 Convention on the Elimination of All Forms of Discrimination against Women; 10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 12. 1989 Convention on the Rights of the Child; 13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 14. 1992 European Charter for Regional or Minority Languages; 15. 1994 Framework Convention for the Protection of National Minorities.

[183] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 58.

However, the text under review does not specify how these international treaties are to be applied within the State's legal system: this has led to some uncertainty as to their actual role.[184] According to a large part of scholars, these doubts are not justified, since it is well known that the appendices have constitutional status and, as such, are directly applicable in Bosnia and Herzegovina without the need for further approval: they are an integral part of the constitutional order.[185] In this regard, it is sufficient to recall that Article II, paragraph 4, establishes the enjoyment by all persons in Bosnia and Herzegovina of the rights and freedoms provided for in that article and in the first Annex to the constitution.[186] The question of whether Annex I is an integral part of the constitution and whether the rights and freedoms it guarantees are directly enforceable by citizens has been definitively settled by the Constitutional Court itself. But not without a gradual and sometimes tortuous process of interpretation. In fact, the judges of the Constitutional Court had initially denied that the rights and freedoms enshrined in Annex I were guaranteed by the constitution, namely the Court had denied, in the judgment AP-1219/07,[187] that Annex I was an integral part of the constitution and that, as such, it could be invoked before the Constitutional Court in the event of a violation. However, two years later, in Judgment AP-1999/08,[188] the same Court partially reversed its initial position on Annex I. In fact, it declared its jurisdiction to review complaints of alleged violation of the rights and freedoms guaranteed by the fifteen international conventions included in Annex I, provided that the complainant claimed to have been discriminated against in one of the areas protected by that annex. In other words, the protection of the rights and freedoms guaranteed in the Annex I could only be invoked in Court if there was discrimination in relation to them. The judges had reached this conclusion based on a reading of Article II, paragraph 4, which states that «[t]he enjoyment of the rights and freedoms provided for in [...] Article [II] or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground [...]».[189] Thus, the conventions listed in Annex I could only be invoked in the event of alleged discrimination - as guaranteed by Article II of the constitution - but otherwise it was not possible to claim a violation of the rights or freedoms guaranteed therein. Subsequently, the Court

[184] For a better understanding of the underlying issue, it is sufficient to recall here that the Constitution of the Federation of Bosnia and Herzegovina, one of the two entities that make up the federal state, adopts the same annex with the same content, but specifies that the instruments of international law protecting human rights and fundamental freedoms have the same constitutional status. This is not so explicitly stated in the Constitution of Bosnia and Herzegovina. See Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 59.

[185] Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 990; Trnka, K., *Specifičnosti ustavnog uređenja Bosne i Hercegovine*, 65; Šarčević, E., *Ustav iz nužde*, 222; Ademović, N., Marko, J., Marković, G., *Ustavno pravo Bosne i Hercegovine*, 51 ff.

[186] Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 990.

[187] Constitutional Court of Bosnia and Herzegovina, AP-1219/07, 13 May 2008, para. 6.

[188] Constitutional Court of Bosnia and Herzegovina, AP-1999/08, 13 October 2010, para. 20.

[189] Constitution of Bosnia and Herzegovina, art. II, para. 4.

reached a different (or even more extensive) conclusion, from which it has not deviated since. In Case U-9/09,[190] the judges found that certain provisions of the Electoral Law of Bosnia and Herzegovina and the Statute of the City of Mostar - which provided for the election of three citizens' representatives from each district - were contrary to Article 25 of the International Covenant on Civil and Political Rights, which is included in Annex I to the constitution. In other words, the courts confirmed for the first time that one of the International Covenants on Civil and Political Rights, which is included in Annex I, is an integral part of the constitution and, as such, can be used as a parameter of constitutional legitimacy in court. Moreover, these rights and freedoms had their own autonomous existence which went beyond the existence of an alleged discrimination. It is therefore possible to conclude - confirming previous doctrinal theories - that Annex I is not only an integral part of the constitution, but also a parameter for assessing legitimacy, and that the rights contained therein are directly actionable in court in the event of violation.[191]

Having examined the main aspects of the three parts that make up the constitution of Bosnia and Herzegovina (preamble, disposition, and Annexes), it is possible to conclude that the protection of human rights and fundamental freedoms plays a central role in its text. In fact, it is clear from the preamble, the twelve articles that compose the constitution and the First Annex that the protection of rights and freedoms is the binding glue that holds the entire constitutional structure together. Indeed, these principles define the constitutional identity of Bosnia and Herzegovina. This is confirmed not only by the textual data of the constitutional Charter, but also by the limits of its revision, as will be seen in the following sections. In conclusion, it is interesting to observe how the protection of human rights and fundamental freedoms, as an element defining the constitutional identity of Bosnia and Herzegovina, finds its own dimension throughout the development of the constitution. In fact, the protection of rights and freedoms, together with the principle of fairness and non-discrimination, the democratic principle, the principle of respect for the rule of law, human dignity, and freedom, are explicitly defined as values that inspire the entire constitution. This affirmation finds its own concrete dimension in the twelve articles that compose the constitution, where these principles are reaffirmed. Moreover, as this pages has attempted to demonstrate, the centrality of the protection of rights and freedoms as constituent elements of the constitutional identity of Bosnia and Herzegovina finds further confirmation in Annex I of the constitution, which contains a list of international treaties concerning human rights and freedoms, which not only find direct application within the country's legal system, but also confirm the centrality of rights and freedoms for the identity of the constitution.

[190] Constitutional Court of Bosnia and Herzegovina, U-9/09, 26 November 2010, paras. 55-57.

[191] On this point see the reconstruction proposed by Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 155-158.

In fact, we have here the direct incorporation, through an explicit constitutional provision, of a series of international treaties that have been specifically introduced to make the protection of rights and freedoms as advanced as possible.

2.6. Constitutional amendment procedure and its limits: an implicit definition of constitutional identity

The explicit limits set for the constitutional amendment procedure in the constitutional Charter of Bosnia and Herzegovina can be a useful aid in reconstructing and describing the elements that embody the hard core of constitutional values and principles,[192] and which represent the cornerstone on which the constitutional identity is based. By placing constraints on the constitutional revision process, the constitution circumscribes and recognizes the presence of an essential core that,[193] if undermined, would lead to modifying and distorting the very essence of the constitutional text. This recognition of an essential core also serves to safeguard the stability and continuity of the constitutional order, protecting against sudden or arbitrary changes that could threaten the underlying principles and values of the system. In this way, explicit limits on constitutional review can be seen as a direct expression of the constitution's commitment to the protection of certain values.[194]

The purpose of this section is to examine whether the constitutional order of Bosnia and Herzegovina sets limits on constitutional revision procedure, and whether these limits can help to identify a distinct constitutional identity. By examining the process and limits of constitutional revision, we can gain insight into the foundational values and principles that underpin the constitution of Bosnia and Herzegovina, and how they reflect the country's unique constitutional identity. Understanding the limits on constitutional revision can also help ensure the stability and continuity

[192] See Gambino, S., D'Ignazio, G., *La revisione costituzionale e i suoi limiti: fra teoria costituzionale, diritto interno, esperienze straniere*, Giuffrè, Milano, 2007, 45 ff.; Grimm, D., *Constituent power and limits of Constitutional Amendments*, in Lanchester, F. (eds.), *Costantino Mortati. Potere costituente e limiti alla revisione costituzionale*, CEDAM, Padova, 2017, 37-47; Kostadinov, B., *Constitutional Identity*, in *Iustinianus Primus Law Review*, Vol. 3, No. 1, 2012, 1-22; Elgie, R., Zielonka, J., *Constitutions and Constitution-Building: A Comparative Perspective*, in Zielonka, J. (eds.), *Democratic Consolidation in Eastern Europe. Volume 1 Institutional Engineering*, Oxford University Press, Oxford, 2001, 25-48; Drinóczi, T., *Constitutional Identity in Europe: The identity of the Constitution. A Regional Approach*, in *German Law Journal*, Vol. 21, 2020, 105-130.

[193] De Vergottini, G., *Diritto costituzionale comparato*, 277.

[194] On this point more generally, see the works of Barile P., *La Costituzione come norma giuridica. Profilo sistematico*, Barbera, Firenze, 1951, 79 ff.; Mortati speaks of "absolute" or "essential" limits because they concern parts that are «constitutive of the essence of the Constitution», on this point see: Mortati, C., *Costituzione (Dottrine generali)*, in *Enciclopedia del diritto,* Vol. XI, Giuffrè, Milano, 1962, 204; Barile, P., De Siervo, U., *Revisione della Costituzione*, in *Nuovo Digesto Italiano*, Vol. XV, UTET, Torino, 1968, 777 ff.; Cerri, A., *Revisione costituzionale*, Vol. XXVII, Giuffrè, Milano, 1991; Dogliani, M., *Potere costituente e revisione costituzionale nella lotta per la costituzione*, in Zabrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, Einaudi, Torino, 1997, 253-289.

of the constitutional order, protecting against sudden or arbitrary changes that could undermine the principles and values that the constitution seeks to uphold.

However, before describing and analysing the limits on the process of constitutional revision, and thus giving some indication of the principles and values potentially protected by the constitution itself, it seems appropriate to devote a specific paragraph to the process of constitutional amendment itself. In fact, in order to fully understand the limits of the revision, it seems necessary to give some explanations, albeit brief, on specific issues that the legal doctrine has addressed since the adoption of the constitution in 1995. Particular attention should be paid to those issues which do not follow directly from a mere reading of the text of the constitution and which, for this very reason, need to be explained in detail. The role of this clarification, which may seem superfluous regarding the main issue of constitutional identity, is fundamental not only to understanding the relationship with the limits of constitutional revision, but also regarding the issue of amending a constitution that is the result of a "heterodirected" adoption process. In particular, the analysis of the modality of constitutional amendment allows for an in-depth examination of certain issues such as the subjects entitled to propose amendments, aggravations in the procedure and other issues closely connected with the "internationalized" nature of the constitution of Bosnia and Herzegovina.

2.6.1. The constitutional amendment procedure in Bosnia and Herzegovina

Before examining the limits of constitutional amendment procedure, which provide an important indication of the fundamental elements that the framers of constitution wished to protect from change, it is necessary to analyse the constitutional revision process itself and its peculiarities. The first paragraph of Article X of the constitution of Bosnia and Herzegovina outlines the amendment procedure. This article comprises only one sentence and may be seen as somewhat laconic due to the absence of certain clarifications that may cause confusion upon first reading. This has led to a lively debate on the correct interpretation of the provision. Starting by reading the textual data, the paragraph stipulates that the constitution can be amended by a decision made by the Parliamentary Assembly, which requires «a two-thirds majority vote of those present and voting in the House of Representatives».[195] Despite its brevity, the provision allows for broader reasoning about constitutional amendment in the Bosnia and Herzegovina legal system upon closer examination. This first paragraph affirms that only the Parliamentary Assembly[196] has the power to approve or reject

[195] Art. X, Constitution of Bosnia and Herzegovina.

[196] The Parliamentary Assembly has two branches, the House of Peoples and the House of Representatives. The former serves as the upper chamber and is elected by the legislative bodies of the entities that comprise the federal state. Simultaneously, it represents the three constituent peoples of Bosnia and Herzegovina, namely the three main ethnic

changes to the constitution. Based on the text of the constitutional provision, regarding the approval of amendments to the constitution, it is stipulated that these, in order to be accepted, must obtain a favourable vote of the Parliamentary Assembly.[197]

This description of the constitutional amendment procedure, coupled with the second part of the provision, contained in the first paragraph of Article X, which expressly states that a qualified majority of two-thirds of those present and voting must be achieved for the amendment to be passed in the House of Representatives, has led some scholars to believe that only this House can pronounce on the constitutional amendment, and not also the House of Peoples.[198] Such a conclusion can certainly lead to erroneous considerations for several reasons. In fact, the constitutional provision clearly and incontrovertibly states that the decision on constitutional amendments belongs to the Parliamentary Assembly, which consists of two Chambers.[199] Furthermore, it should be recalled that the constitutional system of Bosnia and Herzegovina provides for the existence of an equal and perfect bicameralism in the exercise of the legislative power of the two Chambers.[200] It logically follows that the constitutional revision procedure adopted by the Parliamentary Assembly also follows the same

groups of the country (it is recalled that the last paragraph of the Preamble of the Constitution of Bosnia and Herzegovina expressly mentions the presence of three 'constituent peoples', as well as the presence of 'Others', as Bosnian-Herzegovinian citizens who do not identify with one of the country's three main ethnic groups). The Chamber is composed of fifteen Delegates, ten of whom are elected by the House of Peoples of the Federation of Bosnia and Herzegovina. More precisely, Article IV, para. 1 (a) stipulates that the election of the Bosniac and Croatian Delegates shall be carried out, respectively, by the members of the House of Peoples of the Federation of Bosnia and Herzegovina who belong to those constituent peoples. Put another way, the two constituent peoples (Bosniacs and Croats) of the Federation elect their respective Delegates. While the remaining five are elected within the National Assembly of the *Republika Srpska*. The House of Representatives, on the other hand, consists of forty-two members, two-thirds of whom are elected within the constituencies of the Federation of Bosnia and Herzegovina, while the remaining third is elected within the territory of *Republika Srpska*. It is worth noting that although the Constitution does not explicitly refer to the ethnic component of the Chamber, the current practice of allocating seats proportionally among the three ethnic groups - guaranteeing fourteen seats for each representative - has been in place since the first elections. On this point see Montanari, L., *The Use of Comparative and International Law by the Constitutional Court of Bosnia and Herzegovina*, in Ferrari, G. F. (eds.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Brill Nijhoff, Leiden, 2020, 711; Kapidžić, D., *The Segmented Party System of Bosnia and Herzegovina*, in *Političke perspective*, Vol. 7, No.1, 2017, 7-23; Mujagić, N., *Political System*, in Mujagić, N., Arnautović; S. (eds.), *Political Pluralism and Internal Part Democracy. National Study for Bosnia and Herzegovina*, CEMI, Podgorica, 2015, 22-34.

[197] Art. IV, para. 3 Constitution of Bosnia and Herzegovina.

[198] This theory remained in the minority and closely linked to the early years of the Constitution. On this point, see the writing by Димчић, М., *Подјела надлежности између институција Босне и Херцеговине и ентитета*, Академија наука и умјетности Републике Српске, банја Лука [Dimčić, M., *Podjela nadležnosti izmedju institucija Bosne i Hercegovine i entiteta*, Akademija nauka I umjetonosti Republike Srpske, Banja Luka], 1999, 142-143.

[199] «The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives», art. IV Constitution of Bosnia and Herzegovina.

[200] Ademović, N., Marko, J., Marković, G. (eds.), *Ustavno parvo*, 173-174; Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 615; Кузмановић, Р., *Уставно право* [Kuzmanović, R., *Ustavno pravo*], 198-199; Trnka, K., *Ustavno pravo*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2016, 201; Pobrić, N., *Ustavno pravo*, Slovo, Mostar, 2000, 231.

principle.[201] To this consideration of a logical-legal nature, one of a "practical" nature can be added, which necessarily follows from the very structure of the Parliamentary Assembly. In fact, the two Chambers, as illustrated above, represent two subjects that are the bearers of sovereignty: the House of Peoples represents the constituent peoples, namely the Bosniacs, Serbs and Croats; and the House of Representatives is the expression of the entire citizenship of Bosnia and Herzegovina.[202] For these reasons, it seems incomprehensible to exclude the House of Peoples from the exercise of the constitutional revision procedure. Moreover, the constitutional provision specifying the qualified majority required in the House of Representatives alone, without explicit mention of the majority required in the House of Peoples, might seem to favor those advocating for the exclusion of the latter from the revision procedure when solely considering the textual data of the constitution. However, such a conclusion would be flawed. It's essential to recognize that the constituents deliberately omitted any reference to the majority required in the House of Peoples, as a qualified majority is already mandated in this chamber for every vote. Thus, this omission does not support the argument for excluding the House of Peoples from the revision process.[203] Consequently, the framers of constitution did not need to specify again, even within Article X, the majority required for the approval of constitutional amendments by the House of Peoples. In fact, for a structural *quorum* to be achieved within the House of Peoples, the presence of at least nine Delegates, including at least three from each of the constituent peoples, is required. It follows from this composition of the Chamber that, implicitly, a two-thirds majority of those present and voting is always required here.[204] It may, therefore, be concluded that the majority required for the approval of a constitutional amendment is aggravated compared to the *quorum* required to adopt an ordinary law.[205]

A further and fundamental aspect, which, however, does not emerge from the wording of the constitutional text, is that of the subjects entitled to propose an amendment to the constitutional text.[206] The absence of a constitutional provision is remedied by the Rules of Procedure of both chambers of the Parliamentary Assembly of Bosnia and Herzegovina.[207] Specifically, these two documents provide that the procedure for amending the constitution may be proposed by individual

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[201] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 60.

[202] *Ibidem*.

[203] Art. IV, para. 1, b) Constitution of Bosnia and Herzegovina; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 60.

[204] Steiner, C., Ademović, N., *Constitution of Bosnia and Herzegovina*, 978.

[205] «All decisions in both chambers shall be by majority of those present and voting», art. IV, para. 3, d) Constitution of Bosnia and Herzegovina. See Ademović, N., Marko, J., Marković, G. (eds.), *Ustavno parvo*, 176.

[206] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 63-64.

[207] Arts. 140-143 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (*OG of BiH*, Nos. 33/06, 41/06, 91/06 and 91/07); and Arts. 131-133 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (*OG of BiH*, Nos. 33/06, 41/06, 91/06 and 91/07).

members of these two bodies, by the chambers themselves, by the Presidency of Bosnia and Herzegovina and, finally, by the Council of Ministers. The Rules of Procedure of the two chambers stipulate that draft amendments must follow some particular procedure of adoption.[208] In fact, there is an exception to the normal procedure for adopting laws in that it is stipulated that draft amendments to the constitution must first be submitted to the Presidency and the Council of Ministers for their comments,[209] if, on the other hand, it is these bodies that put forward a proposal for an amendment to the constitution, there is no need for a prior submission procedure.[210] In both Houses of the Parliamentary Assembly, deliberations on proposed amendments to the constitution must be held in public session.[211] In addition, the Rules of Procedure of both Houses of the Parliamentary Assembly also provide for time constraints compared to the ordinary procedure for the adoption of laws. Indeed, the commencement of the public debate in the Assembly, on the proposed amendment, cannot take place earlier than thirty days from the presentation of the proposal.[212] Put simply, the Constitutional Affairs Committee of both chambers is required to wait for a minimum of thirty days after the presentation of the proposed constitutional amendment before commencing the debate in the Assembly. Furthermore, a mandatory time frame is established for the discussion of the amendment in the plenary chamber. Specifically, no fewer than fifteen days must transpire between the commencement of the bill's debate in the Assembly and the subsequent vote on it.[213]

A further aspect on which Article X of the constitution has been silent, but which has arisen particular attention especially in the legal doctrine, is the possibility - provided for in case of adoption of ordinary laws - for the Delegates of the House of Peoples to veto them if a threat to the "vital interest"[214] of one of the constituent peoples is detected. In fact, the Delegates of the House of Peoples

[208] Art. 141, para. 1 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 132, para. 1 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[209] Art. 141, para. 2 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 132, para. 2 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[210] Art. 141, para. 2 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 132, para. 2 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[211] Art. 142, para. 1 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 133, para. 1 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[212] Art. 142, para. 2 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 133, para. 2 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[213] Art. 142, para. 3 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; art. 133, para. 3 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[214] Art. IV, para. 3, lett. e), Constitution of Bosnia and Herzegovina.

have the possibility to raise a veto when voting on the proposal of a law when they consider that this law or part of it may violate or endanger the identity of one of the three constituent peoples.[215] The "vital interest" refers to the historical, cultural and social characteristics of an ethnic group that make it unique compared to others.[216] Part of the doctrine[217] considers well-founded - even if not expressly sanctioned by the constitutional provision on constitutional amendment - the possibility for the Delegates of the House of People to veto constitutional amendments as well, if they consider that these are in conflict with the "vital interest" of their constituent peoples.[218] This issue, which may appear marginal or merely doctrinaire, is in fact of crucial importance. If the delegates of the House of Peoples were to be allowed to veto proposed constitutional amendments, this would, in effect, place an implicit limit on constitutional revision.[219]

This would have important consequences for the issue of the constitutional identity of Bosnia and Herzegovina and the definition of it. Indeed, in addition to the limits to the revision procedure expressly provided for in the constitution - and referred to in the following sub-section - there would be added not only tacit constraints, but even limits that can be raised according to the sensitivity of each delegate of the House of Peoples. Put another way, this thesis[220] would lead to the conclusion not only that there are implicit limits to constitutional review, but that these limits are available to the delegates of the House of Peoples. This would entail important variations on the theme of constitutional identity, understood as the hard or "super-constitutional" core of the constitution. Insofar as, the definition of what are the supreme values of the constitution could always be subject to a political, rather than legal, assessment by the delegates of the House of Peoples. These latter,

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[215] The procedure of the veto for violation of the vital interest of one of the constituent peoples of Bosnia and Herzegovina, during the adoption of an ordinary law, can be described as follows, using the words of the Constitution: «a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates […]. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of tie Serb Delegates present and voting. When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity» (Art. IV, para. 3 Constitution of Bosnia and Herzegovina).

[216] See Hennessey, M., A., *Šta je vitalni nacionalni interes?*, in Banović, D., Kapo, Dž. (eds.), *Šta je vitalni interes naroda i kome on pripada? Ustavnopravna i politička dimenzija: zbornik radova sa* konferencije, Centre for Political Studies, Sarajevo, 2014, 6-14; Sahadžić, M., *Ustavnopravna anatema: vitalni interes konstitutivnog naroda na državnoj i entitetskoj razini u Bosni i Hercegovini* ad normam, in Mirović, D. (eds.), *Šta je vitalni interes naroda i kome on pripada? Ustavnopravna i politička dimenzija*, Centar za političke studije, Sarajevo, 2014, 14-27. On the subject of the "vital interest" within the House of Peoples, the Constitutional Court has also expressed itself, here we refer to the judgment of Constitutional Court of Bosnia and Herzegovina, U 10/05 of 22 July 2005, paragraphs 16-19.

[217] Pobrić, N., *Ustavno pravo*, 71-72.

[218] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 976-980.

[219] De Vergottini, G., *Diritto costituzionale comparato*, 288.

[220] Pobrić, N., *Ustavno pravo*, 71-72.

hiding behind the vital interest of their constituent people, would have the possibility and the power to scuttle any constitutional revision process.

After outlining the main argument supporting the veto power of House of Peoples' delegates during the constitutional amendment procedure and examining the impact of this position on the definition of constitutional identity, it is necessary to explain why this theory is untenable within the wider framework of the legal system in Bosnia and Herzegovina. Firstly, the constitution does not explicitly provide for the possibility of adopting the veto in defence of the "vital interest" of the constituent peoples within the constitutional amendment procedure.[221] Moreover, as already pointed out above, the constitutional revision procedure differs from the ordinary procedure for the adoption of laws in that it is regulated in different provisions both at the constitutional level[222] and within the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.[223] Secondly, if the intention of the framers of constitution was to give the constituent peoples, who, along with other citizens, hold sovereignty, the ability to challenge violations of their vital interests, it would have been explicitly included in the constitution.[224] Allowing such a power could have endangered the constitutional revision process by introducing political considerations, rather than strictly legal ones, into the decision-making process. This is particularly true in the context of Bosnia and Herzegovina, where political divisions mirror ethnic divisions and could therefore exacerbate existing tensions.[225]

About the necessary majority to be achieved in the House of Peoples, although this point has been examined and resolved above (qualified majority of two-thirds of the Delegates present and voting), a further issue remains to be analyzed. Specifically, the constitution[226] and Rules of Procedure[227] of this chamber require a constitutive *quorum* of at least three Delegates for each of the constituent peoples. This particular composition - especially in the light of the ethnic federalism that characterises the constitutional order of Bosnia and Herzegovina, and the express provision of a

[221] Ademović, N., Marko, J., Marković, G., *Ustavno parvo*, 183-184; Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 628-630; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 62.

[222] Art. IV, para. 1, b) Constitution of Bosnia and Herzegovina; Art. X, para. 1, Constitution of Bosnia and Herzegovina.

[223] Arts. 63-90 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina; Art. 132, para. 1 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

[224] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 62.

[225] Chadler, D., *Bosnia: The Democracy Paradox*, in *Current History*, Vol. 100, No. 644, 2001, 116; Bieber, F., *Bosnia-Herzegovina: Slow Progress towards a Functional State*, in *Southeast European and Black Sea Studies*, Vol. 6, No. 1, 2006, 46-47; Keil, S., *Multinational federalism in Bosnia and Herzegovina,* Ashgate, Farnham, 2013, 98-102.

[226] Art. IV, para. 1, b) Constitution of Bosnia and Herzegovina.

[227] Art. 63, para. 1 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

specific structural *quorum* within the Chamber - has led part of doctrine to conclude that the adoption of constitutional amendments must, in addition to the attainment of a qualified majority of two-thirds of those voting and present, also provide for the presence of the favourable vote of the majority of Delegates for each of the constituent peoples.[228] To put it another way, constitutional amendments presented to the House of Peoples cannot be approved without obtaining a two-thirds qualified majority, which must also include the affirmative vote of a majority of the Delegates representing each constituent people. These conclusions may appear correct and in accordance with the constitutional order of Bosnia and Herzegovina. Adhering to this theory would have a two-fold effect. Firstly, the adoption of constitutional amendments within the House of Peoples would follow a more stringent procedure than that for ordinary laws. As previously noted, this chamber always requires a two-thirds qualified majority in its decisions. However, if this thesis were to be embraced, the majority required for constitutional amendments would become both qualified and special due to the need for a majority vote from the Delegates representing the three constituent peoples. Secondly, such a requirement for a majority count would facilitate greater consensus among the constituent peoples on matters as important as the constitution, especially given the constitution's strict ethno-territorial foundation. Despite its agreeable general intentions, this theory lacks a solid basis, as the constitutional text does not provide normative elements to support it. Firstly, if the constituents had intended to include the majority vote of each ethnic group, in addition to the two-thirds qualified majority, they would have explicitly stated this in the constitution, just as they did when specifying the *quorum* required for constitutional amendments in the House of Representatives.[229] Secondly, the role of the constituent peoples within the House of Peoples is ensured by the mandatory presence of at least three Delegates representing each of them. Since this represents a constitutive *quorum*, the Chamber would be unable to conduct its business if this requirement is not met, thus ensuring the full participation of the constituent peoples, and safeguarding their consensus on critical issues.[230]

To conclude the analysis of the constitutional amendment procedure, it is worth mentioning that the constitution of Bosnia and Herzegovina includes a provision for amending specific provisions of the text under particular circumstances. Article III of the constitution, which deals with the division of competencies between central state and entity institutions, outlines three possible ways in which this article may be amended. Specifically, Paragraph 5(a) of Article III provides for three

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[228] Trnka, K., *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine*, Fondacija Konrad Adenauer, Sarajevo, 2009, 61.

[229] Art. X, para. 1, Constitution of Bosnia and Herzegovina: «[…] including a two- thirds majority of those present and voting in the House of Representatives». Sul puunto si rimanda alle considerazioni di: Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 60; Ademović, N., Marko, J., Marković, G., *Ustavno parvo*, 183-184; Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 628-630.

[230] Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 61.

circumstances in which the competencies of the state may be expanded, thereby allowing for amendments to the constitution itself. The first case is that whereby the institutions of the central state assume competence in those matters previously attributed, in Annexes 5, 6, 7 and 8 of the Dayton Peace Agreement, to organs of an international character set up *ad hoc*.[231] This, in fact, took place between the late 1990s and the early 2000s, so that the matters previously attributed by the Dayton Agreement to bodies of an international and provisional nature subsequently passed to the competence of state institutions. Although, these changes took place through a constitutional law that did not supplement the original text of Article III.[232] The other possibility of implementation of the competences of the central state institutions can occur through an agreement between the institutions of the entities and the central ones, whereby the entities can cede some of their residual competences to the exclusive competence of the state, as happened in the early 2000s in the areas of defence, national security, the judiciary and indirect taxation.[233] In this case too, the expansion of competences took place by means of a constitutional law that, although it did in fact amend the constitutional text, it was not supplemented by an amendment to the text of the document itself. The last mode of expansion of the competences of the central state, which can be described as "extraordinary", occurs when it is necessary to «preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina».[234]

2.6.2. The limits to the constitutional amendment procedure, or the content of constitutional identity

It is now necessary to examine the limits to the constitutional revision process. These delimitations can be interpreted as a clear indication of the principles, values, and norms that underpin the identity of the Bosnia-Herzegovina's constitutional text. As stated in the first chapter, any attempt to amend these values or principles would not amount to an amendment of the existing constitution, but rather the replacement of the constitutional text with a new one, which would define a new system of values. In other words, such a change would not only modify the constitution but also the constitutional identity that has been in place thus far.[235] In essence, any attempt to modify the

[231] Annex 5: Agreement on Arbitration; Annex 6: Agreement on Human Rights; Annex 7: Agreement on Refugees and Displaced Persons; Annex 8: Agreement on the Commission to Preserve National Monuments.

[232] On this point see: Ademović, N., Marko, J., Marković, G., *Ustavno pravo*, 111-117.

[233] Art. III, 5, a), Constitution of Bosnia and Herzegovina.

[234] *Ibidem*.

[235] On this point Pace, A., *Potere costituente*, 116-117; on constituent power see the works of Jelinek, G., *La dottrina generale dello Stato*, SEL, Milano, 1921, 302 ff; Schmitt, C., *Dottrina della Costituzione*, 23 ff; more generally on this topic, see: De Vega, P., *La reforma constitucional y la problematica del poder constituyente*, Tecnos, Madrid, 1985, 28 ff; Modugno, F., *Il problema dei limiti alla revisione costituzionale*, in *Giurisprudenza costituzionale*, 1992, 1687-1689;

fundamental principles and values enshrined in the constitution would result in a change not only to the constitutional text itself but also to the constitutional identity that has been established thus far.[236] This is why the issue of the limits to constitutional amendment procedure is of utmost importance, as any proposed revision must be in line with the underlying constitutional identity of Bosnia and Herzegovina. Many constitutions, particularly those drafted after World War II, incorporate explicit limitations on the amendment of the constitutional text.[237] Some constitutions also feature "eternity clauses", which establish precise and clear limits on constitutional revision to protect certain principles from modification, given their fundamental role in the legal system. In essence, these clauses act as an "identity clause" that preserves the essence of the constitution.[238] Therefore, studying the limits to constitutional revision and the presence of eternity clauses is crucial for understanding the values and principles that form the core of the constitution under review, and hence its identity.[239] Accordingly, this section will examine these concepts within the legal framework of Bosnia and Herzegovina.

Article X of the constitution of Bosnia and Herzegovina outlines the procedure for constitutional revision, but it also sets limits on this process. The provision specifies that «no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution».[240] This closing statement completes a logical circle by outlining the boundaries of constitutional revision, ensuring that the core values and principles of the constitution remain intact.[241] In other words, no proposed constitutional amendment can seek to remove or reduce any of the rights and freedoms guaranteed in Article II of the constitution. This effectively establishes an "eternity clause" in Bosnia and Herzegovina's constitutional system, which safeguards fundamental rights and freedoms as the supreme values and principles of the system,[242] and which, as such, can never be subject to the constitutional revision procedure. Moreover, a closer reading of Article II shows that amendments cannot even affect the First Annex to the constitution, which contains the international agreements on rights and freedoms that apply in the country's legal

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Tesauro, A., *Sui principi e sulle norme del diritto costituzionale*, in *Scritti in onore di G. M. De Francesco*, Vol. II, Giuffrè, Milano, 1957, 699-700; Gambino, S., *Sui limiti alla revisione della costituzione nell'ordinamento italiano*, in *Revista de Direitos e Garantias Fundamentais*, No. 8, 2010, 56-114.

[236] Jacobsohn, G. J., *Constitutional Identity*, in *The Review of Politics*, Vol. 68, No. 3, 2006, 367.

[237] Suffice it to recall here, by way of example and not limitation, Article 139 of the Constitution of the Italian Republic; Article 79(3) of the German *Grundgesetz*, Articles 89 and 7 of the French Constitution of 1958, Article 290 of the Constitution of Portugal, Article 110(1) of the Greek Constitution.

[238] Anzon Demmig, A., *Principio democratico e controllo di costituzionalità sull'integrazione europea nella "sentenza Lissabon" del Tribunale costituzionale federale tedesco*, in *Giurisprudenza costituzionale,* 2009, 7.

[239] *Ibidem*.

[240] Art. X, para. 2 Constitution of Bosnia and Herzegovina.

[241] Art. II, Constitution of Bosnia and Herzegovina.

[242] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 972.

system. In the first paragraph of Article II of the constitution it is stated that «Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms»,[243] which are enshrined in the First Annex.[244] It is possible to amend Article II of the constitution as well as to expand the list contained in Annex I to the constitution when rights and freedoms are intended to be extended and strengthened, but never diminished or eliminated.[245] Confirming the thesis that the rights and freedoms enshrined explicitly in Article II and, indirectly, within the First Annex to the constitution represent the essence of the constitutional identity of Bosnia and Herzegovina, there is a further clue. Indeed, Article X, precisely in its second paragraph, stipulates that the entire paragraph of the article in question cannot be subject to any constitutional amendment. The doctrine calls this second eternity clause a "self-defence clause".[246] In fact, the provision defends itself here against the possibility of amendment, to expressly prevent a possible change in the content of the eternity clause through a revision of it.[247]

The provision in question contains two eternity clauses within the same paragraph. The first clause prohibits the amendment of the constitution's section on rights and freedoms. The second clause, by armoring it, prohibits the amendment of the paragraph containing the limitation on constitutional revision. However, it is implicit that the constitutional revision procedure set out in the first paragraph of Article X can be amended. Therefore, the constitution only protects the text of the second paragraph of Article X and, by extension, Article II, which the paragraph exempts from any amendment. Thus, even the procedural limits to revision provided for in the first paragraph of Article X can be amended. Consequently, within the constitutional order of Bosnia and Herzegovina, not even the principle of procedural aggravation is exempt from amendment. Potentially, the entire constitutional text can be amended, except for the second paragraph of Article X,[248] the First Annex to the constitution, and the preamble to the constitution, as established in the case law of the Constitutional Court.

In conclusion, the two "eternity clauses" in the second paragraph of Article X of the constitution of Bosnia and Herzegovina establish that rights and freedoms are the "unchangeable core"[249] of the constitutional text, the load-bearing pillars that support it. As Jacobsohn[250] has argued, limits to constitutional revision, especially those established by an "eternity clause", play a crucial

[243] Art. II, Constitution of Bosnia and Herzegovina.

[244] Ademović, N., Marko, J., Marković, G., *Ustavno parvo*, 211-212; Марковић, Г., *Уставни лавиринт* [Marković, G., *Ustavni lavirint*], 64.

[245] Steiner, C., Ademović, N. (eds.), *Constitution of Bosnia and Herzegovina*, 973.

[246] Ademović, N., Marko, J., Marković, G., *Ustavno pravo*, 15; Steiner, C., Ademović, N. (eds.), *Constitution*, 895.

[247] Ademović, N., Marko, J., Marković, G. (eds.), *Ustavno pravo*, 15.

[248] See note No. 221.

[249] Jacobsohn, G. J., *Constitutional Identity*, 136.

[250] *Ibidem*.

role in defining the constitutional identity.[251] Other scholars contend that an "eternity clause" serves as a starting point for constructing a constitutional identity. Above all, the presence of an "eternity clause" in a constitutional text signifies a provision that safeguards the fundamental principles of a state during the exercise of constituent power. [252] According to Ulrich Preuss, "eternity clauses" shed light on the fundamental issues that constitute the founding act and define the essential elements of the foundation myth. In practical terms, it is a legal tool that acknowledges specific constitutional principles, values, or provisions as unamendable and crucial in defining the collective identity of politics, the "we the people".[253] Changing these "eternal" normative clauses would result in the collapse of the collective self and the identity embodied in the constitution.[254] This is why an "eternity clause" can be said to be a legal instrument that allows «society to preserve a particular value in perpetuity and limits the power of government in order to perpetuate that value and thus maintain the political system».[255] Furthermore, the provisions of the constitution that are defined as unchangeable by an eternity clause «constitute the foundation and source of guarantee of constitutional identity».[256] Or again, as von Bogdandy and Schill argue, the mere fact that the eternity clause protects certain values enshrined in the constitution rather than others can be understood as evidence of their importance to a state's constitutional identity.[257] Added to this, moreover, is the conclusion reached by Preuss that an alteration of the "eternity clause" or its content would constitute a change - or even the destruction - of the constitutional identity as established by the constitution.[258] Transferring these general considerations to the legal context of Bosnia and Herzegovina, it can be concluded that the rights and freedoms guaranteed by the constitution in Article II and the First Annex, due to their immutability through any kind of constitutional revision procedure, represent the core of the constitutional identity of this order. Indeed, the presence of an eternity clause, which provides for the non-modifiability of the protection of fundamental freedoms and rights, demonstrates how precisely these constitute the core elements of its constitutional identity.

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[251] Kosař, D., Vyhnánek, L., *Constitutional Identity in the Czech Republic: a new twist om the old fashioned idea?*, in Calliess, C., Van der Schyff, G. (eds.), *Constitutional Identity in Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge, 2019, 110.

[252] Witkowski, Z., Serowaniec, M., *Eternity clause. A Realistic or Merely an Illusory way of Protecting the State's Constitutional Identity?*, in *Studi polacco-italiani di Torún XVII*, 2021, 175.

[253] Preuss, U. K., *The implications of "Eternity Clauses": the German Experience,* in *Israel Law Review*, No. 4, 2011, 445.

[254] Žalimus, D., *Eternity Clauses: a Safeguard of Democratic Order and Constitutional Identity*, 1; Witkowski, Z., Serowaniec, M., *Eternity clause*, 175; Calamo Specchia, M., *La Costituzione tra potere costituente e mutamenti costituzionali*, in *Rivista AIC*, No. 1, 2020.

[255] Witkowski, Z., Serowaniec, M., *Eternity clause*, 175.

[256] *Ibidem*.

[257] Von Bogdandy, A., Schill, S., *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, in *Common Market Law Review*, No. 48, 2011, 1432.

[258] Preuss, U. K., *The implications of "Eternity Clauses"*, 445.

2.7. THE ROLE OF JUDICIARY IN PROTECTING CONSTITUTIONAL IDENTITY

The Courts of Bosnia and Herzegovina, in general, and the Constitutional Court, in particular, have never expressly adopted the lexicon of constitutional identity in their decisions.[259] This fact, of course, makes it more difficult to clearly and unambiguously identify this concept in the legal system in question. Moreover, this silence of judges could be read as testimony to a lack of interest in the subject, if not, indeed, to the absence of a constitutional identity proper to Bosnia and Herzegovina. In fact, despite the silence of constitutional jurisprudence, from the study of the organization and competences of the apex Court it is possible to understand that not only there is a constitutional identity of the Bosnian-Herzegovinian legal system, but that this is deeply connected to the rights and freedoms on which the entire legal construction of the country rests.[260] In fact, the centrality that human rights assume within the Bosnian-Herzegovinian legal system is confirmed precisely by the mechanisms of judicial protection provided both by the constitution and by the General Framework Agreement for Peace in general.[261] In other words, if a reading of the text of the constitution of Bosnia and Herzegovina and its First Annex reveals that fundamental rights and freedoms play a primary role among the values of this legal order and, moreover, that they are explicitly protected from any revision of the constitutional text, it is possible to conclude that the hard core of the identity of this constitution is contained in these very rights and freedoms. This conclusion - although not directly supported by constitutional jurisprudence, which has not explicitly adopted the lexicon of identity - seems, on the other hand, to be supported by the legal means of protection of these rights and freedoms by the Constitutional Court and other national courts. This means that the Constitutional Court and, previously, the Human Rights Chamber - as will be seen below - have had to protect the rights and

[259] Particularly, regarding the decisions of the Constitutional Court, an analysis carried out within the jurisprudential collection of this body has never, to date, revealed an explicit reference to the expression "constitutional identity".

[260] It is recalled, in terms of sources, that the constitutional order of Bosnia and Herzegovina enshrines the protection of rights and freedoms in Article II, paragraph 3, which contains a list of rights. Furthermore, within the same Article, in the second paragraph, it is stipulated that the rights and freedoms provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as its Protocols, «are directly applicable in Bosnia and Herzegovina» and «have priority over all other laws». Also in Article II of the Constitution, in the fourth paragraph, it is stipulated that «[t]he enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».

[261] More generally, the Dayton Peace Agreement expressly states that respect for human rights - along with other values - constitutes the fundamental element for building a lasting peace. A confirmation in this direction can be found in the text of the General Framework Agreement for Peace itself, specifically in Article VII, which states that «[r]icognizing that respect for human rights and the protection of refugees and displaced persons are of vital importance to the achievement of a lasting peace, the Parties agree to and fully comply with the provisions relating to human rights set out in Chapter One of the Agreement in Annex 6, as well as the provisions relating to refugees and displaced persons set out in Chapter One of the Agreement in Annex 7».

freedoms enshrined in the Constitution by virtue of their competences. These competences seem to testify that the drafters specifically wanted to protect a certain part of the Constitution, probably the hard core that can be defined as constitutional identity. In the following pages, an analysis of this mechanism of protection of rights and freedoms will be presented as a demonstration of their importance in the legal system and as a demonstration of the content of the constitutional identity of Bosnia and Herzegovina.

The system of judicial guarantee of rights and freedoms was characterized by dual protection. In fact, until January 2004, citizens of Bosnia and Herzegovina, if they consider that their rights had been violated or that they had been subjected to discriminatory treatment, could turn either to the Constitutional Court or to the Human Rights Chamber. Regarding the latter body, the constitution in article II, paragraph 1 states that «Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina».[262] The Human Rights Commission was a complex body composed of the Office of the *Ombudsman* and the Human Rights Chamber, which found its discipline in Annex VI to the General Framework Agreement for Peace.[263] Specifically, the Human Rights Commission was a body created to provide maximum protection of rights and freedoms. To achieve this end, its constituent bodies were called upon to judge «alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto»[264] or, again, «alleged or apparent discrimination on any ground [...] where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ».[265] The Office of the *Ombudsman*,[266] upon receiving notice of a complaint of violation of rights and freedoms by the

[262] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

[263] Annex VI to the General Framework Agreement for Peace, entitled Agreement on Human Rights, contains the Parties' commitment to «guarantee to all persons within their [Bosnia and Herzegovina's] jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and in the other international agreements listed in the Appendix to this Annex» (Art. I, para.1). In order to uphold this commitment, «the Parties shall establish a Human Rights Commission [...]. The Commission shall consist of two parts: the Office of the Ombudsman and the Human Rights Chamber» (Art. II, para. 1).

[264] Art. II, para. 2, lett. a), Annex VI, Agreement on Human Rights.

[265] *Ivi*, Art. II, para. 2, lett. b).

[266] «The Ombudsman shall be appointed for a non-renewable term of five years by the Chairman-in-Office of the Organization for Security and Cooperation in Europe (OSCE), after consultation with the Parties. He or she shall be independently responsible for choosing his or her own staff» (Art. IV, para. 2, Annex VI, Agreement on Human Rights). On the other hand, about the subjective characteristics of the members of the Office, it is stipulated that they «must be of recognized high moral standing and have competence in the field of international human rights» (Art. IV, para. 3, Annex VI, Agreement on Human Rights). Furthermore, the Office of the Ombudsman had to be characterised by impartiality

Commission, was tasked with investigating and gathering the necessary information for judicial proceedings.[267] In fact, it can be said that the *Ombudsman* performed the role of the investigating judge of the case, who then, once the investigation was completed, passed the case to the Human Rights Chamber, as the judicial body for the protection of rights and freedoms. This Chamber was a body composed of fourteen judges, six of whom were elected by the institutions of Bosnia and Herzegovina (four by the Federation of Bosnia and Herzegovina and two by *Republika Srpska*), while the remaining eight were appointed by the Committee of Ministers of the Council of Europe.[268] The Chamber was activated on the request of «the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights […]».[269] The Chamber exercised the utmost discretion in both accepting applications[270] and prioritising

and independence, as «shall be an independent agency. In carrying out its mandate, no person or organ of the Parties may interfere with its functions» (Art. IV, para. 4, Annex VI, Agreement on Human Rights).

[267] With regard to the powers of the Office of the Ombudsman, please refer to the text of Article V of Annex VI, Agreement on Human Rights, which states that «1. Allegations of violations of human rights received by the Commission shall generally be directed to the Office of the Ombudsman, except where an applicant specifies the Chamber. 2. The Ombudsman may investigate, either on his or her own initiative or in response to an allegation by any Party or person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, alleged or apparent violations of human rights within the scope of paragraph 2 of Article II. The Parties undertake not to hinder in any way the effective exercise of this right. 3. The Ombudsman shall determine which allegations warrant investigation and in what priority, giving particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds. 4. The Ombudsman shall issue findings and conclusions promptly after concluding an investigation. A Party identified as violating human rights shall, within a specified period, explain in writing how it will comply with the conclusions. 5. Where an allegation is received which is within the jurisdiction of the Human Rights Chamber, the Ombudsman may refer the allegation to the Chamber at any stage. 6. The Ombudsman may also present special reports at any time to any competent government organ or official. Those receiving such reports shall reply within a time limit specified by the Ombudsman, including specific responses to any conclusions offered by the Ombudsman. 7. The Ombudsman shall publish a report, which, in the event that a person or entity does not comply with his or her conclusions and recommendations, will be forwarded to the High Representative described in Annex 10 to the General Framework Agreement while such office exists, as well as referred for further action to the Presidency of the appropriate Party. The Ombudsman may also initiate proceedings before the Human Rights Chamber based on such Report. The Ombudsman may also intervene in any proceedings before the Chamber».

[268] Art. VII, paras. 1 and 2, Annex VI, Agreement on Human Rights. Furthermore, it was specified that the judges elected by the Council of Europe should not be citizens of Bosnia and Herzegovina or a neighboring state. With regard to the subjective characteristics of the judges and the length of their term of office, Article VII, paragraph 3, stipulated that «[a]ll members of the Chamber shall possess the qualifications required for appointment to high judicial office or be jurists of recognized competence. The members of the Chamber shall be appointed for a term of five years and may be reappointed».

[269] Art. VII, para. 1, Annex VI, Agreement on Human Rights.

[270] About the procedure of the trial before the House, reference is made to the text of Article X of the Annex VI, Agreement on Human Rights, which states that «1. The Chamber shall develop fair and effective procedures for the adjudication of applications. Such procedures shall provide for appropriate written pleadings and, on the decision of the Chamber, a hearing for oral argument or the presentation of evidence. The Chamber shall have the power to order provisional measures, to appoint experts, and to compel the production of witnesses and evidence. 2. The Chamber shall

cases,[271] guided by the principles set out in the European Convention on Human Rights (ECHR), the International Covenants as detailed in the First Annex to the Constitution and the rights and freedoms contained in Article II.[272] Once the proceedings before the Chamber are concluded, the decision was final and binding[273] which, in the event of an actual violation of rights and freedoms, may remedy them with various measures: «including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures».[274]

The role of the Human Rights Chamber in the defense of human rights was crucial, especially in the period immediately following the signing of the General Framework Agreement, namely when the Constitutional Court had not yet entered into full operation and there were still many organizational problems. The drafters of the peace agreement, aware of such a situation, had in fact purposely wanted to create an independent Court largely supported by international judges to overcome organisational problems and to ensure the protection of rights and not just enunciate principles.[275] However, with the stabilization of the political situation in the country and the strengthening of the institutions created by the 1995 constitution, the role of the Human Rights

normally sit in panels of seven, composed of two members from the Federation, one from the *Republika Srpska*, and four who are not citizens of Bosnia and Herzegovina or any neighboring state. When an application is decided by a panel, the full Chamber may decide, upon motion of a party to the case or the Ombudsman, to review the decision; such review may include the taking of additional evidence where the Chamber so decides. References in this Annex to the Chamber shall include, as appropriate, the Panel, except that the power to develop general rules, regulations and procedures is vested only in the Chamber as a whole. 3. Except in exceptional circumstances in accordance with its rules, hearings of the Chamber shall be held in public. 4. Applicants may be represented in proceedings by attorneys or other representatives of their choice but shall also be personally present unless excused by the Chamber on account of hardship, impossibility, or other good cause. 5. The Parties undertake to provide all relevant, information to, and to cooperate fully with, the Chamber».

[271] Specifically, it is stated that cases are handled on the basis of certain criteria, such as: «(a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted and that the application has been filed with the Commission within six months from such date on which the final decision was taken. (b) The Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure or international investigation or settlement. (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition. (d) The Chamber may reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement. (e) In principle, the Chamber shall endeavor to accept and to give particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds. (f) Applications which entail requests for provisional measures shall be reviewed as a matter of priority in order to determine (1) whether they should be accepted and, if so (2) whether high priority for the scheduling of proceedings on the provisional measures request is warranted» (Art. VII, para. 2, Annex VI, Agreement on Human Rights).

[272] On this point, please refer to the considerations of Masenkó-Mavi, V., *The Dayton Peace Agreement and Human Rights in Bosnia and Herzegovina*, in *Acta Juridica Hungarica*, 2001, 53 ff.

[273] Art. XI, para. 3, Annex VI, Agreement on Human Rights.

[274] Art. XI, para. 1, lett. b), Annex VI, Agreement on Human Rights.

[275] See Aybay, R., *Appendix I: A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina*, in *Netherland Institute of Human Rights*, Vol. 15, No. 4, 1997, 529-545; Novak, M., *Introduction*, in *Human Rights Chamber for Bosnia and Herzegovina, Digest. Decision on Admissibility and Merits 1996-2002*, Sarajevo, 2003, XI.

Commission was slowly taken over by the Constitutional Court. In fact, already Annex VI to the General Framework Agreement provided for the possibility of transferring the competences of the Commission to the state institutions of Bosnia and Herzegovina after the first five years from the entry into force of the Agreement.[276] In reality, the agreement for the termination of the Commission's mandate was only reached in September 2003, after the extension of its mandate had been sanctioned in 2000.[277] With this agreement, the parties decided on the abolition of the body as of January 2004 and the transfer of its competences to the Constitutional Court. Thus, today, the Constitutional Court has remained the only national body responsible for the protection of rights and freedoms.

Article VI of the constitution of Bosnia and Herzegovina regulates the Constitutional Court. Among the competences of this body there is its jurisdiction over appeals against the decisions of any other Court in the country on constitutional issues. Specifically, it deals with human rights issues, which are the main grounds for appealing the decisions of other courts.[278] In order to have access to the Constitutional Court's appellate jurisdiction, domestic judicial remedies must have been exhausted.[279] When judging the actual violation of human rights and freedoms,[280] the Courts use not only the catalogue of rights enshrined in Article II of the constitution, but also the Convention for the Protection of Human Rights and Fundamental Freedoms and the catalogue of rights from the First Annex to the constitution as a parameter of constitutional legitimacy, as Bosnia and Herzegovina

[276] This point is governed by Article XIV of Annex VI, Agreement on Human Rights, which states that «[f]ive years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above».

[277] *Sl. Glasnik BiH*, No. 38/07. Montanari, L., *La tutela dei diritti in Bosnia ed Erzegovina: il complesso rapporto tra Camera dei diritti umani, Corte costituzionale e Corte di Strasburgo*, in Ferrari, G. F. (eds.), *Corti nazionali e Corti europee*, Edizioni Scientifiche Italiane, Napoli, 2006, 164-165.

[278] It must immediately be emphasised that this is a review that does not concern the merits of the decision appealed against, since the Constitutional Court's judgment on appeal is limited to questions of constitutional legitimacy. This point was amply clarified in decision U-63/03 of 27 February 2004, in which the Court specified its role as appellate court, stating that «the Court is not called upon to review the establishment of facts or the interpretation and application of ordinary laws by the lower courts».

[279] There is also a precise deadline for filing an appeal, i.e. within 60 days from the last decision of the ordinary courts.

[280] The composition of the Constitutional Court is regulated in Article VI(1) of the Constitution, which states that «[t]he Constitutional Court of Bosnia and Herzegovina shall have nine members. a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the *Republika Srpska*. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency. b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state. c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70 unless, they resign or are removed for cause by consensus of the other judges. d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights».

«shall ensure the highest level of internationally recognised human rights and fundamental freedoms».[281] Until January 2004, the citizens of Bosnia and Herzegovina could turn alternatively to both the Human Rights Chamber and the Constitutional Court if they considered to had suffered discrimination or in case of violation of their rights or freedoms enshrined in the constitution or, more generally, in the General Framework Agreement for Peace. However, the existence of two courts, in the period from 1996 to 2004, led to a doubt about the jurisdiction of the two courts. Indeed, there was a problem of coordination between their activities, as they covered the same subjective legal positions. Hence, a doubt was raised as to which court was the court of last resort in the protection of human rights. This doubt was then resolved as a matter of practice by the courts themselves, which, with their self-restraint, proclaimed their lack of jurisdiction to review their respective decisions: hence there were two paths of judicial protection of rights and freedoms.[282] Obviously, this question has no longer found reason to exist since the conclusion of the work of the Human Rights Commission in 2004, namely since the Constitutional Court has been the only national court competent to adjudicate disputes on human rights and freedoms.

Returning to what was stated at the beginning of this paragraph, although it is not possible to find in the case law of the Constitutional Court an express reference to the theme of constitutional identity and its content, it is nevertheless possible to define its contours on the basis of other aspects. Specifically, the importance that human rights and freedoms assume within the country's constitutional order can be understood by analysing the system of jurisdictional guarantees accorded to them in the constitution and the other annexes of the General Framework Agreement for Peace (Annex VI). In fact, the protection of human rights was ensured (until 2004), primarily (but not exclusively), by the Human Rights Commission, which in turn was divided into the Office of the Ombudsman and the Human Rights Chamber, a judicial body proposed for the protection of rights.[283] Today, this role is fully filled by the Constitutional Court, which «shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina».[284] This means that the Constitutional Court, at the national level, is the highest court for the protection of rights and freedoms, the last resort for citizens consider that their rights have been violated or, in some way, diminished. The importance of this body in the protection of

[281] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

[282] Specifically, in decision U-7/11 of 26 February 1999, the Constitutional Court ruled that it had no jurisdiction to review decisions reached by the Human Rights Chamber on appeal. Similarly, in decision CH/00/441 of 6 June 2000, the Human Rights Chamber declared that it could not review the decisions on human rights and freedoms reached by the Constitutional Court.

[283] See Živanović, M. (eds.), *Ljudska prava u Bosni i Hercegovini. Pravo, praksa i međunarodni standardi ljudskih prava*, Centar za ljudska prava Univerziteta u Sarajevu, Sarajevo, 2014, 48-81.

[284] Art. VI, para. 3, lett. b), Constitution of Bosnia and Herzegovina.

rights best illustrates why - despite its silence on the point - human rights and freedoms constitute the very essence of the constitutional identity of the BiH legal system. Indeed, not only was the reconstruction of lasting peace based on them, but the constitution itself places the protection of rights and freedoms at its core as the only guarantee for a peaceful society that can coexist despite its differences. It is precisely the task of the Constitutional Court, as the body entrusted with the protection of the constitution,[285] to defend this identity by providing an instrument for the judicial protection of these rights and freedoms. For this reason, it can be concluded that the very competence of the Constitutional Court testifies to the importance of rights and freedoms in identifying the content of the constitutional identity of Bosnia and Herzegovina.

2.8. European Court of Human Rights and constitutional identity in Bosnia and Herzegovina

In the development of this chapter, the peculiar relationship that the constitutional order of Bosnia and Herzegovina has intertwined with the European Convention for the Protection of Human Rights and Fundamental Freedoms has emerged several times. It is precisely this encounter between the two legal systems that constitutes further - and perhaps even the most significant - testimony to the fact that it is precisely the rights and freedoms, which this instrument protects, that constitute the main essence of Bosnia and Herzegovina's constitutional identity. Indeed, within the constitutional text, it is not only stated that the country «shall ensure the highest level of internationally recognised human rights and fundamental freedoms»,[286] but also that «[t]he rights, and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly in Bosnia and Herzegovina [...]».[287] This means that the rights enshrined in the ECHR and its Protocols do not require any "transposition act" in order to develop their effects in the legal system of Bosnia and Herzegovina, but are thus directly applicable within the constitutional system of the country. This made it possible to apply the content of the ECHR in the country even though it had not yet become a member of the Council of Europe, thus ensuring maximum protection of rights and freedoms.[288] To this first consideration it must be added that the ECHR, with respect to the system of sources, «[...] shall have priority over all other law».[289]

[285] Montanari, L., *The Use of Comparative and International Law*, 713-718.

[286] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

[287] *Ivi*, art. II, para. 2.

[288] Bosnia and Herzegovina became a member of the Council of Europe with Resolution No. 234 of the Parliamentary Assembly of the Council of Europe in 2002 and on 12 July of the same year the country ratified the ECHR.

[289] Art. II, para. 2, Constitution of Bosnia and Herzegovina.

This fact led, at first moment, part of the doctrine to consider that the Convention had a higher value than the constitutional Charter.[290] Inasmuch, the expression «all other law» was interpreted as "legal system", understood in its entirety, so that the constitution itself should also be subject to it.[291] However, the Constitutional Court resolved this issue by ruling that the ECHR has a higher value than ordinary law, but not superordinate to the constitution, as they are on the same level. In fact, in a first case on this point, concerning the conformity of certain provisions of the constitution on legislative power with the ECHR, the Constitutional Court judges ruled that «where [...] an examination of the conformity of certain provisions of the constitution of Bosnia and Herzegovina with the European Convention is required, [...] the rights [contained in the ECHR] cannot have a higher status than the [constitution]», because «the European Convention, as an international document, entered into force by virtue of the Constitution of Bosnia and Herzegovina».[292] Subsequently, the judges of the Court again upheld this decision in a new ruling, in which they recognised that the «provisions of international treaties, primarily the European Convention, cannot hold a higher status in human rights matters than the constitution of Bosnia and Herzegovina (decision U-5/04 of 27 January 2006)».[293] In 2015, then, the judges of the Court established their competence to judge the conformity of the constitutions of the two entities (Federation of Bosnia and Herzegovina and *Republika Srpska*) not only with respect to the provisions of the constitution, but also with respect to the ECHR, because «in interpreting the term Constitution and the obligation of the Constitutional Court to uphold it, account must be taken of the [central] position that the rights referred to in the European Convention and its protocols occupy in the constitutional order of the State».[294]

Moreover, when the judges of the Constitutional Court are called upon to resolve a question of constitutional legitimacy, not only are they obliged to use the provisions of the Constitution as a yardstick, but the ECHR itself is a tool to be used in resolving the judgment. In fact, as mentioned above, the highest level of protection of human rights and fundamental freedoms, which are internationally recognised, is guaranteed in the country, and for this reason the European Convention

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[290] See Vehabović, F., *Odnos ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih Sloboda*, ACIPS, Sarajevo, 2006, 94; Szasz, P. C., *The protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, in *American Journal of International Law*, Vol. 90, 1996, 301; Sloan, J., *The Dayton Peace Agreement: Human Rights Guarantees and their Implementation*, in *European Journal of International Law*, No. 7, 1996, 207-225.

[291] This interpretation was supported within the text of the constitution itself. Indeed, in Article III(3)(b), the Constitution states that «the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities». In this case, the noun 'law' finds a logical interpretation as the 'order' as a whole and not as the primary source of the order, i.e., the law. In fact, the general principles of international law form an integral part of the constitutional order of Bosnia and Herzegovina.

[292] Constitutional Court of Bosnia and Herzegovina, Judgment U-5/04, 27 January 2006, para. 14.

[293] Constitutional Court of Bosnia and Herzegovina, Judgment U-13/05, 26 May 2006, para. 10.

[294] Constitutional Court of Bosnia and Herzegovina, Judgment U-14/12, 26 March 2015, para. 49.

constitutes the essential parameter of reference for questions relating to the violation of rights.[295] This observation is further confirmed by the discipline of incidental appeals to the Constitutional Court, where the constitution itself expressly provides for the verification of the compatibility of legislation also with respect to the ECHR and its Protocols.[296] These observations show how the constitution exercises a fundamental function of "opening"[297] the legal system of Bosnia and Herzegovina to the provisions of the ECHR and, as can be seen from Annex I to the constitution, also to international rights more generally. In other words, through the constitution the legal system of Bosnia and Herzegovina has been made "permeable" to the rights and freedoms enshrined both within the European Convention and within the other international conventions, which apply to it. Consequently, the openness to the influences coming from the convention system and, more generally, to the clauses of international law has entailed an "enrichment" of the system of sources of domestic law; in fact, the latter becomes an integral element of the obligation to read the domestic legal system in line with convention law.[298] It is interesting to emphasise, however, that there is a significant difference between the European Convention and the other international instruments for the protection of rights and freedoms. In fact, the ECHR not only finds direct application within the Bosnian and Herzegovinian legal system and occupies, within the system of sources, a position equal to the constitution and superior to the ordinary laws of the country, but it is also an instrument used as a reference parameter for the judgement of constitutional legitimacy, on a par with the constitution itself. This aspect places the ECHR in a central position within the constitutional order with respect to the other international instruments for the protection of rights.

The central role that the European Convention plays within the legal order of Bosnia and Herzegovina also demonstrates the importance of human rights and freedoms there. Indeed, with the direct application of this document and the fact that it constitutes a parameter of interpretation of every decision of the Constitutional Court, citizens are granted the highest protection in the area of

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[295] See Pirola, F., *L'adesione della Bosnia-Erzegovina alla Cedu sotto osservazione: aspetti problematici e spunti di riflessione nel caso Pudarić*, in *Rivista di Diritti Comparati*, No. 2, 2021, 184-197; Vehabović, F., *Bosnia and Herzegovina. Impact of the case law of the European Court of Human Rights on postconflict society of Bosnia and Herzegovina*, in Motoc, I., Ziemele, I. (eds.), *The impact of the EcHR on the democratic change in Central and Eastern Europe. Judicial Perspectives*, Cambridge University Press, Cambridge, 2016, 80-109.

[296] Article VI of the Constitution of Bosnia and Herzegovina, in paragraph 3, listing the competences of the Constitutional Court, states that «[t]he Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision».

[297] Belov, M., *The Opening of the Constitutional Order of Democracy in Transition towards Supernational Constitutionalism: the Bulgarian case*, in Fekete, B., Gardos-Orosz, F. (eds.), *Central and Eastern European Socio-Political and Legal Transition Revisited*, Peter Lang, Frankfurt, 2017, 119.

[298] Vehabović, F., *Bosnia and Herzegovina*, 90.

rights. Moreover, it shows how the special protection of rights and freedoms derives precisely from further confirmation of the role they play within the legal system, so much so that it can be concluded that it is precisely these that constitute the main essence of the constitutional identity of Bosnia and Herzegovina. Indeed, the protection of the human rights is placed at the core of the entire constitutional construction of the country. This is evidenced by the fact that they find special jurisdictional protection, first, through both the Human Rights Chamber and the Constitutional Court, and now, at the national level, only within the latter. Moreover, these rights not only find their source within the constitution, but also at the international level, as is the case of the First Annex to the Constitution and, in particular, with the European Convention, which finds direct application within the legal system and is used as a parameter for the judgement of constitutionality like any other provision of the constitution. Therefore, the ECHR constitutes a unique instrument for the protection of rights and for the democratic and inclusive development of the country's legal system.

2.9. Are "Constituent peoples" the other side of the Constitutional Identity? Constitutional and ECtHR jurisprudence compared

The work done so far has attempted to demonstrate, on the one hand, the existence of a constitutional identity specific to the constitutional order of Bosnia and Herzegovina; on the other hand, aims to trace the path that defines the content of this identity, which is result of heterodirected constitutional process. From the analysis of the constitutional text, the study of the limits to the constitutional revision process and the analysis of the competences of the Constitutional Court - as the apex jurisprudence has never directly expressed on the issue of identity - it was concluded that the constitutional identity of Bosnia and Herzegovina is deeply and clearly rooted in the protection of human rights and fundamental freedoms. Indeed, the framers placed the highest protection of rights and freedoms at the top of the entire system, as its basis and essence. In this way, it was possible to achieve a minimum level of constitutional values and principles that could be shared by the population beyond the differences and divisions created by the war. Furthermore, it was possible to find a common language on which to (re)build the constitutional order and social fabric. However, anyone who has tackled the study of the legal order of Bosnia and Herzegovina over the past twenty years has certainly come across the topic of "constituent peoples", especially regarding their position within the institutional system that resulted from the adoption of the Dayton constitution.[299] Indeed, the role of the "constituent peoples", especially regarding the exercise of electoral rights, has found particular

[299] For a general overview of the doctrine on this point, see Begić, Z., Delić, Z., *Constituency of peoples in the constitutional system of Bosnia and Herzegovina: Chasing fair solutions*, in *International Journal of Constitutional Law*, Vol. 11, No. 2, 2013, 447-465.

attention in the studies of public law doctrine. For this reason, but especially because of the position these “peoples” enjoy within the state system and state institutions, it seems legitimate to ask whether this protection accorded to them also constitutes an element of the constitutional identity of Bosnia and Herzegovina. In fact, the legitimacy of this question derives from the fact that the entire institutional apparatus is based on the equal representation of this group and the entire system seems to rest on this principle (often in precarious balance). In other words, considering that state institutions - whether by explicit constitutional provision or established tradition - are exclusively made up of the "constituent peoples" in a proportional manner, it is worth exploring whether, beyond safeguarding fundamental rights and freedoms, the constituents also aimed to incorporate the equal representation of these ethnic groups as an additional aspect of Bosnia and Herzegovina's constitutional identity. It should be clarified at the outset of this paragraph that, based on the text of the constitution, its interpretation by the Constitutional Court, and the judgments of the European Court of Human Rights (ECtHR), the role, while significant, designated for the “constituent peoples” cannot be regarded as a component of Bosnia and Herzegovina's constitutional identity. While this conclusion may appear to diverge from the emphasis that legal doctrine has placed on this matter, a closer examination of positive law and the interactions between the Constitutional Court of Bosnia and Herzegovina and the European Court of Human Rights solidly supports the above assertion. These two Courts have grappled with the role of “constituent peoples”, yet fundamentally arrived at the same rationale. In order to substantiate this assertion, which we have deliberately chosen to introduce in advance, we will initially proceed scrutinizing the constitutional text, followed by an exploration of the jurisprudence of both Courts.

2.9.1. The “constituent peoples” and “Others” in the text of the Constitution

The central role that the “constituent peoples” play within the constitutional order of Bosnia and Herzegovina has suggested that these ethnic groups not only enjoy a special *status*, but that this also translates into an integral part of the country's constitutional identity. Indeed, the entire institutional apparatus and the very balance that allowed peace to be achieved seems to rest on their equal representation. Starting from the analysis of the constitutional text, the expression “constituent peoples” is encountered for the first and only time within the last paragraph of the Preamble. More precisely, it is stated that «Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizen of Bosnia and Herzegovina hereby determine [...] the Constitution [...]».[300] With this provision, the constituents divided the population of Bosnia and Herzegovina into two categories: on

[300] Preamble of Constitution of Bosnia and Herzegovina.

the one hand, the "constituent peoples", which are represented by the three main ethnic groups present in the country and who were the actors of the armed conflict in the 1990s, namely Bosniacs, Croats, and Serbs;[301] on the other hand, there are the "Others",[302] namely the other minorities present and recognized in the country and those who simply do not wish to identify themselves as belonging to one of the ethnic groups present in the country.[303] Such a division of the population into two macro-categories does not present any particular points of conflict, except for the fact that the adjective "constitutive" seems to imply that three principal ethnic groups have a central role in society, compared to the "Others". However, the constitution on this point seems to be clear and states that precisely the "constituent peoples" together with the "Others" determine the content of the constitution, as citizens of Bosnia and Herzegovina. Thus, it should be concluded that there is an equal role of the two macro-groups within the country's order. In reality, such a conclusion could not be supported by reading the subsequent constitutional provisions, which, precisely, give the "constituent peoples" a predominant role in the institutional scene of Bosnia and Herzegovina.

Institutions in Bosnia and Herzegovina, both as it emerges from the constitutional provisions and by custom confirmed in practice, are composed, and elected on the basis of ethnic and territorial criteria, where the role of the "constituent peoples" is predominant and exclusive of the "Others". Specifically, when the composition of the legislative body is sanctioned, it is stated that the Parliamentary Assembly is composed of two branches: the House of Peoples and the House of Representatives. The first Chamber is composed of fifteen delegates, two-thirds of whom (five Bosniacs and five Croats) are elected by the Bosniac and Croat delegates from the House of Peoples of the Federation of Bosnia and Herzegovina (one of the two federal entities that make up the state),

[301] The population of Bosnia and Herzegovina, based on the last census in 2013, consists of the Bosniacs, who make up 50.11% of the total population, approximately 1,769,592 people, followed by the Serbs with 30.78%, of the population, namely 1,086,733 people, and the Croats 15.43% of the population, with 544,780 people. The 2013 census data can be found on the website of the Agency for Statistics of Bosnia and Herzegovina. For further information, refer to Gunnarsson Popović, V., *Who is Bosnian?*, 16-27; Babović, M. (eds.), *Population Situation Analysis in Bosnia and Herzegovina*, in *SeConS development Initiative group*, 2020; Žíla, O., *Ethno-demographic development in Bosnia and Herzegovina in 1971-1991 and its propensity for ethnic conflict,* in *Acta Universitatis Palackianae Olomucensis – Geographica*, Vol. 44, No. 1, 2013, 5-25; Gekić, H., Mirić, R., *Hidden Geographis of population implosion in Bosnia and Herzegovina*, in *European Journal of Geography*, Vol. 11, No. 2, 2020, 47-64.

[302] The "Others" make up 2.73% of the country's population with 96,539 people.

[303] The Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Protection of Rights of Members of National Minorities in 2003 (PS BiH, br. 24/03). The law states that BiH will protect the status, equality and rights of 17 national minorities present in Bosnia and Herzegovina: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, and Ukrainians. For more on this subject, refer to Katz, V., *The Position of National Minorities in Bosnia and Herzegovina before and after the Breakup of Yugoslavia*, in *Studia Środkowoeuropejskie i Balkanistyczne*, Vol. XXVI, 2017, 193-204; Nagradić, S., *National minorities in legislation of Bosnia and Herzegovina*, in *Politeia*, Vol. 5, No. 10, 2015, 181-207; Hodžić, E., *Political Partecipation of National Minorities in Local Governance in Bosnia and* Herzegovina, Analitika Center for Social Research, Sarajevo, 2011, 24-46; Milićević, N., *Ustavni Položaj nacionalnih manjina u Bosni i Hercegovini*, in *Međunarodne studije*, Vol. II, No. 3, 2002, 99-115.

where these two ethnic groups constitute the majority. Likewise, the remaining five delegates (Serbs) are elected by the National Assembly of *Republika Srpska*, the other federal entity.[304] The Chamber of Peoples was conceived by the constituents – as evidenced by its very name – as a body representing the exclusive demands of the "constituent peoples" within a bicameral and perfect parliamentary system. As far as the House of Representatives is concerned, however, the constitution does not stipulate equal representation (not even the necessary presence) of the three main ethnic groups in terms of the composition of the body. On the contrary, it is simply stipulated that, of the forty-two members that make up this body, two-thirds are to be elected from within the constituencies of the Federation of Bosnia and Herzegovina, and the remaining third from those of *Republika Srpska*,[305] thus without explicit reference to ethnic requirements. Nevertheless, in line with established practice, the "constituent peoples" – bolstered by their numerical majority over the "Others" – ultimately came to occupy, with only rare exceptions, the seats in the House of Representatives in the same proportions as described for the upper branch of the Parliamentary Assembly. Two-thirds of the seats held by members elected on the territory of the Federation of Bosnia and Herzegovina are equally divided between Bosniacs and Croats, just as the remaining third, elected in the constituencies of *Republika Srpska*, is composed by Serbs. From an initial analysis of the provisions contained in Article IV, it can be deduced that the constituents wanted to establish an upper chamber, the House of Peoples, with the intention of granting the greatest possible representativeness to the "constituent peoples", precisely to rebalance their weight within the legislature and to guarantee them the possibility of influencing the decisions of the same body in an equal manner. It suffices to consider, for example, that within the House of Peoples, each representative of the three main ethnic groups has the power to veto a resolution which they perceive as detrimental to the "vital interest" of their respective "People".[306] However, this central (or "constitutive") role of the Bosniacs, Croats and Serbs has found expansion even where the constitution did not provide for a predominant role. Indeed, to this day, although not exclusively, the House of Representatives is segmented along ethnic lines, so that most ethnic Serb representatives come from *Republika Srpska*, as do most Bosniacs and Croats from the

[304] Art. IV, para. 1, a), b), Constitution of Bosnia and Herzegovina.

[305] Art. IV, para. 12, Constitution of Bosnia and Herzegovina.

[306] The art. IV, para. 3 of the Constitution of Bosnia and Herzegovina describe this veto procedure in this manner: «e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph l(a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting. f) When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity».

Federation of Bosnia and Herzegovina.[307] This first consideration, which will be confirmed in the subsequent provisions to be examined, testifies to how, in reality, the "constituent peoples" assume a central (if not exclusive) role within the country's legislative structures.

As concerned the executive power, however, the constitution stipulates that the Presidency of Bosnia and Herzegovina consists of three members: one Bosniac and one Croat, elected from within the constituencies of the Federation of Bosnia and Herzegovina, and a Serbian member, elected from the territory of *Republika Srpska*. Here too, the constituents wanted to create not only equal representation of the "constituent peoples", but also their predominance over the "Others", as the Presidency is only open to candidates from the three main ethnic groups in the country. As for the Council of Ministers, the Constitution stipulates that no more than two thirds of the ministers may come from the Federation of Bosnia and Herzegovina, implicitly guaranteeing the remaining third to members of *Republika Srpska*.[308] It can be seen that the constituents did not explicitly intend to confer ministries exclusively to the "constituent peoples", however, the presence of a territorial criterion nevertheless pushed for the composition of ministries to also reflect ethnicity and, precisely, the majoritarian ethnic groups within the entities. Similarly, regarding the composition of the Constitutional Court, the constituents stipulated that of the nine judges of which the body is composed, four should be elected by the House of Representatives of the Federation of Bosnia and Herzegovina and two by the Parliamentary Assembly of *Republika Srpska*.[309] In practice - even though there is no provision in the constitution stipulating the exclusive representation of the "constituent peoples" - the individuals who have served as judges on the Constitutional Court have always been an expression of the country's three main ethnic groups.

What has been described so far demonstrates the central role that the "constituent peoples" have assumed within the constitutional order of Bosnia and Herzegovina. In fact, it can be concluded, based on the above description, that the state institutions stand precisely on the presence and equal representation of this groups. In other words, it appears that the "constituent peoples" reached an agreement between the conflicting parties by constructing a consociative democracy in which the

[307] For a complete and up-to-date list of the members of the House of Representatives, consult the body's official website.

[308] Art. V, Constitution of Bosnia and Herzegovina.

[309] Art. V, para. 1, a), Constitution of Bosnia and Herzegovina. As for the remaining three judges of the Constitutional Court, they «shall be selected by the President of the European Court of Human Rights after consultation with the Presidency». On the international members of Constitutional Court see Schwartz, A., *International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia*, in *Law & Social Inquiry*, Vol. 44, No. 1, 2019, 26-27; Montanari, L., *The Use of Comparative and International Law*, 713; Montanari, L., *La composizione della Corte costituzionale della Bosnia ed Erzegovina tra influenza del fattore etnico e garanzie internazionali*, in Calamo Specchia, M. (eds.), *Le Corti costituzionali: composizione, indipendenza, legittimazione*, Giappichelli, Torino, 2011, 118 ff.

form of government rests on an ethnic and territorial balance.[310] In light of this peculiar state construction, the obvious conclusion seems to be that - alongside the constitutional identity based on the protection of rights and freedoms - the protection of the "constituent peoples" is also a structural element of this identity. Indeed, if the constitutional order is based on the protection of rights, the institutional order seems, on the other hand, to be based on the equal representation of the three main ethnic groups. However, from a deeper analysis of the positive law, it can be concluded that the position held by the country's main ethnic groups, particularly within the legislative and executive institutions, should not be read as a founding element of the constitutional structure and, as such, it's very identity. In fact, the constituents assigned a predominant role to the "constituent peoples" because this was the result of the Dayton Peace Agreement. Otherwise said, the predominant position of the three ethnic groups within the state structure created by the 1995 constitution was a direct result of the contingent historical circumstances and the need to find a post-war balance. The quickest way to reach an agreement between the three warring groups was to guarantee them not only equal representation at the institutional and territorial level (as evidenced by the division of the country into entities), but also equal participation in decision-making processes, to guarantee the interests of the "peoples" and avoid any form of marginalization of them.[311] It appeared clear at the time, in fact, that «the equal composition of the institutions of Bosnia and Herzegovina was the only way to involve the national political elites [manely the Bosniacs, Croats and Serbs], bearers of opposing political agendas and military objectives, to collaborate in the processes of renewal of Bosnian-Herzegovinian citizenship and the creation of a functional state order. In this way, they were guaranteed equality in the division of political power and equal influence in decision-making processes».[312] Although - and this has been extensively highlighted in the first part of this paragraph - the constituents had envisaged the exclusive presence of the "constituent peoples" within only the Presidency of Bosnia and Herzegovina and in the House of Peoples of the Parliamentary Assembly, this principle was also extended to the country's other institutions, due to the predominance of the political and territorial structures created by the three main ethnic groups: this was the case for the House of Representatives,

[310] Among the many works on the subject of consociative democracies and the power-sharing system see: Lijphart, A., *Democracy in Plural Societies. A Comparative Exploration*, Yale University Press, Yale, 1977; Lijphart, A., *Constitutional Design for Divided Societies*, in *Journal of Democracy*, Vol. 15, No. 2, 2004, 96-109; McGarry, J., O'Leary, B., *Introduction: The macro-political regulation of ethnic conflict*, in McGarry, J., O'Leary, B. (eds.), *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts*, Routledge, London, 1993, 1-40; Norman, W., *Negotiating Nationalism. Nation-building, Federalism, and Secession in the Multinational State*, Oxford University Press, Oxford, 2006; Taylor, C., *Multiculturalism. Examining the Politics of Recognition*, Princeton University Press, Princeton, 1994, Keil, S., *Multinational Federalism in Bosnia and Herzegovina*, 125-176.

[311] Weller, M., Nobbs, K. (eds.), *Asymmetric Autonomy and the Settlement if Ethnic Conflicts*, University of Pennsylvania Press, Philadelphia, 2010.

[312] Marković, G., *Bosanskohercehovački federalizam*, 337.

the Council of Ministers and the Constitutional Court.[313] In this way, the adoption of a predominantly ethnic-based consociative democracy, which was supposed to provide protection for the different groups into which society was segmented, turned into a degeneration of the system of representation.[314] As a result, the "constituent peoples", who were already endowed with important political (and other) structures and thanks to their overwhelming numerical predominance,[315] effectively imposed the ethnic-based power-sharing solution on all other institutions in the country, not allowing, or at any rate significantly limiting, the "Others" the chance to be elected. Added to this is the country's own electoral legislation, which requires the convergence of ethnicity and residency criteria for access to certain institutions. For example, even for the "constituent peoples" there is discrimination in this regard, because the Serbs member of the presidency must necessarily be elected by Serbs and must belong to that ethnic group, similarly, the two members of the presidency elected in the Federation of Bosnia and Herzegovina must necessarily be Bosniacs or Croats and elected only from among these ethnic groups. Such a circumstance does not allow a Serb residing in the Federation of Bosnia and Herzegovina to elect the Serbs member of the Presidency or, in turn, to be elected, and the same applies to Bosniacs and Croats residing in *Republika Srpska*. In fact, the adoption of such a consociative democracy has created an extremely complex state organisation that is often subject to the cross-vetoes of the "constituent peoples" in deliberation. It emerges from this broad consideration that the ethnically-based power-sharing system - adopted following the Dayton Agreement and, therefore, on the basis of the constitution contained therein - and the consequent primary role of three main ethnic groups within state institutions was more a necessity dictated by historical contingencies than a free choice. Moreover, it is clear from the constitutional text itself that the framers wanted to give only some of the executive and legislative bodies exclusive *status* and that, instead, their predominance over the entire institutional system of the state was an alteration of the constituents' original intent. For these reasons, it seems difficult to conclude that the protection of the "constituent peoples" represent another element of the constitutional identity of Bosnia and Herzegovina, along with the protection of fundamental rights and freedoms. Furthermore, it should be added that the protection of three principal ethnic groups is an element of the political system of Bosnia and Herzegovina and not of its constitutional essence. This is evidenced by the fact that in the constitution, when the procedure of constitutional revision is regulated and, specifically, its limits are described,

[313] Marković, G., *Bosanskohercehovački federalizam*, 356-357.

[314] See Bieber, F., *Power Sharing as Ethnic Representation in Postconflict Societies: The Case of Bosnia, Macedonia, and Kosovo*, in Mungiu, A., Krastev, I. (eds.), *Nationalism After Communism: Lessons Learned*, Central European University Press, Budapest, 2004, 231-248; Kivimäki, T., Kramer, M., Pasch, P. (eds.), *The Dynamics of Conflict in the Multi-ethnic State of Bosnia and Herzegovina. Country Conflict-Analysus Study*, Friedrich Ebert Stiftung, Sarajevo, 2012.

[315] It is recalled that out of a population of just under 4 million people, only 2.7 % of the population declared themselves to belong to the "Others" at the last census in 2013. On this point, see footnote No. 301.

the element of the protection of "constituent peoples" is not guaranteed, as are the values of human rights and fundamental freedoms.[316] This shows that the constituents explicitly wanted to preserve the values and principles associated with the protection of rights and freedoms. Whereas the constitutionalisation of "constituent peoples" role is merely a political-institutional solution that the framers provided to guarantee the preconditions for peace, which were achieved with the Dayton Agreement. The constitutionalisation of three principal ethnic groups represents, in other words, an element of the form of democracy established in the country and not of its identity: rather, it can be described as a specificity that is result of the Dayton Agreement and that has inevitably also had repercussions within the constitutional order, which has sought to circumscribe it to the form of government.

Furthermore, if the predominance of the "constituent peoples" within the institutions of the state were to be seen as an integral aspect of the country's constitutional identity, it would potentially conflict with another component of constitutional identity, namely the safeguarding of fundamental rights and freedoms. Indeed, if the protection of rights and freedoms represents the constitutional identity of Bosnia and Herzegovina, there cannot also be an identity that, on the contrary, establishes the predominance of certain ethnic groups to the detriment of other minorities, because this conflicts with the protection of rights and freedoms, which is the very essence of the constitutional order of the country. Moreover, this also conflicts with the principle of the prohibition of discrimination, enshrined in the ECHR, which, let us recall, finds direct application within the system in question and is also used as a parameter in the constitutional legitimacy judgment.

2.9.2. "Constituent peoples" and constitutional identity in Constitutional Court and ECtHR Jurisprudence

The conclusions suggested above, within the context of the analysis of the constitutional text, also appear to be confirmed by the tensions that have arisen between constitutional jurisprudence and that of the Strasbourg Court. In fact, even though the Constitutional Court - as already highlighted above - has never embraced the lexicon of constitutional identity and, as such, has never clearly defined the elements of this identity, it has nevertheless had occasion to express its views on the role of the "constituent peoples" within the constitutional structure of the country and, the same has been done by the European Court of Human Rights.

[316] «No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph», Art. X, para. 2, Constitution of Bosnia and Herzegovina.

The Constitutional Court, first and foremost, ruled on the role of "constituent peoples" within the legal system. In particular, in its judgment U-5/98,[317] precisely in its third partial decision,[318] the judges of the Court were called upon to decide on the compatibility of the provisions of the constitution of *Republika Srpska*, which enshrined the right to self-determination of the Serbs people as «inalienable and untransferable, born out of the Serbs people's struggle for freedom and independence»,[319] to which was added, then, the intention to bind the entity «to other states of the Serbs people»,[320] as well as the definition of *Republika Srpska* as a «state of the Serbs people and all its citizens», with respect to the preamble and Article II paragraphs 4 and 6 and Article III paragraph 3 of the constitution.[321] Similarly, the legitimacy of the provision of the constitution of the Federation of Bosnia and Herzegovina in which the entity was referred to as consisting only of the Bosniac and Croat peoples, together with the "Others", was challenged with respect to the same parameters.[322] What the applicant, a member of the Presidency, was attempting to argue with his application to the Court was that under the constitution of Bosnia and Herzegovina all three "constituent peoples" are constitutive over the entire territory of the country; therefore, *Republika Srpska* could not declare itself to be the State of only one people, nor, similarly, could the Federation of Bosnia and Herzegovina the State of only Bosniacs and Croats.

The judges of the Constitutional Court were thus called upon to answer the question of «what idea of a multinational state [was] pursued by the Constitution»[323] and whether the Dayton Agreement, in territorially delimiting the two federal entities, also recognised a territorial separation between the country's "constituent peoples".[324] The Court, in a first *obiter dictum*, recalls that any truly democratic system requires a compromising policy and that, in a multinational state, compromise between cultures and ethnic groups prohibits both assimilation and segregation of groups. For this reason, territorial segregation as envisaged in entity constitutions cannot in any way

[317] Constitutional Court of Bosnia and Herzegovina, U-5/98 III, 30 June -1st July 2000.

[318] It should be noted that the judgment, for reasons of practicality, but above all because of the volume of the arguments dealt with, was divided by the constitutional judges into four partial decisions. The first concerned the interpretation of the term 'boundary' with respect to the administrative divisions between the two entities that make up the federal state. In the second decision, the judges intervened in an important manner on the subject of sources, namely by interpreting a doctrine of implicit state powers and introducing a system of competing competences between the state and federal entities. Moreover, they expressed themselves in favour of the framework legislation (not provided for in the Constitution) that the High Representative made extensive use of in the early 2000s. The third partial decision, then, is the one that will be covered in this paragraph. And finally, the fourth partial decision concerned particularly sensitive issues such as language and common defence.

[319] Preamble Constitution of the *Republika Srpska*.

[320] *Ibidem*.

[321] *Ivi*, art. 1.

[322] Art. 1, Constitution of Federation of Bosnia and Herzegovina.

[323] Constitutional Court of Bosnia and Herzegovina, U-5/98, para. 53.

[324] *Ibidem*.

be permitted, but rather entities should facilitate ethnic coexistence as an «instrument for the integration of state and society».[325] Entities therefore have a constitutional obligation not to discriminate against those "constituent peoples" who are in a *de facto* minority position within their territory. In other words, the prohibition of discrimination - laid down in Article II, paragraphs 4 and 5 of the constitution of Bosnia and Herzegovina - applies not only to individuals, but also to groups, thus preventing preferential treatment by the entities only to those "constituent peoples" who constitute a majority there. The Court derives a constitutional principle of collective equality, which «prohibits any special privilege for one or more of the constituent peoples, which may be presented in any form of predominance in governmental structures and any ethnic homogenisation through segregation based on territorial separation».[326] For these reasons, the constitutional provisions of the two entities, where the predominance of the Serbs people is enshrined in the *Republika Srpska*, or that of the Bosniacs and Croats in the Federation of Bosnia and Herzegovina, are to be considered incompatible with the constitutional provisions enshrining the "constitutive" nature of the three main ethnic groups throughout the country's territory and contrary to the principle of collective equality derived from the tenor of the constitution.[327] In summary, the judges of the Court affirm that the "constitutive peoples" and the role they enjoy, both in the formation and functioning of state institutions, are "constitutive", namely valid throughout the territory of the State, regardless of the predominance of one or two ethnic groups over the others within the entities. Furthermore, the existence of a principle of collective equality of the "constitutive peoples" is affirmed, which goes beyond the principle of equality that usually applies to individuals and not groups. This has led - as will be seen more fully below - not only to a tension between the principle of collective and individual equality, but also between the enjoyment of rights (specifically electoral rights) of the ethnic group and the individual.

If, on the one hand, the U-5/98 III ruling made it clear that the "constituent peoples" enjoy the same collective rights, enshrined in the Constitution, throughout the entire territory of the State; on the other hand, the Court's subsequent rulings have established the legitimacy of the predominance of the three main ethnic groups with respect to the formation and functioning of certain State institutions. It was seen, in this regard, in the opening part of this section that the Presidency and the House of Peoples are formed, and function based on ethnic criteria. Judgments AP-2678/06,[328] AP-

[325] Constitutional Court of Bosnia and Herzegovina, U-5/98, para. 57.

[326] *Ivi*, para. 60.

[327] For a more extensive commentary on the judgment, among many others, refer to two particularly significant contributions: Palermo, F., *Bonsia Erzegovina: la Corte costituzionale fissa i confini della (nuova) società multietnica*, in DPCE, No. IV, 2000, 1479-1489; Marawiec Mansfiel, A., *Ethnic but equal: the question for a new democratic order in Bosnia and Herzegovina*, in *Columbia Law Review*, Vol. 103, No. 8, 2003, 2052-2093.

[328] Constitutional Court of Bosnia and Herzegovina, AP-2678/06, 29 September 2006.

2127/09,[329] AP-1945/10,[330] and AP-3464/18,[331] in which the Constitutional Court judges essentially affirmed that the exclusive possibility for members of the "constituent peoples" to stand for election to the Presidency and the House of Peoples constituted legitimate discrimination against the "Others", because this ensured the peace and institutional balance that had been achieved in Dayton between the country's three main ethnic groups, went in this direction. In fact, the Court considers that differential treatment is justified when it is based on a legitimate public purpose, when the instruments employed can achieve the desired effect, when those instruments are necessary and less intrusive to achieve the objective, and when the deviations from the principle of equality are proportionate to the intensity of the purpose. Moreover, the judges add that discrimination may originate from a historical genesis, as in the present case, namely, to safeguard peace.[332] However, while the Constitutional Court's interpretation found grounds to establish the predominant role of the "constituent peoples" over the "Others" within the country's institutional system, based on the premise that the Dayton Agreement and the adoption of the new constitution in 1995 established a democratic system on a consociative or power-sharing basis, this conclusion was not endorsed by the judges of the ECtHR. In particular, with the judgment *Sejdić and Finci v. Bosnia and Herzegovina*,[333] for the first time, the Strasbourg judges condemned Bosnia and Herzegovina for violation of the prohibition of discrimination. Specifically, the two applicants from which the case takes its name, belonging to the group of "Others", complained that they were prevented from standing as candidates for the Presidency and the House of Peoples, as both the Constitution and the Electoral Law reserve these institutions for the "constituent peoples". Claiming that they had been discriminated against because of their ethnic origin, the applicants appealed to the Strasbourg Court. For its part, the ECtHR considered discrimination based on ethnicity to be a form of racial discrimination; therefore, the differential treatment of the two applicants was practically impossible to justify, as it did not pursue a legitimate aim and there was no reasonable relationship of proportionality. On this basis, the Court concluded that the ineligibility of the two applicants for election to the House of Peoples lacked objective and reasonable justification, violating Article 14 ECHR (prohibition of discrimination), read in conjunction with Article 3 Protocol No. 1 (right to free elections). About the collective presidency, the Court drew a similar conclusion, finding a violation of Article 1 Protocol No. 12 (general prohibition of discrimination). Comparing the ruling of the Strasbourg Court and that of the Constitutional Court of Bosnia and Herzegovina, the distance between the position of the two appears

[329] Constitutional Court of Bosnia and Herzegovina, AP-2127/10, 12 September 2010.
[330] Constitutional Court of Bosnia and Herzegovina, AP-1945/10, 29 June 2010.
[331] Constitutional Court of Bosnia and Herzegovina, AP-3464/18, 17 July 2018.
[332] Constitutional Court of Bosnia and Herzegovina, U-5/98, III, para. 79.
[333] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06, 22 December 2009.

immediate. Indeed, according to the Strasbourg Court, the State had a very narrow margin of appreciation, precisely because of the ethnic (and therefore racial) nature of the discrimination. On the contrary, the judges of the Constitutional Court argued that there was a wide margin of appreciation, given that the constitutional structure was established in the ashes of a violent conflict and therefore the historical context should be strongly reflected in the assessment of the legitimacy of this differential treatment. According to the judges of Bosnia and Herzegovina, the time was not yet ripe for a change of the system towards a system reflecting a purely majority model and thus abandoning the power-sharing system. However, the European Court of Human Rights was not of the same opinion and argued that it was possible to introduce some corrections in the country's political system, without, however, fully abandoning the consociative model and causing the weakening or, worse, the collapse of the system. Subsequently, always coming to the same conclusions, the Strasbourg Court also ruled on other occasions on the compatibility of the electoral system of Bosnia and Herzegovina and the ethnic criteria established therein with the principle of non-discrimination and individual equality, and each time it found the system of Bosnia and Herzegovina incompatible with these principles, enshrined in the ECHR and Protocol No. 12.[334]

Considering this contrast between the Constitutional Court of Bosnia and Herzegovina and the European Court of Human Rights, it is legitimate to ask how it is possible that the primacy of the "constituent peoples" is so important to the institutional order of the country and what relationship it has with constitutional identity. The first of these questions is answered within the jurisprudence of the Constitutional Court,[335] where the judges have stated that the central role assumed by three principal ethnic groups regarding the composition and functioning of state institutions is justified by the very specificity of the internal organisation of Bosnia and Herzegovina, outlined in the Dayton Agreement and whose goal was the establishment of peace and dialogue between the opposing parties. For this reason, the judges of the Constitutional Court add, the predominant role assumed by the "constituent peoples" as opposed to the "Others" within the institutional structures of the country should also be read in the context of the discretion granted to states to establish certain limitations on

[334] ECtHR, *Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014; ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016; ECtHR, *Baralja v. Bosnia and Herzegovina*, No. 30100/18, 29 October 2019; ECtHR, *Pudarić v. Bosnia and Herzegovina*, No. 55799/18, 8 December 2020; ECtHR, *Kovačević v. Bosnia and Herzegovina*, No. 43651/22, 29 August 2023. For a first comment on the recent Kovačević ruling, see Nurkić, B., *Kovačević v. Bosnia and Herzegovina: The Complete Guidelines for the Constitutional Reform in B&H*, in *Strasburg observer*, 12 September 2023; Woelk, J., *Opening Pandora's Box?: On the Kovačević Case and the European Court of Human Rights' fundamental criticism of the electoral system in Bosnia and Herzegovina*, in *VerfBlog*, 1st September 2023; Bonifati, L., *Kovačević c. Bosnia ed Erzegovina: un nuovo affondo alla Costituzione di Dayton*, in *Quaderni costituzionali*, No. 4, 2023, 922-928.

[335] In particular, in the argument that the judges of the Court upheld in the case Constitutional Court of Bosnia and Herzegovina, AP-2678/06, paras. 16-24.

the exercise of certain individual rights.[336] Differential treatment would be justified precisely by the existence of a legitimate purpose, which should be found in the specificity of the historical context in which the constitution of Bosnia and Herzegovina was adopted and, more precisely, with the purpose of maintaining peace, the continuation of dialogue, and thus the creation of suitable conditions for changes to the provisions of the constitution regarding the composition of the legislative and executive state institutions.[337] Of a different opinion, however, as mentioned above, have been the judges of the ECtHR, who have recognised in the marginal role assumed by the "Others" within state institutions and, specifically, in their limitation of the full enjoyment of the right to vote, a violation of the principle of non-discrimination enshrined in Article 1 of Protocol No. 12 and Article 14 of the ECHR. Specifically, on several occasions the Strasbourg judges have condemned Bosnia and Herzegovina for violation of the principle of non-discrimination due to the discriminatory treatment that the Constitution reserves to "Others" in electoral matters and that cannot find reasonable justification in that it is discrimination on ethnic grounds, which, as such, are considered as a racial discrimination and, therefore, not acceptable in a fully democratic and multi-ethnic society, as Bosnia and Herzegovina's aims to be.[338] Furthermore, the European Court of Human Rights pointed out that the Bosnian-Herzegovinian State could not enjoy a wide margin of appreciation, since some of the institutional solutions adopted in the constitution had been the necessary result of the peace agreement reached in Dayton in 1995. In fact, the judges find «significant positive developments in Bosnia and Herzegovina since the Dayton Agreement»,[339] which may give hope for a constitutional reform,[340] which could if not overcome the system of consociative democracy on an ethnic basis, at least make it more inclusive. So much so that

«while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the

[336] Constitutional Court of Bosnia and Herzegovina, AP-2678/06, para. 21.

[337] *Ivi*, para. 22.

[338] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 46.

[339] *Ivi*, para. 47.

[340] It recalls the 'Butmir Accords' and the 'April Package' that attempted, and almost failed, to change the text of the constitution in the part that regulates the composition of the main legislative and executive institutions, to make them accessible also to the 'Others' and, as such, more inclusive. On the attempts to reform the constitution in a more inclusive sense, see Lopez Domènech, B., *Reviving Bosnia's constitutional reform*, in *European Policy Centre*, 2023; Marko, J., *Constitutional Reform in Bosnia and Herzgovina 2005*-06, in *European Yearbookk of Minority Issues Online*, Vol. 5, No. 1, 2006, 207-218; Seizović, Z., *Constitutional Reform in Bosnia and Herzegovina: "Civil State" of Constituent Peoples*, in Second Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region, organized by the HUMSEC project in Sarajevo, 4-6 October 2007, 1-5; Bieber, F., *Constitutional reform in Bosnia and Herzegovina: preparing for EU accession*, in *European Policy Centre*, 2010.

Venice Commission […] clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere […]».[341]

It is noteworthy, in relation to this final segment of the decision under consideration, that despite arriving at diametrically opposed conclusions, both the Constitutional Court of Bosnia and Herzegovina and the European Court of Human Rights concur on one aspect: namely, the recommendation to amend the provisions of the national constitution to enhance its inclusivity. In fact, if, for the Constitutional Court, the current institutional set-up must be preserved to maintain peace and, therefore, continuous dialogue between the country's three main ethnic groups, this must be done in order to create the «appropriate conditions for amendments to the [...] provisions of the Constitution of Bosnia and Herzegovina and the Electoral Law [...]»,[342] concerning the composition and functioning of state bodies. For the judges of the European Court of Human Rights, the purpose is the same, namely the need to revise the provisions of the constitution on state institutions composition and the Electoral Law, however, to be implemented in the immediate future, without remaining bound to these provisions in order not to change them again.

In conclusion, it is interesting to highlight how the Constitutional Court confirmed the legitimacy of the predominance of the "constituent peoples" within the institutional structures of the country to the detriment of the "Others", arguing, however, that this difference in treatment finds reason in the historical context in which the Constitution was adopted. This, however, led to a contrast with the jurisprudence of the Strasbourg Court, which, on the other hand, found no reasonable justification for such unequal treatment and therefore condemned Bosnia and Herzegovina for violation of the principle of non-discrimination. However, both courts emphasised the need to overcome this ethnic-based power-sharing mechanism, whereby it is the "constituent peoples" who play the primary role, in favour of a more inclusive system. This convergence between the two Courts clearly demonstrates, especially with regard to the Constitutional Court of Bosnia and Herzegovina, that the primary role of the "constituent peoples", within the institutional system, cannot be an element of constitutional identity, as for the Court it is only a temporary means to achieve the «suitable conditions for amendments to the [...] provisions of the Constitution of Bosnia and Herzegovina [regarding the composition and functioning of state institutions] and the Electoral Law [...]»[343], and thus create a more inclusive system. Although with divergent conclusions, the

[341] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 48.
[342] Constitutional Court of Bosnia and Herzegovina, AP-2678/06, para. 22.
[343] *Ibidem*.

Constitutional Court and the European Court of Human Rights, however, seem to agree on the main long-term objective of the constitutional order of Bosnia and Herzegovina: the need to overcome an institutional structure that was only meant to be provisional, in view of a constitutional reform desired by local actors, as the Venice Commission had already called for in its 2005 opinion.[344] In concrete terms, the fact that both Courts called for a downsizing of consociative democracy model and, therefore, a more inclusive electoral system necessarily leads to the conclusion that the constitutive role of the country's three main ethnic groups cannot be considered an element of constitutional identity, since it is a transitional solution and, as such, certainly not part of those principles and values that constitute the hard and unchangeable core of a constitution.[345]

2.10. CONCLUSIONS: WHICH IDENTITY?

The subject of constitutional identity presents significant difficulties both in its definition and in the identification of the characteristics that constitute it. Added to this is a different view of the subject that holds this identity: for some, it refers to the population that is subject to a constitution, while for others, it refers to the constitutional text itself.[346] In this chapter, to identify the constitutional identity of Bosnia and Herzegovina, we have chosen to research and study it as this identity emerges from the text of the constitution, which represents a privileged point of study that can provide significant information on the content of identity. The textual analysis of the constitution, in fact, clearly delineates the identity essence that the constituents wanted to imprint on the country's legal order. For this reason, in conclusion, it is worth briefly reviewing the pieces that make up this identity.

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[344] European Commission for Democracy Through Law, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (March 2005), paras. 74-77. Specifically, the Venice Commission proposed for the Presidency and House of Peoples different solutions. For the Presidency, the Venice Commission proposed two possibilities: «(1) replace the collective Presidency with a single president and confer most executive powers to the Council of Ministers in which all constituent peoples are represented alongside the Others, and allow all Bosnians, regardless of their ethnicity, to be eligible for the single Presidency; or (2) maintain the collective Presidency, but allow all Bosnians to be eligible and devise a rule under which no more than one member of the Presidency belongs to the same constituent peoples or the Others. The Venice Commission did, however, express a preference for a single Presidency. As for the House of Peoples, the Venice Commission proposed complete abolishment and retaining only the House of Representatives, which is the chamber that performs most of the legislative work and does not discriminate against the Others. The House of Peoples acts as a check on the House of Representatives, vetoing any piece of legislation that is perceived as harmful to a people's interests. The Venice Commission's proposal would transfer the exercise of the vital interest veto to the House of Representatives, which would become the sole legislative chamber».

[345] The two Courts demonstrate how the constitutional identity of Bosnia and Herzegovina cannot be sought within the role played by the constituent peoples within the constitutional order of the country. However, the rulings of the two courts show that their downsizing is not only possible, but also desirable, and as such demonstrates that the role of the constituent peoples is not covered by a limitation on constitutional review.

[346] Martì, J. L., *Two Different Ideas of Constitutional Identity*, 17-36.

The very Preamble of the constitution anticipates the elements that inspired the constituents in the writing of the constitutional text and the values on which the new order was to be based, both in the reconstruction of society after the conflict, which affected Bosnia and Herzegovina from 1992 to 1995, and in the rebuilding of the state apparatus and the form of government. The Preamble, in fact, states that the constitution is based on respect «for human dignity, liberty, and equality»,[347] thus placing itself in complete discontinuity with the previous war period, when these principles had been violently denied. The will to overcome the trauma of war is evidenced by the fact that immediately afterwards, in the Preamble, it is stated that the new constitution is dedicated to «peace, justice, tolerance, and reconciliation».[348] All this would not be possible, however, without the guarantee of full application «for international humanitarian law»[349] and without inspiration from the «Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments».[350] The constituents outlined, within the preamble, albeit *in nuce*, the essential elements of the country's constitutional identity, which is expressed more broadly in the preceptive part of the constitutional text. Indeed, the principles set out above constitute a single logical whole, where each cannot exist without the other. Therefore, there can be no respect for human dignity without freedom and equity, just as there can be no peace without justice, no reconciliation without mutual tolerance. To hold these principles together, the constituents placed human rights and freedom as the ideal glue that encapsulates all the values on which the country's constitutional order is based and as the instrument for their protection. Indeed, it is human rights and freedom that emerge as central elements within the constitutional framework and, therefore, also of its identity. Article II of the constitution, in its first paragraph, opens precisely by stating that Bosnia and Herzegovina and its federal entities are committed to ensuring the highest level of internationally guaranteed human rights and fundamental freedoms. But the framers did not limit themselves to a mere enunciation of principles, as they established that these human rights are guaranteed by the Human Rights Commission,[351] regulated within Annex VI of the General Framework Agreement for Peace: that is, through the effective protection of a judicial body such as the Human Rights Chamber. The presence of this body and, more generally, of the Human Rights Commission itself, demonstrates that rights and freedoms are not only enunciated as principles and values at the basis of the country's internal constitutional

[347] Preamble to Constitution of Bosnia and Herzegovina, paragraph one.
[348] Preamble to Constitution of Bosnia and Herzegovina, paragraph two.
[349] Preamble to Constitution of Bosnia and Herzegovina, paragraph seven.
[350] Preamble to Constitution of Bosnia and Herzegovina, paragraph eight.
[351] Art. II, para. 1, Constitution of Bosnia and Herzegovina.

order, but also find a specific and concrete jurisdictional protection that ensures their effective application. In addition to what has been said so far, it must be added that the constitution of Bosnia and Herzegovina is also open to the international order as far as human rights and freedoms are concerned, since the content of the ECHR and its Protocols are directly applied within the country's legal system and these take on a higher hierarchical value than the country's other laws.[352] So much so that the European Convention is used as a parameter of constitutional legitimacy by the judges of the Constitutional Court. Indeed, «[t]he Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols».[353] The centrality that the issue of rights assumes within the country's legal system is also confirmed by the content of the First Annex to the constitution, in which there is a list of fifteen international agreements on human rights that apply in Bosnia and Herzegovina, precisely to ensure the highest international standard as enshrined in the constitution.[354]

An analysis of the constitutional text, its annexes and, more generally, the General Framework Agreement for Peace shows that human rights and freedoms were placed at the heart not only of the legal order of Bosnia and Herzegovina, but of the entire peace agreement. As far as the constitution is concerned, the constituents - in an attempt to re-found a new society based on respect for human dignity and freedom, where lasting peace could be restored and where tolerance and reconciliation between the peoples of Bosnia and Herzegovina could find their place - saw human rights and freedoms as the means to this end. In fact, the greatest difficulty the constituents had to solve while drafting the constitution was precisely that of which values and principles to place at the basis of the country's constitutional order. This difficulty stemmed from the deep divisions and hostility that had been created between the peoples of Bosnia and Herzegovina during the war. In the face of this difficulty, it seemed most appropriate to identify these principles and values in something that was both universal and therefore widely accepted by all parties: above their differences and specificities. These supreme values, in fact, were precisely identified in human rights and freedoms. These principles made it possible to reach an immediate agreement between the parties on the values to be placed at the basis of the order and managed to transcend the differences between peoples. Moreover, by placing freedom and human rights at the heart of the constitution, the constituents wanted to make a clean break from the wartime period in which these were systematically trampled upon and denied.

[352] Art. II, para. 2, Constitution of Bosnia and Herzegovina.

[353] Art. VI, para. 3, lett. c), Constitution of Bosnia and Herzegovina.

[354] «Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms». Art. II, para. 1, Constitution of Bosnia and Herzegovina.

The fact that these principles not only find their own enunciation within the constitution, but that it also opens to international law, such as the direct application of the European Convention or international agreements on the protection of human rights, shows best that the constituents wanted to provide the highest and most up-to-date level of human rights protection. In a way, it can be said that the constituents' decision to place freedoms and human rights at the basis of the constitutional order of Bosnia and Herzegovina was more a necessity than a free choice. Indeed, while the choice was made to place these principles as a means of overcoming the traumas of war, the use of these principles was necessary because of the difficulty in reaching an agreement between Bosniacs, Serbs and Croats. However, this does not mean that the protection of rights is superficial or worse, fictitious within the constitutional text. In fact, these values have the important task of holding together the constitutional order of the country and its peoples, with their differences and peculiarities.

Defining the identity of a constitutional text is never easy, and this difficulty becomes even greater when the constitution being examined is the result of an international agreement, where the influence of local actors has been little or none. However, in the case of Bosnia and Herzegovina, the identification of this constitutional identity seems to emerge clearly from the analysis of the constitution. In fact, human rights, and freedoms, with their universality, managed to recompose the rifts between the peoples of Bosnia and Herzegovina and give a clear direction to the entire constitutional order. For this reason, the constitutional identity of Bosnia and Herzegovina lies in the protection of human rights.[355] This has made it possible to rebuild an entire legal order and society on principles and values that can be universally shared beyond differences. Admittedly, the society of Bosnia and Herzegovina is still segmented in many aspects of daily, political, and institutional life, but respect for these supreme values has made it possible to defuse possible conflicts and ensure the coexistence of different peoples.[356] It can be said that in this system, constitutional identity has not been used to accentuate the differences between the various segments of the population or to set precise limits to exaggerate their individuality in relation to external, international, and supranational law. In Bosnia and Herzegovina, constitutional identity has been constructed as an element that aggregates differences or, even better, as an element that goes beyond differences and is able, with the universality of the principles on which it is based, to synthesise diversity into elements that can be shared by all. The power of constitutional identity in this order lies entirely in its ability to have laid the foundations of unity and not diversity: that is, in its ability to have left room for the differences and peculiarities of each people, but at the same time also the creation of principles and values that

[355] On this point, see the critique of Pajić Z., *A Critical Appraisal of Human Rights Provisions of Dayton Constitution of Bosnia and Herzegovina*, in *Human Rights Quarterly*, Vol. 20, No. 1, 1998, 125-138.

[356] See Szasz, P. C., *Protecting Human and Minority Rights in Bosnia: A Documentary survey of International Proporals*, in *California Western International Law Journal*, Vol. 25, No.2, 1995, 237 ff.

transcend these differences. These elements of identity lie precisely in respect for fundamental freedoms and human rights. The order of Bosnia and Herzegovina - together with that of the European Union, as will be examined in the next chapter - is a clear example of a synthesis of diversity, in which constitutional identity serves to create unity around universal and generally shared values. However, as far as the legal order of Bosnia and Herzegovina is concerned, the constitutional identity based on fundamental rights and freedoms, as the glue for an ethnically divided society, is still an ideal solution. In fact, the material constitution shows that the divisions between the three constituent peoples are still strong, and this has important consequences on the definition of identity.

CHAPTER 3

WHEN CONSTITUTIONAL IDENTITY MEETS EU LAW: A EUROPEAN CONSTITUTIONAL IDENTITY

3.1. EUROPEAN UNION CONSTITUTIONAL IDENTITY: SOME PREMISES

Trying to identify the constitutional identity of the European Union (EU) is certainly no easy task, especially when the boundaries of this concept are still blurred, and its content is still widely debated in doctrine. However, this attempt is justified and deserves scholarly interest in relation to one of the most vexing questions of the law and the sociological dimension of the contemporary world.

Indeed, societies are increasingly characterised by a plurality not only of groups and individuals, but also of values. In particular, the question to which the law is now more than ever called upon to provide an answer is how to create a legal system that can be a synthesis of the different values present in contemporary societies and that can identify those points of contact capable of holding a legal system together without renouncing diversity.[1]

[1] See Foret, F., Vargovčíková, J. (eds.), *Value Politics in the European Union. From Market to Culture and Back*, Routledge, London, 2023, *passim*; Youngs, R., Pishchikova, K., *A More Pluralist Approach to European Democracy Support*, Carnegie Endowment for International Peace Publications Department, Washington, 2013, 1-30; Nieuwenhuis, A., *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, in *European Constitutional Law*

The European Union - understood as a "process", as a living entity called upon to respond to contingent needs - appears to be a unique vantage point for understanding the dynamics of the synthesis of diversity. Indeed, the Union embraces different forms and types of diversity: from linguistic and cultural diversity to that of the legal and governmental systems it encompasses. It is precisely for this reason that the “process” of EU construction has often been characterised by the search for a balance between different and sometimes difficult to reconcile demands. However, the Union's strength seems to lie precisely in its ability to balance differences, without denying them, but by creating a common language that can be understood by the different elements that make it up. The creation of these conditions, in fact, passes precisely through the issue of constitutional identity, which from 2022 onwards also explicitly concerns the EU order itself.[2]

The concept of a European identity officially and explicitly enters the European Union legal order, as its characteristic feature, in February 2022, when the judges of the Court of Justice of the European Union affirmed in judgments C-156 and C-157 that Article 2 of the Treaty on European Union (TEU)

«is not merely a statement of political guidelines or intentions, but contains values which [...] form part of the very identity of the Union as a common legal order, values embodied in principles which impose legally binding obligations on the Member States».[3]

More specifically, the concept of identity had already entered the lexicon of the European Union following the major changes introduced by the Maastricht Treaty in 1992,[4] but it was better known under the label of the obligation of the Union's institutions to respect the national identities of

Review, No. 3, 2007, 367-384; Gómez-Chacón, M., *European Identity. Individual, Group and Society*, University od Deusto Press, Bilbao, 2003, *passim*.

[2] In fact, the topic of identity has been of interest to the European Union since the 1970s, when the Copenhagen Declaration on European Identity was drafted in 1973 and, explicitly, within treaty law since the Maastricht Treaty. However, especially with Maastricht, identity was read from the perspective of the member states, as something to be preserved with respect to the process of European integration. See Van der Schyff, G., *Exploring Member State and European Union Constitutional Identity*, in *European Public Law*, Vol. 22, No. 2, 2016, 227-241; Konstadinides, T., *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011, 195-218; Von Bogdandy, A., Bast, J. (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2009, *passim*; Manzella, A., *Dopo Amsterdam. L’identità costituzionale dell’Unione europea*, in *il Mulino*, No. 5, 1997, 906-925.

[3] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, 16 February 2022, para. 232; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, 16 February 2022, para. 145: « The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».

[4] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

the Member States. On the contrary, in the two decisions of 2022, the judges of the Court of Justice not only affirmed for the first time and explicitly the existence of an identity of the European Union, but also defined its substance, namely the values on which the entire order of the Union is based, and which are enshrined in Article 2 of the Treaty on European Union. However, the Court of Justice has made it clear that these are values that form the basis of the Union as a common legal order in which the Member States also participate, and which are in turn obliged to respect these values and principles.

The judgments C-156/21 and C-157/21 - also known as "twin" or "conditionality" judgments because of their content - represent an important milestone on the long road to European integration, since the judges of the Court of Justice not only affirmed the existence of a European Union identity and defined its content, but also issued a peremptory warning to those Member States which, since the adoption of the Treaty of Lisbon, have often used Article 4(2) of the Treaty on European Union to oppose the integration process, and have used this provision to reclaim parts of their sovereignty,[5] if not to justify illiberal transformations in some Central European countries.[6] Indeed, the Court of Justice has reaffirmed that the values on which the Union is founded are the same values that Member States must respect and that constitute a limit to the preservation of national identity enshrined in Article 4(2) of the Treaty on European Union. In other words, the European courts have confirmed that the Union is obliged to respect the national identities of the Member States as long as they do not conflict with the founding values of the European Union itself, as set out in Article 2 TEU, which

[5] See Deimantaitè, A., *The EU and national sovereignty: the encounter of two concepts of sovereignty. Change or continuity?*, in *Australian and New Zealand Journal of European Studies*, Vol. 12, No. 3, 2020, 59-69; Brack, N., Coman, R., Crespy, A., *Sovereignty conflicts in the European Union*, in *Les Cahiers du Cevipol*, Vol. 4, No. 4, 2019, 3-30; Vila Maior, P., *European Integration and Sovereignty: A Proposal of Re-conceptualisation*, in *Centro de Estudos da População, Economia e Sociedade*, No. 1, 2019, 1-28; Cloots, E., *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, No. 2, 2016, 82-98; Toniatti, R., *Sowereinty Lost, Constitutional Identity Regained*, in Sainz Arnaiz, A., Alcoberro Llivna, C. (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge, 2013, 49-74; Rossi, L. S., Casolari, F. (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Springer, Heidelberg, 2014, 19-56; Bribosia, H., *The Main Institutional Innovations of the Lisbon Treaty*, in Griller, S., Ziller, J. (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?*, Springer, Vienna, 2008, 57.

[6] See *ex multis* Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, in *Verfassungsblog*, 21 Febraury 2022. See Rupnik, J., *Illiberal Democracy and Hybrid Regimes in East-Central Europe*, in Kolozova, K., Milanese, N. (eds.), *"Illiberal Democracies" in Europe: An Authoritarian Response to the Crisis of Illiberalism*, The Institute for European, Russian, and Eurasian Studies, 2023, 9-16; Fassi, E., Cecorulli, M., Lucarelli, S., *An illiberal power? EU bordering practices and the liberal international order*, in *International Affairs*, Vol. 99, No. 6., 2023, 2261-2279; Khoma, N., Vdovychyn, I., *Illiberal Democracy as a Result of Liberal Democratic Regression in Central and Eastern European Countries*, in *European Journal of Transformation Studies*, Vol. 9, No. 1, 2021, 58–71; Lucarelli, S., *The EU and the crisis of liberal order: at home and abroad*, in Bengtsson, R., Sundström, M. R. (eds.), *The EU and the emerging global order. Essays in honour of Ole Elgtröm*, Lund University Press, Lund, 2018, 143-160; Merkel, W., Scholl, F., *Illiberalism, populism and democracy in East and West*, in *Czech Journal of Political Science*, Vol. 25, No. 1, 2018, 28-44; Ekiert, G., *The Illiberal Challenge in Post-Communist Europe Surprises and Puzzles*, in *Taiwan Journal of Democracy*, Vol. 8, No. 2, 2012, 63-77.

constitute its identity.[7] In doing so, the judges of the Court of Justice confirmed, on the one hand, that the Member States have their own national identities, inherent in their fundamental political and constitutional structures, which the Union is obliged to respect under Article 4(2) TEU and, on the other hand, that the Member States, by joining the Union, have agreed to adhere to certain common values which determine the identity of the European Union. For this reason, the judges conclude, the national identities of the Member States cannot conflict with the identity of the Union.

As mentioned above, these two judgments represent a milestone not only in the process of European integration, but also in the construction of the constitutional order of the European Union itself. In fact, the decision of the judges of the Court of Justice should not be read as an extemporaneous or top-down decision; on the contrary, judgments C-156/21 and C-157/21 represent the latest development of a decades of case-law of the courts of the Union and the natural evolution of the law of the Treaties, which, since the Treaty of Maastricht, has increasingly defined a constitutional form of the Union's legal order.

Starting from these assumptions, this chapter will essentially be divided into two parts, seeking to illustrate the search for the constitutional identity of the European Union through an evolutionary view of the concept. In fact, the first part of the text will focus on the reconnaissance of the positive law of the Treaties, to illustrate how they have developed from a chronological point of view, and then focus on the current wording of the Treaties, to search within them for the axiological elements that in themselves potentially constitute the elements that define the identity of the Union. Briefly, the study moves on to the analysis of the textual datum of the Treaties, seeking to identify which principles and values are the foundations of the EU and how they have been defined and developed within the text of the Treaties. In addition, the study of the Treaties will be carried out on several levels, examining the existence of explicit limits to the revision of the Treaties, as well as the existence of aggravated procedures for the amendment of some of its parts and, in general, of the instruments put in place to guarantee these values and principles, which should constitute an important indication of the existence of principles or values that are better protected and, as such, possible elements of this identity. It should be stressed that the study of the Charter of Fundamental Rights of the European Union will not be used directly in this search for the constitutional identity of the European Union. Even though this document constitutes an important reference point for the Union's legal order and has the same value as the Treaties, it has been decided in this work to focus the study on the Treaties and their evolution, also in the light of the interpretation of the Treaties by the Court of Justice. For this reason, it was decided to leave more space for the interpretation of the Treaties, which has increasingly developed along identity lines. Also because, in the second part of

[7] Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, 1.

the chapter, on the other hand, an attempt will be made to retrace, according to a descending chronological order, the case-law of the Court of Justice in order to illustrate how the judges arrived at decisions C-156/21 and C-157/21, so as to contextualise their content in an evolutionary perspective that the Court has undertaken since the *van Gend & Loos* case[8] and of which the judgments of February 2022 constitute the most recent jurisprudential development.

However, before proceeding with the analysis of identity elements within the EU legal system as announced above, some further clarifications should be made. The question of the constitutional identity of the European Union and its content immediately raises two issues that are still debated in academic literature and on which no widely shared view has been yet reached among scholars.[9] On the one hand, this idea presupposes the existence of a constitution of the European Union and, on the other, that this "peculiar" constitutional system[10] is endowed with an autonomous identity. Given the existence of these two problematic assumptions, let us make it clear from the outset that the main objective of this chapter is to explore and reconstruct the elements that define the constitutional identity of the European Union through a path that starts from Treaty law and then continues within the jurisprudence of the Court of Justice.[11]

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[8] ECJ, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case C-26/62, 5 February 1963.

[9] On this topic, *ex plurimis*, see Fossum, J. E., Menéndez, A. J., *A Constitutional Theory for a Democratic European Union*, Rowman & Littlefield Publishers, Lanham, 2011, 45-161; Pernice, I., *The Treaty of Lisbon: Multilevel Constitutionalism in* Action, in *Columbia Journal Of European* Law, Vol. 15, 2009, 354-358; Ziller, J., *The Constitutionalization of the European Union: Comparative Perspectives*, in *Loyola Law Review*, Vol. 55, 2009, 428-433; Craig, P., *Constitutions, Constitutionalism, and the European Union*, in *European Law Journal*, Vol. 7, No. 2, 2001, 125-150; Weiler, J. H. H., *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge, 2012, 304-312; Möllers, C., *Pouvoir Constituant – Constitution – Constitutionalisation*, in von Bogdandy, A., Bast, J. (eds.), *Principles of European Constitutional Law*, Oxford University Press, Oxford, 2011, 195-199.

[10] Pernice, I., *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, in *European Constitutional Law Review*, Vol. 11, 2015, 541-562; della Cananea, G., *Is European Constitutionalism Really "Multilevel"?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, Vol. 70, 2010, 283-317; Martinico, G., *From the Constitution for Europe to the Reform Treaty: a literature survey on European Constitutional Law*, in *Perspectives on Federalism*, Vol. 1, 2009, 13-41; Besselink, L., *A Composite European Constitution*, European Law Publishing, Groningen, 2007.

[11] Regarding the debate on the EU Constitution, refer to the considerations set out in section 1.4 of the first chapter of this work. About the existence of European Union constitution we refer just to some consideration of Besselinek: «if we want to reflect on the kind of 'constitution' of the European Union, we must first verify, at least preliminarily, that we can speak of a 'constitution' of the European Union. This would only be possible, at least at this preliminary stage, if we decouple the concept of 'constitution' from that of 'state'. One justification for doing so, in my view, is to take the nature of the power exercised by the Union, in light of the three typical functions of constitutions identified above. I believe that the powers exercised by the Union are by their nature no different from those of the state. The powers that the Union exercises on a day-to-day basis over subjects (individuals, citizens and public and private companies) are in essence the exercise of unilateral power. The legitimacy of any exercise of the Union's powers is subordinate to and independent of a subject's consent to the exercise of that power in particular cases; such powers can be exercised against the will of the subjects. In other words, obedience is presumed, just as in the case of state authority exercised over subjects. The constituent documents of the European Union and the law governing them, moreover, have the three functions that constitutions have: they constitute the institutions, they authorise them, and the exercise of the powers conferred is subject

Moreover, this chapter seeks to distance itself from the prevailing doctrinarian interpretation of the constitutional identity of the European Union, which results from a reading of Article 4(2) of the Treaty on European Union (TEU), to focus instead on Article 2 of the TEU and its related provisions, as well as on the case law of the Court of Justice.[12] Indeed, given the Union's obligation to respect not only the equality of the Member States before the Treaties, but also their national identity, part of the doctrine[13] and, above all, the constitutional courts of some Member States have seen in this provision a tool to limit the application of EU law because it is assumed to be potentially detrimental to national constitutional identity.[14] This has involved also a kind of negative definition of European constitutional identity, according to which it is the result of those values or principles that do not conflict with the identity of the Member States.[15] In this interpretation, the founding principles and values of the European Union are recognized only when they align with the national identities of its Member States. On the contrary, this chapter seeks to explore and reconstruct the constitutional identity of the Union order from a European perspective. This means that it will attempt to trace the elements of this identity as they appear in the Union's legal system itself. Indeed, both the

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to rules governing their use (in particular, but not limited to, fundamental rights and other fundamental rules of primary law, including general principles such as proportionality)» in Besselink, L.F.M., *The Identity of Europe's Constitution(s)*, in *Rivista di Diritto Comparato*, No. 1, 2023, 12. On the constitutional debate, among many, see at least McCormick, J. P., *Habermas on the EU: Normative Aspirations, Empirical Questions, and Historical Assumptions*, in McCormick, J. P. (eds.), *Weber, Habermas and Transformations of the European State Constitutional, Social, and Supranational Democracy*, Cambridge University Press, Cambridge, 2010, 176-230; von Bogdandy, A., Bast, J. (eds.), *Principles of European Constitutional Law*, Oxford University Press, Oxford, 2011, *passim*; Martinico, G., *Lo spirito polemico del diritto europeo. Studio sulle ambizioni costituzionali dell'Unione*, Aracne, Roma, 2011, 11-55; Ziller, J., *The Constitutionalization of the European Union: Comparative Perspectives*, in *Loyola Law Review*, Vol. 55, 2009, 413-447; Pernice, I., *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *Columbia Journal of European Law*, Vol. 15, No. 3, 2009, 351-406; Amato, G., Bribosia, H., De Witte, B., (eds.), *Genesis and destiny of the European Constitution*, Bruylant, Bruxelles, 2007, 34 *passim;* Rossi, L. S. (eds.), *Il progetto di Trattato-Costituzione (verso una nuova architettura dell'Unione Europea)*, Giuffrè, Milano 2004, 21-99.

[12] Art. 4, para. 2 TEU: «The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State».

[13] On the extension of the concept of national identity, we refer to the considerations of De Witte, B., *Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States*, in *European Public Law*, Vol. 27, No. 3, 2021, 559-570; Kaczorowska-Ireland, A., *What is the European Union required to Respect under Article 4(2) TEU? The Uniqueness Approach*, in *European Public Law*, Vol. 25, No. 1, 2019, 57-82.

[14] See *ex multis* Scnettger, A., *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Calliess, C., Van der Schyff, G. (eds.), *Constitutional identity in a Europe of Multilevel Constitutionalism*, 2019, Cambridge University Press, Cambridge, 2019, 9-38; Di Federico, G., *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violation of National Identity and the Quest for Adequate (Judicial) Standards*, in *European Public Law*, Vol. 25, No. 3, 2019, 347-380.

[15] An early outline of this idea can be found in Mangiameli, S., *The European Union and the Identity of Member State*, in *L'Europe en Formation*, No. 3, 2013, 151-168; Cloots, E., *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, Vol. 45, No. 2, 2016, 82-98.

text of the Treaties and the jurisprudence of the Union's courts are the ideal tools for reconstructing this identity. The methodology of analysis that will be used is an attempt to change the traditional perspective, thus allowing this concept to be dissociated from that of the national identities of the Member States. In this way the constitutional identity that is both specific to the Union and shared with the Member States, as a synthesis of values and principles common to both systems. The decision to adopt a "european perspective" in the search for the constitutional identity of the European Union stems first and foremost from the desire to search for the principles and values laid down in the Treaties as the founding elements of the constitutional order of the European Union. We believe that this will lead to a better understanding of the constitutional identity of the European Union, especially in relation to the constitutional identities of the Member States, to trace the relations and limits of European integration with respect to the legal systems of the States. It will also allow us to approach the issue of the constitutional identity of the European Union from a perspective that has been neglected in the academic literature.

We believe that this approach to research, which focuses precisely on European identity, has been further justified in recent years, as the European Union seems to have "embraced" the lexicon of constitutional identity, [16] to the extent that it reached the pinnacle of this approach with the recent judgments C-156 and C-157 of 2022, in which the judges of the Court of Justice explicitly defined the content of the constitutional identity of the European Union and the relationship between it and the national identity protected by Article 4(2) of the Treaty on European Union.

PART I: EUROPEAN CONSTITUTIONAL IDENTITY FROM THE PERSPECTIVE OF TREATIES

3.2. NATIONAL IDENTITY BETWEEN MEMBER STATES AND TREATIES

As noted at the outset, the issue of constitutional identity has for much of the past few years been the exclusive preserve of the Member States, which have on some occasions also "misused" it.[17]

[16] On this point, see the considerations of Drinóczi, T., Faraguna, P., *The Constitutional Identity of the EU as a Counterbalance for Uncostitutional Constitutional Identities of member States*, in *European Yearbook of Constitutional Law*, 2022, 57-87.

[17] On this point, the doctrine is rather broad; for a general overview of the issue, see at least Martinico, G., *Contro l'uso populista dell'identità nazionale. Per una lettura "contestualizzata" dell'articolo 4.2 TUE*, in *DPCE online*, No. 3, 2020, 3961-3981; Scholtes, J., *Abusing Constitutional Identity*, in *German Law Journal*, No. 22, 2021, 534-556; Fabbrini, F., Sajó, A., *The dangers of constitutional identity*, in *European Law Journal*, No. 25, 2019, 457-473; Kelman, R. D., Pech, L., *The Use and Abuse of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, in *Cambridge Yearbook of European Legal Studies*, No. 21, 2019, 59-74; Cloots, E., *National Identity in EU Law*, Oxford, 2015; Cloots, E., *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, Vol. 45, 2016, 82; Dobbs, M., *Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?*, in *Yearbook of European*

Surprisingly, it can be said that the reason for the almost exclusive use of this concept by the States lies precisely in the European Union itself, or rather in the content of the Treaties.

In fact, a first theorisation of the idea of a limit to European integration, albeit under different names and in different situations from today's, can be found in the early 1970s in the judgments of the German Federal Court and the Italian Constitutional Court: in other words, the foundations of the idea of "counter-limits" were laid.[18] Here, however, we would like to reconstruct, albeit briefly and in its essential elements, how the concept of the defence of national identity became not only part of the current legal jargon of the European Union, but also how this idea was crystallised (institutionalised) within the Treaties. Indeed, it is in primary law that the obligation to respect the national identity of Member States is explicitly enshrined. Therefore, to better understand how and why the identity of the European Union has evolved, we will first consider how the protection of the national identities of the Member States has evolved in the Treaties and what role it has played in the definition of the "common" European identity and in the relations between national and supranational systems. In particular, the attempts to trace the stages that led to the codification of the concept of national identity in the Treaties can help to illustrate, on the one hand, the relationship that has been created between the Member States and the European Union in terms of integration and, on the other hand, how the concept of identity has been accepted and then developed by the Euro-unitary order.

The concept of constitutional identity has been used in recent years, first by the constitutional and supreme courts of the Member States and then by governments, as a tool - some have called it a "picklock"[19] - to force the debate on the relationship between the European Union and the Member States and on the limits of integration. In other words, national constitutional and supreme courts have often used the concept of national identity as a "surrogate" for the concept of sovereignty. In

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Law, No. 33, 2014, 298; Di Federico, G., *L'identità nazionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, Editoriale Scientifica, Napoli, 2017; Konstadinides, T., *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, No. 13, 2011, 195; Besselink, L., *National and Constitutional Identity before and after Lisbon*, in *Utrecht Law Review*, No. 6; 2010, 36-41; Guastaferro, B., *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, in *Yearbook of European Law,* Vol. 31, 2012, 263-267.

[18] Recall here at least BVG 27 May 1974, 2 BvL 52/71 *Solange I-Beschluß*, *BVerfGE* 37, para. 271; BVG 22 October 1986, 2 BvR 197/83 *Solange II, BVerfGE* 73, para. 339; Constitutional Court 27 December 1973, No. 183, *Forntini*; Constitutional Court 5 June 1984, No. 170, *Granital*; Italian Constitutional Court, 21 April 1989, No. 232. See Polimeni, S., *Contolimiti e identità costituzionale nazionale. Contributo per una ricostruzione del "dialogo" tra le Corti*, Editoriale Scientifica, Napoli, 2018, 32-44; Faraguna, P., *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Franco Angeli, Milano, 2015, 61-83; Ruggeri, A., *Primato del diritto sovranazionale* versus *identità costituzionale? (Alla ricerca dell'araba fenice costituzionale: i "controlimiti")*, in Bernardi, A. (eds.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Jovene editore, Napoli, 2017, 19-43.

[19] Toniatti, R., *Sowereinty Lost, Constitutional Identity Regained*, 50-51; Mangiameli, S., *The European Union and the Identity of Member States*, in *L'Europe en Formation*, No. 3, 2013, 151-168.

order to have a better understanding of this idea, we can quote the words of Weiler, who argued that «mobilizing in the name of sovereignty is *passé*; mobilizing to protect identity by insisting on constitutional specificity is *à la mode*»[20] However, the purpose of this section is not to examine how the concept of national identity has been used by the Member States, but rather to provide a brief overview of how this concept first became part of the Union's primary law and then an element from which the identity of the European legal order developed. As mentioned above, the Maastricht Treaty of 1992 introduced the identity concept for the first time. Specifically, Article F, first paragraph, states that

> «the Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy».[21]

The introduction of the national identity clause can be better understood in the light of the important changes that took place on the European continent in the early 1990s: both in the historical context and in the economic, social, and legal context. As a result of these events, the prospect of achieving a political union in Europe, in addition to the economic union that had been in place since the early 1950s, became increasingly topical at European level.

Indeed, the need to extend European integration to the political and constitutional sphere had already become apparent in 1983 with the adoption of the Solemn Declaration on European Union by the Stuttgart European Council.[22] The content of the declaration was thus fundamental to the adoption of the Single European Act in 1986, with which the Community intended not only to give new impetus to the construction of the internal free market, but also to initiate an embryonic strand of European political union, which was achieved at the two Dublin European Councils in April and June 1990, leading to the Maastricht European Council. The reason for the inclusion of a clause on national identity can be explained precisely in the light of the new Community competences

[20] On this concept see Weiler, J. H. H., *A Constitution for Europe? Some Hard Choices*, in *Journal of Common Market and Studies*, Vol. 40, No. 4, 2002, 569. In this passage, the author has precisely intended to explain how the Member States and their apex courts have replaced the concept of 'sovereignty' with that of 'national identity' based on constitutional specificity in such a way as also to cause less fuss about Member States slowing down or opposing the integration process.

[21] Treaty of Maastricht, Art. F(1).

[22] The Solemn Declaration on the European Union, made in Stuttgart between 17 and 19 June 1983, was structured around several fundamental points. Specifically, it stated the will to deepen and strengthen European integration, as well as the need for a strengthening of adherence to democratic principles and respect for human rights within the member states. It was also stated that these objectives would not be achieved without greater coherence of action and coordination of common policies, to which was necessarily added the need to adopt more effective decision-making procedures, through a formal institutionalisation of the role and tasks of the European Council and a strengthening of the powers of the European Parliament. All this with a view to strengthening not only the area of the common market, but also European political cooperation and in the cultural sphere.

introduced by the Maastricht Treaty of 1992. In fact, the extension of Community competences, together with the introduction of the innovative principle of subsidiarity,[23] almost made it necessary to introduce the identity clause, which, according to at least one part of the doctrine, was intended as an instrument to rebalance the position of the Member States within the Euro-unitary order. The introduction of Article F was thus intended to guarantee the safeguarding of key national competences, which would thus remain the exclusive and "inviolable" prerogative of national systems.[24]

It should be recalled that at the time, the concept of national identity was interpreted by the doctrine and the Court of Justice as the constitutional identity of the Member States, namely as a strictly legal concept, leaving no room for a national identity based on culture.[25] This is why, from the outset, the identity clause has been read in the context of the transfer of powers from the level of the nation States to that of the Union.[26] In this way, the clause introduces a limit to European integration and to the powers that can be transferred to it.[27] However, this provision, which establishes respect for the national identities of the Member States, is counterbalanced by a limitation stemming from the text of the Treaty itself. In fact, the first paragraph of Article F states that the obligation to respect the identity clause only applies within state where systems of government are based on the principles of democracy. This means that the Union and its organs are obliged to respect national identity as long as the state system of government are based on democratic principles.[28]

On the contrary, with the successive Treaties of Amsterdam and Nice, Article 6(3) of the Treaty on European Union lost this "democratic clause", according to which «the Union shall respect the national identities of its Member States»,[29] and no longer contained any limits on the extent to which the European Union could respect the national identities of its Member States, to which it had

[23] Treaty of Maastricht, Art. 3(B).

[24] Faraguna, P., *On the identity clause and its abuses: back to the treaty*, in *European Public Law*, Vol. 27, No. 3, 2021, 427-446; Guastaferro, B., *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clauses*, in *Yearbook of European Law*, Vol. 31, No. 1, 2012, 263-318.

[25] See Hartley, T. C., C*onstitutional and Institutional Aspects of the Maastricht Agreement*, in *The International and Comparative Law Quarterly*, Vol. 42, No. 2, 1993, 213-237; Abbey, M. H., Bromfield, N., *A Practitioner's Guide to the Maastricht Treaty*, in *Michigan Journal of International Law*, Vol. 15, No. 4, 1994, 1329-1357; Wiegandt, M. H., *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, in *American University International Law Review*, Vol. 10, No. 2, 1995, 889-916; Mitchell, J., *Understanding Maastricht*, in *Contemporary European History*, Vol. 5, No. 2, 1996, 243-257.

[26] Schnettger, A., *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Calliess, C., Van der Schyff, G. (eds.), *Constitutional identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge, 2019, 9-38.

[27] Schnettger, A., *Article 4(2) TEU*, 11-19; Guastaferro, B., *Legalità sovranazionale e legalità costituzionale. Tensioni costitutive e giunture ordinamentali*, Torino, Giappichelli, 2013, 121 *passim*; ID., *Beyond the Exceptionalism*, 308.

[28] Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, 1.

[29] Art. 6(3) TEU, Amsterdam and Nice version.

previously been bound by democratic principles. In fact, an important change in the wording of the national identity clause occurred with the Treaty establishing a Constitution for Europe, which, although not adopted at the time, was fundamental to the current wording of Article 4(2) TEU, as amended by the Treaty of Lisbon.[30] Indeed, looking directly at the current text of Article 4(2) TEU, it states that

«the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self- government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State».[31]

The first element that emerges from the current wording of the national identity clause is undoubtedly the broadening of the text and thus a greater specification of the limits and content of national identity. In this way, the national identity of the Member States seems to be increasingly sought and limited to the constitutional sphere. Specifically, this identity is said to be inherent in the fundamental and political structures of the national order contained in the constitution, to which regional and local autonomies are added. According to this formulation, identity should therefore be brought back into the legal sphere to avoid a possible abuse of the identity clause by the Member States. In fact, as the German Federal Court argued, States could use the concept of national identity as an absolute limit to European integration with respect to the core of their constitution, which could not be changed even with the democratic consent of the majority of the members of the parliamentary assembly, as it is an unamendable part of the constitution.[32]

Still others authors have read into the new wording of the national identity clause the possibility for Member States to decide to derogate from a provision of EU law in exceptional cases where it conflicts with the essential content of a national constitution.[33] On the other hand, with regard

[30] Article I-5(1) of the 2004 Constitutional Treaty states that «the union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self- government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security».

[31] Art. 4(2) TEU.

[32] See Schütze, R., *European Union Law*, Cambridge University Press, Cambridge, 2018, 137-138.

[33] See Van der Schyff, G., *Exploring Member State and European Union Constitutional Identity*, in *European Journal of Public Law*, Vol. 22, No. 2, 2016, 230-231; Kumm, M., Ferrares Comella, V., *The Primacy Clause of the Treaty and the Future of Constitutional Conflict in the European Union*, in *International Journal of Constitutional Law*, Vol. 3, Nos. 2-3, 2005, 473; von Bogdandy, A., Schill, S., *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, Vol. 48, 2011, 1417; Guastaferro, B., *Beyond the Exceptionalism*, 309-311.

to the extension of the concept of national identity, some scholars, such as De Witte, are more inclined to limit the scope of interpretation of the national identity clause. In particular, the content of article 4(2) TEU should refer exclusively to institutional diversity in the strict sense of the constitutional text and not so much to its interpretation. Thus, the Union and its institutions should respect only those constitutional features that are provided for in the TEU provision, such as regional or local self-government, organisation of the judiciary, choice of form of government or electoral system.[34] According to this more restrictive interpretation of article 4(2) TEU, it would be possible to avoid an abuse of the national identity clause by Member States, which could limit the integration process only to those areas explicitly protected by article 4(2) TEU, thus restricting the field to a possible abuse of the concept of national identity.[35]

To have a more comprehensive understanding of the content of the national identity clause the analysis of the jurisprudence of the Court of Justice could be useful, albeit limited to a few essential but significant cases.

The first judgment on the subject of national identity after the entry into force of the Lisbon Treaty in 2009 was the judgment of 22 December 2010 in the case of *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (C-208/09),[36] in which the Court recognised that the abolition of titles of nobility was indeed a typical element of the Austrian national identity, which had chosen to place the constitutional principle of equality and the republican principle at its centre. For this reason, the applicant could not rely on article 21 TEU (concerning European citizenship) against the Austrian law prohibiting the use of titles of nobility in her name. Similarly, in the *Runevič-Vardyn and Wardyn case* (C-391/09) of 12 May 2011,[37] the Court of Justice recognised the need for the European Union

[34] De Witte, B., *Article 4(2) TUE as a Protection of Institutional Diversity of the Member States*, in *European Public Law*, Vol. 27, No. 3, 2021, 563-565; Fabbrini, F., Sajó, A., *The dangers of constitutional identity*, 459.

[35] See Bárd, P., Chronowski, N., Fleck, Z., *Use, Misuse, and Abuse of Constitutional Identity in Europe*, in *Central European University Democracy Institute Working Papers*, No. 6, 2023, 1-44; Weber, F., *The Identity of Union Law in Primacy: Piercing Through* Euro Box Promotion and Others, in *European Papers*, Vol. 7, No. 2, 749-771; Levits, E., *On primacy, common constitutional traditions, and national identity in the common European constitutional space*, in *EUnited in diversity: between common constitutional traditions and national identities International Conference,* Riga, Latvia – 2-3 September 2021, Conference Proceedings, 2022, 27-34; Weatherill, S., *Distinctive identity claims, article 4(2) TEU (and a fleetingly sad nod to Brexit)*, in *International Journal of Constitutional Law*, No. 14, 2016, VII-XIII; Dobbs, M., *Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?*, in *Yearbook of European Law*, Vol. 33, No. 1, 2014, 298-334; Preshova, D., *Battleground or meeting point? Respect for national identities in the European Union – Articles 4(2) of the Treaty on European Union*, in *Croatian Yearbook of European Law and Policy*, 2013, No. 8, 267-298; Guastaferro, B., *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, in *Jean Monnet Working Paper Series*, No. 1/12, 2012, 1-69; Van der Schyff, G., *The constitutional relationship between the European Union and its member states: The role of national identity in article 4(2) TEU*, in *European Law Review*, Vol. 37, 2012, 563-584.

[36] ECJ, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Case C-208/09, 22 December 2010.

[37] ECJ, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Case C-391/09, 12 May 2011.

to respect Lithuania's national identity, which in this specific case had manifested itself in the form of the protection of the national language, which under Lithuanian law allowed the State to reject the applicant's request to use the original spelling of her surname for registration in the Lithuanian civil status register. Again, as in the *Digibet* case (C-156/13) of 12 June 2014,[38] the distribution of powers between the central, regional, and local levels constitutes an integral part of the national identity clause. Or as in the *Torresi* case (C-58 and 59/13) of 17 July 2014,[39] in which the judges of the Court of Justice confirmed that, based on article 4(2) TEU, the European institutions are obliged to respect the Italian rules governing access to certain professions.[40]

From the few, but significant, judgments on the application of article 4(2) TEU reported here, it is possible to understand how respect for the national identity of Member States has been interpreted by the EU court beyond the mere textual fact of the provision. Indeed, the identity clause has been applied as a general rule protecting a wide range of national interests, and not only the basic constitutional structures of the Member States, as article 4(2) TEU seems to explicitly state.[41] This is clearly demonstrated in the *Sayn-Wittgenstein*, *Runevič-Vardyn* and *Torresi* judgments, where the defence of identity has been applied to elements that belong more to national history and culture or to access to certain professions, as in the Italian case, than to the fundamental provisions of a constitutional order. From this consideration follows another interpretation, according to which cultural identity may be covered by the identity clause to the extent that it is interpreted by the Member State as an integral part of the national constitutional identity: «conversely, the characteristics of cultural identity are relevant only to the extent that they inform the constitution».[42]

In conclusion, the concept of national identity is porous, as its content is also subject to interpretation by national courts.[43] For this reason, it is possible to distinguish two notions of national

[38] ECJ, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, 12 June 2014.

[39] ECJ, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata*, Cases C-58/13 and C-59/13, 17 July 2014.

[40] Another significant ruling about the recognition of the constitutional identity of member states is certainly ECJ, *Hungary v. Slovak Republic*, Case C-364/10, ECLI:EU:C:2012:630, Judgment of 16 Oct. 2012. In this case, however, the ECJ did not react to the reference to Article 4.2 TEU by Slovakia.

[41] On this topic see considerations of De Witte, B., *Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States*, in *European Public Law*, Vol. 27, No. 3, 2021, 559-570; Capelli, T., *The respect for national identity in the context of European integration*, in *Astrid Rassegna*, No. 16, 2023, 11-36; Fromage, D., *National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of a General Trend Towards Multilevel Governance Within the EU*, in *European Public Law*, Vol. 27, No. 3, 2021, 497-516; Aichholzer, J., Kritzinger, S., Plescia, C., *National identity profiles and support for the European Union*, in *European Union Politics*, Vol. 22, No. 2, 2021, 293-315; Cloots, E., *The Meaning of the Identity Clause*, in Cloots, E. (eds.), *National Identity in EU Law*, Oxford University Press, Oxford, 2015, 127-192; Van der Schyff, G. *The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU*, in *European Law Review*, Vol. 37, No. 5, 2012, 563-584.

[42] Capelli, T., *The respect for national identity*, 15.

[43] Schnettger, A., *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Calliess, C., Van der Schyff, G. (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*,

identity, which may also not be symmetrical: from one side, that provided by the European Court of Justice, which is characterised by ensuring uniformity in the interpretation and implementation of EU law, and as a counterweight to the use of the identity clause as a tool to oppose the European integration process. And, from the other side, the interpretation of the concept of national identity by the constitutional and supreme courts of the member states as a specification of national identity given by the interpretation of national constitutional law.

3.3. European founding principles: the axiological dimension of the European Union

The first part of this chapter will be devoted to framing and reconstructing the identity of the European Union through the text of the Treaties and, in particular, the Treaty on European Union, since, already from an evolutionary reading of these document, it is possible to trace the elements that later defined the content of the identity. Indeed, the Treaties, as will be seen below, contain rather clear indications as to what elements constitute the core of these documents. For this reason, in the following pages we shall attempt - as we did with the previous case study on Bosnia and Herzegovina - to trace the identity of the European Union from the way it emerges from the text of the Treaties by analysing, first, the mere normative datum, and then moving on to the study of the mechanisms for protecting this essential core, which the documents themselves provide.

In doing so, this first part of the chapter will adopt a method of analysis that can be described as deductive, that is, it will start from an exposition of the elements that potentially define the core of the Union's values from which the identity of this order is defined. More specifically - after analysing how European principles, first, and values, then, have developed within the European Union order, starting from the very first institutional changes of the 1970s and ending with the Lisbon Treaty - the chapter will focus on the analysis of the necessary requirements for a candidate state to join the European Union, as the presence of specific elements can be an important perspective to observe the values on which the European constitutional identity is based.

Subsequently, the fact that the Treaty on European Union provides for the existence of mechanisms aimed at sanctioning Member States that do not respect the values on which the Union is founded constitutes, in our opinion, a fundamental element in reconstructing the European identity from the perspective of the Treaties, just as the creation of specific conditionality mechanisms aimed at enforcing compliance with certain elements that form an integral part of the Union's founding

Cambridge University Press, Cambridge, 2019, 9-38.

values, at the level of secondary legislation, is an indication of further protection of the European identity.

Then, the role that European values also assume in the external sphere of the Union and, specifically, in relation to other legal systems will be illustrated. Moreover, with the evolution that the current European Union has undergone since the adoption of the Maastricht Treaty, to understand how European identity develops not only within European legal texts and court rulings, but also in everyday life, it has been decided to devote a space to describing the theme of European citizenship, defined as a fundamental status in which the relationship between European and non-European citizens is increasingly important. The dividing line in the Union's external relations is precisely this distinction between EU and non-EU citizens.

Finally, to conclude the examination of the normative datum, a fundamental aspect to be evaluated is that of the existence or non-existence of limits to the procedure for revising the primary sources of European Union law. In fact, the provision of an aggravated procedure for the revision of certain parts of the Treaties and the fact that, by way of case law, the review by the Court of Justice of the legitimacy of amendments to EU primary law has been accepted and that the very values set forth in Article 2 TEU are adopted as a yardstick for judgement is an indication of the importance that these have for the European order in general and for the definition of the Union's identity in particular.

In order to set the thread that holds this chapter together, it can be said that the first part will be devoted to an analysis of the text of the Treaties, and in particular the Treaty on European Union, as a positive basis for a comprehensive study of European constitutional identity. Whereas the second part will be focused to framing the constitutional identity of the European Union from the perspective of the case law of the Court of Justice. With these premises in place, it is now possible to analyse the identity dimension of the European Union as it emerges from the text of the Treaties.

3.3.1. The evolution of European identity: from Declaration on European identity to the Lisbon Treaty

It is now common knowledge that the European Union, before assuming the name and characteristics it has today, was originally and exclusively an economic community, established by the Treaty of Paris as the European Coal and Steel Community and later transformed into the European Economic Community by the Treaty of Rome.[44] But already in the first half of the 1970s,

[44] See Segers, M., Van Hecke, S. (eds.), *The Cambridge History of the European Union*, Vols. 1 and 2, Cambridge University Press, Cambridge, 2023; Amato. G., Moavero-Milanesi, E., Pasquino, G., Reichlin, L. (eds.), *The History of*

there was an internal pressure within the Community to give it a real political character. Suffice it to say that the meetings of the Heads of State or Government of the Member States, which had developed in practice since 1961 and were formalised under the name of European Councils at the Paris Summit in 1974, were already moving in this direction.[45] The purpose of these meetings was precisely to give political impetus to the Community and to promote European integration with greater cohesion between the Member States.[46] Similarly, the decision taken at the 1976 European Council to elect the European Parliament by direct universal suffrage, with the first direct elections taking place in 1979, was a further demonstration of the Community's desire for change in political direction.[47] Various European Councils in the 1970s and 1980s also moved in the same direction; in particular, the adoption of the Solemn Declaration on the European Union at the Stuttgart European Council in 1983 explicitly proposed a political union to complement the existing economic community.[48] This was followed by the adoption of the Single European Act,[49] which launched an embryonic project for a political structure of the Community,[50] later concretised by the Maastricht Treaty.

Almost simultaneously with the nascent desire to endow the Community with a political dimension as well, the idea of defining a European identity emerged as an essential element for such European integration.[51] Indeed, the notion had arisen that the recognition of a core of European values shared by states and their citizens would favour the transformation of the Community in a political sense.[52] At the same time, however, the need had also arisen to develop a common position of the member states regarding other institutions outside the Community and, in particular, with regard to

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European Union, Bloomsburry, London, 2019; Kaiser, W., Varsori, A. (eds.), *European Union History Themes and Debates*, Palgrave Macmillan, London, 2010.

[45] Despite the formalisation of the discipline of the European Council with the London European Council in 1977 and the Stuttgart European Council in 1983, it was not until 1987, with the Single European Act, that the European Council was enshrined in the Treaties, and it was only with the Maastricht Treaty (1992) that it acquired the status of an institution of the European Union.

[46] See Wheatley, J., Mendez, F., *Reconceptualizing Dimensions of Political Competition In Europe: A Demand-side Approach*, in *British Journal of Political Science*, Vol. 51, No. 1, 2021, 40-59; Grevi, G., *Strategic autonomy for European choices: The key to Europe's shaping power*, in *European Policy Centre*, 2019, 3-23; Reinisch, A., *Essentials of EU Law*, Cambridge University Press, Cambridge, 2012, 14 *passim*; Pocar, F., *Diritto dell'Unione europea*, Giuffrè, Milano, 2010, 106; Borchardt, K. D., *European Integration. The origins and growth of the European Union*, European Documentation, Brussels, 1995, 59-72.

[47] Lupo, N., Manzella, A., *Il Parlamento europeo. Una introduzione*, Luiss University Press, Roma, 2019, 11-21.

[48] Solemn Declaration on European Union. European Council, Stuttgart 19 June 1983. Bulletin of the European Communities, No. 6/1983

[49] Single European Act, 29 June 1987, Official Journal of the European Commities, L 169/1.

[50] Mastroianni, R., Strozzi, G., *Diritto dell'Unione Europea. Parte istituzionale*, Giappichelli, Torino, 2023, 9-11.

[51] Haas, E., B., *The Uniting of Europe. Political, Social, and Economic Forces 1950*-1957; University of Notre Dame Press, Notre Dame, 1958, 3-29, 113-161, 390-450; Zanichelli, M., *L'Europa come scelta*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*; Vol. 31, 2002, 917-942.

[52] Lelieveldt, H., Princen, S., *The Politics of the European Union*, Cambridge University Press, Cambridge, 2023, 21-37; Fiszer, J. M., *From Political Transformation to Europeanization and Democracy in the New European Union Member States: An Attempt to Review Results*, in *Polish Sociological Review*, Vol. 195, No. 3, 2016, 373-388.

international law. Official efforts were directed towards this goal already in the early 1970s, finding a first and clear attempt in the 1973 Declaration of Heads of State and Government on European Identity.[53] This document, in fact, was drafted with the precise intention of affirming and declining the European identity, which, in terms of its content, surprisingly anticipated those principles developed by the subsequent Treaties and which have led to the current definition of the identity of the European Union.

It is interesting to note, at the outset, that the then nine member states matured the need to define the European identity for «[...] a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs [...]».[54] This first statement, contained in the preamble of the Document on European Identity, shows how the issue of identity arose within the European order as an attempt to define a common vision to be adopted in international affairs. In other words, the need arose for the European Union to define its own character and purpose in relation to other legal orders. This circumstance leads to the conclusion that the Community needed to externalise these principles outside its own legal system, rather than fixing them for the states that were already part of it. Indeed, in the wake of this interpretation, it seems to explain what is stated in the first article of the Declaration, which affirms that

> «the Nine European States might have been pushed towards disunity by their history and by selfishly defending misjudged interests. But they have overcome their past enmities and have decided that unity is a basic European necessity to ensure the survival of the civilization which they have in common».[55]

This suggests that it was some Member States that decided to unite since some common and shared values to avoid a repetition of past mistakes that led to the outbreak of two world wars. However, stripping away the rather rhetorical surface of some parts of this document, it is possible to see what are the values on which this community has decided to base itself. Specifically, the document states that «the Nine [...] are determined to defend the principles of representative democracy, the rule of law, social justice - which is the ultimate goal of economic progress - and respect for human rights».[56] These values are thus placed at the heart of the European identity, which in turn will have to evolve according to the dynamics of the construction of the European project, in order to strengthen

[53] Document on European Identity, adopted by the Foreign Ministers of Member States of the European Communities on 14 December 1973 in Copenhagen, Europa-Archive 2/1974, D 50.

[54] Preamble of Document on European Identity, 14 December 1973.

[55] Document on The European Identity, Art. 1.

[56] *Ibidem*.

the internal cohesion of the Member States and contribute to the development of truly European policies.[57]

Based on the declarations made by the Heads of State or Government in Copenhagen in December 1973, it is possible to trace the development of these values within the European Union. Indeed, the Single European Act of 1986 - following the Solemn Declaration on the European Union adopted after the Stuttgart European Council of 1983 - renewed the promotion of the values enshrined in the Copenhagen Declaration. In particular, the Member States declared themselves «determined to promote democracy based on fundamental rights»,[58] as well as freedom, equality, and social justice. In this historical perspective, it seems interesting to focus attention on the first major change in the Community's structure: the adoption of the Maastricht Treaty in 1992, which marked «a new stage in the process of European integration undertaken with the establishment of the European Community».[59]

To understand the extent to which the values expressed in the 1973 Declaration played a role, it is enough to analyse the Preamble to the Treaty in question. Indeed, the text begins with a solemn declaration in which the Heads of State or Government of the twelve Member States reaffirm «their attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law».[60] This first statement shows the closeness of the values identified as fundamental in the 1973 Declaration on European Identity and those now reaffirmed in the Maastricht Treaty establishing the new European Union. In this respect, the continuity of values between the Economic Communities and the European Union is significant. Indeed, despite the radical changes that have taken place in the European institutions, it is significant that the values have not changed: democracy, the rule of law and respect for human rights are there. Not only are the founding values of the new Union enshrined in the Maastricht Treaty, but it also states that the Union aims, among other things, to «affirm its identity»[61] and «strengthen the protection of rights».[62]

Following this analysis, the subsequent Treaty of Amsterdam of 1997[63] took a further step towards consolidating the values on which the European Union is based. In fact, it not only reaffirms the initial core already expressed in the preamble of the Maastricht Treaty, but also modifies the previous article F and explicitly states that «the Union is founded on the principles of liberty,

[57] Document on The European Identity, Art. 22.

[58] Single European Act, Preamble.

[59] Treaty of Maastricht on European Union, 7 February 1992, Official Journal of the European Communities C 325/5, Preamble.

[60] *Ibidem*.

[61] *Ivi*, Art. B, para. 2.

[62] *Ivi*, Art. B, para. 3.

[63] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 10 November 1997, Official Journal of the European Union C 340, P. 0001 – 0144.

democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States».[64] Thus, the Treaty on European Union, as amended in Amsterdam, no longer states, as it did before, that the Community defends or reaffirms its attachment to European values, but that the Union is founded on certain principles which are the same as those first enshrined in the Declaration on European Identity. The Treaty of Amsterdam had the merit of enshrining in the Treaties that the Union has principles on which it is founded and which it shares with the Member States.

Changes in the formulation of European values would have to wait until the draft Treaty establishing a Constitution for Europe of 2003, which not only states in its preamble that the Union is inspired, inter alia, by the inviolable and inalienable rights of the individual, freedom, democracy, and the rule of law,[65] but also devotes a specific article, I-2, to the values of the Union. This article states that

> «the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».[66]

Although the Treaty establishing a Constitution for Europe failed to be ratified by France and the Netherlands and, for this and other reasons, was abandoned as a project, it nevertheless marked an important moment in the history of European identity. It is indeed significant that the members of the European Convention decided to open the text of the Constitution, in its normative part, with an article devoted to the values of the European Union. It is also significant that here too there is continuity in the content of the values of the European Union, the only difference with previous formulations being the addition of respect for the rights of persons belonging to minorities.

The importance of the formulation of the values of the European Union in the version of the Treaty establishing a Constitution for Europe that was subsequently not adopted is confirmed by the fact that the Treaty of Lisbon has adopted the same wording for Article 2 TEU,[67] just as the same

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[64] Treaty of Amsterdam, Art. 6, para. 1.

[65] Treaty Establishing a Constitution for Europe, 16 December 2004, Official Journal of the European Union C 310/1, Preamble.

[66] *Ivi*, Art. I-2.

[67] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, Official Journal of the European Union C 306/01, art. 2 «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

wording was used in the preamble of the version consolidated by the TEU.[68] It is worth noting that, in the transition between the wording of the Treaty on European Union in its Nice version and that of the Treaty of Lisbon, the expression "values" was used to describe the elements which constitute the essence of the Union's order, whereas subsequently - and this change had already been made in the Treaty establishing a Constitution for Europe - reference was made to "principles". Today, however, in the light of the two judgments of the Court of Justice, C-156/21 and C-157/21, the judges have made it clear that the values enshrined in Article 2 of the TEU are values that have been accepted as principles and are therefore legally binding. If we want to outline the values on which the European Union is founded today and which, according to the case law of the Court of Justice, constitute its identity, we can say that they are: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The centrality that these values have acquired in the Treaties clearly sanctions the overcoming of the mercantile outlook that characterised the first European Communities.[69]

3.4. Pre-adhesion respect for European Values: art. 49 TEU

The analysis of the normative datum carried out so far has shown that the values enshrined in Article 2 of the Treaty on European Union constitute the core of the identity of the Union order. While on the one hand it is the text of the TEU itself which enshrines the values on which the European Union is founded, and on the other hand it is the Court of Justice which, in its recent case law, has affirmed that these values constitute its identity, it is also possible to deduce this central role of the values contained in Article 2 of the TEU on the basis of a deductive analysis of the other provisions of the Treaty. Specifically, the intention of this section is to move in this direction by examining Article 49 TEU,[70] which is the interface between the law of the Union and the law of the States, in

[68] Treaty of Lisbon, Preamble, «Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law».

[69] See Besselink, L., *The Persistence of a Contested Concept*, 599; Faraguna, P., *On the Identity Clause and Its Abuses: 'Back to the Treaty'*, in *European Public Law*, Vol. 27, No. 3, 2021, 427-446; Wendel, M., *The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany*, in *European Public Law*, Vol. 27, No. 3, 2021, 465-493; Martinico, G., *Taming National Identity: A Systematic Understanding of Article 4.2 TEU*, in *European Public Law*, Vol. 27, No. 3, 2021, 447-464; Millet, F. X., *Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way*, in *European Public Law*, Vol. 27, No. 3, 2021, 571-595; Claes, M., *National Identity and the Protection of Fundamental Rights*, in *European Public Law*, Vol. 27, No. 3, 2021, 517-535; Bonelli, M., *National Identity and European Integration Beyond 'Limited Fields'*, in *European Public Law*, Vol. 27, No. 3, 2021, 537-557; Villani, U., *Valori comuni e rilevanza delle identità nazionali e locali nel processo d'integrazione europea*, Editoriale Scientifica, Napoli, 2011, 11.

[70] Art. 49 TEU: «Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified

this case the non-Member States. In fact, the article we are going to examine is concerned with the criteria and conditions that a state must possess and respect in order to be able to embark on the path of accession to the European Union.

Without going through the various stages of the accession procedure,[71] in order to reconstruct the elements that make up the identity of the European Union, it is important to note that, in primary law, there are essentially two conditions that a state wishing to join the Union must meet: on the one hand, there is a geographical element, in that it must be a country belonging to the European continent,[72] and, on the other hand, it must respect the values referred to in Article 2 and [be]

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of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements».

[71] At this point, we would just like to give some general coordinates regarding the EU accession procedure. First of all, it should be recalled that this procedure consists of two stages: one "Community" and the other "intergovernmental". The first stage is triggered when a country wishing to join the Union submits an application to the Council of the European Union, which also informs the European Parliament and the national parliaments of the Member States. After consulting the European Commission, the Council of the European Union must take a unanimous decision on the application. In fact, it is the Commission that is responsible for assessing the situation of the applicant state by means of an in-depth examination aimed at establishing whether or not the conditions for accession are met (Article 49 and the Copenhagen criteria). To complete the "Community" phase, the European Parliament must also approve the accession of the applicant state by a simple majority of its members. At this point, the "intergovernmental" phase begins, which takes place between the Member States and the candidate country. In other words, it involves international agreements between these states, resulting in an accession treaty which lays down the conditions of accession and the necessary adjustments to the treaties, as well as possible derogations, usually of a temporary nature, from the existing rules to take account of the specific difficulties of the new member state. The accession treaty must then be submitted for ratification by all the Member States to complete the accession procedure. For more information on this procedure, see Erlbacher, F., *Art. 49 TEU*, in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary,* Oxford University Press, Oxford, 2019, 311-318; Puglia, M., *Art. 49 TUE*, in Tizzano, A. (eds.), *Trattati dell'Unione Europea*, Giuffré, Milano, 2014, 336-337; Pocar, F., Baruffi, M. C., *Commentario breve ai Trattati dell'Unione europea*, CEDAM, Milano, 2014, 147-149; Cerruti, T., *The Political Criteria for Accession to the EU in the Experience of Croatia*, in *European Public Law*, Vol 20, No. 4, 2014, 771-798; Mehlhausen, T., *European Union Enlargement: Material Interests, Community Norms and* Anomie, Routledge, London, 2015; Kochenov, D., *EU Enlargement and the Failure of Conditionality*, Kluwer, Alphen van den Rijn, 2008: Cremona, M. (eds.), *The Enlargement of the European Union*, Oxford University Press, Oxford, 2003.

[72] It should be noted that for an application to be admissible, it is sufficient for even part of the territory of the applicant state to be on the European continent. Therefore, the European Council rejected Morocco's application in 1987, but accepted Turkey's at the Brussels Council in 2004. More generally, however, the Commission argued that the concept of a European state also expresses a commonality of ideas and values, and thus brings together not only geographical but also historical and cultural elements, all of which together contribute to shaping the identity of the Union. See Weinzierl, J., *Territoriality Beyond the State: The EU's Territorial Claims and the Search for Their Legitimacy*, in *German Law Journal*, No. 22, 2021, 650-672; Lippert, B., *Turkey as a Special and (Almost) Dead Case of EU Enlargement Policy*, in Reiners, W., Turhan, E. (eds), *EU-Turkey Relations*, Palgrave Macmillan, London, 2021, 267-293; Dabrowski, M., Myachenkova, Y., *The Western Balkans on the road to the European Union*, in *Policy Contribution*, No. 4, 2018, 1-23; Adam, R., Tizzano, A., *Manuale di diritto dell'Unione europea*, Giappichelli, Torino, 2014, 42; Yeşilada, B. A., *Some expected and some not-so-expected Benefits of Turkey's EU Membership for both Parties*, Paper prepared for presentation at the European Union Studies Conference in Montreal, Canada, May 17-20, 2007, 1-21; Grigoriadis, I. N., *Turkey's*

committed to promoting them».[73] It is worth noting that these two criteria are not the only ones required of a state wishing to start the EU accession process; in fact, as we will see below, there are also the famous "Copenhagen criteria". It is interesting to note, however, that the main criterion explicitly required by the Union's primary law is that of respecting and promoting the values on which the European Union is founded. In other words, a state wishing to join the European Union must first respect the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Not only that, but the state wishing to initiate the accession process must also engage in the effective «promotion»[74] of these values in its internal and external procedures.

Article 49 TEU clearly demonstrates the value of the principles set out in Article 2 of the same Treaty. Indeed, they constitute the very foundation of the European Union, since they are the main "key" to membership of the Union, without which those states that wish to do so cannot even initiate the accession procedure, and as will be seen in the following paragraph, respect for these values is also necessary throughout the period of membership. This fact illustrates the importance of the principles set out in Article 2 of the TEU for the European order, so much so that it can be seen from this element alone that these values constitute the content of the identity of the European Union, understood as a core of values that not only forms the basis of European law but also constitutes a unifying element between the Member States and those who wish to join the Union.

At the beginning of this section, it was stated that the criteria set out in Article 49 of the Treaty on European Union are not the only ones whose fulfilment and promotion is necessary to activate the accession process. In fact, the Copenhagen European Council of 21 and 22 June 1993[75] established the criteria which take their name from this city, and which were later clarified at the Madrid European Council in 1995, defining the criteria and detailed requirements which each candidate country must meet in order to aspire to membership. In particular, the first criterion, the political criterion, is significant in that it further reflects the importance of the values on which the European Union is based for the definition of European identity. Indeed, the State that wishes to activate the procedure for accession to the European Union must demonstrate that it has stable political institutions capable of guaranteeing - and this is the link with the values enshrined in Article 2 of the TEU - a democratic

Accession to the European Union: Debating the Most Difficult Enlargement Ever, in *The SAIS Review of International Affairs*, Vol. 26, No. 1, 2006, 147-160; Emerson, M., *Has Turkey Fulfilled the Copenhagen Political Criteria?*, in *Centre for European Policy Studies*, No. 48, 2004, 1-6.

[73] Art. 49 TEU.

[74] *Ibidem*.

[75] European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1.

order in which the principle of the rule of law applies and in which human rights are respected, as well as the rights of minorities and their effective protection.[76]

It is significant that the political criteria were rejected by the Heads of State and Government at the Copenhagen European Council in 1993 on the same basis as the values on which the Union is founded. In fact, when examining whether the political criteria were met,[77] the Union's institutions focused first of all on the question of democracy, analysing it not only from a purely formal point of view - according to which a State wishing to join the Union must have a parliamentary body to which the executive is accountable, must respect the principle of the separation of powers and must hold elections at reasonable intervals - but also from a substantive point of view. During the accession process, the European institutions must ensure that the political institutions are genuinely stable and effectively rooted in political life, as well as that the state institutions function effectively.[78] Respect for the democratic principle therefore also implies the application of the rule of law, as well as respect for human rights and the protection of minorities, all of which constitute the values on which the European Union is founded and which the Court of Justice has defined as the material content of the European identity.[79]

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[76] See Myhren, T. A., *The Copenhagen Criteria. A comparative case study of Bosnia and Hercegovina and Turkey*, Norwegian University of Science and Technology Faculty of Humanities, 2021, 2-24; Janse, R., *Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement*, in *International Journal of Constitutional Law*, Vol. 17, No. 1, 2019, 43-65; Hoti, A., Gerguri, D., *The Copenhagen Political Criteria for Joining the EU: the Case of Kosovo*, in *Teorija in Praksa*, Vol. 54, No. 6, 2017, 1008-1022; Kochenov, D., *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*, in *European Integration online Papers* (EIoP), Vol. 8, No. 10, 2004, 1-24.

[77] In addition to the political criterion, there are two other parameters. The first is the "economic criterion", which requires that the candidate country has established a functioning market economy capable of coping with the pressure of competition and the strength of the European single market. This criterion presupposes the liberalisation of prices and trade and the existence of a legal and administrative framework, both private and public, appropriate to the European single market. A corollary of these principles is the ability of the candidate country to take on the responsibilities and obligations of future membership of a single European market and monetary union. The third criterion is the "acquis communautaire", namely the candidate's ability to accept and respect the rights and obligations inherent in the European Union's legal order and institutional framework. Following the Brussels European Council of 14 and 15 December 2006, a fourth criterion was introduced, which concerns the capacity of the European Union itself to absorb new members while maintaining the momentum of European integration. This criterion is particularly important because it examines whether, in taking on new obligations towards a candidate country, the Union itself is able to preserve its capacity to act and decide, while maintaining the right balance within its institutions, respecting budgetary constraints and effectively implementing common policies. See Craig, P., De Burca, G., *EU Law. Text, Cases, and Materials*, Oxford University Press, Oxford, 2020, 46; Petrov, R., *Applying for EU Membership in Time of War: "Accession through War" of Ukraine*, in *Istituto Affari Internazionali*, No. 9, 2023, 3-20; Janse, R., *The evolution of the political criteria for accession to the European Community, 1957-1973*, in *European Law Journal*, Vol. 24, No. 1, 2018, 57-76; Topidi, K., *Are the Copenhagen Criteria Undermined by the Lisbon Treaty?*, in *European Yearbook of Minority Issues Online*, 1 June 2013.

[78] Puglia, M., *Art. 49 TUE*, in Tizzano, A. (eds.), *Trattati dell'Unione Europea*, 335.

[79] See Silva do Monte, D., *EU's Democratic Conditionality: Democratic Principles and Procedures?*, in *Contexto Internacional*, Vol. 45, No. 1, 2023, 1-29; Dudley, D., *European Union membership conditionality: the Copenhagen criteria and the quality of democracy*, in *Southeast European and Black Sea Studies*, Vol. 20, No. 4, 2020, 525-545; Democratic Progress Institute, *The role of European Union accession in democratisation processes*, DPI, London, 2016,

One particular aspect of Article 49 TEU that is worth mentioning here, partly because it is not yet possible to make more far-reaching considerations, given that this is an ongoing issue with uncertain outcomes, concerns Ukraine's application for EU membership. In fact, the country had already shown for decades that it wanted to follow the path of European membership, but an acceleration in this direction came after the invasion by Russia,[80] which led to the formal submission of the application for EU membership on 28 February 2022. Then, on 24 June 2022, the European Council, accepting the Commission's recommendations, granted Ukraine EU candidate status. The rapid granting of candidate status to the country indicates that a political decision took precedence over the strict adherence to the criteria outlined in Article 49 of the EU Treaty. So much so that some have even spoken of an "accelerated procedure" for Ukraine's accession to the EU.[81] In fact, this would make it possible to avoid the long and difficult pre-accession phase, which, let us remember, has developed by custom and is not explicitly regulated in Article 49 TEU. In this way, a strict application of this provision would allow Ukraine to negotiate the Accession Treaty with the Member States in order to establish the conditions of accession and the adjustments to the Treaties on which the Union is founded,[82] and thus to proceed directly to the stage of ratification by each Member State.[83] In other words, the doctrine states that Ukraine could accede according to an accelerated, flexible and exclusively value-based approach under Article 49 TEU. This would significantly shorten the timeframe of formal accession and skip pre-accession by introducing long transition periods with robust post-accession application clauses in the Accession Treaty.[84]

Regarding the case just mentioned, what is relevant for the purposes of this study and, in particular, this paragraph, is not so much the description per se of the "facilitated" procedure that could be reserved for Ukraine's accession to the European Union, but the fact that the substantive conditions for accession - namely those contained in the first sentence of Article 49 TEU - have not been called into question. Neither the Council nor the Commission has ever questioned the possibility of Ukraine becoming part of the European Union without fully respecting and promoting the founding values of the European Union as enshrined in Article 2 TEU. In terms of the definition of European identity, this point is of the utmost importance, since the Union's institutions have implicitly affirmed

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11-49; Pridham, G., *European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives*, in *Government and Opposition*, Vol. 41, No. 3, 2006, 373-400; Grabbe, H., *European Union Conditionality and the "Acquis Communautaire"*, in *International Political Science Review*, Vol. 23, No. 3, 2002, 249-268.

[80] See Plokhy, S., *The Russo-Ukrainian War,* Penguin, London, 2023.

[81] Kochenov, D., Janse, R., *Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure'*, in *EU Law Live*, 30 March 2022.

[82] *Ivi*, 2.

[83] *Ibidem*.

[84] *Ibidem*.

that it is not possible under any circumstances, not even in exceptional circumstances such as defence war, to accede to European membership without full respect for the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. This confirms that the criterion of respect for the founding values of the European Union cannot be read or interpreted as a mere procedural matter, but as an indispensable element at the core of the European Union, defining its identity, without which states wishing to join the European Union cannot do so.

A further consideration that arises from this is that for the European Union to derogate, even temporarily for exceptional reasons, from these values would constitute not only a violation of an article of primary law, but a much more serious violation of the principles that constitute its essence and foundation. The violation of these values would amount to a denial of its own identity and a consequent distortion of it, which would no longer be at the center of its equilibrium. The importance of Article 49 TEU for the definition of European identity is significant, and the case of Ukraine's accession to the Union has perhaps best and most clearly demonstrated this assumption. Indeed, it is through this article, which sets out the conditions and modalities for accession to the Union, that Article 2 TEU reveals its full significance for the entire Euro-Union order. For it is precisely the values it expresses that constitute the identity of the Union, not least because it is precisely these values that must be respected and promoted in order to join the Union.

It is in the sharing of these values, not only at the level of the European institutions, but also at the level of the States, that one understands that there is a value criterion for pre-accession to the European Union that can never fail, not even in exceptional cases and circumstances such as the war in Ukraine. For this reason, we can conclude this paragraph by stating that the values contained in Article 2 of the TEU are inescapable and necessary for accession to the Union, thus confirming that these values constitute its true essence, the identity without which the Euro-Union order would be altered. The fact that States are obliged to respect and promote the values set out in Article 2 TEU is also confirmed by the case-law of the Court of Justice. In the *Republika* case, the judges of the Court held that respect for the values on which the European Union is founded must be shown not only at the time of accession to the Union, but also throughout the State's membership of the Union. [85]

[85]See ECJ, *Republika v. Il-Prim Ministru*, Case C-824/18, 20 April 2021.

3.5. INTERNAL RESPECT FOR EUROPEAN VALUES: ART. 7 TEU (POLITICAL CRITERIA OF PROTECTION OF FOUNDING VALUES OF UE)

The values proclaimed in Article 2 of the Treaty on European Union find their own protection on the "external" side; in fact, as described in the previous paragraph, any State that respects and promotes the protection of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, may apply to activate the procedure for accession to the European Union. This means that the Treaty lays down essential conditions and limits for accession to the Union, and thus provides a mechanism for the protection of the values on which it is founded, which prevents access to any State subject that does not share them or that could alter their nature, so that one can speak of an "external" or "prior" protection of the values that characterise the Union. Also, the same values on which the Union's order is based are also protected “internally”, namely, against possible violations by Member States. This protection is enshrined in Article 7 of the Treaty on European Union.

Before proceeding to an analysis of this provision and its value in terms of the protection of the constitutional identity of the European Union, as enshrined in Article 2 TEU, we consider it important to stress that, already on the basis of Articles 49 and 7 TEU, it is possible to identify the existence of values specific to the European Union, in respect of which the institutions of the Union can impose compliance on national legal systems, both in the accession phase and for the entire duration of the State's permanence within the Union.

It is therefore important to note from these two provisions that, in addition to the rules governing the division of competences between the Union and the Member States, there are values which the Union upholds and with which the Euro-unitary order also imposes compliance on the national legal systems. This anticipation is significant because, long before the Court of Justice explicitly stated in its "twin" judgments C-156/21 and C-157/21 of February 2022 that the values contained in Article 2 TEU constitute the essence of the constitutional identity of the European Union, it shows that already with the Treaty of Amsterdam (1997), which introduced a first version of the current Article 7 TEU, the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights were given a special protection not guaranteed by any other provision of the Treaties.[86]

[86] See Olsen, T. V., *Why and How Should the European Union Defend its Values?*, in *Res Publica*, Vol. 29, 2023, 69-88; Sanna C., *Art. 7*, in Pocar, F., Baruffi, M. C. (eds.), *Commentario breve ai Trattati dell'Unione europea*, 71-72; Ivic, S., *The Concept of European Values*, in *Cultura. International Journal of Philosophy of Culture and Axiology*, Vol. 16, No.1, 2019, 103-117.

The mechanism for the protection and promotion of values and, therefore, of European identity itself, provides for three different procedures or stages in which the action of certain bodies of the European Union can be distinguished. Specifically, these procedures can be framed as gradual and consequential, as the seriousness of the violation of the founding values is commensurate with the procedure used. The first procedure, which is laid down in the first paragraph of Article 7 TEU, constitutes a preventive measure with respect to the violation by a Member State of one or more of the values referred to in Article 2 TEU, in that it is a sort of pre-activation of the European bodies, which consists in the formal establishment of the fact that in a Member State there exists «[...] a clear risk of a serious breach [...] of the values referred to in Article 2».[87]

Specifically, if it emerges that one of the Member States is acting in a manner contrary to one or more of the values that constitute the founding basis of the European Union order, the Council may address recommendations to that State and, if necessary, also hear the Member State's reasons.[88] However, «on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission [...]»,[89] the Council, on the basis of a resolution obtained by a qualified majority of four fifths of its members, itself preceded by the consent of the European Parliament, may determine the existence of «a clear risk of a serious breach»[90] of the values contained in Article 2 TEU by a Member State. In fact, unlike the current wording of Article 7 TEU, which, as mentioned at the outset, was introduced with the Treaty of Amsterdam, originally this pre-activation procedure by which the Council ascertains the existence of a clear risk of a breach was not envisaged; really, it was introduced with the Treaty of Nice following the events concerning one of the member states in the early 2000s.

Especially, following the general elections held in Austria, the possibility had arisen that the FPÖ (Austrian Freedom Party), known for its extreme right-wing positions and avowedly ultranationalist and xenophobic positions, would become part of the coalition government; in response to such a possibility, the President-in-Office of the Council adopted a "common reaction", on behalf of fourteen Member States, announcing that he would take positive action against the Austrian State if it formed a coalition government with the FPÖ.[91] After both the European Commission and the European Parliament had commented on the initiative taken by the Council, a

[87] Art. 7, para. 1 TEU.

[88] *Ibidem*.

[89] *Ibidem*.

[90] *Ibidem*.

[91] Specifically, the Council would break off official bilateral contacts, no support would be given to Austrian candidates in international organisations, and Austrian ambassadors in European capitals would only be received on a technical, not a political level. See European Parliament resolution on the outcome of the legislative elections in Austria and the proposed formation of a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), 2 February 2000.

specially created "committee of wise men", consulted by the President-in-Office, had also presented its conclusions and although it had not censured either the Austrian government or the FPÖ ministers, it had, however, emphasised the importance and usefulness of the provision of a kind of pre-alarm warning against possible violations of the basic principles of the European Union. In the wake of this specific case and following the observations of the President-in-Office in the first half of 2000, as well as the report of the Council of Wise Men, Article 7 TEU was amended by the Treaty of Nice with the addition of a first paragraph providing for an early warning and early warning procedure, which was added to the already existing measures and introduced by the Treaty of Amsterdam.[92]

According to the current wording of Article 7, after explaining the circumstances in which the pre-activation procedure was created, the first paragraph concludes by stating that «the Council shall regularly verify that the grounds on which such a determination was made continue to apply».[93] This wording is justified precisely by the nature of the pre-activation procedure, which is an early warning of a breach of the values enshrined in Article 2 TEU and therefore does not take the form of an actual breach, but of a «[...] clear risk of a serious breach [...]»,[94] which can also be avoided by the Member State and which would therefore remove the grounds for activating the early warning procedure.[95]

The second procedure to protect the values enshrined as the essence of the identity of the European Union, which find their definition in Article 2 TEU, can be triggered in the event of more

[92] The pre-activation mechanism introduced by the Treaty of Nice, which provides for activation by one third of the Member States, the European Parliament or the Commission, could end with a finding by the Council of Heads of State or Government, after approval by the European Parliament, that there is a clear risk of a serious breach by a Member State of the values set out in Article 6 TEU. It is interesting to note that here, too, the finding would have to be adopted after hearing the State in question, in accordance with the principle of the adversarial debate, which is also reflected in the current wording of Article 7 TEU, to which recommendations may also be addressed, so that the State may reconsider the situation of violation of the principles on which the Union is founded.

[93] Art. 7, para. 1, TEU.

[94] *Ibidem.*

[95] It must be made clear that the risk of violation of the values of Article 2 TEU must be evident, which is translated by the legal formulas of *periculum in mora* and *fumus boni juris*, which are typical elements of emergency and precautionary measures. To further clarify the circumstances of application of the pre-activation procedures of Article 7 TEU, the European Commission also intervened in 2003 with a Communication to the Council and the European Parliament (COM (2003) 606 of 15 October 2003 on Article 7 of the Treaty on European Union). Respect for and promotion of the values on which the Union is founded, para. 1.4.2). Specifically, the Commission cites as an example of a clear risk the adoption of a law authorising the suppression of procedural guarantees in the event of war, whereas the implementation of the law would constitute a case of serious breach. Moreover, the nature of the seriousness of the violation can also be determined on the basis of the object and result of the violation, so that measures designed to affect certain sections of the population, such as ethnic or religious minorities, can be identified. The protection proposed by the European Parliament provides for an even higher standard, qualifying as a violation of Article 2 TEU - and thus not only as a potential risk - the exercise of legislative power in contradiction with the founding values of the EU, and considering as relevant also omissions on the part of the Member State, such as tolerance of anti-Semitic, xenophobic or, more generally, racist manifestations. On this point, see the Report on the Communication from the Commission on Article 7 of the Treaty on European Union: COM(2003) 606 - C5-0594/2003 (INI), 1 April 2004; Committee on Constitutional Affairs; Johannes Voggenhauber.

serious violations of these values. Indeed, this procedure is not intended to declare the existence of a risk, but of a serious and persistent breach of Article 2 by a Member State. The procedure provided for in the second paragraph may be triggered «[...] on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the European Parliament».[96] The deliberation is carried out by the Council, which must act unanimously on the finding of the existence of «a serious and persistent breach by a Member State of the values mentioned in Article 2»,[97] not without, however, inviting that Member State to submit its observations. It should be emphasised that the effects resulting from such a finding by the Council act on the reputation of the "condemned" Member State. Indeed, in this case, the infringement committed by the State tends to carry a great deal of weight in public opinion and on the political level, this, like the pre-activation procedure, acts as a censure rather than a sanction. Indeed, the application of a sanction against a Member State occurs with the activation of the procedure provided for in Article 7(3) TEU. That is, once the existence of a «serious and persistent»[98] breach has been established, «[...] the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council […]».[99]

It is significant to note that in adopting the sanctions, against the State that violates the values on which the Union is founded, the Council may decide - by obtaining a qualified majority of 72% of the Member States in favour, representing at least 65% of the Union's population - to exclude the Member State from voting in the Council, effectively nullifying the "condemned" State's influence and ability to shape Council deliberations.[100] However, it must be made clear that the provision, among the possible suspensions of rights, explicitly provides only for that from the right to vote, which, for that reason, must be considered as a kind of maximum penalty, given the seriousness of the Member State's inability to have a voice in the Council. The Council, when adopting the sanction to be applied to the State that has systematically violated the values set out in Article 2 TEU, must take into account «the possible consequences of such a suspension on the rights and obligations of natural and legal persons».[101] This means that the sanction must be commensurate not only with the consequences it may have on the trust between the member states and the very relationship between the sanctioned member state and the institutions of the European Union, but also with the consequences it may have on citizens and legal persons, in order not to compromise their rights and,

[96] Art. 7, para. 2, TEU.
[97] Art. 7, para. 2, TEU.
[98] *Ibidem*.
[99] Art. 7, para. 3. TEU.
[100] Art. 238, para. 3, let. b) TFEU.
[101] Art. 7, para. 3, TEU.

above all, so that they do not suffer from violations attributable to the political decisions of the government of the sanctioned state. This last remark is also confirmed by the fact that «the Member State in question continues in any case to be bound by its obligations under the treaties».[102]
This implies that the commitments undertaken by the Member State through its accession to the European Union continue to be binding, irrespective of the fact that the State has been sanctioned with the exclusion of certain rights arising from its membership of the Union, just as the State is obliged to guarantee its citizens and legal persons all the rights and guarantees enshrined in European law through the Treaties and secondary sources.

Lastly, it must be remembered that the penalties imposed on a Member State that systematically violates the values set out in Article 2 TEU and their extent may be subject to change and, therefore, are not permanent. Indeed, «the Council, acting by a qualified majority, may subsequently decide to amend or revoke measures adopted pursuant to paragraph 3 [of Article 7] TEU, in order to respond to changes in the situation which led to their imposition».[103]

The description of the procedure for censuring and, if necessary, sanctioning the systematic behaviour of Member States which violates the values on which the European Union is founded, as laid down in Article 2 of the Treaty on European Union, gives rise to several general considerations which allow us to outline the substance and the difficulties of activating these procedures.

It's evident that this process is inherently political, as it involves the activation of the political bodies within the European Union, particularly the Council, which holds sole authority in determining the presence of a clear risk or a significant breach by a Member State concerning the values outlined in Article 2. The fact that the Court of Justice of the European Union has no role to play in the violation or non-violation of the fundamental values of the European order confirms this observation. Furthermore, the political nature is demonstrated by the fact that the Council is called upon to assess systemic violations of the fundamental values of the Union and not an individual case in which the Member State has failed to comply with provisions of European law.

The other aspect that distinguishes the activation of the procedures for the protection of the Union's values provided for in Article 7 TEU is their typically "internationalist" basis of operation, namely derived from procedures typically adopted under international law.[104] Emblematic elements in this sense are those derived from the majorities required to activate the various procedures. In particular, the unanimity of the members of the Council is a clear indication of this. The inherent

[102] Art. 7, para. 3, TEU.

[103] Art. 7, para. 4, TEU.

[104] On this point, it is recalled, for example, that such a procedure finds some precedents in the founding treaties of some international organisations, such as Article 8 of the Statute of the Council of Europe, or Article 9 of the Charter of the Organisation of American States.

difficulty in activating this procedure to safeguard Article 2 TEU serves as a clear indication of its political nature. This challenge primarily arises from the necessity to secure a wide consensus, which is crucial for condemning or imposing sanctions on actions contradicting the fundamental values of the European Union. Indeed, the high degree of consensus required - a qualified majority of two thirds of the members of the Council for the pre-accession procedure and unanimity for the censure and sanction procedure - is such that it makes the use and application of Article 7 TEU so complex that some have described it as a «dead letter».[105] In fact, it is precisely the highly political nature of this provision that makes it so difficult to activate. It was conceived as a last resort, to be used only in exceptional and particularly critical circumstances in terms of the resilience of the values on which the Union is founded.[106]

Leaving aside the issue of activating procedures to protect and guarantee the founding values of the European Union, it is nevertheless possible to understand the importance of the provision contained in Article 7 TEU for the definition of the constitutional identity of the European Union. Indeed, unlike all other provisions within the Treaties, Article 2 TEU is granted special protection of a political nature, underscoring its pivotal role in the entire constitutional framework of the Union. Essentially, the values constituting the EU's constitutional identity receive unique safeguarding within the TEU. This means that Member States posing a risk or engaging in systematic violations of the values outlined in Article 2 may not only face censure but also be subject to "punitive" measures, including restrictions or suspensions of certain rights.

A particularly interesting aspect, which confirms the importance of Article 7 TEU in defining the identity of the European Union, is that this article does not only apply to the sphere of Union rights, but also covers violations that may occur in areas of strictly national competence. Indeed, if violations of fundamental values in a Member State are serious enough to reach the level of gravity required by Article 7 TEU and thus undermine the Union's own values and the trust between Member

[105] Kochenov, D., Article 7 TEU: *A Commentary on a Much Talked-About "Dead" Provision*, in *Polish Yearbook of International Law*, No. XXXVII, 2018, 140.

[106] It seems significant that Barroso, one of the Presidents of the European Commission, referred to the procedure under Article 7 TEU as a "nuclear option", namely as a kind of deterrent, very dangerous, to be used only in extreme circumstances and outside any ordinary situation. Further evidence of this difficulty of activation can also be found in the only two cases of activation of the early warning procedure against Poland and Hungary, respectively, at the initiative of the European Commission on 20 December 2017 and by the European Parliament on 12 September 2018: EU Commission, Reasoned proposal pursuant to Article 7(1) of the Treaty on European Union on the rule of law in Poland - Proposal for a Council Decision on the determination of the existence of a clear risk of a serious breach of the rule of law by the Republic of Poland, COM(2017) 835 final and European Parliament Resolution of the European Parliament of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, that there is a clear risk of a serious breach by Hungary of the values on which the Union, 2017/2131(INL). For an update on the situation of the two countries with respect to the activation of the Article 7 pre-allocation procedure, see Pech, L., Jaraczewski, J., *Systemic Threat to the Rule of Law in Poland: Update and New Article 7(1) TEU Recommendations*, in *Central European University Working Papers Series*, No. 2, 2023, 6-102.

States, procedures of censure and, if necessary, sanctions can be activated. This shows how the Member State is responsible not only for respecting the Union's founding values within the Union's legal order, but also regarding its own internal legal order, which, precisely in order to join and remain in the Union, must make these values its own and not merely fictitious.[107]

In conclusion, for the reconstruction of the constitutional identity of the European order within the Treaties, Article 7 TEU is an indispensable element. Indeed, this provision lays down a series of procedures for the explicit protection and safeguarding of the founding values of the Union, which constitute its identity. This provision, read in conjunction with Article 49 TEU, demonstrates the central position that the Union's founding values occupy within the Treaties and explains why the Court of Justice has identified in them precisely the principles that define its constitutional identity. Indeed, these values represent the condition for access to the European Union and for remaining within it, since they define not only its identity, but also the set of values capable of acting as the glue that binds the Member States and the Union together, on which the meta-legal values have been defined.

3.5.1. REGULATION 2020/2092: FINANCIAL CRITERIA OF PROTECTION OF FOUNDING VALUES OF UE

The values listed in Article 2 of the Treaty on European Union, which - as the Court of Justice expressly stated in its judgments C-156/21 and C-157/21 of 16 February 2022 - constitute the content of the constitutional identity of the European order, are protected not only in the Treaties but also in the sources of secondary law. Indeed, after having described in the previous pages the mechanisms for the protection of the values on which the European Union is founded, provided for in Article 49 TEU and Article 7 of the same Treaty, this section will describe the role that Regulation 2020/2092 has assumed in the protection of the identity of the European Union or, more precisely, of a part of this identity.[108]

The document in question plays an important role in the reconstruction of the constitutional identity of the European Union that this chapter intends to describe, because it shows how not only

[107] See Montanari, L., *Il rispetto del principio di Rule of law come sfida per il futuro dell'Unione Europea*, in *La Comunità Internazionale*, No. 1, 2020, 75-96; Marinai, S., *Considerazioni in merito all'introduzione, "a Trattati invariati", di nuovi meccanismi per il rispetto della rule of law*, in *Studi sull'integrazione europea*, No. 1, 2020, 69-88; Villani, U., *Sul controllo dello Stato di diritto nell'Unione europea*, in *Freedom, Security & Justice: European Legal Studies*, No. 1, 2020, 10-27; Kochenov, D., Pech, L., *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, No. 3, 2015, 512-540.

[108] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, of 16 December 2020, *On a general regime of conditionality for the protection of the Union budget*, Official Journal of the European Union, LI 533/1, 22 December 2020.

the Union's primary law provides protection for the values that define the Union's identity, but also how these have been created through secondary law. In particular, the regulation that will be examined in the following pages is significant in this respect because it provides a mechanism for protecting the rule of law - thus one of the values envisaged by Article 2 TEU and an element of European identity - through a conditionality mechanism based on access to EU funds. In other words, and as will be seen in more detail below, the European Commission has proposed to establish a link between respect for the rule of law and the Member States' access to European funding, in order to "sanction" - through the mechanism of conditionality - by suspending the Structural Funds of the Cohesion Policy and, more generally, European funding for those Member States that violate respect for the rule of law. Such a provision is in fact an indication of the broad protection that the founding values of the European Union find not only at the level of the Treaties but also at the level of secondary sources, but at the same time it shows how the Union's decision-making bodies have wished to supplement the protection provided by the Treaties, and in particular by Article 7 TEU, with secondary law. In fact, as mentioned in the previous paragraph, this decision was also taken because of the objective difficulties in activating procedures to protect the Union's founding values. Added to this is the urgent need to address the worrying phenomenon of the deterioration of the rule of law in some Member States, to which the procedure provided for in Regulation 2020/2092 can provide a rapid and decisive response, not only because it affects the availability of European financial resources for the Member States, but also because it is easier to activate than the specific sanctioning procedures provided for in Article 7 TEU.

It is now appropriate to describe, albeit briefly, the genesis of Regulation 2020/2092 and its specific content, to better illustrate the role that a secondary source - such as the Regulation - can play in protecting a specific element of the European Union's identity.

In fact, the idea of creating an instrument to suspend the allocation of European funds to Member States that undermine the rule of law dates back several years before the adoption of Regulation 2020/2092. Indeed, as early as 2017, the German and Italian governments had proposed[109] to the Commission to link European funds to respect for the rule of law,[110] in order to curb the worrying backsliding of the rule of law in some Central and Eastern European countries.[111]

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[109] Federal Government of Germany, *Joint Statement by the German Government and the German Länder on EU Cohesion Policy Beyond 2020*, 2017; Italian Government, *Il Quadro Finanziario Pluriennale: uno strumento strategico al servizio degli obiettivi dell'Unione Europea*, 2017.

[110] See Pech, L., Scheppele, K. L., *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal* Studies, Vol. 19, 2017, 3-47; Lindseth, P., Fasone, C., *Rule of Law Conditionality and Resource Mobilization. The Foundations of a Genuinely "conditionality" EU?*, in *Verfassungsbolg,* 11 December 2020.

[111] Faced with such a proposal, the President of the Commission, Jean-Claude Juncker, had initially rejected it as detrimental to the process of European integration and with respect to the mutual trust that should exist between the Member States. However, this did not prevent, in 2018, the Commission from presenting a first draft of the Regulation

Specifically, the proposal was based on the idea of using the funds to address the crisis of the rule of law, which had become particularly urgent in the case of the Hungarian and Polish governments. In particular, the proposers felt that it was necessary to break the vicious circle whereby European Union funding was supporting governments whose actions and constitutional reforms seriously endangered the rule of law and democracy in general.[112] With regard to the concrete circumstances that led the Commission to present the proposal for a regulation in May 2018, it is understandable that it was conceived first and foremost as a genuine instrument to protect the rule of law.[113] However, in the face of a political clash during the adoption of this draft, the Commission gradually stuck to a more strictly technical legal basis.

Notably, this was found in Article 322 of the Treaty on the Functioning of the European Union, which allows the Parliament and the Council to adopt «the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts».[114] In this way, the Commission justified the introduction of the economic conditionality mechanism as necessary to protect the Union's financial interests and sound budgetary management. This is evidenced by the fact that, after its adoption in December 2020 and subsequent entry into force in January 2021, the regulation lost the explicit reference to the rule of law in its title and took the name "Regulation on a general system of conditionality for the protection of the Union's budget". However, this should not be interpreted as the Commission and the European

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that went in this direction, although the process of adopting the document proved particularly troubled. Indeed, the first proposal had been, in part, scuttled by the Council's Legal Service, which, in a negative opinion, had criticised the way in which the rule of law was protected through a procedure of financial conditionality (Opinion of the Legal Service 13593/18, Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States, 25 October 2018). In addition to the legal difficulties, there were also political ones. In fact, the negotiations for the adoption of the Regulation were, first, characterised by the difficulties of negotiation between the Council and the European Parliament and then, due to the opposition of the governments of Poland and Hungary, which threatened to scupper the adoption of the Multi-Annual Financial Framework (2021-2027), in the event of the adoption of the Regulation. This led to a compromise in December 2020 that allowed the adoption of Regulation 2020/2092. See Dimitrovs, A., Droste, H., *Conditionality Mechanism: What's In It?*, in *Verfassungsbolg,* 30 December 2020; Scheppele, K. L., Pech, S., *Compromising the Rule of Law while Compromising on the Rule of Law*, in *Verfassungsbolg*, 12 December 2020; Nguyen, T., *The EU's New Rule of Law Mechanism: How it Works and Why the 'Deal' Did Not Weaken It*, in *Jacques Delors Centre*, December 2020, 1-6; Alemanno, A., Chamon, M., *To Save the Rule of Law you Must Apparently Break It*, in *Verfassungsbolg,* 11 December 2020.

[112] Kelemen, D., *The European Union's Authoritarian Equilibrium*, in *Journal of European Integration*, Vol 27, No. 3, 2020, 481-499; Uitz, R., *Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU*, in *Bridge Network – Working Paper*, No. 7, 2020, 1-17.

[113] See Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States, COM (2018) 324 final, 2 May 2018.

[114] Art. 322, para. 1, lett. a), TFEU.

Parliament, and the Union in general, abandoning the use of conditionality to enforce the rule of law in favour of a "technocratic" approach based on respect for the EU budget.

Indeed, such a conclusion could be misleading, since the rule of law plays a primary role in the Regulation, which can be well understood by reading the part that introduce Regulation 2020/2092. In particular, it is recalled that «the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as set out in Article 2 of the Treaty on European Union (TEU)».[115] It is also recalled that «[...] the European Council reaffirmed that the Union's financial interests must be protected in accordance with the general principles enshrined in the Treaties, in particular the values referred to in Article 2 of the TEU. It also stressed the importance of the protection of the Union's financial interests and of respect for the rule of law».[116]

With regard to the functioning of Regulation 2020/2092, however, it should first be pointed out that it is a document that contains the necessary rules for «[…] protecting the Union budget in the event of breaches of the principles of the rule of law in the Member States».[117] For this reason, it explicitly defines behaviour on the part of the Member States that «may indicate a breach of the principles of the rule of law».[118] Concretely, the Regulation provides for «threats to the independence of the judiciary»,[119] but likewise «failure to prevent, correct or sanction arbitrary or unlawful decisions taken by public authorities, including law enforcement authorities, failure to allocate financial and human resources to the detriment of their proper functioning, or failure to ensure the absence of conflicts of interest»,[120] or, again, «limiting the availability and effectiveness of legal remedies, for example through restrictive procedural rules and failure to enforce judgments or limit the effectiveness of investigations, prosecutions or sanctions for breaches of law».[121]

As regards the specific cases provided for in the Regulation, Article 4[122] states that appropriate measures shall be taken to protect the budget against infringements of the rule of law where it is established that they «affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way».[123] With regard to the procedure for triggering the Regulation, the Commission has a primary role in this, since it is the Commission which proposes to the Council measures against the Member State which has

[115] Regulation (EU, Euratom) 2020/2092, Preamble, para. 1.
[116] *Ivi*, Preamble, para. 2.
[117] *Ivi*, Art. 1.
[118] *Ivi*, Art. 3.
[119] *Ivi*, Art. 3, lett. a).
[120] *Ivi*, Art. 3, lett. b).
[121] *Ivi,* Art. 3, lett. c).
[122] *Ivi*, Art. 5.
[123] *Ivi*, Art. 4.

failed to comply with the principle of the rule of law, unless it considers that other procedures provided for by Union law will enable it to protect the Union budget more effectively.[124] However, before taking this decisive step to activate the Regulation, the Commission ensures that it informs the European Parliament and, of course, the Member State potentially affected by the measure it intends to take. On the one hand, the Parliament can invite the Commission to a dialogue on its conclusions and, on the other hand, the State can provide the Commission with the relevant information on the circumstances that led to the activation of the procedure.[125] Notwithstanding, if the Commission, after having given the State concerned the opportunity to submit its observations, considers that the measures taken by the Member State undermine or are likely to undermine in a sufficiently direct manner the sound financial management of the Union budget or the protection of the Union's financial interests, it «[…] shall submit a proposal for an implementing decision on the appropriate measures […]»[126] to be taken. Finally, the Council, acting by a qualified majority, decides whether to apply the measures proposed by the Commission.[127] These measures may be revoked by the Council at any time if, to simplify matters, the State adopts corrective measures or if the objective conditions for maintaining the sanctions previously adopted are no longer fulfilled.[128]

Having explained the reasons that led to the adoption of Regulation 2020/2092 and the operational criteria that underpin this document, it is necessary to turn our further reflections to the main theme of this section, namely the role of secondary law in protecting the Union's founding

[124] Regulation (EU, Euratom) 2020/2092, Art. 6, para. 1.

[125] In particular, Article 6 para. 5 of Regulation 2020/2092 provides that: «the Member State concerned shall provide the required information and may make observations on the findings set out in the notification referred to in paragraph 1 within a time limit to be specified by the Commission, which shall be at least one month and not more than three months from the date of notification of the findings. In its observations, the Member State may propose the adoption of remedial measures to address the findings set out in the Commission's notification».

[126] Regulation (EU, Euratom) 2020/2092, Art. 6, para. 9.

[127] *Ivi*, Art. 6, paras. 10 and 11.

[128] Especially, with regard to the revocation of measures under Regulation 2020/2092, the text of Article 7 should be quoted, which states: «1. The Member State concerned may, at any time, adopt new remedial measures and submit to the Commission a written notification including evidence to show that the conditions of Article 4 are no longer fulfilled. 2. At the request of the Member State concerned, or on its own initiative and at the latest one year after the adoption of measures by the Council, the Commission shall reassess the situation in the Member State concerned, taking into account any evidence submitted by the Member State concerned, as well as the adequacy of any new remedial measures adopted by the Member State concerned. Where the Commission considers that the conditions of Article 4 are no longer fulfilled, it shall submit to the Council a proposal for an implementing decision lifting the adopted measures. Where the Commission considers that the situation leading to the adoption of measures has been remedied in part, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures. Where the Commission considers that the situation leading to the adoption of measures has not been remedied, it shall address to the Member State concerned a reasoned decision and inform the Council thereof. When the Member State concerned submits a written notification pursuant to paragraph 1, the Commission shall submit its proposal or adopt its decision within one month of receiving that notification. This period may be extended in duly justified circumstances, in which case the Commission shall without delay inform the Member State concerned of the reasons for the extension. The procedure set out in paragraphs 3, 4, 5, 6, 9, 10 and 11 of Article 6 shall apply by analogy as appropriate. […]».

values and defining its identity. In order to do so, some passages from the "twin" judgments - C-156/21 and C-157/21 - will be taken up, which stand out as particularly significant in describing the role of the protection of the rule of law through the mechanism of conditionality.

First, it is important to note how the Court of Justice has identified a close link between the EU budget and the values on which it is based. In particular, the judges stated that «[…] the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law […]».[129] The Court reached this conclusion on the basis that only a legal system which fully respects the principle of the rule of law can provide adequate guarantees that financial resources are actually used in accordance with the provisions of European Union law.[130] Such a premise served the judges of the Court of Justice to confirm the legitimacy of Regulation 2020/2092, which combines respect for the rule of law with a horizontal conditionality mechanism.[131] It can therefore be concluded from the Court's decision that it is possible for the European legislator to adopt such conditionality mechanisms even when other values essential to the Union are endangered by the Member States.

In other words, even if Regulation 2020/2092 applies only to breaches of the rule of law, this does not potentially prevent the adoption of subsequent regulations protecting the other values on which the identity of the Union is based, by means of the instrument of horizontal conditionality.[132]

A further element worth mentioning here is that of the compatibility of the instrument of conditionality with the law of the Treaties, and in particular with Article 7 of the Treaty on European Union. About this profile, the Court of Justice, in its "twin" judgments, recalls on several occasions the existence of a clear distinction between the sanctioning instrument of Article 7 TEU and the merely conditional instrument of the Regulation.[133]

Indeed, the instrument of conditionality can be activated in the event of an infringement of a specific protected interest together with an ascertained violation. Nonetheless, this is not the only difference noted by the Court. Indeed, the judges stated that «[...] the EU legislature cannot establish, without infringing article 7 TEU, a procedure parallel to that laid down by that provision, having, in

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[129] ECJ, *Republic of Poland v. European Parliament*, C-157/21, para. 147.

[130] Grisostolo, F. E., *Rule of Law e condizionalità finanziaria nel Regolamento (UE, Euratom) 2020/2092*, in Montanari, L., Cozzi, A. L., Milenković, M., Ristić, I., *We, the People of the United Europe*, 173-192.

[131] ECJ, *Republic of Poland v. European* Parliament, C-157/21, para. 154.

[132] Baraggia, A., *La condizionalità come strumento di governo negli Stati compositi. Una comparazione tra Stati Uniti, Canada e Unione Europea*, Giappichelli, Milano, 2023, 200-220; Baraggia, A., Bonelli, M., *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in *German Law Journal*, Vol. 23, No. 2, 2022, 151.

[133] ECJ, *Republic of Poland v. European* Parliament, C-157/21, paras. 129, 137, 181, 182. See Baraggia, A., *La condizionalità come strumento di governo negli Stati compositi*, 178-187.

essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision».[134] The Court of Justice took this decision precisely in order to prevent the unanimity requirement for the adoption of sanctions, which can be activated by Article 7 TEU, from being circumvented by the creation of an alternative and simpler mechanism, such as that of conditionality.[135] It should be recalled that the scope of the conditionality mechanism is not limited to the violation of the rule of law, but also extends to the budgetary impact.[136] Similarly, Article 7 of the TEU is aimed only at protecting the Union's fundamental values, whereas the horizontal conditionality mechanism introduced by Regulation 2020/2092 is primarily aimed at guaranteeing the Union's financial management, and it is only when this is threatened by breaches of the rule of law that the Regulation activates its sanctions.[137] Finally, it should brought to mind that the two instruments for the protection of the fundamental values of the European Union also differ in terms of the measures that can be taken. In fact, Article 7 TEU is characterised by the atypical nature of the measures that can be adopted, since it provides only for the suspension of certain rights as the maximum sanction for the State that violates the content of Article 2 TEU, whereas Regulation 2020/2092 provides an exhaustive list of measures that can be adopted by the Council in Article 5.[138]

Although Regulation 2020/2092 intervenes to protect the Member States' respect for the rule of law when it comes to the protection of the budget, this should not lead to the conclusion that the rule of law should be relegated to second place within the Regulation, since it is another instrument created to protect one of the most important principles that make up the European identity, thus

[134] ECJ, *Republic of Poland v. European* Parliament, C-157/21, para. 206.

[135] Grisostolo, F. E., *Rule of Law e condizionalità finanziaria*, 175.

[136] ECJ, *Republic of Poland v. European Parliament*, C-157/21, para. 213.

[137] *Ivi*, para. 209.

[138] Art. 5, para. 1, Regulation 2020/2092: «Provided that the conditions set out in Article 4 of this Regulation are fulfilled, one or more of the following appropriate measures may be adopted in accordance with the procedure set out in Article 6 of this Regulation: (a) where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Article 62(1) of the Financial Regulation, and where a government entity is the recipient: (i) a suspension of payments or of the implementation of the legal commitment or a termination of the legal commitment pursuant to Article 131(3) of the Financial Regulation; (ii) a prohibition on entering into new legal commitments; (iii) a suspension of the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget; (iv) a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget; (v) a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget; (b) where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of the Financial Regulation: (i) a suspension of the approval of one or more programmes or an amendment thereof; (ii) a suspension of commitments; (iii) a reduction of commitments, including through financial corrections or transfers to other spending programmes; (iv) a reduction of pre-financing; (v) an interruption of payment deadlines; (vi) a suspension of payments». See Salmoni, F., *La funzionalizzazione della tutela dello Stato di diritto alla sana gestione finanziaria e alla tutela del bilancio dell'UE (a prima lettura delle sentt. C-156 e C-157 Ungheria e Polonia v. Parlamento e Consiglio)*, in *Consulta Online*, No. 1, 2022, 303-310.

confirming the nature of a «community of law»[139] underpinned by a set of constitutional principles listed in Article 2 TEU.

In this context, it is worth to remember the importance of creating an instrument based on conditionality to promote respect for the rule of law by the Member States of the Union. Although, as explained above, the uniqueness of the sanctions mechanism provided for in Article 7 TEU in the event of a violation of the founding values of the European Union must be acknowledged, this should not overshadow the important opening provided by Regulation 2020/2092 for the protection of the Union's interests against violations of the rule of law through horizontal mechanisms with a specific purpose.[140] This means that, even if there are certain limits to the applicability of the Regulation, such as the necessary link with a negative consequence for the European budget in the event of a violation of the rule of law, the establishment of such a mechanism is further evidence of how the European institutions tend to protect, also through financial conditionality, the fundamental principles that constitute the constitutional identity of the European Union.[141]

In conclusion, we would like to emphasise that the adoption of Regulation 2020/2092 is not only the response of the Commission and the European Parliament to a situation of regression of the rule of law in certain Member States of the Union, but also a confirmation of the fact that the Union is founded on certain values that define its identity, among which the rule of law plays a central role and, as such, finds a special guarantee through a financial guarantee mechanism. Indeed, the Regulation states that «the Union financial interests must be protected in accordance with the general principles set out in the Treaties, in particular the values referred to in Article 2 TEU. It also underlined the importance of the protection of the financial interests of the Union and the importance of respect for the rule of law».[142] Moreover, the importance of the rule of law for the identity of the European Union is confirmed by the same Regulation, which recalls that these and the other values referred to in Article 2 TEU must be respected and promoted not only during the process of accession to the European Union, but also throughout the period during which the Member State is a member of the Union, since it «[…] joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU».[143] In this respect, it is significant that these values, which constitute the identity of the European Union, are not only protected in financial terms, in terms of the way in which they are protected, but that this protection

[139] See Ruggeri, A., *Una Costituzione ed un diritto costituzionale per l'Europea unita*, in Costanzo, A., Mezzetti, L., Ruggeri, A., *Lineamenti di diritto costituzionale dell'Unione europea*, Giappichelli, Torino, 2022, 2-21.

[140] Grisostolo, F. E., *Rule of Law e condizionalità finanziaria*, 189.

[141] Daicampi, M., *Contenuti e dimensioni dell'identità costituzionale dell'Unione europea*, 24.

[142] Regulation (EU, Euratom) 2020/2092, Preamble, para. 2.

[143] *Ivi*, para. 5.

is also provided for in secondary legislation, thus confirming the importance of these values within the sources of European Union law.

3.6. THE INFRINGEMENT PROCEDURE AS AN "ALTERNATIVE" INSTRUMENT TO PROTECT THE FOUNDING VALUES OF THE EUROPEAN UNION (258 AND 260 TFEU)

In this first part of this chapter, the identity of the European Union was reconstructed based on the mechanisms and procedures for safeguarding the values on which this identity is founded, and which are explicitly codified in Article 2 of the Treaty on European Union. In particular, the procedures for safeguarding the founding values of the European Union during the pre-accession period, as they result from Article 49 TEU, were examined. It then goes on to describe the special measures for the protection of European values provided for in Article 7 TEU, which is the political protection instrument par excellence. We then turn to the financial instrument for the protection of these values, introduced by Regulation 2020/2092, which is characterised by the fact that it combines the protection of the rule of law with the protection of the European budget. At this point, it remains to analyse the main judicial mechanism provided for by the Treaties to identify and put an end to behaviour by a Member State that is contrary to the Treaties and the rules deriving from them, and thus also to Article 2 of the EU Treaty. This procedure for the protection of European law and values is laid down and described in Articles 258-260 TFEU.

It is necessary to start from the assumption that Article 17 TEU provides that it is the European Commission that monitors the application of EU law and that, in order to fulfil this task, the Commission may, in the cases discussed below, activate the infringement procedure provided for in Article 258 of the Treaty on the Functioning of the European Union (TFEU).[144] In brief, this procedure is governed by Articles 258 and 260 of the TFEU, which provide for a procedure aimed at ensuring the uniform application of Union law by directly monitoring the behaviour of States with regard to the obligations arising from membership of the European Union and respect for the *acquis communautaire*.[145] From this point of view, the procedure is characterised by the fact that it is an important opportunity for the Court of Justice to pronounce on the correct interpretation of "Community" provisions, a function which is all the more indispensable in the event of divergences of interpretation between the Court of Justice and the national courts. As regards the activation of the

[144] Pocar, F., Baruffi, M. C., *Commentario breve ai Trattati dell'Unione europea*, 1270-1285.

[145] Infringement proceedings are aimed at «bringing about the detection and cessation of behaviour by a Member State that is contrary to Community law», as stated in ECJ, *France v. Commission*, Case C-15 and 16/76, 7 February 1979, para. 27.

infringement procedure, it is sufficient for the Commission to «consider»[146] that a Member State has failed to fulfil its obligations under the Treaties, without laying down further and different conditions for the operation of the procedure provided for therein, in order to issue a reasoned opinion initiating the procedure.[147] In the light of what has just been said, it should be noted that the Commission enjoys a wide margin of discretion in assessing the appropriateness of proceedings for failure to fulfil obligations. More precisely, the Commission has complete freedom not only to initiate the infringement procedure, but also to continue it and to decide when to activate the instrument.[148] To these initial considerations of a general nature, it should be added, for the purposes of this work, that the infringement procedure has also become increasingly important in the context of the "political" sphere for monitoring respect for the Union's values, taking its place alongside the main instrument for the protection of European values contained in Article 7 of the EU Treaty. However, there are important differences between the infringement procedure and the protection of EU values as enshrined in Article 7 TEU, which will be highlighted below by describing the nature and functioning of the infringement procedure.

As regards the legal nature of the instrument provided for in Article 258 TFEU, it can be said that it is characterised by a typically objective character, which is essentially expressed in two ways. On the one hand, the failure to comply with an obligation imposed by a rule of Community law constitutes an infringement per se, regardless of whether such failure has had any negative effects, the extent or frequency of the situations complained of, or any cooperative efforts made by the Member State to put an end to the infringement during the pre-litigation phase.[149] On the other hand, it follows from the objective nature of the infringement procedure that it is for the Commission alone to decide whether it is appropriate to bring an action, whereas it is for the Court of Justice to assess, at the hearing stage, whether the infringement established exists or not.[150] Whereas, with regard to the function of the procedure in general, as already mentioned, its purpose is to restore the Community law which has been infringed, which for the Court of Justice is an opportunity to clarify that «[…] the procedure for a declaration of a failure on the part of a State to fulfil an obligation itself affords a

[146] Art. 258 TFEU.

[147] Pocar, F., Baruffi, M. C., *Commentario breve*, 1271-1272.

[148] *Ivi*, 1270-1271.

[149] On this point see ECJ, *Commission v. Portugal*, Case C-150/97, 21 January 1999, para. 21; ECJ, *Commission v. Ireland*, Case C-392/96, 21 September 1999, paras. 60-61; ECJ, *Commission v. France*, Case C-233/00, 26 June 2003, para. 62; ECJ, *Commission v. France*, Case C-177/04, 14 March 2006, para. 52; ECJ, *Commission v. Spain*, Case C-36/05, 26 October 2006, para. 38; ECJ, *Commission v. Danmark*, Case C-226/01, 30 January 2003, para. 32; ECJ *Commission v. Italy*, Case C-122/18, 28 January 2020, para. 64; ECJ, *Commission v. Polond*, Case C-821/19, 25 February 2021, para. 40.

[150] See Gencarelli, F., *La Commissione "Custode del Trattato": il controllo dell'applicazione del diritto comunitario negli Stati membri*, in *Diritto Comunitario e degli Scambi Internazionali*, 2004, 231-233.

means of determining the exact nature of the obligations of the member States in case of differences of interpretation».[151]

However, this succinct description conceals a procedure that is much more nuanced and differentiated in its mechanisms. In fact, the purpose of the procedure under Article 258 TFEU is to identify and put an end to a Member State's conduct that is contrary to Union law. By contrast, the purpose of the procedure provided for in Article 260 TFEU is narrower, in that it aims to compel the Member State at fault to comply with a judgment of the Court of Justice for failure to fulfil its obligations.[152] In order to achieve this objective, the instrument provided for in Article 260(2) TFEU is the possibility of imposing financial penalties on the defaulting State, thereby exerting economic pressure on it to put an end to the failure to fulfil its obligations.[153]

In the light of these two articles, it is possible to define the infringement procedure as consisting of two distinct moments: on the one hand, the "pre-litigation" stage and, on the other hand, the "litigation" stage itself.[154] The purpose of the "pre-litigation" phase is to give the offending Member State the opportunity to justify its position (in accordance with the principle of adversarial debate which inspires the entire procedure) or to allow it to comply voluntarily with the requirements of the specific rule which has been infringed. Because of these specific characteristics, the doctrine defines this phase as «conciliatory» or «negotiating».[155] Indeed, while the formal objective of the "pre-litigation" phase is to give the State suspected of an infringement the opportunity to present its point of view on the allegation of a breach of its obligations, in substance this means the opportunity to reach an amicable settlement between the Commission and the State concerned by the opinion.[156] On the other hand, the "contentious" phase of the procedure initiated under Article 258 TFEU is limited, through the delivery of a purely declaratory judgment by the Court of Justice, to determining whether the defendant Member State has failed to fulfil its obligations under EU law. On the other hand, the same stage, established by Article 260 TFEU, has the additional purpose of imposing a deterrent, namely a financial penalty on the defendant State, to induce it to comply.

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[151] ECJ, *Commission v. France*, Case C-7/71, para. 49.

[152] ECJ, *Sweden v. Association de la presse internationale and Commission*, Cases C-514/07 P, C-528/07 P e C-532/07 P, 21 September 2010, para.119.

[153] ECJ, *Commissione v.* France, Case C-177/04, paras. 59-60.

[154] Pocar, F., Baruffi, M. C., *Commentario breve ai Trattati dell'Unione europea*, 1272-1274.

[155] Hofmann, A., *Compliance or 'Rule Gain'? The Commission's Goals in the Infringement Procedure*, Conference: CES 25th International Conference of Europeanists, Glasgow, 2017, 1-3; Chalmers, D., Davies, G., Monti, G., *European Union Law. Cases and Materials*, Cambridge University Press, Cambridge, 2010, 339.

[156] The Court of Justice does not stray far from the doctrine. Indeed, the same judges have recalled that the objective of the pre-litigation procedure is to enable the Member State to «comply voluntarily with the requirements of the Treaty or, possibly, to offer it the right to justify its actions» (ECJ, *Commission v. Netherlands*, Casa C-157/94, 23 October 1997, para.60). See also: ECJ, *Commission v. Italy*, Case C-158/94, para. 56, ECJ, *Commission v. France*, Case C-159/94, para. 103; ECJ, *Commission v. Germany*, Case C-191/95, 19 September 1998, para. 44.

Having described the characteristics of the infringement procedure, it is appropriate to focus the analysis on the use of this instrument in relation to systematic violations of the values that underpin the European order.[157] This issue has become particularly relevant in the wake of the numerous threats of backsliding on rule of law in Poland and Hungary. In fact, the Commission, having encountered several difficulties in activating the Article 7 TEU procedure, resorted to the infringement procedure against violations of the rule of law.[158] This was possible because systematic violations of the values enshrined in Article 2 TEU can also take the form of violations of specific provisions of primary or secondary Union law, in respect of which the infringement procedure can therefore be activated,[159] as the Hungarian and Polish cases concretely demonstrate. Moreover, the doctrinal debate and the practice of application by the Union institutions have shown that the activation of the protection procedure under Article 7 TEU does not exclude the infringement procedure.[160] Furthermore, it should be recalled that the procedures that can be activated by Article 7 TEU and those provided for in Article 258 TFEU can perfectly coexist, being autonomous and independent of each other, as already stated by the Advocate General in Case C-619/18 concerning

[157] Von Bogdandy, A., Ioannidis, M., *Systemic Deficiency in the rule of law: what it is, what has been done, what can be done*, in *Common Market Law Review*, Vol.51, No.1, 2014, 59-96; Safjan, M., *The Rule of Law and the Future of Europe*, in *Il Diritto dell'Unione europea*, 2019, 425 ff.

[158] With regard to Poland, the Commission activated the procedure under Article 7(1) TEU for the first time in its reasoned proposal of 20 December 2017, COM (2017) 835 final. A source of concern was, in particular, a sequence of six laws on the Polish Constitutional Tribunal that undermined the independence of the judiciary. The Commission also activated Article 258 TFEU. On 6 May 2021, Advocate General Evgeni Tanchev delivered his Opinion, ECLI:EU:C:2021:366, in which he proposed that the Court declare that Poland had failed to fulfil its obligations under the Treaties. The Polish rules at issue have also been the subject of numerous references for a preliminary ruling (ECJ, *A. K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy*, Cases C-624/18, C-625/18, C-585/19, 19 November 2019). On this poit see Montanari, L., *Il rispetto del principio di rule of law come sfida per il futuro dell'Unione europea*, in *La Comunità internazionale*, 2020, 75 ff.; Aranci, M., *La reazione dell'Unione europea alla crisi polacca: la Commissione attiva l'art. 7 TUE*, in *Federalismi.it*, 2018, 1 ff.; Sadurski, W., *Poland's Constitutional Breakdown*, Oxford University Press, Oxford, 2019, 21-44. The mechanism provided for in Article 7(1) TEU was also activated in respect of Hungary. In this case, the proposal came from Parliament on 12 September 2018 with a request to the Council to find that there was a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). The areas of concern were, briefly, the independence of the judiciary and other institutions, the protection of privacy and personal data, and freedom of expression. Also in the Hungarian case, the Commission initially initiated infringement proceedings on the basis of Article 258 TFEU. On this point, see ECJ, *Commissione v. Hungary*, Case C-288/12, 8 April 2012; ECJ, *Commissione v. Hungary*, Case C-286/12, 6 November 2012. See also Mori, P., *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*, in *Federalismi.it*, No. 8, 2020, p. 196-210.

[159] *Ex multis* Schmidt, M., Bogdanowicz, P., *The Infringement Procedure in the Rule of Law crisis: how to make effective use of Article 258 TFEU*, in *Common Market Law Review*, Vol. 55, No. 4, 2018, 1061-1100; Mori, P., *La procedura d'infrazione a fronte di violazioni dei diritti fondamentali*, 363; Mastroianni, R., *Stato di diritto o ragion di stato? La difficile rotta verso un controllo europeo del rispetto dei valori dell'Unione negli Stati membri*, in Triggiani, E. *et al* (eds.), *Dialoghi con Ugo Villani*, Cacucci Editore, Bari, 2017, 605-612; Kochenov, D., *On Policing Article 2 TEU Compliance: Reverse Solange and Systemic Infringements Analyzed*, in *Polish Yearbook of International Law*, Vol. 33, 2014, 145-170.

[160] See Scheppele, K. L., *Enforcing the basic principles of EU law through systemic infringement actions*, in Closa, C., Kochenov, D., (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge, 2016,105 ff.

Poland.[161] In fact, these procedures are not only different in nature - the first being political in nature and involving purely political institutions, whereas the second is more legal in nature, in particular because of the role of the Court of Justice - but also in terms of their subject matter. On the one hand, Article 7 TEU guarantees protection in the event of a clear violation of one of the values listed in Article 2 TEU. On the other hand, Article 258 TFEU gives the Commission the power to bring an action before the Court of Justice if a Member State fails to fulfil one of its obligations under the Treaties. It follows that the activation of one procedure does not exclude the other; the two procedures are complementary.

However, from a purely substantive point of view, the activation of the infringement procedure may be potentially more effective in protecting the values on which the European Union is founded, but not necessarily better. The reason for this lies in the difficulty of activating the protection procedure provided for in Article 7 TEU itself. This provision explicitly requires that «there is a clear risk of a serious breach by a Member State of the values referred to in Article 2» and «[t]he European Council […] may determine the existence of a serious and persistent breach by a Member State of [these] values».[162] With regard to the assessment of the existence of these circumstances, the criterion adopted is much more political than legal (these assessments are entrusted to the Council and the European Council), which makes its concrete meaning rather uncertain.[163] Leaving aside any consideration of the deeper meaning of the above terms, it is clear that the provision does not merely require a departure from the rule of law in a Member State, but refers to a much higher threshold, requiring a «clear risk of a serious breach» or a «serious and persistent breach».[164]

On closer examination, however, the infringement procedure appears to have a more limited application than Article 7 TEU. Indeed, it is considered that this provision can be applied not only to infringements falling within the sphere of Union law, but also, and more broadly, to matters falling within the competence of the Member States.[165] In addition, the *quorum* laid down for deliberations appear to be difficult to achieve. Such a situation may explain why the Commission has chosen to use the infringement procedure under Article 258 TFEU to "tackle" the same conduct already condemned under Article 7 TEU.

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[161] Opinion of Advocate General Tanchev in ECJ, *European Commission v. Republic of Poland*, Case C-619/18, 11 April 2019.

[162] Art. 7, paras. 1 and 2, TEU.

[163] Curti Gialdino, C., *La Commissione europea dinanzi alla crisi costituzionale polacca: considerazioni sulla tutela dello stato di diritto nell'Unione*, in *Federalismi.it*, No. 12, 2016, 2-26.

[164] Art. 7, para. 2, TEU.

[165] See Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final. Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems*, in Common Market Law Review, Vol. 53, No.3, 2016, 597-605.

In the light of this situation, the infringement procedure, in its various procedural stages and moments, is proving to be a particularly useful instrument, not only for guaranteeing the fundamental rights of individuals, but also for dealing with systematic breaches of the principles and values that underpin the political and institutional life of the Union. For this reason, the infringement procedure provided for in Articles 258 and 260 of the Treaty on the Functioning of the European Union constitutes a further element in the attempt to reconstruct the identity of the European Union. This specific procedure has the advantage of being easier to activate than the procedure provided for in Article 7 of the Treaty on European Union, but above all it makes it possible to defuse the political tension surrounding the issue of sanctions, which Mr. Barroso has defined as the «nuclear option»[166] in the case of the procedure provided for in Article 7 of the Treaty on European Union.

In the light of these considerations, it can be concluded that the infringement procedure, when used to defend the founding values of the European Union, should not be seen as an instrument adopted by the Commission to circumvent the nature of Article 7 TEU, but rather as an instrument that is easier to manage and, thanks to the possibility of imposing fines, particularly effective. Indeed, it is sufficient to recall that the economic conditionality regulation is justified in terms of the rule of law based on the economic criterion. For this reason, the infringement procedure is another instrument that the European identity has at its disposal to defend its essence.

3.7. The External Role of European Values

As shown in the first part of this chapter, the issue of the identity of the European Union - although already an implicit constituent element of the then European Economic Community - has emerged with greater clarity and insistence since the major Treaty changes that took place with Maastricht, which gave rise to the desire to explicitly define the values and principles that underpin this supranational organisation. The need for an explicit externalisation of these values had already emerged at the beginning of the 1970s in the context of relations with actors outside the Community, and in particular with third countries and international organisations.

In this context, the Declaration on European Identity, adopted in Copenhagen in 1973, in which the nine Member States set the main goal of «draw up a document on European identity. In order to better define their relations with other countries, their responsibilities and their place in world affairs».[167] It is precisely in this perspective of defining its own nature, its own set of values in relation

[166] José Mnuel Durão Barroso, Presidente of the European Commission, *State of the Union address 2013*, 11 September 2013, Speech/13/684.

[167] Declaration on European Identity (Copenhagen, 14-15 December 1973), Preamble.

to other systems,[168] that the former Community, in reaffirming its determination to «defend the principles of representative democracy, the rule of law, social justice – which is the ultimate goal of economic progress – and respect for human rights»,[169] described these values as «fundamental elements of the European identity».[170] It is on the basis of this last statement that it is possible to understand the importance of the actions undertaken by the Union *vis-à-vis* third countries or international organisations and, above all, the values that inspire these actions in defining the identity of the European Union. In this sense, this section is devoted to reconstructing this identity by analysing the values that drive the Union's actions towards other legal systems. In particular, it will examine the provisions of the Treaty on European Union which set out the values on which the EU institutions are based and by which they must be inspired in their approach to other systems.

Article 3 of the Treaty on European Union opens by setting out the objectives that the Union is to achieve or, more simply, to promote both internally and externally. Specifically, it states that «the Union shall aim to promote peace, its values and the well-being of its peoples».[171] It would seem that the main mission of the European Union can be summed up in a triptych: peace, values and the well-being of its peoples. Such a prediction can be explained by the historical context in which first the European Coal and Steel Community and then the European Economic Community were established. Indeed, this article recalls the «historical roots of the European Union's integration process».[172]

In particular, the first paragraph of Article 3 of the TEU refers to the primary objective of the then Community, namely peace among the peoples of Europe, which was to be achieved, firstly, by the free movement of raw materials such as coal and steel - essential for the reconstruction of heavy industry after the Second World War - and, secondly, by the creation of a common economic market. But the "founding fathers" of the Communities understood that economic prosperity could not be achieved solely through big industry, but also by reaching out to the citizens of the Member States, so that the economic distress of Europe's peoples would not lead to a breach of the peace. In this way it is possible to explain why the Union continues to seek peace and the well-being of its peoples, since these two aspects are inseparable and without them the development of the Union itself is not possible.

[168] The idea of the EU as a union of values is reflected in the Laeken Declaration (2001) which launched the Convention on the Future of Europe, specifically in the context of the Union's external policy. See Laeken Declaration on the future of the European Union (15 December 2001), Bulletin of the European Union, No. 12, 2001, 19-23.

[169] Declaration on European Identity, Art. I, para. 1.

[170] *Ibidem*.

[171] Art. 3, para 1, TEU.

[172] Pocar, F., Baruffi, M. C., *Commentario breve ai Trattati dell'Unione europea*, 9.

In addition to these two elements, however, the current Treaty on European Union draws attention to a further element, namely the Union's own values, which it undertakes to promote.[173] In particular, this promotion of the values and interests that underpin the European Union's order is expressed not only *vis-à-vis* the Member States, but also «in its relations with the rest of the world»,[174] not only to promote free and fair trade, but also to promote values that go beyond the purely economic.[175] This passage is significant in terms of defining the identity of the European Union, since it states that the values that underpin and define European identity have not only a fundamental importance within the European Union order, to which the European institutions and the Member States must adhere, but also an external value, since they define the way in which the institutions and the Union itself relate to external orders.

This aspect is particularly important because it precisely defines and delimits the European identity externally, namely it highlights the essential characteristics of this order when it comes into confrontation with other entities. Thus, the Union's external action will always be determined by the affirmation of its values, which the European institutions will always have to respect, without compromise the principles on which it is founded by concluding international treaties or other agreements with third countries that could in any way diminish or even violate these values.

The definition would not be complete, however, if attention were not drawn to another particularly important element in defining the identity of the Union's order. Indeed, in its relations with the rest of the world, the Union's institutions must not only respect the Union's founding values, but also «promote»[176] them. In this sense, identity seems to take on a kind of "messianic" value that guides the Union in its relations with other systems and from which the institutions cannot deviate.[177]

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[173] In fact, the current wording of Article 3(1) TEU largely reproduces Article I-3 of the Treaty establishing a Constitution for Europe, which never entered into force, and in turn reproduces the previous Article 2 TEU and 2 TEC. «The Union's aim is to promote peace, its values and the well-being of its peoples» (art. I-3, Treaty establishing a Constitution for Europe). «The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance , a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States» (art. 2 TEU). See Pocar, F., Baruffi, M. C., *Commentario breve ai Trattati dell'Unione europea*, 9.

[174] Art. 3, para 5, TEU.

[175] Specifically, Article 3(5) of the TEU states that the promotion of the Union's values and interests contribute to the protection of its citizens (citizenship of the European Union was introduced by the Treaty of Maastricht in 1992) and to the contribution «to peace, security, the sustainable development of the Earth to solidarity and mutual respect among peoples, to free and fair trade, to the elimination of poverty and the protection of human rights, in particular the rights of the child, and to the strict observance and the development of international law, including respect for the principles of the United Nations Charter» (Art. 3(5) TEU).

[176] Art. 3, para. 5, TEU.

[177] See Weiler, J. H. H., *Europe in crisis. On "Political Messianism", "Legitimacy" and the "Rule of Law"*, in

The analysis of the Union's external action shows that the values contained in Article 2 TEU not only describe the European identity with regard to its internal structure and, in particular, its relations with the Member States, but also define the behaviour and objectives that the European institutions must pursue in their external action. In particular, the Treaties state that these values are to be pursued primarily on the basis of geographical proximity «the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation».[178] A reading of this provision should not lead to the conclusion that the Union upholds the values that define its identity only in relation to its neighbours, since the Treaty on European Union goes on to state that the Union's action extends «on the international scene»[179] and that its«[…] action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law».[180]

Article 21 TEU is significant because it not only states, in a general way, that the Union shall conform to the values which determined its creation, development and enlargement, as was the case in Article 3 of the same Treaty, but it also declares these values. In this respect, it is significant that there is an almost total overlap between the values declined in Article 21 and those contained in Article 2 TEU. In contrast to the general wording of Article 3 TEU, which states that the Union shall seek to promote its values in its relations with others, Article 21 TEU explicitly states that these principles shall guide the Union in its actions on the international scene. Compared with the values set out in Article 2 of the TEU, it is significant that reference is still made to human rights and fundamental freedoms, but for the first time their universality and indivisibility are enshrined. There is also a reference to the United Nations Charter and, more generally, to respect for international law, precisely because of the external dimension of the Union, which is dealt with in Title V of the Treaty on European Union.[181]

Singapore Journal of Legal Studies, 2012, 248-268; Weiler, J. H. H., *The Transformation of Europe*, in *The Yale Law Journal*, Vol. 100, No. 8, 1991, 2403-2483; Schermers, H. G., *Comment on Weiler's "The Transformation of Europe"*, in *The Yale Law Journal*, Vol. 100, No. 8, 1991, 2525-2536.

[178] Art. 8, para. 1, TEU.

[179] Art. 21, para. 1, TEU.

[180] Art. 21, para. 1, TEU.

[181] Title V is entitled "General Provisions on the Union's External Action and specific Provisions on the Common Foreign and Security Policy". See Bartoloni, M. E., Poli, S (eds.), *L'azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021; Cabrita, T., *Understanding the EU-led 'pandemic' of constitutional foreign policy objectives - Joris Larik, Foreign Policy Objectives in European Constitutional Law (Oxford University Press 2016)*, in *European*

Regarding the external action of the Union in relation to the values which define its identity, it is important to point out that, as has already been said, the Union's action on the international scene is based precisely on those principles which constitute its essence, its foundation. For this reason, the Union seeks to establish relations with third countries and international organisations which share the principles on which it is founded, in order to «[…] preserve peace, prevent conflicts and strengthen international security […]».[182] Among the objectives of the Union's external relations, however, the Treaty places first the « safeguard its values […]» and the consolidation of and support for «[…] democracy, the rule of law, human rights and the principles of international law».[183]

In the light of the provisions of the Treaty on European Union, it is important to bear in mind that all the Union's external action must be guided by the values on which it is founded. The Union's general foreign policy mandate is to develop relations with countries and organisations that share its values,[184] and at the same time the Union must seek to promote these principles in its external relations.[185] As the Union's identity has gradually developed, this has been reflected in its external projection and in its external and internal policies. It is also worth noting that the values that characterise the European identity are also the key to achieving the Union's objectives, not only in its internal sphere, but also in its external policy towards third countries and international organisations. This demonstrates the close link between the values of the European Union and its external action and shows how the European Union does not merely proclaim the values on which it is founded, but actively promotes them in all its manifestations, in particular regarding the creation of an area of freedom, security and justice that goes beyond its geographical borders.

Constitutional Law Review, Vol. 15, No. 1, 2019, 171-180; Cardwell, P. J., *Values in the European Union's foreign policy: an analysis and assessment of CFSP*, in *European Foreign Affairs* Review, Vol. 21, No. 4, 2016, 601-621; Cremona, M., *Values in EU Foreign Policy*, in Evans, M., Koutrakos, P. (eds.), *Beyond the Established Orders: Policy interconnections between the EU and the rest of the world*, Hart Publishing, Oxford, 2011, 275-315.

[182] Art. 21, para. 2, lett. c), TEU. In addition to these, other specific purposes are «foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) helpdevelopinternationalmeasurestopreserveandimprovethequalityoftheenvironmentand the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance» (art. 21, para. 2, letts. e), f), g), h), TEU).

[183] Art. 21, para. 2, letts. a) and b), TEU.

[184] Article 21, para. 2, TEU: «The Union shall seek to develop relations and build partnerships with third countries, and inter- national, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations».

[185] Cremona, M., *Values in EU Foreign Policy*, 284.

3.8. THE EU CITIZENSHIP AS ELEMENT OF EUROPEAN IDENTITY

There is another element that has actively contributed to the definition and, even more, to the wider dissemination of the values that make up the European identity, and that is citizenship of the European Union. The existence of European citizenship, in fact, sets an important dividing line between those countries that are members of the Union and those that are not. Such a division implies that the values on which the Union is founded, and which define its identity apply to all European citizens: this means that citizenship is at the heart of any identity since it is the medium through which these values are transmitted.[186] Furthermore, the concept of European citizenship has made it possible to go beyond the purely institutional dimension of European values and to make them effective at the level of the European population. This characteristic is all the more significant if we consider that the dimension of European values is not only addressed within the Union and beyond its borders - as examined in the previous paragraph - but also finds its own direct applicability with regard to the peoples of Europe, who, despite their linguistic, ethnic, cultural, historical and religious diversity, can nevertheless find a core of values which unite them and which constitute a synthesis of the legal values which the European continent has historically developed and which the Union has placed at the heart of its own legal construction.

To understand the link between the identity of the European Union and its citizenship, it seems appropriate to retrace some of the stages in the history of this institution: in order to outline its defining elements and its essential content. Citizenship of the European Union was officially established by the Maastricht Treaty in 1992.[187] In fact, the question of granting new rights to the citizens of the Member States had already been raised in the mid-1970s, so much so that a "Committee for a People's Europe"[188] - known as the Adonnino Committee - was set up at the Fontainebleau European Council in June 1982, but its work was not subsequently incorporated into the Single Act of 1986.[189] Thus, the first political agreement on the establishment of a European citizenship, complementary to that of the Member States, was not reached until the 1990 Dublin European Council,[190] which conferred

[186] See Shaw, J., *EU citizenship: Still a Fundamental Status?,* in Bauböck, R. (eds,), *Debating European Citizenship*, Springer, Berlin, 2019, 1-17; Montanari, L., *La cittadinanza (europea ma non solo) nel processo di integrazione dell'Unione europea: alcune riflessioni sull'evoluzione più recente*, in *Forum di Quaderni Costituzionali*, 2019, 1-11.

[187] Treaty of Maastricht on European Union, Official Journal C 191, 29 July 1992 P 0001-0110. See Adam, R., *Prime riflessioni sulla cittadinanza dell'Unione*, in *Rivista di diritto internazionale*, 1992, 622 ff.; Cartabia, M., *Cittadinanza europea*, in *Enciclopedia giuridica*, Vol. VI, Treccani, Roma, 1995; Pinelli, C., *Cittadinanza europea*, in *Enciclopedia del diritto*, Annali, Giuffrè, Milano, 2007, 181 ff.

[188] Report from the *ad hoc* Committee on a People's Europe, Commission of the European Communities, Bulletin of the EC 3-1985; European Council Meeting at Fontainebleau, Conclusion of the Presidency, 25 and 26 June 1984, Bulletin of the European Communities, No. 6/1984.

[189] Single European Act, Official Journal of the European Communities, No. L 169/1 29 June 1987.

[190] European Council in Dublin, 25-26 June 1990, Bulletin of the European Communities, No. 6/1990.

additional rights on the citizens of the Member States over and above those already deriving from the Treaties - the right of free movement and residence granted by the 1957 Treaty of Rome - and which could be activated directly *vis-à-vis* the Union as well as towards the Member States, as was previously the case.

These new citizenship rights included the right to petition, the right to address the European Ombudsman, and the right to use one's national language to write to and receive responses from Community bodies. The essential content of the agreement reached at the Dublin European Council would, with minor variations, be incorporated into the Maastricht Treaty. Subsequently, the legal institution of European citizenship would also be included in the Treaty establishing a European Constitution of 2004,[191] but never entered into force, due to the referendum rejection by France and the Netherlands. However, albeit with slight changes to the original 1992 wording, citizenship was confirmed in the 2007 Treaty of Lisbon,[192] which now enshrines the final wording of the Treaties. Specifically, Articles 9, 10, 11 of the Treaty on European Union[193] and Articles 20, 21, 22, 23 and 24 of the Treaty on the Functioning of the European Union deal with the issue of citizenship.[194]

The rights associated with European citizenship were confirmed by the Charter of Fundamental Rights of the European Union, which devotes Title V to the subject of "Citizenship". The enjoyment of those rights is directly linked to the possession of the nationality of a Member State. The conclusions of Advocate General Poiares Maduro in the *Rottmann* case help us to understand what European citizenship really means: «[...] it presupposes the existence of a link of a political nature between European citizens, even if it is not a link of belonging to a people. This political link unites the peoples of Europe. It is based on their mutual commitment to open their political communities to other European citizens and to build a new form of civic and political solidarity at European level».[195] Citizenship of the Union can therefore be defined as sui generis, in that it requires

[191] Treaty establishing a Constitution for Europe, Official Journal of the European Union, C 310, 16 December 2004.

[192] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, C 306/1 12 December 2007. See Schrauwen, A., *European Union Citizenship in the Treaty of Lisbon: Any Change at all?*, in *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008, 55 ff.

[193] See Art. 9 TEU and Art. 11 TEU.

[194] See Art. 20 TFEU, Art. 21 TFEU, Art. 23 TFEU and Art. 24 TFEU. Summarising the content of these provisions, it can be said that, among other things, citizens of the Union enjoy the right to move and reside freely within the territory of the Member States. This includes the right to vote and to stand as a candidate not only in elections to the European Parliament but also in municipal elections in the Member State of residence. There is also the right to diplomatic and consular protection in third countries, the right to petition the European Parliament, the right to complain to the European Ombudsman, the right of access to documents and the right to good administration.

[195] ECJ, Opinion of Advocate General Poiares Maduro in *Janko Rottman v Freistaat Bayern*, Case C-135/08, 2 March 2010, para. 23. See Hyltén-Cavallius, K., *Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises*, in *European Constitutional Law Review*, Vol. 18, No. 3, 2022, 556-571.

the possession of citizenship of another order as the only condition for its attribution: it is, as some scholars have called it, a «citizenship without nationality».[196]

It is therefore up to the States to determine who their citizens are and what the criteria are for acquiring national citizenship, from which European citizenship automatically follows, as the judges of the Court of Justice confirmed in the *Kaur* case in February 2001.[197] In fact, the Court had already ruled on this point in the *Micheletti* case of July 1992, in which the judges stated that «the determination of the ways and means of acquiring nationality [...] falls within the competence of each Member State, a competence which must be exercised in compliance with Community law».[198] In *E.P. v. Préfet du Gers and Instutut national de la statistique et des études économiques* case,[199] on the other hand, the judges of the Court of Justice recalled that the loss of European citizenship results not only from the loss of national citizenship at national level, but also - as in the case of Brexit - from the withdrawal of a Member State from the Union, as provided for in Article 50 TEU.[200] Moreover, the Court of Justice was able to significantly strengthen the role of European citizenship, so much so that it stated in the *Grzelczyk* decision of 2001 that «Union citizenship is destined to be the fundamental status of nationals of the Member States […]».[201]

The status of European citizen remains as long as the state of which one is a citizen is a member of the Union. Moreover, with the Lisbon Treaty - on the basis of Articles 9 TEU and 20 TFEU - European citizenship went from being "complementary" to "additional" to national citizenship. This has led to European citizenship being considered as a true second citizenship, endowed with an autonomous meaning, whereby this status is destined to become fundamental with reference to the possibility of asserting one's rights not only within the Euro-Union order, but also *vis-à-vis* one's own State.

At least for the time being, therefore, the existence of a European citizenship independent of national citizenship is not sustainable. About the development of the concept of citizenship with respect to the enjoyment of rights, a central role has been played by the case law of the Court of Justice. In *Marie-Nathalie D'Hoop v. Office national de l'emploi*, the Court stated that «a citizen of

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[196] Rossi, L. S., *I cittadini*, in Tizzano, A. (eds.), *Il diritto provato dell'Unione Europea*, Giappichelli, Torino, 2006, 116; Carerns, J., *Culture, Citizenship, and Community. A Contextual Explolration of Justice as Evenhandedness*, Oxford University Press, Oxford, 2000, *passim.*

[197] ECJ, *The Queen v Secretary of State for the Home Department*, Case C-192/99, 20 February 2001.

[198] ECJ, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, Case C-369/90, 7 July 1992, para. 10.

[199] ECJ, *E.P. v. Préfet du Gers e Institut national de la statistique et des études économiques*, Case C-673/20, 9 June 2022.

[200] Art. 50, para. 1, TEU: «Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements».

[201] ECJ, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99, 20 September 2001, para. 31.

the Union is entitled to be accorded in all the Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation [and that, therefore] it would be incompatible with the right to freedom of movement if he were to be treated less favourably in the Member State of which he is a national than he would be if he had not benefited from the facilities granted by the Treaty in respect of movement».[202]

Even if the main objective of European citizenship was to protect citizens moving to another state, over the years and in cases involving European citizenship, the Court of Justice has broadened its consideration of the connecting factor to Union law, moving from the traditional approach, which required the presence of a cross-border situation, to extending its scope.

The Court of Justice thus ended up declaring that European citizens can claim certain rights *vis-à-vis* their country of nationality, even in the absence of the exercise of the right of movement and residence. The potential of this new approach became evident in the *Zambrano* case, where the Court declared that Article 20 TFEU precludes national measures that may deprive citizens of the Union of the genuine «enjoyment of the rights attaching to the status of citizen of the Union».[203] Applying this criterion to the specific case, it concluded that a third-country national who is in a Member State and whose dependent minor children are nationals has the right to reside and work in that member state. A refusal to grant the parent such rights would in fact deprive the children of the «real and effective enjoyment of the rights attaching to the status of citizen of the Union».[204] The Court further specified the validity of this criterion even in cases where minors have never exercised their right to free movement within the EU. This means, in other words, that states are increasingly restricted in their treatment of their own nationals because they have rights (and the status of European citizens) that derive directly from the treaties. All this has led part of the doctrine to consider that we are facing an important achievement in the process of European integration, also because of the symbolic value that European citizenship would assume. The affair of the institution of such citizenship therefore represents not only a project of political union but also an attempt to build a European identity in the consciousness of the citizens of the member states.[205]

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[202] ECJ, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, Case C-224/98, 11 July 2002, para. 30.

[203] ECJ, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Case C-34/09, 8 March 2011, par. 45.

[204] *Ivi*, para. 45. See also Vecchio, F., *Il caso Ruiz Zambrano tra cittadinanza europea, discriminazioni a rovescio e nuove possibilità di applicazione della Carta dei diritti fondamentali dell'Unione*, in *Diritto Pubblico Comparato ed Europeo*, No. 3, 2011, 1249 ff; Lenaerts. K., *EU citizenship and the European Court of Justice's 'stone-by-stone' approach*, in *International Comparative Jurisprudence*, Vol. 1, No. 1, 2015, 1-10.

[205] Mori, P., *Il primato dei valori comuni dell'Unione europea*, in *Il diritto dell'Unione europea*, No. 1, 2021, 73-75; Politi, F., *Diritto costituzionale dell'unione europea*, Giappichelli, Torino, 2021, 135-137, 140-144; Costanzo, P., Mezzeti, L. Ruggeri, A., *Lineamenti di diritto costituzionale dell'Unione europea*, 469-476; Gargiulo, P., *Le forme della cittadinanza. Tra cittadinanza Europea e cittadinanza nazionale*, Ediesse, Roma, 2012, 22 ff.

The idea of European citizenship arose in the first place to strengthen and promote the role of the European population in the process of European integration. This is confirmed by the fact that European citizenship was introduced precisely with the Maastricht Treaty, which played a key role in the revival and formation of a new concept of Europe: based not only on the economic element, but also on the political one. For this reason, the very concept of European citizenship was also introduced to promote the identity of the European, which was to find a solid element in the freedom of movement and residence within the territory of the Union, the right to vote, protection by diplomatic authorities in third countries and the right to petition the European Parliament as well as the possibility of appealing to the European Ombudsman.[206] In addition to the elements just mentioned, which find their discipline within the text of the Treaties and the Charter of Rights of the European Union, European citizenship has been instrumental in making the values on which the European Union is founded directly applicable within national legal systems. Indeed, European citizenship contains certain elements that go beyond the mere exercise of the rights associated with 'economic citizenship' and, indeed, can put into practice the values contained in Article 2 TEU. Having said this, the introduction of European citizenship was intended to foster not only a union of states, but also a union among European citizens, which is based on respect for human dignity, freedom, democracy, equality, the rule of law and human rights.

This observation further demonstrates how the values underpinning the identity of the European Union can transcend mere relations between the Member States and the Union and to establish common principles on which the citizenship of the European Union is founded and built, which finds its building blocks within values that transcend state and geographical elements. Hence, it can be concluded that European citizenship and the values on which the Union is based constitute the further frameworks through which to reconstruct the existence of a genuine European identity among the citizens of the Member States.[207] As a matter of fact, it emerges that the consolidation of the values on which the European Union is based also passes through the affirmation of a common identity among European citizens, as the first element of the «community of values» that is the

[206] See Bellamy, R., Castiglione, D. Shaw, J., *Making European Citizens: Civic Inclusion in a Transnational Context (One Europe or Several?)*, Palgrave, London, 2006, 117 ff.; Delanty, G., *The cosmopolitan imagination: critical cosmopolitanism and social theory*, in *The British journal of sociology*, Vol. 57, No. 1, 2006, 25-47; Delanty, G., Rumford, C., *Rethinking Europe. Social theory and the implications of Europeanization*, Routledge, London, 2005, 31 ff.; Lepsius, M. R., *The European Union: Economic and Political Integration and Cultural Plurality*, in Eder, K., Giesen, B. (eds.), *European Citizenship: Between National Legacies and Postnational Projects*, Oxford University Press, Oxford, 2001, 205-221.

[207] Gargiulo, P., *Valori dell'Unione e cittadinanza europea: strumenti di affermazione dell'identità europea?*, in Montanari, L., Cozzi, A. L., Milenković, M., Ristić, I., *We, the People of the United Europe*, 43-51.

Union.[208] Moreover, citizenship seems to be the place where the values that underpin the legal order of the European Union are realised and given a concrete dimension.

3.9. European Values and the limits to the Treaty revision procedure

As was pointed out in the previous case study - concerning Bosnia and Herzegovina - a fundamental element in reconstructing the constitutional identity of a legal system is to analyse the formal and, above all, the substantial limits of the procedure for amending or revising the constitution itself. In fact, such an analysis makes it possible to determine, first, whether or not there are tightened procedures for revising the constitutional text, but above all, whether there is a core of values and principles within the constitution that cannot be subject to any kind of modification or replacement, since they constitute its very essence. Applying these general considerations to the study of the reconstruction of the identity of the European Union, it seems possible to define some fundamental aspects of this identity. This is particularly the case because the analysis of the limits of the Treaty revision procedure is based both on the text of the Treaties and on some of the case law of the Court of Justice. This paragraph is therefore presented as a summary of the main elements that make up the identity of the European Union and, as such, makes it possible to define its main aspects.

Before analysing the question of the limits of the Treaties revision procedure it should be recalled that the Community, and later the Union, were established by international Treaties. One of the consequences of this consideration is that the amendment procedure should be subject to the principles laid down in Article 39 of the Vienna Convention on the Law of Treaties.[209] This provision states that «a treaty may be amended by agreement between the parties»,[210] which means that the procedure for amending a treaty is entirely at the disposal of the parties and that there are therefore no formal procedures to be followed, other than the fact that there must be agreement between the parties. In other words, the agreement of the parties may take forms other than that of a treaty. For example, a contract may be amended by an oral agreement[211] or by the development of a practice which the parties accept as binding.[212] On the basis of these considerations, it can be concluded that in general international law there are no formal or substantive obligations regarding the treaty

[208] Pitruzzella, G., *L'Unione europea come "comunità di valori" e la forza costituzionale del valore dello "stato di diritto"*, in *Federalismi.it*, No. 28, 2021, 1-10.

[209] Vienna Convention on the Law of Treaty, 23 May 1969, United Nations, Treaty Series, Vol.1155, 331.

[210] *Ivi*, Art. 39.

[211] *Ivi*, Art. 3.

[212] *Ivi*, Art. 31, para. 3, lett. a.

amendment procedure, the only necessary element being the existence of an agreement between the parties that is binding by treaty.[213]

In contrast to the freedom of form enjoyed by international treaties in general, as enshrined in Article 39 of the Vienna Convention, the Treaty on European Union provides for a special and specific Treaty revision procedure. This means that the Treaty on European Union excludes any other revision procedure than that provided for in Article 48 TEU. In other words, the possibility of informal Treaty amendments based on a subsequent agreement of the Member States is excluded within the European Union order. This is one of the peculiarities of the European legal system, which excludes the freedom of form regarding the revision of the Treaties, but rather formalises this procedure. Another peculiarity that emerges from this first consideration, and which is worth mentioning here, is the fact that the Member States cannot be defined as «masters of the Treaties»[214] as regards the form of treaty revision, since they themselves must submit to a formal procedure laid down by the Treaties and from which they cannot derogate.[215] Having established that the Treaty on European Union provides for a specific procedure for the revision of the Treaties, from which the Member States cannot derogate, it is necessary to analyse the central question of this section, namely whether there are limits to the revision of the Treaties or whether Article 48 TEU permits any kind of amendment.

An analysis of Article 48 TEU shows that there are explicit limits to the revision of the Treaties, with mandatory procedures to be followed by the institutions of the European Union and the Member States when amending the Treaties. Specifically, the article provides for the existence of two revision procedures: «the Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures».[216] To briefly highlight the main differences between the two procedures, the "ordinary procedure" provides that the initiative for amendment may be proposed to the Council alternatively by the Member States, the European Parliament, or the Commission. The revision procedure begins with a prior opinion of the European Council, followed by the convening of a special convention of representatives of the national parliaments, the Heads of State or Government of the Member States, the European Parliament and the Commission, and finally a conference of representatives of the governments of all

[213] However, this does not preclude the parties to an agreement from including a specific amendment procedure within the agreement itself, as this is within their power when the treaty is drafted. See Aust, A., *Modern Treaty Law and Practice*, London School of Economics and Political Science, London, 2013, 233-235.

[214] The Maastricht Case (1993) 89 *BVerfGE* 155, para. 111; The Lissabon Case (2009) 123 *BVerfGE* 267, para. 231.

[215] ECJ, *Gabriella Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case C-43/75, 8 April 1976, para. 58.

[216] Art. 48, para. 1 TUE. See Albert, R., *Constitutional Amendments: Making, Breaking and Changing Constitutions*, Oxford University Press, Oxford, 2019, 113 ff.; Roznai, Y., *Unconstitutional Constitutional Amendments*, Oxford University Press, Oxford, 2017, 201 ff.

the Member States, which decides unanimously, followed by the ratification of the proposed revision by all the Member States.[217] The simplified procedure, on the other hand, applies only to the third part of the TFEU (Union internal policies and actions, including the internal market, the area of freedom, security and justice, monetary and economic policies and social policies) and consists of a unanimous decision by the European Council, after consulting the European Parliament, the Commission and, in the case of changes in the monetary field, possibly the European Central Bank, with the general limitation that it is prohibited to extend the competences of the Union by this procedure, since it is only through the ordinary procedure that the competences of the Union can be increased or reduced.[218] In the light of the two procedures under Article 48 TEU, it is clear that in the legal order of the European Union there is not only a formalised treaty revision procedure, but also formal limits to this revision procedure. In fact, the provision for two separate procedures for revising the Treaties is an element that defines the presence of formal limits to revision in the European Treaties, namely the imposition of mandatory procedures that do away with the freedom of form that generally characterises the regulation of "ordinary" international treaties.

[217] In detail, the ordinary revision procedure is regulated as follows: «The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council». Art. 48, paras. 2, 3, 4, 5.

[218] In detail, the simplifies revision procedure is regulated as follows: «The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties». Art. 48, para. 6 TEU.

A particularly significant element that anticipates the issue of the substantial limits to the amendability of the Treaties is the question of the possibility of attributing to the Court of Justice the competence to assess the legitimacy of possible reforms based on the values underlying the European Union order. This issue is particularly important because it allows us to examine the issue of the substantial limits to the procedure for amending the Treaties and, therefore, to understand how the issue of the Union's identity intersects with that of the limits to treaty revision.

Since the text of the Treaties does not explicitly provide for the contribution of the Court of Justice in the procedure of amending the Treaties, it was a judgment of the Court itself that expressed on this point. Specifically, with the *Pringle* case of 2012,[219] the judges of the Court of Justice were called upon to assess the legitimacy of an amendment, adopted under a simplified procedure, that added the European Stability Mechanism to the already existing Article 136 TFEU. The first question that the Court of Luxembourg had to address was whether it had jurisdiction to assess the legitimacy of the amendment, as ten states intervening in the case, in addition to the European Council and the Commission, argued that the Court of Justice did not have the power under Article 267 TFEU to assess the validity of the provisions of the Treaties on the grounds that such a substantive review would preclude amendments to the Treaties.[220] The Court acknowledged that it had jurisdiction to assess the question submitted to it, since the decision of the European Council by which that amendment was approved is to be considered to all intents and purposes an «act of the institutions»[221] within the meaning of Article 267 TFEU.

The Court's scrutiny of the lawfulness of Treaty amendments adopted by simplified procedure, however, is not merely a formal check on compliance with the procedures prescribed by the TEU, but also operates as a substantive check on compliance with the further limits dictated by Article 48 TEU, namely the possibility of amending only Part Three of the TFEU and the prohibition on extending the Union's competences.[222] The decisions taken are therefore assessed on their merits using the rest of the Union's primary law as a parameter of legitimacy. Indeed, verifying that the amendment must insist exclusively on Part Three of the TFEU is equivalent to judging whether it respects and is compatible with the rest of the provisions of the Treaties. The configuration of the characteristics of the review of the lawfulness of the revision of the Treaties, albeit limited to the simplified procedure, represents an element of great importance from a dogmatic point of view, since it admits the possibility of a material review of the lawfulness of the amendments, and thus the configurability of material limits with respect to the revision of the Treaties. Thus, the judges of the

[219] ECJ, *Thomas Pringle v Government of Ireland*, Case C-370/12, 27 November 2012.
[220] ECJ, *Thomas Pringle v Government of Ireland*, Case C-370/12, para. 32.
[221] *Ivi*, para. 33.
[222] *Ivi*, para. 36.

Court of Justice have clarified that there are substantive limits to amendments in the context of the simplified revision procedure and that they cannot entail changes to primary law outside Part Three of the TFEU. As to whether, on the other hand, there are implicit substantive limits to treaty amendments and whether the Court of Justice can declare a revision adopted under the ordinary procedure unlawful on the grounds of violation of certain fundamental rules of European law, an answer is to be found in a few judgments of the Court of Justice. The configuration of the Court of Justice's review of the legitimacy of the revision of the Treaties, although limited to the simplified procedure, is of great importance from a dogmatic point of view since it admits the possibility of a substantive review of the legitimacy of the amendments and thus the configurability of the substantive limits of the revision of the Treaties.[223]

In fact, as early as December 1991,[224] the Court of Justice expressed its opposition to a draft agreement between the European Community and the EFTA (European Free Trade Association) countries on the creation of a European Economic Area (EEA), which provided, *inter alia*, for the establishment of an independent Court to settle disputes relating to the application of that agreement. The concern of the Court of Justice was, in particular, the protection of the autonomy of the Community legal order and the unity of interpretation of the law, guaranteed by the Court itself, which would be threatened by the establishment of a parallel system of Courts. Beyond the details of the assessments made, what is relevant for the purposes of the present analysis is that the Court, in holding that the institutional system established by the agreement under examination infringes the fundamental principles of the European legal order, states that not even an authoritative revision of the Treaty rules on the conclusion of international agreements by the Community could render that system legitimate.[225] In so doing, the Court of Justice of the European Communities clearly indicates that the very foundations of the legal order constitute an insurmountable material limit, not only for international agreements concluded by the Community, but also for Treaty revision procedures, and brings back into this sphere the fundamental features that define the functioning of the "community of law" that is the Union, starting with the autonomous and individual position of the Court of Justice itself.[226]

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[223] See the considerations of Passchier, R., Stremler, M., *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, in *Cambridge Journal of International and Comparative Law*, Vol. 5, No. 2, 2016, 337-362.

[224] ECJ, Opinion 1/91, 1991.

[225] For further details on the case, refer to what has already been described in this chapter in section 3.3.3.

[226] Opinion 1/91, paras. 70, 71, 72: «[…] an international agreement providing for a system of courts, including a court with jurisdiction to interpret its provisions, is not in principle incompatible with Community law and may therefore have Article 238 of the EEC Treaty as its legal basis. However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. For the same reasons, an amendment of Article 238 in the way indicated by the

In order to understand the question of the existence of implicit substantive limits to the revision of the Treaties, and how the jurisprudence of the European Union has outlined this question in broad terms, it is also appropriate to refer to a subsequent opinion of the Court of Justice, namely that concerning the assessment of the compatibility with Union law of a draft agreement which was to create a European Patent Court.[227] Restricting the judges' decision to the part relevant to the present discussion, it can be seen how the Court of Justice reacted negatively to the creation of a patent court on the grounds that its existence would be outside the institutional and judicial framework of the Union and that it would have exclusive jurisdiction to adjudicate on disputes arising in the field of patents, effectively excluding the role of the Court of Justice. On this basis, the judges concluded that the creation of a Patent Court «would deprive the courts of the Member States of their jurisdiction to interpret and apply European Union law and would deprive the Court of Justice of its jurisdiction to give preliminary rulings on questions referred by those courts».[228] Consequently, such a system «would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable for preserving the nature of European Union law».[229]

Subsequently, in Opinion 2/13,[230] the Court reaffirmed the existence of fundamental institutional and operational principles of the Union's legal order which could not be infringed or, to a certain extent, diminished by the European Union's accession to the European Convention on Human Rights, since accession to the Convention would alter the Union's competences and the Court's monopoly of interpretation.[231] In fact, the Court of Justice prohibits any change that would entail a departure from the fundamental principles of the Union, a categorical prohibition: the foundations of the Union can never be limited, only corrected and refined.

From an institutional point of view, there is an instrument of judicial review of the legitimacy of the revision of the Treaties, and, from a dogmatic point of view, the Court itself recognises that this review is not limited to an examination of the formal characteristics of the procedure for emending the Treaties but is also of a substantive nature and concerns the content of these Treaty amendments. What emerges from a mere reading of the text of the Treaties is the absence of an "eternity clause" in European Union's constitutional system. However, even without a complete and exhaustive theorisation of the substantive limits implicit in the revision of the Treaties, it seems to

Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement».

[227] ECJ, Opinion 1/09, *European and Community Patents Court*, 8 March 2011.

[228] ECJ, Opinion 1/09, para. 89.

[229] *Ibidem*.

[230] ECJ, Opinion 2/13, 2013.

[231] For further details on the case, refer to what has already been described in this chapter in section 3.10.2.

emerge from the three opinions of the Court of Justice proposed above that the autonomy of EU law constitutes a founding value and, as such, also a substantial limit to the procedure for revising the Treaties.

As far as the identity of the Union is concerned, the judgments of the Court of Justice indeed show how the courts implicitly identified substantive limits to the introduction of certain new competences into the Union's legal order, as this would have changed the nature of the Union's primary law and the specific competences it provides for.[232]

This reasoning - developed in the opinions described above - finds further and broader confirmation in the *Kadi I* case.[233] There, the judges of the Court of Justice stated that, although the case did not explicitly concern an amendment of the Treaties, the existence of certain values, expressly defined in Article 2 TEU, constitutes a limitation on the incorporation into secondary Union law of acts of other international institutions that are contrary to those same values identified in Article 2 TEU. A partial translation of these considerations of the Court of Justice, also in the light of previous case law, shows that the values on which the Union is founded constitute an important element of substantive limitation on the revision of the Union Treaties. Although there is no complete theory on this point, it is possible to consider the values that define the constitutional identity of the European Union as an implicit material limitation on the revision of the Treaties. Indeed, in the opinions described above, the Courts have consistently recognised the existence of an «essential character»[234] of the Union's legal order, which must be safeguarded in any revision of the Treaties.

PART II: EUROPEAN CONSTITUTIONAL IDENTITY FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF JUSTICE

3.10. EUROPEAN CONSTITUTIONAL IDENTITY FROM THE PERSPECTIVE OF THE JURISPRUDENCE OF EUROPEAN COURT OF JUSTICE

As anticipated above, the second part of this chapter is devoted to the reconstruction of the constitutional identity of the European Union through EU case law. Specifically, several important

[232] See Kawczynska, M., *The Court of Justice of the European Union as a law-maker: enhancing integration or acting ultra vires?*, in Florczak-Wątor, M., *Judicial Law-Making in European Constitutional Courts*, Routledge, London, 2020, 203-221; Várnay, E., *Judicial Passivism at the European Court of Justice?*, in *Hungarian Journal of Legal Studies,* Vol. 60, No. 2, 2019, 127-154; Dawson, M., De Witte, B., Muir, E., *Judicial Activism at the European Court of Justice*, Edward Elgar, Cheltenham, 2013, 21-55; Starr-Deelen, D., Deelen, B., *The European Court of Justice as a Federator*, in *Publius*, Vol. 26, No. 4, 1996, 81-97.

[233] For further details on the case, refer to what has already been described in this chapter in section 3.3.4.

[234] ECJ, Opinion 1/09, para. 89.

judgments and opinions of the Court of Justice will be traced chronologically in order to understand how the judges gradually arrived at judgments C-156/21 and C-157/21, in which they defined the identity of the European Union.

The term “national identity” appears in one hundred and six (106) judgments and opinions of the Court of Justice, consulting the official website of the Court of Justice of the European Union. The expression "constitutional identity" appears in only twenty-one (21) judgments of the Court of Justice. The syntagma “identity of the European Union” appears in only four (4) (*sic*) judgments, two of which explicitly sanction the existence of the concept of the identity of the European Union for the first time and define its content.[235] The Advocate General's opinion in C-715/20 states that:

«the value of human dignity constitutes the actual *Grundnorm* (basic norm) of post-World War Two European constitutionalism against the horrors of totalitarianism which denied any value of the human person. Human dignity, which is central to the constitutional traditions of the Member States and consistently placed at the foundation of the constitutional identity of the European Union […]».[236]

A first reading of these data, which are essentially based on a purely quantitative reconstruction of the times when the concept of "identity" appears in the jurisprudence of the Court of Justice, might suggest that it is too early to speak of a constitutional identity proper to the European Union.

On the contrary, it seems that the clarity with which the judges of the Court of Justice have expressed themselves on this delicate and vexed question, together with the relevance of the decision in relation to the concrete case from which it derives, constitute sufficient and significant elements to retrace a kind of history of the idea of the constitutional identity of the European Union, starting precisely from the case-law of the Court of Justice which, without showing any self-restraint, has clearly expressed itself on the existence of this identity within the European Union, defining not only its content and legal basis, but also implicitly the relationship between this supranational identity and the national identities of the Member States, which the Union, on the basis of Article 4(2) TEU, is obliged to respect.[237] Moreover, it should be added that the two judgments of the Court of Justice in which the content of the identity of the European Union was clearly established are the final result of

[235] ECJ, *J.K. v. TP S.A.*, Case C-356/21, 8 September 2022, para. 109: «[…]In recent judgments of the Court, sitting as a full court, it has explained that values enumerated in Article 2 TEU, including equality, are an integral part of the very identity of the European Union (judgments of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, paragraph 232, and of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, paragraph 264) […]».

[236] ECJ, *K. L. v. X sp. z.o.o.*, Case C-715/20, Opinion of Advocate General Pitruzzella, 30 March 2023, para. 76.

[237] ECJ, *RS*, Case C-430/21, 22 February 2022.

a jurisprudence that has progressively developed, first by defining the constitutional content of the legal order of the European Union, then by adopting the theory of counter-limits, until today, when it has explicitly affirmed not only the existence but also the content of the European identity.

By its very nature, the law of the European Union is in a constant state of flux, built on a foundation laid down in the founding Treaties and their subsequent developments, which are subject to an evolution that necessarily passes through the jurisprudence of the Court of Justice, thus creating a layered system. It is precisely because of this "stratification", which characterises the European order, that we will begin by analysing this system layer by layer to reconstruct the constitutional identity of the European Union. In this respect, the judgments that first established the European identity are characterised by the fact that they are the result - at least so far - of a slow but steady jurisprudence on this concept. For this reason, the following section will examine the content of the judgment and the impact it has had on the definition of a European Union identity. The following pages will then illustrate the path taken by the Court of Justice: from the first judgments in which this question was raised, to the subsequent judgments in which it has slowly developed and consolidated not only the concept of identity, but also its content and its relationship with the legal systems of the Member States.[238]

The role of the Court of Justice in defining the constitutional identity of the European Union implicitly raises the question of the Court's judicial activism. Indeed, the judges of Luxemburg have shown on several occasions that they prefer a teleological approach to interpretation, filling in the gaps in the Treaties and favouring the goal of European integration over a more textual and originalist interpretation.[239] In particular, in the name of upholding the rule of law within the Union, the Court has used its powers of interpretation of the Treaties and derived EU legislation to develop principles of a constitutional nature as part of the EU legal order.[240] This observation certainly confirms that the Court's approach to judicial interpretation has been instrumental in transforming EU law from treaty-

[238] See Tridimas, T., *Wreaking the wrongs: Balancing rights and the Public interest the EU way*, in *Columbia Journal of European Law*, Vol. 29, No. 2, 2023, 185-213; Hoxhaj, A., *The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget*, in *Nordic Journal of European Law*, Vol. 5, No. 1, 2022, 133; Govaere, I., *Promoting the Rule of Law in EU External Relations: A Conceptual Framework*, in *College of Europe Research Paper in Law*, No. 3, 2022, 1-21; Groussot, X., Zemskova, A., Bungerfeldt, K., *Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-Of-Law Crisis, and Why Solidarity Is Essential*, in *Nordic Journal of European Law*, No. 1, 2022, 1-19; Liakopoulos, D., *The rule of law conditionality. Opportunities and challenges*, in *Revista De Estudios Europeos*, Vol. 81, 2022, 1–28.

[239] See Beck, G., *Judicial activism in the court of justice of the EU*, in *University of Queensland Law Journal*, Vol. 36, No. 2, 2017, 333-353; Dhooghe, V., Franken, R., Opgenhaffen, T., *Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context*, in *Tilburg Law Review*, Vol. 20, No. 2, 2015, 122-141; Itzcovich, G., *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, in *STALS Research Paper*, No. 4, 2014, 1-53; Pasa, B., Bairati, L., *Judicial Creativity Within Europe's "Mixed Jurisdiction"*, in *Tulane European and Civil Law Forum*, Vol. 29, 2014, 1-45.

[240] Beck, G., *Judicial activism*, 334.

based international law into a supranational legal order that has penetrated the legal systems and legal sovereignty of the EU Member States in many areas that were traditionally the exclusive domain of national law.[241] Similarly, on the issue of constitutional identity, the judges of the Court of Justice - as will be reconstructed in the following pages - have relied on an evolutionary and teleological interpretation of the text of the Treaties. Indeed, the Luxemburg judges have progressively interpreted certain principles and values contained in the Treaties to the point of defining them as constituent elements of the constitutional identity of the European Union. In this respect, however, we consider that it is necessary to make a clarification. In fact, as we have tried to show in the first part of this chapter, the elements for identifying the principles and values on which the constitutional identity of the European Union is based can already be identified in part from the text of the Treaties and from other aspects that are always linked to them, such as the existence of certain procedures for revising the Treaties. Moreover, the recent introduction of provisions explicitly aimed at safeguarding certain fundamental principles of the European Union and forming part of its constitutional identity through the limitation of financial resources is a further element indicating that the constituent elements of the identity were in fact already clear from the positive law of the Treaties. With this clarification, we wanted to say that the teleological criterion and the evolutionary interpretation adopted by the Court of Justice have certainly contributed to the definition of the constitutional identity of the European Union and the identification of its elements. However, with the reconstruction carried out in the first part of this chapter, we also wanted to show that certain elements present in the Treaties were already sufficient instruments for defining the criteria of the European Union's constitutional identity, and that the Court of Justice merely took them up, without having to fill gaps in the Treaties with particularly far-fetched evolutionary or teleological interpretations. In fact, as will be explained in more detail in the following pages, in judgments C-156/21 and C-157/21, the judges of the Court of Justice reaffirmed that constitutional identity is a key concept of public law and also a fundamental pillar of the European Union and defined its content on the basis of Article 2 of the Treaty on European Union.[242] The real significance of these two decisions of the Luxemburg Court lies in the fact that, for the first time, its judges not only explicitly defined the existence of a specific constitutional identity of the European Union, but also identified its content.

[241] Beck, G., *Judicial activism*, 335.

[242] Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, 1.

3.10.1. THE JURISPRUDENTIAL PATH TO THE EUROPEAN CONSTITUTIONAL IDENTITY

The judgments C-156 and C-157 are the result of a long and continuous process of "constitutionalisation" of EU primary law by the Court of Justice. At present, the highest expression of this concept seems to be the affirmation by the judges of the same Court that Article 2 TEU is not a mere statement of guidelines or intentions of a political nature, but contains values embodied in principles which are binding not only on the institutions of the European Union but also on the Member States. Moreover, the judges add, these values, which are enshrined in Article 2 TEU, constitute the very identity of the European Union as a common legal order.[243] This is also confirmed by the fact that «the European Union must be able to defend those values within the limits of its powers as laid down in the Treaties».[244]

Apart from these aspects – which will be further explored in the following pages – it is important to note that, in the two judgments referred to above, the judges of the Court of Justice confirmed the legal force of the values contained in Article 2 TEU, expressly affirming the existence of a constitutional identity specific to the European Union, which its institutions, within the limits of the powers conferred them by Treaties, are obliged to uphold, with a "naturalness" that seems to contrast with the importance and consequences that such declarations have for the European legal order, but also for that of the Member States. In fact, the judges stated their positions in their reasoning as a logical premise for the decision of the concrete case. This seems to implicitly confirm the impression that the considerations on Article 2 TEU are a well-established and well-known element, which therefore does not require any explanation as to why the judges accepted these premises in reaching their decision. The reason for this consideration is understandable in the light of the jurisprudential development of the Court of Justice and, to a lesser extent, of the General Court in recent decades. In this section, we would like to try to reconstruct – without claiming to give a complete and exhaustive organic vision – how the jurisprudence of the Court, but not only, has moved towards developing and defining some of the concepts that have since been included in the broader field of constitutional identity, which the judges made explicit in the "twin" judgments of February 2022.

It has been decided to leave aside the content of the now famous judgments *Van Gend en Loos v. Nederlandse Administratie der Belastingen* and *Costa v. Enel*, which respectively established two of the fundamental concepts of the idea of constitutionalising European Union law, namely the

[243] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para. 232; ECJ, C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*, para. 264.

[244] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para 127; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, para 145.

principle of the direct effectiveness of the Treaties and the primacy of Community law over the law of the Member States.[245] However, it is worth remembering that, in *Van Gend en Loos*, the judges of the Court of Justice ruled 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, and the subject of which comprise not only member states but also their nationals».[246]

This statement, which was further developed and applied in other rulings of the Court, stands in symmetrical relation to the "twin" rulings of February 2022. In fact, in the *Van Gend en Loos* case, the judges ruled that the Community legal order was to be considered totally independent of that of the Member States; whereas in judgments C-156/21 and C-157/21, the Court of Justice ruled that this «new legal order»,[247] like the States, has its own constitutional identity. Starting from this idea, we find it interesting to dwell on the content of those judgments which anticipated certain aspects which subsequently became an integral part of those values on which the Union was to be structured, both within the provisions of the Treaties and within the Court's own case-law. In this respect, it is essential to begin this jurisprudential presentation by quoting the content of Case C-138/79, also known as *Roquette Frères*,[248] in which the judges of the Court of Justice affirmed for the first time that the content of the Treaties

«[…] allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament

[245] ECJ, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case C-26/62, 5 February 1963; ECJ, *Costa v. ENEL*, Case C-6/64,15 July 1964; in addition to these two "pillar" judgments of the Union, there is also the more recent Opinion 1/09 of the Court of Justice, which confirmed the principles set out in them as well established. About the issue of constitutionalizing of European Law see Claes, M., *Constitutionalising Europe. The Making of a European Constitutional Law*, Bloomsbury, London, 2024; Rasmussen, M., Sindbjerg Martinsen, *EU constitutionalisation revisited: Redressing a central assumption in European studies*, in *European Law* Journal, Vol. 25, No. 3, 2019, 251-272; Longo, M., *Constitutionalising Europe. Processes and Practices*, Routledge, London, 2016; Villani, U., *Una rilettura della sentenza Van Gen den Loos dopo cinquant'anni*, in *Studi sull'integrazione europea*, 2013, 225-237; Arena, A., *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, in *European Journal of International Law*, Vol. 30, No. 3, 2019, 1017–1037; Hofmann, H., *Conflicts and Integration - Revisiting Costa v ENEL and Simmental II*, in Azoulai, L., Maduro, M. (eds.), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, London, 2010, 60-68.

[246] ECJ, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case C-26/62, B.

[247] *Ibidem*.

[248] ECJ, *SA Roquette Frères v Council of the European Communities*, Case C-138/79, 29 October 1980.

in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void»[249]

In this passage, the judges of the Court – stating that Parliament's role in the legislative process reflects the democratic and fundamental principle that citizens must be able to participate in the exercise of legislative power through a representative assembly – declare that the democratic principle underpins the Community legal order as an essential factor in the institutional balance enshrined in the Treaties. So much so, in fact, that consultation of Parliament is an essential formality when provided for by the Treaties, and failure to comply with it even leads to the nullity of a measure adopted without respecting this principle.[250] It is interesting to note that, as early as 1980, the Court of Justice, albeit with a certain degree of discretion, identified the democratic principle as an «essential factor in the balance provided for by the Treaties»,[251] thus anticipating by far what is now provided for in Article 2 TEU, which includes democracy as one of the founding values of the European Union.[252] The centrality of the democratic element in the legal order of the European Union has been further confirmed in the jurisprudence, a few decades after the aforementioned judgment. Indeed, the judges of the First Chamber of the General Court of the European Union, in Case T-754/14 of 10 May 2017, confirmed that

«[…] the principle of democracy, which, as it is stated in particular in the preamble to the EU Treaty, in Article 2 TEU and in the preamble to the Charter of Fundamental Rights of the European Union, is one of the fundamental values of the European Union […]».[253]

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[249] ECJ, *SA Roquette Frères v Council of the European Communities*, Case C-138/79, para. 33.

[250] This judgment of the Court of Justice is significant when one considers that it was delivered only a few months after the first elections to the European Parliament by direct universal suffrage, which took place in June 1979. To recapitulate just a few of the milestones in the history of the European Union's legislative body (together with the Council of the European Union), it should be remembered that in 1952 the Treaty establishing the European Coal and Steel Community set up a Common Assembly of the European Coal and Steel Community, which was a consultative assembly of 78 members appointed by the national parliaments of the countries that had established the ECSC. Subsequently, in 1958, the Treaties of Rome established the European Parliamentary Assembly, whose 142 members were appointed by the national governments from among the parliamentarians of the individual countries. In 1962 the former Assembly changed its name to the European Parliament, and in 1973 the number of MEPs was increased. However, the most significant turning point - and the one directly relevant to the present case - occurred on 20 September 1976, when the European Council decided to apply direct universal suffrage to the election of its members, albeit on the basis of the Member States' own electoral systems. The text drawn up by the European Council entered into force in July 1978, and the first elections to the Parliament by universal suffrage were held, electing 410 Members. The successive enlargements of the Union have also increased the number of MEPs. For further details see Tulli, U., *Un Parlamento per l'Europa. Il Parlamento europeo e la battaglia per la sua elezioni (1948-1979*), Le Monier, Firenze, 2017, 23-165.

[251] *Ivi*, 111.

[252] Art. 2 TEU.

[253] General Court (First Chamber) of 10 May 2017, Case T-754/14, para. 37.

A further and fundamental milestone in the jurisprudential definition of the values underpinning EU law (but not only) is the famous judgment C-294/83, now known as *Parti écologiste 'Les Verts' v European Parliament*, in which the judges of the Court of Justice stated in 1986 that

«it must first be emphasized […] that the European Economic Community is a community based on the rule of law, inasmuch as neither its member state nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty».[254]

Alongside the democratic principle, on which the Court had spoken a few years earlier, the theme of the rule of law is placed in a central position within the Union's legal structure. Specifically, the judges of the Luxemburg Court, in lapidary fashion, emphasise that the European Community is, first and foremost, a community of law, namely a community whose basis is to be found in the protection of the principle of the rule of law. It follows (and precedes) from this that none of the acts adopted either by the Member States or by the institutions of the then Community can be exempt from scrutiny for conformity with what is called the «basic constitutional charter [of the Community]»,[255] namely the treaties. In this ruling, therefore, for the first time, and explicitly, two concepts are affirmed that have been indispensable for the subsequent development of the constitutional identity of the European Union.

Indeed, the judges of the Court of Justice affirm that the Treaties constitute not only one of the legal sources underlying EU law, but also, and above all, its true basic constitutional charter, namely that document with "supreme" value within the hierarchy of European Union sources. This affirmation of the Court has obviously allowed the first foundations to be laid with respect to the idea of constitutionalisation of European Union law, namely of a law that was born as supranational, but that over time has increasingly taken on typically constitutional features and language.[256] In addition to these considerations, the judges fill this European "constitution" with content, affirming, in fact, that the European Economic Community is based on law, precisely on the principles deriving from the rule of law, as well as on the democratic element, which they had sanctioned in the C-138/79 judgment.

The *Les Verts* ruling had an impressive significance for European Union law, because it enabled and, at the same time, anticipated that set of values common to the Member States on which

[254] ECJ, *Parti écologiste "Les Verts" v European Parliament*, Case C-294/83, 23 April 1986, para. 23.

[255] ECJ, *Parti écologiste "Les Verts" v European Parliament*, Case C-294/83, 23 April 1986, para. 23.

[256] Grimm, D., *Una costituzione per l'Europa*, in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, Einaudi, Torino, 1997, 339-367; Habermas, J., *Una costituzione per l'Europa? Osservazioni su Dieter Grimm*, in Zagrebelsky, G., Portinaro, P. P., Luther, J. (eds.), *Il futuro della costituzione*, 369-375.

the European Union is based, which were then laid down within the treaties, starting with Article 6 of the Maastricht Treaty and the subsequent amending treaties. Thus, the jurisprudence of the Court of Justice has declared the rule of law to be the source of principles applicable in the legal order of the Union, which can be invoked before the courts and which form the basis of the Community.[257] The *Les Verts* case, in fact, paved the way for a long series of other Court of Justice's rulings in which the centrality of the principle of the rule of law within the legal construction of the European Union was reaffirmed. In particular, it is worth mentioning here Case C-355/04 P, *Segi and Others v Council*, of 27 February 2007, in which the judges stated that

«[…] as is clear from Article 6 EU [in the wording of the TEU in force at the time of the decision], the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union».[258]

In this case, the Court recall that the Union is not only founded on the principle of the rule of law, but that it also undertakes to respect fundamental rights, which constitute the general principles of Community law. This guarantee also derives from the fact that the institutions of the Union are subject to review of the conformity of their acts with the Treaties and the general principles of law, just as the Member States are subject to the law of the Union. Only a few years later, the judges of the Court of Justice confirmed that the European Union «is a union based on the rule of law, its

[257] The subsequent case law of the Court of Justice has also developed the content of the principle of the rule of law, declining it into: (a) the principle of legality, from which it follows that the legislative process must be transparent, accountable, democratic and pluralistic, such that 'respect for the rule of law must be fully guaranteed' within the Union's legal system, as enshrined in Case C-496/99 P, *Commission v. CAS Succhi di Frutta*, of 29 April 2004; (b) legal certainty, whereby the rules adopted must be clear and foreseeable in order to guarantee the principle of 'legitimate expectations' and may not adopt retroactive amendments, except where derogations are justified by the objective to be achieved and where the legitimate expectations of the persons concerned are in any event protected, as enshrined in Joined Cases 212 and 217/80, Administration of State Finances v. Salumi, of 12 November 1981 (c) prohibition of arbitrariness on the part of the executive power in the exercise of its functions, whereby intervention by the public authorities in the sphere of private activities, whether of natural or legal persons, must be based on the law, as established in Joined Cases C-46/87 and 227/88, Hoechst AG v. Commission of 21 September 1989; d) independent and effective judicial review, whereby the institutions of the Union are subject to review as to the conformity of their acts with the Treaties, general principles of law and fundamental rights. This also translates into effective judicial protection to individuals with respect to their rights under Union law, this was affirmed in Case C-583/11 P, Inuit Tapiriit Kanatami and Others v. Parliament and Council, of 3 October 2013, as well as already mentioned in Case C-174/98 P and C-189/98 P, Netherlands and van der Wal v. Commission, of 11 January 2000, which enshrined the right to a court independent of the executive power; e) finally, the principle of equality before the law, as a general principle of Union law, as enshrined in Articles 20 and 21 of the Nice Charter. On this point, the Court of Justice ruled in *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, Case C-550/07 P,14 September 2010.

[258] ECJ, *Segi and Others v Council*, Case C-355/04 P, 27 February 2007, para. 51.

institutions being subject to review of the conformity of their acts, *inter alia*, with Treaty and the general principles of law», adding, moreover, that «those principles are the very foundation of that Union […]».[259] In doing so, the judges reaffirmed three concepts that have become cornerstones of the European Union's legal system: (a) that the Union is founded on the principle of the rule of law; (b) that acts adopted by the EU institutions are reviewed by the Court of Justice for their legality in relation to the Treaties; and, finally, (c) that these principles constitute the very foundation of the Union. The Court also moved in this direction in Case C-362/14 *Schrems*,[260] where the judges stated that the very existence of effective judicial review to ensure compliance with the provisions of EU law is part of the very essence of the rule of law. In other words, the Court recalls that there can be no effective respect for the rule of law without effective judicial review by the Court of Justice to ensure that the institutions of the Union and the Member States comply with the provisions of Union law.[261] Moreover, in Case C-455/14 P, concerning the European Union Police Mission (EUPM) in Bosnia and Herzegovina, of 19 July 2016, the judges of the Court of Justice stated that, in addition to the principle of the rule of law, «the European Union is founded, in particular, on the values of equality […]».[262]

In Case C-377/98, *Netherlands v. European Parliament and Council*, of 9 October 2001, the judges ruled that human dignity is a general principle of European Union law and also a parameter of legitimacy used by the Court itself in assessing secondary law in relation to the Treaties. Indeed, the judges stated that

«it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed».[263]

[259] ECJ, *Poland v Commission*, Case C-336/09 P, 26 June 2012, paras. 36, 37.

[260] ECJ, *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, 6 October 2015.

[261] The judges of the Court of Justice stated in Case C-362/17, *Schrems*, para. 95 that «[l]ikewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19; *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 14; and *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80)».

[262] ECJ, *EUPM in Bosnia and Herzegovina*, Case C-455/14 P, 19 July 2016, para. 41.

[263] ECJ, *Netherlands v European Parliament and Council*, Case C-377/98, 9 October 2001, para. 70.

The Court's decision is significant because the issue of respect for human dignity is, in Article 2 TEU, one of the cornerstones of the values on which the entire system of the European Union is based and, therefore, one of the elements that define the constitutional identity of the European Union. It is also interesting to note that the judges of the Court of Justice explicitly stated that the protection of human dignity, as a fundamental element of primary law, must always be used as a parameter of legitimacy in relation to the Treaties when examining the compatibility of the acts of the European institutions. The judgment in question closely reflects the legal language used by the constitutional courts of the Member States and shows how the Court of Justice has also adopted this language.

To remain on the subject of the protection of human dignity, it is important to recall in this context the content of the Case C-36/02, *Omega*, of 14 October 2004, in which the judges of the Court of Justice recognised for the first time the possibility that the right to trade may have limits when it serves to guarantee human dignity.[264] It seems interesting to us to propose below the full text of the judges' reasoning, because for the first time in the jurisprudence of the Court of Justice, the value of human dignity is placed above the very commercial freedoms on which the European Economic Community was founded.

«[…] the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law […]. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services […]».[265]

The judges recall that the European Union's legal order «undeniably aims to ensure respect for human dignity»,[266] since this is a general principle of law and, as such, this value can justify a limitation of other obligations imposed by Community law, even if they derive from a freedom guaranteed by the Treaties (in this case, the provision of services). With this ruling, the judges of the Court of Justice implicitly sanctioned the existence of a kind of hierarchy among the rights guaranteed by the Treaties, according to which the protection of human dignity cannot be subordinated to the

[264] For a more in-depth look at Avbelj, M., *Fundamental Human Rights as an Exception to the Freedom of Movement of Goods*, in *Jean Monnet Working Paper*, No. 6, 2004.

[265] ECJ, *Omega*, Case C-36/02, 14 October 2004, paras. 34 and 35. It should be noted, then, that the judges specify that «[h]owever, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures», in ECJ, *Omega*, Case C-36/02, para 36.

[266] ECJ, *Omega*, Case C-36/02, para. 34.

freedom of trade.[267] In this way, human dignity seems to be placed - in the language of the Italian Constitutional Court - in a "super-constitutional" position.

In order to conclude this path within the jurisprudence of the Court of Justice concerning the identification and definition of the values that have been defined as the basis of the Union's legal order, it seems appropriate to recall the judgment C-896/19, *Republika v. Il-Prim Ministru*, of 20 April 2021. In this case, the judges of the Court of Justice went a step further not only in defining the values underlying the Union's legal order, but also in effectively defending them. In the present case, the Court stated that

«[…] compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU […] ».[268]

What the judges have confirmed is that the exercise by the Member States of the rights conferred on them by the Treaties is necessarily linked to their respect for the values enshrined in Article 2 TEU, as confirmed by Article 7 TEU, which provides for the suspension of the rights of membership of the Union in the event of a serious and persistent breach by a Member State of the principles on which the Union's legal order is founded. It follows from this first consideration that a Member State may not amend its national legislation in such a way as to reduce the protection afforded by the principle of the rule of law. This means that the Court of Justice recognises the existence of a "principle of non-regression" according to which States must undertake to promote the values set out in Article 2 TEU not only at the time of their accession to the European Union, but throughout their membership.[269] This means that a minimum level of protection of common values is guaranteed between the law of the Union and that of the Member States. Finally, the judges of the

[267] In fact, this is an anticipation of what was later confirmed by the judges of the Court of Justice in Opinion 2/13.

[268] ECJ, *Repubblika v. Il-Prim Ministru*, Case C-896/19, 20 April 2021, para. 63.

[269] On this topic see Scholtes, J., *Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU*, in *European Constitutional Law Review*, Vol. 19, No. 1, 2023, 59-87; Pech, L., *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in *Hague Journal on the Rule of Law*, Vol. 14, 2022, 118; Pech, L., Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, in *SIEPS Swedish Institute for European Policy Studies*, No. 3, 2021, 203; Collins, L., *Principle of Non-Regression*, in Morin, J., Orsini, A. (eds.), *Essential Concepts of Global Environmental Governance*, Routledge, London, 2020, 205-206; Pech, L., Sceppele, K., *Illiberalism within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, Vol 19, 2017, 30-31; Bakardjieva Engelbrekt, A., Moberg, A., Nergelius, J., *Rule of Law in the EU 30 Years After the Fall of the Berlin Wall: Taking Stock and Looking Ahead*, in Bakardjieva Engelbrekt, A., Moberg, A., Nergelius, J. (eds.), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall*, Hart Publishing, Oxford, 2021, 4-7.

Court of Justice recall that the protection of the principle of the rule of law, in particular, and of the values enshrined in Article 2 TEU, in general, finds concrete and effective expression in the role played by the courts of the European Union in that order.

The jurisprudential reconstruction proposed in this paragraph has made it possible - at least, we believe it has - to show that the Court's "twin" judgments, C-156 and C-157, are in fact the culmination of an interpretative journey which the Court began at the turn of the 1970s and 1980s and which has led to the current expression in which it not only affirms the existence of an identity proper to the European Union, but also provides the normative content contained in Article 2 TEU. It is indeed significant that the judges of the Court of Justice have come to define the content of the European identity thanks to a slow but steady jurisprudence that has seen the values and constitutional principles shared by the Member States as the primary essence of this identity, which has then developed with its own specificities. It is also significant how this jurisprudence has, over time, first adopted the semantics of the national constitutional and supreme courts, using concepts such as «constitutional treaty»,[270] «supreme principles»,[271] and then going so far as to implicitly adopt the concept of "counter-limits" in order to contain any changes to the «basic structures» and «principles underlying the European legal order»[272] resulting from the Union's membership of international organisations; To this day, judges have adopted the language of identity, stating that the Union not only has its own identity, but that the content of this identity can constitute a limitation on the national identities of the Member States if these conflict with the values inherent to the Euro-unitary order. «Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».[273]

However, even if the identity of the European Union's legal system is an obstacle to a possible national identity that could conflict with the founding values of the European Union, this does not mean that the European identity is born in opposition to that of the Member States, which, let us remember, the Union's institutions are obliged to respect under Article 4(2) TEU. It is a set of values and principles that derive from common membership of a legal history that has developed and spread throughout Europe. It is an identity which has been defined as a synthesis of the highest legal values which today form the basis, albeit to varying degrees, of the legal systems which are part of the Union. This fact also explains why the judges of the Court of Justice have adopted the semantics of identity:

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[270] ECJ, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, Joined Case C-402/05 P and C-415/05 P, para. 281.

[271] ECJ, Opinion 2/13, para. 168.

[272] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para. 127; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, para.145.

[273] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para. 127; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, para.145.

on the one hand, in order to iron out possible divergences between the two levels (national and supranational) of legal systems and not to exacerbate their clash; on the other hand, in order to reaffirm the centrality of the values contained in Article 2 TEU, not only before the institutions of the Union, but also before the Member States, which have accepted them and made them their own by joining the Union.

The jurisprudence of the Court of Justice examined here has shown in an illuminating way how the judges have interpreted the concept of constitutional identity in a "stratified" order such as that of the European Union, characterised by multiple tensions and complex pluralism. In response to these peculiarities of the legal system and the socio-legal context, the jurisprudence of the Union has gradually identified and then defined the values underlying its legal system, giving them a central role within the legal organisation, so much so that they were first included in the Treaties and subsequently the courts defined these values as constituent elements of the identity of the legal system of the European Union. Significantly, the Court of Justice has identified this identity in certain values which are widely shared by the Member States and which, as such, are capable of creating an identity which is the synthesis of the highest values and principles created by Western legal culture.

3.10.2. The Kadi case and Opinion 2/13 of CJEU as a definition of European identity from outside: or about European counter-limits theory

In the "twin" judgments – C-156 and C-157 – the Court of Justice, for the first time, explicitly defined the legal nature of the values contained in Article 2 TEU, describing them as principles constituting the identity of the European Union as such. As mentioned above, these two decisions represent the most recent development about identity within the legal system of the European Union; this means that the judges' decision can be seen as a development of the Court's reasoning in this area. In fact, other judgments had already explicitly affirmed the existence of incompressible values within the European order compared to other orders outside the Union. An emblematic case of this jurisprudential orientation is certainly the *Kadi* case, in which the Court declared the existence of immutable principles within the European Union as opposed to legal orders outside the Union. In so doing, the judges identified - without explicitly using the lexicon of identity - the existence of values inherent to the constitutional structure of the European Union, which are incompressible to other legal systems.

For the first time, part of the scholars stated that the Court had adopted the theory of "counter-limits", developed in jurisprudence mainly by the Italian Constitutional Court and the German Federal

Court, according to which there are principles within the Treaties that cannot be undermined or in any way diminished in relation to, as in this specific case, international law. As will be seen below, in the *Kadi* case and subsequently in an opinion of the Court of Justice, the judges affirmed the existence of a "hard core" of values, which has specific guarantees from the Euro-unitary order itself, as placed in the defence and protection of this order.[274]

The *Kadi* case stems from Mr. Kadi's application for annulment of Commission Regulation No. 1190/2004, which amended the previous Regulation No. 881/2002 and confirmed for the umpteenth time his inclusion on a "black list" drawn up by the United Nations Security Council, which provided for the freezing of the assets of certain persons, including Mr. Kadi, on the grounds of an alleged link with the Taliban terrorist movement.[275] Apart from the present case, what is of interest for the present discussion is the fact that the regulations adopted by the Commission at various times have in fact denied the persons included in this list drawn up by the Security Council the possibility of any legal defence, which has led to the 'freezing' of their assets and property on the territory of the European Union. In addition, there is a total lack of any kind of justification for the substantive elements that led to the inclusion of the subject in this list. Moreover, the persons included in the list could only challenge the measures taken by the Commission through the diplomatic representative of the State of which they were nationals, thus preventing any direct petition by the person affected by the measure.

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[274] See Sun, Y., *On the Relationship between EU Law and Member State Law: From the Principle of Primacy to the Doctrine of Counter-limits*, in *Journal of Education, Humanities and Social Science*, Vol. 8, 2023, 44-49; Cozzi, A. O., *The Italian Constitutional Court, the plurality of legal orders and supranational fundamental rights: a discussion in terms of interlegality*, in *European Law Open*, Vol. 1, No. 3, 2022, 606-626; Pellegrini, D., *I controlimiti al primato del diritto dell'Unione europea nel dialogo tra le Corti*, Firenze University Press, Firenze, 2021, *passim*; Piccirilli, G., *The 'Taricco Saga': the Italian Constitutional Court continues its European Journey*, in *European Constitutional Law Review*, Vol. 14, 2018, 814-833; Paris, D., *Limiting the 'Counter-limits'. National Constitutional Courts and the Scope of the Primacy of EU Law*, in *Italian Journal of Public Law*, No. 1, 2018, 205-225; Cartabia, M., *The Italian Constitutional Court and the Relationship Between the Italian legal system and the European Union*, in Slaughter, A. M., Stone Sweet, A., Weiler, J. H. H. (eds.), *The European Court and National Courts. Doctrine and Jurisprudence. Legal Change in Its Social Context*, Hart, Oxford, 1998, 133-146.

[275] In fact, this was Mr. Kadi's second attempt to be removed from the list implemented by Regulation 881/2002. In fact, already in 2005, the then Court of First Instance had dismissed a similar action on the grounds that this act merely gave effect to Security Council Resolutions and therefore the Community judicature had no power to review it, except in extreme cases of violation of mandatory rules of jus cogens. As regards the facts of the case, it should be noted that Mr Kadi was a resident of Saudi Arabia but held assets in an EU country, namely Sweden. Specifically, the individual, together with the *Al Barakaat* charity, complained that the seizure of their assets had taken place not only without a court hearing and without the possibility of cross-examination, but even without these individuals being accused of any unlawful acts, since the only reason why these individuals had had their assets frozen was because of a measure adopted by the United Nations Security Council, which had drawn up a list of possible individuals linked to terrorist associations of an Islamist nature, such as *Al Qaeda*. Thus, the European Union, in implementation of the UN Security Council resolution, adopted a regulation 'freezing' the assets in the territory of the Union of all the persons on the list drawn up by the Security Council. The applicants argued that the Commission's regulation should have been annulled under Article 263 TFEU and that it was also in complete breach of human rights.

In the first action, which resulted in a judgment of the Court of First Instance in 2005,[276] Kadi, together with other applicants, sought the annulment of the Commission's regulations under Article 263 TFEU on the grounds of the Union's lack of competence in this specific matter and an alleged infringement of the fundamental rights of defence in judicial proceedings and of the right to a fair trial. However, the Court of Justice rejected the appellants' claims, arguing that it was impossible for the Court to assess the legality of a regulation implementing a UN Security Council resolution in the light of the European Union's legal order, since this could only be done in relation to the rules of international *jus cogens*.[277] Thus, in 2008, in the *Kadi I* case,[278] the Grand Chamber of the Court of Justice delivered an appeal judgment, which constitutes the central decision of this section, confirming the existence of counter-limits in the Euro-unitary version.

Regarding the alleged immunity from judicial review of the Security Council's implementing regulations, which the Court of First Instance had upheld at first instance, the judges of the Court of Justice stated that the European Community was not subject to judicial review because

«the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions […]».[279]

There are interesting issues at this point in the decision.

First, it is stated that the (then) European Community was based on the principles of the rule of law. This is particularly significant because not only do the judges take up what was established in the 1986 *Les Verts* judgment,[280] but it is also possible to understand how the Court has consistently kept the rule of law at the heart of its founding values in its jurisprudence, just as it later reaffirmed in judgments C-156 and C-157 that the same respect for the rule of law, which is also enshrined in Article 2 TEU, is an element of its own constitutional identity.

Secondly, on the basis of the role played by the rule of law in this system, it is established that neither the institutions of the Union nor the Member States can escape control of the conformity of their acts with «the fundamental constitutional charter constituted by the Treaties».[281] In this way, the

[276] Tribunal EU, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* T-315/01, 21 September 2005.

[277] *Ivi*, para. 219.

[278] ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, C 402/05 P and C 415/05, 3 September 2008.

[279] ECJ, *Yassin Abdullah Kadi*, C 402/05 P and C 415/05, para. 281.

[280] ECJ, *Les Verts v. Parliament*, Case C-294/83, para. 23.

[281] *Ibidem*.

judges not only deny that there is - as the judges of the Court of First Instance had concluded - any kind of jurisdictional immunity of the implementing regulations of the resolutions of the UN Security Council, but explicitly affirm that no act, national or supranational, can escape the control of legitimacy by the Court of Justice, using as a benchmark «the basic constitutional charter, the EC Treaty»,[282] which has established a complete system of legal and procedural remedies to enable the Court of Justice to review the legitimacy of the acts of the institutions.[283]

Moreover, it is important to note that the judges used a purely "constitutional" semantics, affirming that the acts of the Union must always be subject to review by the Court of Justice, in accordance with the principle of the rule of law, which, like any state system, uses its constitutional charter, defined in this case by the Treaties, as a yardstick. This passage, read in conjunction with the "twin" judgments, explains how a constitutional vision - albeit with its strong peculiarities - has developed in the jurisprudence of the Court of Justice and has now found a further building block with the definition of a constitutional identity of the European Union.[284]

On the other hand, as regards the relationship between European law and international law, the judges of the Court of Justice recall that

«an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction […] that the Court has, moreover, already held to form part of the very foundations of the Community […]».[285]

With this passage, the judges of the Court of Justice have (re)established two important aspects in the context of the system of sources of the European legal order and in the context of the functioning and role of the judicial system. It is argued that no international agreement can affect the question of the distribution of competences, which is laid down in the Treaties and which, as recalled in the previous paragraph of the decision, constitutes «the fundamental constitutional charter»[286] of the European Union. It follows directly from this consideration that international treaties cannot even affect the autonomy of the Community legal order, which not only enjoys exclusive competence, as

[282] ECJ, *Yassin Abdullah Kadi*, C 402/05 P and C 415/05, para. 281.

[283] *Ibidem*.

[284] See Taborowski, M., *The Identity of the EU Legal Order as a "Shield" for Judicial Independence in the (Polish) Rule of Law Crisis*, in *Working Papers, Forum Transregionale Studien*, No. 24, 2023, 4-30; Staudinger, I., *The Rise and Fall of Rule of Law Conditionality*, in *European Papers*, Vol. 7, No. 2, 2022, 721-737; Grabowska-Moroz, B., Grogan, J., Kochenov, D. V., Pech, L., *Reconciling Theory and Practice of the Rule of Law in the European Union*, in *Hague Journal on Rule of Law*, Vol. 14, No. 2, 2022, 101-105.

[285] ECJ, *Yassin Abdullah Kadi*, C 402/05 P and C 415/05, para. 282.

[286] *Ivi*, para. 281.

enshrined in the Treaties, but also constitutes a fundamental element of the identity of the Euro-Union order itself. In fact, the judges here take up and fully confirm an argument first set out in Opinion 1/91 and then reiterated in 2006 in *Commission v Ireland*.[287]

About Opinion 1/91, which is more relevant here for the purposes of this work, the judges of the Court were asked, among other things, to answer the question of whether it was possible to identify implicit limits of a substantive nature to the amendment of primary law of the Union, including in this case with regard to an international treaty.

Leaving aside the incident that gave rise to the case, the Court's answer can be summarised as follows. The judges expressed their opposition to a draft agreement between the then European Community and the European Free Trade Association (EFTA)[288] countries on the establishment of a European Economic Area, which provided for the appointment of an independent *ad hoc* court to settle disputes relating to that international agreement. The main doubts about the creation of an independent court stemmed from the possible threat it could have posed to the protection of the autonomy of the single European legal system and, consequently, to the unity of interpretation of European law, which is the prerogative of the Court of Justice alone in the last resort. As a result of these problems, the judges of the Court of Justice, in their Opinion 1/91, rejected the feasibility of this agreement in terms of European Union law, on the grounds that the legal-institutional system which sought to create the international agreement between the EU and the EFTA countries violated «the very foundations»[289] of the European Union's legal order, including the autonomy of the European Union's legal order.

A further aspect, which is not of secondary importance, already appears in Opinion 1/91 of the Court of Justice and is fully confirmed by the *Kadi I* judgment. What the Luxembourg judges affirmed was that the European Union's internal order has its own foundations which constitute a limit - it seems appropriate to speak of a counter-limit, since it applies to international law - material with regard to the application of the international agreements concluded by the Union. It is interesting to note that, beginning with Opinion 1/91, then with the *Commission v Ireland* case, culminating in the *Kadi I* case and Opinion 2/13, which will be discussed in more detail below, the fundamental

[287] See ECJ, Opinion 1/91, 1991, ECR I-6079, paras. 35 and 71; ECJ, *Commission v Ireland*, Case C-459/03, para. 123.

[288] See Iannuccelli, P., *La Corte di giustizia e l'autonomia del sistema giudiziario dell'Unione europea: quousque tandem?*, in *Il diritto dell'Unione europea*, No. 2, 2018, 281-308; Mariani, P., *La partecipazione esterna al mercato interno: ripensare ai modelli di cooperazione economica in Europa con gli Stati che non intendono aderire al progetto europeo*, in *Eurojus*, No. 4, 2022, 74-84.

[289] ECJ, Opinion 1/91, 1991, ECR I-6079, paras. 35 and 71.

principles on which the European Union's internal order is based have become a cornerstone of the "external" defence of the Union's identity.[290]

Returning to the *Kadi* case, however, the judges of the Court of Justice have added another building block to the creation and definition of European Union counterweights to the application of international law, and thus also to the description of the constitutional identity of the European Union. In fact, the judges continue their reasoning by stating that

«[…] fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories[…]».[291]

This means that respect for fundamental rights constitutes a fundamental element of the legal order of the European Union, the observance of which is guaranteed by the Court of Justice as the guardian of fundamental rights in matters within its jurisdiction. It also states that, in its commitment to the protection of fundamental rights, the Court finds inspiration and a parameter for the development of the content of the concept of fundamental rights in the constitutional traditions common to the Member States and in the guidelines provided by the international instruments for the protection of those rights. It is clear from this passage that the Court did not seek to create an autonomous content in the field of the defence of human rights, in opposition to that developed in international conventions or by the States themselves, but, on the contrary, sought a synthesis between them.

However, with regard to the relationship with international law, the judges of the Court of Justice state that «respect for human rights is a condition for the legality of Community acts»,[292] which is why no act of an international nature which is contrary to the full protection of human rights can be accepted by the Union.[293] In other words, respect for human rights is the European Union's counter-limitation to any international act that conflicts with them.

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[290] Daicampi, M., *Contenuti e dimensioni dell'identità costituzionale dell'Unione europea*, in Montanari, L., Cozzi, A. O., Milenković, M., Ristić, I. (eds.), *We, The People of the United Europe,* 17-26.

[291] ECJ, *Yassin Abdullah Kadi*, C 402/05 P and C 415/05, para. 283.

[292] ECJ, *Yassin Abdullah Kadi*, C 402/05 P and C 415/05, para. 284. This was already noted in ECJ, Opinion 2/94, 28 March 1996, para. 34.

[293] ECJ, Opinion 2/94, para. 34: «measures incompatible with respect for human rights are not acceptable in the Community». This point was already addressed by the court in the case ECJ, *Schmidberger*, Case C-112/00, 12 June 2003, para. 73; ECJ, *Friedrich Kremzow v Republik Österreich*, Case C-299/95, 29 May 1997, para. 14; ECJ, *Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, Case C-260/89, 18 June 1991, para. 41.

It can be said that what has been presented so far are the preliminary aspects of establishing the existence of Euro-unitary counterbalances, which, incidentally, had already been implicitly affirmed, albeit with some variations.[294] In fact, the disruptive power of the *Kadi* case lies in the fact that the judges of the Court of Justice clearly and explicitly affirm the existence of a system of euro-unitary counterbalances which must be opposed to the international order and its treaties when they conflict with the founding principles of the Union. This is what it says

«the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty».[295]

In this way, the judges affirm that the Union possesses «constitutional principles»[296] (*sic*) which cannot be undermined or in any way diminished in their essence by an act of international law when applied within the Euro-unitary order.[297] With this passage, the Court of Luxembourg recognises not only that the Union has its own, autonomous constitutional principles, but also, and above all, that these cannot in any way be undermined by the law of other systems, in this case international law.[298] But that those principles constitute an obstacle to the entry into the European legal order of those international treaties which violate those principles, whereby

[294] See Di Marco, R., *The "Path Towards European Integration" of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17*, in *European Papers*, Vol. 3, No. 2, 2018, 8843-855; Fikfak, V., *Kadi and the Role of the Court of Justice of the European Union in the International Legal Order*, in *Cambridge Yearbook of European Legal Studies*, Vol. 15 , 2013 , 587 – 617; Kokott, J., Sobotta, C., *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, in *European Journal of International Law*, Vol. 23, No. 4, 2012, 1015-1024; Cherubini, F., *The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession*, in *German Law Journal*, Vol. 16, No. 6, 2015, 1375-1386; Palombino, F. M., *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, in *Heidelberg Journal of International Law*, Vol. 75, 2015, 503-529; Lenaerts, K., *The Kadi Saga and the Rule of Law within the EU*, in SMU Law Review, Vol. 67, No. 4, 2014, 707-715; Türküler Isiksel, N., *Fundamental rights in the EU after Kadi and Al Barakaat*, in *European Law Journal*, Vol. 16, No. 5, 2010, 551-577; Hilpold, P., *EU Law and UN Law in Conflict: The Kadi Case*, in von Bogdandy, A., Wolfrum, R. (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 13, 2009, 141-182; Govaer, I., *The importance of International Developments in the case-law of the European Court of Justice: Kadi and the autonomy of the EC legal order*, in *Research Papers in Law Cahiers juridiques*, No. 1, 2009, 2-18; Cannizzaro, E., *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case*, in *Yearbook of European Law*, Vol. 28, No. 1, 2009, 593–600.

[295] ECJ, *Yassin Abdullah Kadi*, C-402/05 P and C-415/05, para. 285.

[296] *Ibidem*.

[297] Advocate General Maduro in his conclusions in the ECJ, *Yassin Abdullah Kadi*, Case C-402/05 P and C-415/05, para. 44, had defined constitutional principles as «the constitutional framework created by the Treaties».

[298] Some scholars have seen in this position of the Court a parallelism with the Solange judgments, whereby the reasoning of the German judges with regard to the limits of Germany's European integration would be the same as that of the judges of the Court, but with regard to international law; on this parallelism, see Isiksel, T., *Fundamental Rights in the EU After Kadi and Al Barakaat*, in *European Law Journal*, No. 16, 2010, 551. Of opposite opinion, however, seems to be Gattini, A., *Joined Cases C– 402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, Judgment of the Grand Chamber of 3 September 2008*, in *Common Market Law Review*, No.

«[…] all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty».[299]

This confirms that one of the inalienable principles of European Union law is respect for fundamental rights, which are subject to the control and remedies of the Court of Justice in reviewing the legitimacy of Community acts and which constitute «a constitutional guarantee forming part of the very foundations of the Community».[300] It is therefore understandable that the judges of the Court of Justice, returning to the case that gave rise to the present case, denied the immunity of the Commission regulations implementing the United Nations Security Council resolution from review as to their compatibility with fundamental rights and, consequently, the annulment of such acts as contrary to fundamental rights, which in the present case take the form of the right to defence and the right to a fair trial of those affected by the sanctions imposed by the Commission.

The *Kadi I* judgment is particularly relevant to the process of creating and defining the identity of the European Union for several reasons, at least two of which should be highlighted here. Firstly, it is remarkable that the judges of the Court of Justice used a language and a "symbolism" in their decision that is typically constitutional and particularly strong.[301] Indeed, there are many references to the «founding principles» of the European «constitutional system» or to the «Treaty-based constitutional charter».[302] But it is not only the vocabulary used that is typically constitutional; the reasoning adopted by the Court of Justice of Luxembourg «in all respects adopts the depth and argumentative techniques of a constitutional court».[303]

The second aspect, which is closely related to the identity issue, is that the judges of the Court of Justice explicitly put into practice the idea that the European Union, like the constitutional and supreme courts of the Member States, embraces the theory of counter-limits, which is expressed in

16, 2009, 213.

[299] ECJ, *Yassin Abdullah Kadi*, C-402/05 P and C-415/05, para. 285.

[300] *Ivi*, para. 290.

[301] See Walker, N., *Opening or Closure? The Constitutional Intimations of the ECJ*, in Azoulai, L., Poiares Maduro, M. (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Bloomsbury, London, 2010, 333; Ferrari, G. F., *Kadi: verso una Corte di giustizia costituzionale?,* in *Diritto pubblico comparato ed europeo*, No. 1, 2009, 187-192.

[302] ECJ, *Yassin Abdullah Kadi*, C-402/05 P and C-415/05, paras. 283, 284, 285.

[303] Pollicino, O., *Corte di giustizia e giudici nazionali: il moto "ascendente", ovverosia l'incidenza delle "tradizioni costituzionali comuni" nella tutela apprestata ai diritti dalla Corte dell'Unione*, *in Consulta online*, No. 1, 2015, 257-258. On the alignment of the Court's reasoning with the case law of national constitutional courts on intergovernmental relations, see Tzanakopoulos, A., *The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments*, in Avbelj, M., Fontanelli, F., Martinico, G. (eds.), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial*, Routledge, London, 2014, 121-134.

the defence of the core of supreme values on which the constitutional order of the European Union is based. From a diachronic perspective, this judgment constitutes the logical premise for the conclusions reached by the Court of Justice in the Polish and Hungarian cases of 2022. Indeed, with the *Kadi* case, the judges took up the theme of counter-limits to international law to protect their own founding principles from the "outside", namely from international law. In the "twin" judgments, C-156 and C-157, the judges explicitly spoke of a European constitutional identity as opposed to an "internal" constitutional identity, namely in relation to those national identities of the Member States that might conflict with the Euro-unitary one.[304] Such a development can only be described as logical and consistent.

Indeed, we have moved from the idea of counter-limits to be applied "outside" the constitutional order of the European Union to the idea of "internal" limits as an expression of the constitutional identity of the European Union. In this respect, it is significant that the creation of the constitutional identity of the European Union is a clear response that the judges of the Court of Luxembourg wanted to give to the possible "threats" that it might suffer both from international law and from the law of the Member States.

The importance of the *Kadi I* judgment within the legal order of the European Union, with a view to the identification of a subsequent Euro-unitary constitutional identity, is confirmed first and foremost by the *Kadi II* judgment,[305] in terms of its essential content, but above all by Opinion 2/13,[306] in which the judges of the Court of Justice define the idea of the existence of counter-limits of a European nature as self-evident. In fact, leaving aside the events that gave rise to the Opinion and, above all, the full treatment that the judges of the Court of Justice gave in their reconstruction - which, given the breadth of the arguments used, would merit a separate discussion - this section will limit itself to highlighting those aspects that are of significant relevance to the construction of the Union's counter-limits.[307] Firstly, the judges of the Court of Justice affirm the existence of a specific feature of the European Union's legal order, in that

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[304] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para. 232; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, para. 145: «The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».

[305] ECJ, *European Commission and others v. Yassin Abdullah Kadi,* Case C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013.

[306] CJEU, Opinion of 18 December 2014, Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/13.

[307] Although it is not possible to provide a complete and detailed analysis of the case, we will limit ourselves here to summarising what were the main points on which the judges of the Court of Justice were called upon to respond. In the present case, the Court of Justice was called upon, based on Article 218 TFEU, to give its opinion on the draft provisional agreement of 5 April 2013, drawn up by the institutions of the European Union, the Member States and the Council of

«[…] the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals […]. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation […]».[308]

The Court, following a line of reasoning that has now become consolidated in its jurisprudence - we need only think of the *Van Gend* and *Costa* cases or, more recently, Opinion 1/09 - confirms the creation of a new legal order that is not like any other international treaty, not only because it is endowed with its own autonomous institutions, but above all because the States that have acceded to it have consented to limitations on their sovereignty in favour of the Union.[309] However, what is most relevant for the creation of a theory of Euro-Union subsequent constitutional identity of the European Union is the next passage of the opinion, which states that the Union is endowed with a «constitutional framework of its own»,[310] containing «founding principles»[311] that determine not only the functioning

Europe, on the accession of the Union to the European Convention on Human Rights (ECHR). In fact, this opinion follows one adopted in March 1996, Opinion 2/94, on the same subject, in which, however, the European Court of Justice had found that there was no suitable legal basis within the European Union legal system for accession to the ECHR, especially since the need was highlighted that an institutional change of this magnitude also had to have a political foundation. Following Opinion 2/94, however, the Union had undergone major changes, both institutional and political. In fact, the Lisbon Treaty had introduced the necessary legal bases for accession to the ECHR into the European Treaties, specifically within the TEU. In fact, Article 6(2) of the TEU states that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". In addition to this, there is also the amendment of Article 59 of the ECHR, by Additional Protocol No. 14, to allow subjects other than states to accede to the Charter. These important changes, on the part of both the Union and the ECHR, had the effect of preparing the ground for the negotiations on the accession of the EU to the ECHR, which took place in two sessions over a period of three years (2010-2011 and 2012-2013), and led to the draft on which the Court was called upon to give its opinion. Wanting to summarise Opinion 2/13, which is characterised by its complexity, it can be said that it was divided into eight sections, coinciding with the individual questions submitted to the Court. For more details see Anrò, I., *Il parere 2/13 della Corte di giustizia sull'adesione dell'Unione europea alla CEDU: questo matrimonio non s'ha da fare? (1)*, in *Diritti Comparati*, 2015; Pellegini, D., *L'adesione dell'Unione europea alla CEDU oltre il parere 2/13 CGUE*, in *Federalismi.it*, 2016.

[308] Opinion 2/13 of 18 December 2014, paras. 157 and 158.

[309] Leaving aside the content of the most famous judgments of the Court of Justice, here we propose the words used by the judges of the Court of Justice in Opinion 1/09: As is clear from the settled case-law of the Court of Justice, unlike ordinary international treaties, the founding treaties of the Union have established a new legal order, endowed with its own institutions, to which the States have renounced, in ever larger areas, their sovereign powers and which recognises as subjects not only the Member States but also their citizens (see, in particular, Case 26/62 *van Gend & Loos* [1963] ECR 1, in particular para. 5, and Case 6/64 *Costa* [1964] ECR 11, para. 11). The fundamental characteristics of the legal order of the Union thus established are its primacy over the rights of the Member States and the direct effect of a whole series of rules that apply to the nationals of those States as well as to the States themselves, see Opinion 1/91 of 14 December 1991, [1991] ECR I-6079, para. 65.

[310] Opinion 2/13, para. 158.

[311] *Ibidem.*

of this legal order, but also the «consequences with regard to the procedure and conditions for accession to the ECHR».[312] This means that the existence of a constitutional order and the fundamental principles underlying that order necessarily determine and bind relations with the other orders with which the Union interacts. As the Court had already anticipated in the *Kadi* case.

In fact, in Opinion 2/13, the judges of the Court of Justice confirmed the existence of certain fundamental elements of the European Union's order,[313] on which

> «[t]his legal structure is based on the fundamental premises that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU»[314]

and which constitute a limit - in this case a counter-limit -[315] to the integration of the European Union into the international order and, in this specific case, into the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Opinion 2/13 of the Court of Justice, however, not only confirms what was already decided in the *Kadi I* case, but also adds another aspect which is certainly not marginal to the search for and identification of an identity proper to the European Union. By rejecting the Union's accession to the ECHR, the judges have also established that there is a guarantee of the "hard core" of values underlying the European order, not only in international law but also in European primary law itself, namely the Treaties. In rejecting the draft agreement on the Union's accession to the ECHR,[316] the judges also criticised the opening provided by Article 6(2) of the EU Treaty, which states that «[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms».[317]

In other words, the judges recognised the existence of a fundamental core of values underpinning the European Union order, which could not be undermined even by a reform of the text of the Treaties. In this particular case, a large part of the doctrine had expected a positive response from the Court in its opinion, precisely because of the explicit way in which the TEU advocated the Union's accession to the ECHR.[318] Nevertheless, the judges considered that the protection of this

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[312] Opinion 2/13, para. 158.

[313] *Ivi*, para. 167.

[314] *Ivi*, 168.

[315] *Ivi*, para. 167.

[316] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[317] Art. 6, para. 2, TEU.

[318] On this point, please refer to the considerations of Martinico, G., *Building Supernational Identity: Legal Reasoning and Outcome in Kasi I and Opinion 2/13 of the Court of Justice*, in *Italian Journal of Public Law*, Vol. 8, No. 2, 2016,

"hard core" of values in the Union's legal order took precedence over the provision of Article 6(2) TEU. Significantly, in no less than seven of the eight points on which the Court was asked to give an opinion, the judges recognised the existence of a "hard core" of values which are presented as non-derogable and in respect of which the judges saw the inapplicability of the provisions contained in the draft accession to the ECHR as «contrary […] to the intrinsic nature of the EU».[319]

This aspect of Opinion 2/13 shows how the Court has adopted the concept of the "supreme principles" of the legal order as a limit not only to international law, but also to its own primary law, which in this case explicitly requires the openness of the European legal order to external law. For this reason, Opinion 2/13 is disruptive not only regarding the theory of the "counter-limits" of Union law *vis-à-vis* international law, but also, and perhaps above all, because it explicitly confirms the existence of incompressible principles in the legal system of the European Union, at the risk of changing the nature of that legal system. This shows how the Court of Luxembourg clearly enshrines the possibility that the "very foundations" of the legal system are an insurmountable material limit not only for international agreements concluded by the Community, but also for treaty revision procedures.

Mutatis mutandis, it can be said that even before the judges introduced the theme of identity into their language in judgments C-156 and C-157, they accepted the theory of counter-limits and, almost simultaneously, also declared the existence of a "hard core" of super-constitutional values. From this point of view, it is important to note that, from a purely jurisprudential point of view, the Court of Justice's development towards the constitutionalisation of the European Union has been slow - a first stage can be seen in the *Van Gend en Loos, Costa v. ENEL*, and Les *Verts* judgments - but steady and inexorable. Indeed, the language and legal casuistry used are precisely those of constitutional law and constitutional jurisprudence. This shows that the emergence of the concept of constitutional identity, from a Euro-unitary perspective, was not a chance event or a hasty response by the judges of the Court of Justice to yet another crisis of the Union, but, on the contrary, a process that began in the 1980s, gradually developed and has now been made explicit, but is still being defined and developed: a journey that is still in progress.

235-267.

[319] Opinion 2/13, para. 193.

3.10.3. THE CASE *ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES* (CASE C-64/16): A BRIDGE BETWEEN THE "TWIN" JUDGMENTS AND THE COURT OF JUSTICE'S PREVIOUS CASE LAW ON EUROPEAN IDENTITY

Judgments C-156 and C-157, which we have also referred to as the "twin" or "conditionality judgments," have the merit of being the first pronouncements in which the judges of the Court of Justice not only affirmed the existence of an identity proper to the European Union, but also identified its content in the values set out in Article 2 TEU. However, from the point of view of the transformative role played by the Court of Justice in EU law,[320] the case of the *Associação Sindical dos Juízes Portugueses*[321] constitutes the link between the two judgments of 16 February and the previous jurisprudence of the Court of Justice, through which the identity of the European Union has been progressively developed, the salient moments of which will be traced in the remainder of this chapter. Indeed, this judgment linked, for the first time, respect for the values enshrined in Article 2 TEU to Article 19 TEU, namely it combined the instruments of judicial review provided for by the Treaties with the values on which the European Union is founded. It was precisely to overcome the difficulties of activating the "political" instruments provided for in Article 7 TEU and to create an instrument that could prove effective in ensuring or restoring respect for the rule of law on the part of the Member States, especially in the light of the recent «backsliding of the rule of law» in some Eastern countries and,[322] more generally, in the light of the Member States' resistance to «EU control in areas traditionally linked to the concept of national sovereignty and outside its competence».[323]

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[320] In his speech at Icon-s Italia on 13 October 2023, Von Bogdandy, A., expressed himself in these terms about the Case of *Associação Sindical dos Juízes Portugueses*; Zinonos, P., *Judicial Independence & National Judges in the Recent Case Law of the Court of Justice*, in *European Public Law*, Vol. 25, No. 4, 2019, 615-636; Krajewski, M., *Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*, in *European Papers*, Vol. 3, No. 1, 2018, 395-407; Pech, L., Platon, S., *Judicial Independence Under threat: The Court of Justice to the Rescue in the ASJP Case (Case C-64/16, Associação Sindical dos Juízes Portugueses, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, EU:C:2018:117)*, in *Common Market Law Review*; Vol. 55, 2018, 1827-1854; Torres Perez, A., *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence*, in *Maastricht Journal of European and Comparative* , Vol. 27, No. 1, 2020, 105-119.

[321] ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, 27 February 2018.

[322] See Grabowska-Moroz, B., *Judicial Dialogue about Judicial Independence in terms of Rule of Law Backsliding*, in *Central European University Democracy Institute Working Papers*, No. 12, 2023, 1-28; Scheppele, K. L., Pech, L., *Illiberalism Within: Rule of Law Backsliding in the* EU, in *Cambridge Yearbook of European Legal* Studies, Vol. 19, 2017, 3-47; Scheppele, K. L., Pech, L., *What is Rule of Law Backsliding?*, in *VerfBlog*, 2 March 2018; Ginsburg, T., *Democratic Backsliding and the Rule of Law*, in *Ohio Northern University Law Review*, Vol. 44, 2018, 351-369; Turkut, E., *The Venice Commission and Rule of Law Backsliding in Turkey, Poland and Hungary*, Brill, Leiden, 2021; Avbelj, M., Letnar Černič, J., *The Impact of European Institutions on the Rule of Law and Democracy. Slovenia and Beyond*, Hart, Oxford, 2020, 1-9 and 241-259; Gora, A., de Wilde, P., *The essence of democratic backsliding in the European Union: deliberation and rule of law*, in *Journal of European Public Policy*, Vol. 29, No. 3, 2022, 342-362.

[323] Parodi, M., *Il controllo della Corte di giustizia sul rispetto del principio dello Stato di diritto da parte degli Stati membri: alcune riflessioni in margine alla sentenza* Associação Sindical dos Juízes Portugueses, in *European Papers*,

The case arose from an administrative appeal brought before the Portuguese *Supremo Tribunal Administrativo* by the *Associação Sindical dos Juízes Portugueses*, on behalf of the members of the *Tribunal de Contas*, seeking the annulment of the administrative acts which had established the temporary reduction in the amount of remuneration and the modification of the conditions of permanence of certain civil servants, including judges of the Portuguese Court of Auditors. This administrative act had been adopted based on Law No. 75/2014,[324] approved in order to reduce the State's budget deficit on the basis of the commitments made by the Lusitanian Government with the European Union. However, the judges of the *Supremo Tribunal Administrativo* referred the case to the Court of Justice by way of a preliminary reference based on Article 267 TFEU, alleging a violation of the principle of judicial independence as a result of the restrictions imposed on the guarantees relating to the status of judges. The national courts therefore asked the Court of Justice whether the principle of the independence of the judiciary, enshrined in Article 19 para. 1 TEU and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding measures reducing the remuneration of judges such as those applied in Portugal. In other words, the Portuguese administrative judges argued that the discretion enjoyed by a Member State in the implementation of its budgetary policy - a principle recognised by the European Union itself - cannot justify that State's failure to comply with the general principles of European Union law, which fully include the principle of the independence of the judiciary.[325]

Indeed, the judges of the Supreme Administrative Court have held that national judges, like judges in the European system, guarantee effective judicial protection of rights. For this reason, the guarantee of the effectiveness of this protection requires the national judges to disregard the principles of independence and impartiality, which also includes the payment of an adequate and stable remuneration to avoid the risks of external pressure.

The judges of the European Court of Justice ruled that the reduction of judges' salaries, as a temporary measure and generally applicable to all civil servants, could not affect the independence of the judges of the Portuguese Court of Auditors, and that therefore the measures taken by the Portuguese Government did not infringe the principle of the independence of the judiciary. However, with this ruling, the judges of the Court of Justice did not simply resolve the case at hand but shifted their attention to the nature and content of the obligation of Member States to ensure respect for the rule of law through the effective adjudication of rights deriving from EU law.

Vol. 3, No. 2, 2018, 986.

[324] Lei n. 75/2014, *Estabelece os mecanismos das reduções remuneratórias temporárias e as condições da sua reversão*, 12 September 2014, Art. 2, para. 9.

[325] ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, para. 15.

In their decision, the judges of the Court of Justice dealt extensively with the interpretation to be given to Article 19 TEU. Firstly, they referred to the settled case-law according to which it is for the Court of Justice, the General Court and the national courts to ensure effective judicial review capable of ensuring that the law is observed in the interpretation and application of the Treaties.[326] However, the judges did not limit themselves to this interpretation, but added further observations on Article 19 TEU, finding a link between it and Article 2 TEU, according to which «Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals».[327]

For the purpose of defining the constitutional identity of the European Union, the first sentence of this paragraph is particularly important: it states that the values expressed in Article 2 TEU are realised precisely through effective judicial review. Such a conclusion – coupled with the now well-established guarantee of judicial review of the EU legal order, including by national courts – has interesting implications for the source and content of the obligation on Member States «to ensure a system of judicial remedies and procedures capable of providing effective judicial review in areas governed by EU law».[328] While the role of the courts of the Member States in ensuring effective judicial protection within the legal order of the European Union is nothing new, the novelty lies in the identification of the source of this obligation on the part of the Member States.[329]

Indeed, the judges of the Court of Justice have held that the source of this obligation to ensure effective judicial protection by the national courts is not only, as hitherto held, the principle of sincere cooperation and Article 19 TEU and Articles 47 and 51 of the Charter of Fundamental Rights of the European Union,[330] but also Article 2 TEU, read in conjunction with Article 19 TEU. Indeed, the

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[326] ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, para. 32.

[327] *Ibidem*.

[328] Parodi, M., *Il controllo della Corte di giustizia*, 988.

[329] Already in ECJ, *Unión de Pequeños Agricultores*, Case C-50/00, 25 July 2002, para. 41, the Court of Justice had stated that «[…] it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection». This same position was later reiterated by the Court in other cases, such as: ECJ, *Inuit Tapiriit Kanatami*, Case C-583/11 P, 3 October 2013 and ECJ, *T&L Sugars*, Case C-456/13 P, 28 April 2015.

[330] Charter of Fundamental Rights of the European Union, art. 47: «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice». Art. 51: «The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties».

judges of the Court of Justice have stated that «the existence of an effective judicial review system capable of ensuring compliance with EU law is an essential feature of a State governed by the rule of law».[331] Therefore, by ensuring effective judicial protection for individuals within their respective jurisdictions, national courts also ensure respect for the rule of law enshrined in Article 2 TEU. This interpretation by the Court of Justice establishes a direct link between Article 19 TEU and the rule of law, understood as a common value in Article 2 TEU. Although there is no precise definition of the rule of law in EU law the case law of the Court of Justice has progressively identified its characteristics, including both formal procedural guarantees and substantive guarantees, including the independence and impartiality of the judiciary. The value of this judgment is therefore twofold.

On the one hand, the judges of the Court of Justice have strengthened the Member States' own control of respect for the rule of law by guaranteeing effective judicial protection: if a national court considers that a measure adopted within its own system is contrary to the principle of the rule of law, it may refer the matter to the Court of Justice for a preliminary ruling. In this way, the Court of Justice actively involves national courts in protecting the rule of law as a value on which the European Union is founded, and which is common to the Member States, as enshrined in Article 2 TEU. In so doing, the Court of Justice also offers national courts, «at least indirectly, the possibility of reacting to any national measure liable to affect their judicial function».[332]

On the other hand, the role of the Court of Justice in monitoring the Member States' respect for the rule of law will be considerably strengthened, since the instrument of preliminary reference by national courts will enable it to rule on the compatibility or otherwise of national measures with the principle of the rule of law as laid down in Article 19 TEU, irrespective of the existence of other links with EU law. Indeed, this interpretation of Article 19(1) TEU gives the principle of effective judicial protection a much wider scope than it would have based on Article 47 of the Charter of Fundamental Rights of the European Union. The Court of Justice has previously ruled that if a legal situation «does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction».[333]

In the *Associação Sindical dos Juízes Portugueses* case, the Court accepted a much broader interpretation of the expression «matters governed by Union law»,[334] including not only matters within the competence of the European Union, but also the values set out in Article 2 TEU.[335] This

[331] ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, para. 36.

[332] Parodi, M., *Il controllo della Corte di giustizia*, 991.

[333] ECJ, *Åklagaren v. Hans Åkerberg Fransson*, Case C-617/10, 26 February 2013, para. 22.

[334] Art. 19, para. 1, TUE

[335] See Bonelli, M., Claes, M., *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary*, in *European Constitutional Law Review*, Vol. 14, No. 3, 2018, 622-643; Guerra Martins, A.M., *Constitutional Judge,*

means that national courts may also refer purely internal matters to the Court of Justice for a preliminary ruling if they are liable to undermine or in any way affect the values on which not only the identity of the European Union is founded, as stated in judgments C-156 and C-157, but which are also «values common to the Member States».[336]

The importance of the *Associação Sindical dos Juízes Portugueses* judgment lies in the fact that it has potentially enabled the judges of the Court of Justice to rule, since Article 19 TEU, on any internal matter of the Member States in which national judges see a possible violation of the values enshrined in Article 2 TEU. In this way, the values on which the European order is based, and which are common to the Member States would receive greater judicial protection not only from the institutions of the Union but also from the Member States themselves. In particular, it would make it possible to better monitor the rule of law in the Member States, thus overcoming the obstacles inherent in the implementation of Article 7 TEU.

Last but not least, the judges of the Court of Justice have, on the one hand, confirmed the central role of the values set out in Article 2 TEU not only for the European legal order but also for that of the Member States, so that they can be invoked both in preliminary rulings and in infringement proceedings against Member States. On the other hand, even before affirming that the identity of the Union is rooted in Article 2 TEU, the Court of Justice anticipated with this ruling the central role that the content of this article plays not only for the legal order of the Union, but also for that of the Member States.

The *Associação Sindical dos Juízes Portugueses* case established the existence of values, such as the rule of law, which cannot be excluded from EU judicial protection because they are in fact situations which do not fall within the competence of the Union's legal order. The judges of the Court of Justice have for the first time included Article 2 TEU in the "toolbox" of the European legal order.[337] In doing so, the Court opened the door to the transformation of EU values into standards for the organisation of national judiciaries, both through the creative interpretation of Article 19(1) TEU and through the strong reference to Article 2 TEU and judicial independence. In conclusion, the significance of the *Associação Sindical dos Juízes Portugueses* case can be summed up in the fact that, for the first time, the judges of the European Court of Justice established that judges, both those

Social Rights and Public Debt Crisis – The Portuguese Constitutional Case Law, in *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 5, 2015, 678 ff.; Pereira Coutinho, F., *Austerity on the loose in Portugal: European judicial restraint in times of crisis*, in *Perspectives on Federalism*, Vol. 8, No. 3, 2016, 105-132; Markakis, M., Dermine, P., *Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: Florescu*, in *Common Market Law Review*, Vol. 55, 2018, 662 ff.

[336] Art. 2 TEU.

[337] Coli, M., *The Associação Sindical dos Juízes Portugueses judgment: what role for the Court of Justice in the protection of EU values?*, in *Diritti Comparati,* 1 November 2018.

belonging to the judicial system of the European Union and those of the Member States, can decide based on the values enshrined in Article 2 TEU. In other words, the direct applicability of the values on which the EU legal order is based was already anticipated here, even before the "twin" judgments established their normative and thus binding character.

A further primacy of this judgment is that it confirms the existence of a line of defence for European values on a judicial basis, thus going beyond the instruments of protection of a political nature, which instead derive from Article 7 TEU.[338] The extension of the judicial competence of the Courts is a significant reflection of the centrality that values are progressively assuming within the European legal order,[339] of which the two judgments of the Court of Justice, C-156/21 and C-157/21, are the highest expression, and of which, on the other hand, the judgments to be examined in next paragraphs represent the logical and necessary antecedent in order to understand the development of European identity from the perspective of the case-law of the Court of Justice.

3.10.4. CASES C-156/21 AND C-157/21 AS EXPLICIT DEFINITION OF EUROPEAN CONSTITUTIONAL IDENTITY

The importance of the judgments C-156/21 and C-157/21[340] for the legal system of the European Union and for the scholar debate about European values was foreshadowed by certain particularly significant procedural elements. The first element that distinguishes these two judgments is the fact that they were delivered by the full Court of twenty-seven judges, a composition that is rarely used and only in exceptional circumstances.[341] Indeed, the Statute of the Court of Justice

[338] Von Bogdandy, A., *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, in *Max Planck Institute Research Papers Series*, No. 14, 2019, 24.

[339] Antpöhler, C., *et al.*, *Reverse Solange – Protecting the essence of fundamental rights against EU Member States*, in *Common Market Law* Review, Vol. 49, No. 2, 2012, 489; Von Bogdandy, A., *et al.*, *A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine*, in von Bogdandy, A., Sonnevend, P. (eds.), *Constitutional Crisis in the European Constitutional Area*, Nomos, Baden-Baden, 2015, 235.

[340] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21; Baraggia, A., *La condizionalità a difesa dei valori fondamentali dell'Unione nel cono di luce delle sentenze C-156/21 e C-157/21*, in *Quaderni costituzionali*, No. 2, 2022, 372.

[341] See *ex plurimis* Rask Madsen, M., Nicola, F., Vauchez, A., *Researching the European Court of Justice. Methodological Shifts and Law's Embeddedness*, Cambridge University Press, Cambridge, 2022, 158-186; Boin, A., Schmidt, S. K., *The European Court of Justice: Guardian of European Integration*, Springer, Berlin, 2020, 1-37; Tridimas, T., *The Court of Justice of the European Union*, in Schütze, R., Tridimas, T. (eds.), *Oxford Principles of European Union Law*, Oxford University Press, Oxford, 2018, 581-609; Schmidt, S. K., Kelemen, R. D., *Introduction. The European Court of Justice and legal integration: perpetual momentum?*, in Schmidt, S. K., Kelemen, R. D. (eds.), *The Power of the European Court of Justice*, Routledge, London, 2017, 1-7.

provides, *inter alia*,[342] that the judges of the Court may deliberate in plenary session when «[...] a case pending before it is of exceptional importance [...]».[343]

This first element, which concerns the composition of the Court, is a significant indication of the value that these judgments should have in the eyes of the judges. A further element is the timing of the decision. Indeed, the judges of the Court of Justice took a relatively short time to decide the case: to be precise, it took them about eleven months to reach their verdict, a much shorter time than the average of 17.3 months recorded in 2022.[344] This detail seems to reflect the urgency felt by the judges in deciding an issue that would certainly have been of far greater importance than simply resolving the case. In this way, it seems that the judges wanted to make it clear to the outside world that there was no doubt about the interpretation among the judges, leading to a clear and shared decision on the role of the founding values within the European Union order. However, the speed with which the judges resolved the case can also be explained by the fact that the matter to be resolved required a certain urgency in the decision. Indeed, the issue of conditionality and access to European funds linked to respect for the rule of law was at the centre of the EU debate, as the fate of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general system of conditionality for the protection of the Union's budget would depend on the Court's decision. [345]

It must be assumed that the facts which gave rise to the "conditionality" judgments of the Court of Justice have their own relevance to the question of constitutional identity, since Regulation 2020/2092, on which the Court was called upon to rule, had as its main objective the creation of a conditionality mechanism - capable of overcoming the difficulties of implementation inherent in the "political" approach of Article 7 TEU - by which the institutions of the Union could exert pressure on the Member States, in the context of the allocation of financial resources, to ensure respect for the rule of law. For this reason, the facts that led to the judgments of the Court of Justice in Cases C-156 and C-157 will be presented, albeit briefly and only in the context of the aspects relevant to this chapter, while a more detailed discussion of the Regulation and its purpose as an “economic” instrument for the protection of the rule of law will take place in a separate section of this chapter.

In the present case, the two judgments arise from actions for annulment brought by the governments of Poland and Hungary against the European Parliament and the Council. Specifically, the two governments asked the Court to assess the conformity with the Treaties of the “conditionality mechanism” introduced into European law by Regulation 2020/2092, which aims to protect the

[342] Statute of the Court of Justice of the European Union, art. 16, para. 4.

[343] *Ibidem*, art. 16, para. 5.

[344] Annual Report 2022. Statistics concerning the judicial activity of the Court of Justice, 2022, 14.

[345] Regulation (EU, Euratom) 2020/2092 of 16 December 2020 of the European Parliament and Council on a general regime of conditionality for the protection of the Union budget.

Union's budget from breaches of the rule of law. This is, in a nutshell, the regulation adopted in December 2020, which is intended to sanction the behaviour of the Member States, particularly in recent years,[346] which the European institutions have not been able to manage with the ordinary tools available[347] - such as the threat to the independence of the judiciary or the failure to redress arbitrary or unlawful decisions by public authorities - and which is likely to undermine the sound management of the EU budget, by means of the suspension of funds, in particular those of the so-called "*NextGenerationEU*", the early repayment of loans, the termination of financing agreements to the detriment of the budget itself.[348]

Regarding the complaints of the governments of the two Member States, they criticised the fact that the legal basis of Article 322 TFEU - used by the European Union to adopt Regulation 2020/2092 - allows the creation of mechanisms to protect the budget, provided that they serve to defend the principle of sound financial management within the EU and not to protect compliance with the rule of law. Moreover, the legislator could not create instruments that circumvent the "ordinary" procedure laid down in Article 7 TEU, namely the judicial remedy of the infringement procedure, if the breach of the effective judicial protection under Article 19 para. 1 TEU. This is undoubtedly the central question at the heart of the action brought by two Member States which have long been at the

[346] *Ex plurimis* Lopez Garrido, D., Lopez Castillo, A., *The EU Framework for Enforcing the Respect of the Rule of Law and the Union's Fundamental Principles and Values*, in *European Parliament Documents* PE 608.856., 2019, 29, 30–32; Scheppele, K. L., Peach, L., Platon, S., *Compromising the Rule of Law while Compromising on the Rule of Law*, in *Verfassungsblog*, 13 December 2020; Alemanno, A., Chamon, M., *To Save the Rule of Law You Must Apparently Break It*, in *Verfassungsblog*, 11 December 2020; Sacchetti, V., *Once more, with feeling: il finale annunciato del ricorso per l'annullamento del meccanismo di condizionalità relativo alla rule of law (sentenze C-156/21 e C-157/21)*, in *Diritti Comparati*, 3 March 2022; Pohjankoski, P., *The Unveiling of EU's Constitutional Identity. Judgements in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council*, in *EU Law Live*, Special Issue, No. 91, 2022, 3 ff.; Fisicaro, M., *Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation. ECJ judgements of 16 February 2022, Cases C-156/24, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council*, in *European Constitutional Law Review*, Vol. 18, 2022, 334 ff.; Kirst, N., *Rule of Law Conditionality before the Court – A Judgement of Constitutional Nature. Judgements in C-156/21, Hungary v. Parliament and Council and C- 157/21, Poland v. Parliament and Council*, in *EU Law Live*, Special Issue, No. 91, 2022, 7 ff.

[347] Here we refer to Article 7 TEU. For more details see Pech, L., Lane Scheppele, K., *Is Article 7 Really the EU's "Nuclear Option"?*, in *Verfassungsblog*, 6 March 2018; Schroeder, W., *The European Union and the Rule of Law - State of Affairs and Ways of Strengthening*, in Schroeder, W. (eds.), *Strenghtening the rule of law in Europe*, London, 2016, 3-36; Closa, C., Kochenov, D., *Reinforcement of the Rule of Law Oversight in the European Union: Key Options*, in Schroeder, W. (eds.), *Strenghtening the rule of law*, 173-196.

[348] See Baraggia, A., Bonelli, M., *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in *German Law Journal*, Vol. 23, No. 2, 2022, 131-156; Mignolli, A., *Condizionalità, Stato di diritto e interessi finanziari dell'Unione: strada aperta o nuovo compromesso? Riflessioni sulle conclusioni dell'Avvocato Generale nelle cause C-156/21 e C-157/21*, in *Ordine Internazionale e Diritti Umani*, No. 5, 2021, 1348 ff.; Casolari, F., *Novembre. Lo Stato di diritto preso sul serio*, in Manzini, P., Vellano, M. (eds.), *Unione Europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, Cedam, Padova, 2021, 302-310.

center of judicial and political vicissitudes owing to a series of internal measures which have repeatedly been contrary to the rule of law.[349]

The Court of Justice, which was therefore called upon to respond to the doubts as to whether the legal basis on which the Commission and the Parliament had adopted that document had been correctly applied, stated that the regulation was entirely devoted to the protection of the EU budget, having regard both to the nature, purpose and conditions of application and revocation of the measures provided for therein and to the more general objective of protecting the legitimate interests of the final recipients and beneficiaries of the European funds thus guaranteed. In this context, the rule of law constitutes an «essential precondition for compliance with the principles of sound financial management».[350] The judges of the Court of Luxembourg recalled that the sharing of the fundamental values referred to in Article 2 TEU is one of the «specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law […]», and as such «justifies the existence of mutual trust».[351] Respect for the rule of law is therefore a precondition for the exercise of the rights deriving from the Treaties, with the consequent legitimacy of the mechanism for protecting the budget, the main instrument for giving substance to Community policies.[352]

Then, relying on the arguments put forward by the applicants themselves, the Court pointed out that the conditionality mechanism could not be regarded as a means of circumventing the political procedure established by Article 7 TEU for the protection of values. Indeed, the Union's arsenal for the defence of its fundamental principles also extends to judicial proceedings, as argued by Hungary and Poland: it follows that it is therefore compatible with other mechanisms designed to protect the rule of law, albeit in a mediated form through a sufficiently direct link with the EU budget, which is the ultimate asset protected by the mechanism in question.[353]

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[349] Lattanzi, U., *Rinvio pregiudiziale ex art. 267 TFUE e procedimenti disciplinari nazionali nell'ambito della crisi del rule of law: CGUE, sentenza del 23 novembre 2021, C-564/19, IS*, in *Diritti Comparati*, 27 January 2022.

[350] ECJ, Case C-157/21, para. 130; see also Opinion of the European Economic and Social Committee on Rule of law and the recovery found, 2022/C 194/05, 23 March 2021.

[351] ECJ, *Poland v. Parliament and Council*, Case C-157/21, para. 143.

[352] As regards, on the other hand, the assessment concerning respect for legal certainty. In response to the applicant States' concerns as to whether Article 3 of Regulation (EU) 2020/2092, which identifies certain cases 'indicative of a breach of the principles of the rule of law', complied with that principle, the Luxembourg judges stated that «the Union legislature cannot be expected to specify, in the context of such a conditionality mechanism, all cases of breach of the constituent principles of the rule of law» (ECJ, *Poland v. Parliament and Council*, Case C-157/21, para. 171).

[353] See Besselink, L., *The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives*, in Jakab, A., Kochenov, D. (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, Oxford, 2016, 128-144; Blauberger, M., Van Hüllen, V., *Conditionality of EU Funds: an instrument to enforce EU fundamental values?*, in *Journal of European Integration*, Vol. 43, No. 1, 2021, 1 ff.; Di Federico, G., *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, in *European Public Law*, No. 3, 2019, 355 ff.; Bien-Kacala, A., *How to unfriend the*

Among the Court's considerations that led to the dismissal of the action for annulment under Article 263 TFEU[354] is a very interesting question that is central to this chapter, namely that of respect for the national identity of the Member States, as enshrined in Article 4(2) TEU. On this point, the judges emphasized that respect for this principle entails a margin of appreciation for the States in giving effect to the value of the rule of law, in the understanding that its protection constitutes an obligation of result incumbent on all the contracting parties of the Union and that no diversification to this end can be tolerated.[355] Moreover, in another crucial passage of the judgments, the judges of the Court of Justice recalled that

«[…] Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States».[356]

Thus, in a few but very clear lines, the Court of Justice reaffirms three fundamental aspects of the European constitutional identity, which we will now examine: a) the content of Article 2 TEU does not contain mere political and general statements; b) the values set out in that provision are not only binding on the Union and the Member States, but c) they constitute the elements that define

«[…] the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».[357]

With these two decisions, the judges of the Court of Justice have resolved several issues which are fundamental to the definition of the constitutional identity of the Union. In particular, the Court of Justice has given a clear and definitive answer to the question of the legal nature of the content of Article 2 TEU and, consequently, of its applicability. Specifically, a doctrinal debate has been opened – starting with the drafting of Article 6 of the Treaty of Amsterdam, which introduces respect for the rule of law and fundamental rights as a basis of the Union, and which today finds its fullest expression

EU in Poland. The rise and fall of EU-friendly interpretation of the 1997 Constitution, in *Diritto pubblico comparato ed europeo*, No. 1, 2022, 155.

[354] See art. 263 TFEU.

[355] ECJ, *Poland v. Parliament and Council*, Case C-157/21, para. 265.

[356] ECJ, *Hungary v. Parliament and Council*, Case C-156/21, para. 232; ECJ, *Poland v. Parliament and Council*, Case C-157/21, para. 264.

[357] ECJ, *Hungary v. Parliament and* Council, Case C-156/21, para 127; ECJ*, Poland v. Parliament and* Council, Case C-157/21, para 145.

in Article 2 TEU, as amended by the Treaty of Lisbon – which has led some scholars to question whether the principles or values contained in this article of the Treaty are directly applicable.

Indeed, some scholars, such as Terhechte - a well-known critic of the use of values in the judicial sphere - argue that the content of Article 2 TEU consists of values which, by their very nature, are not justiciable and cannot be directly applicable.[358] Similarly, scholar Itzcovich argues that «courts have the task of applying laws, not values, [and] in order to ensure that values are properly applied, they should first be transformed into laws».[359] In other words, Itzcovich argues that the justiciability of the values contained in Article 2 TEU would be directly linked to their implementation.

In contrast, other scholars take very different positions, more favourable to the Court's use of values in decision-making. Among them is Kochenov, who overcomes the concerns expressed by Terchechte and Itzcovich by arguing that the Union's founding values are in fact legal "principles" that not only have direct application in the Euro-EU legal order but are also legally binding.[360] In support of his thesis, Kochenov relies on the wording of the Treaty of Amsterdam, which defines the Union's foundations as "principles" rather than "values.[361]

Other authors, however, overcome the terminological dichotomy between "values" and "principles", such as Calliess, who argues that «values represent (constitutional) principles which, dogmatically, create structural requirements and optimisation needs».[362] This type of interpretation justifies the direct applicability of fundamental values by giving them a widely recognised legal character and paving the way for their autonomous application, which can be justified by reference to the doctrine of "useful effect".[363]

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[358] Terhechte, J. P., *Artikle 2. Werte der Union*, in Pechstein, M., Nowak, C., Häde, U. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Mohr Siebeck, Tübingen, 2017, 73-88.

[359] Itzcovich, G., *On the Legal Enforcement of Values: The Importance of Institutional Context*, in Jakab, A., Kochenov, D. (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, Oxford, 2016, 31.

[360] On the distinction between values and principles, see Williams, A., *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, Vol. 29, No. 3, 2009, 549-577; Kochenov, D., *The Acquis and Its Principles: The Enforcement of the 'law' versus the Enforcement of 'Values' in the EU*, in Jakab, A., Kochenov, D. (eds.), *The Enforcement of EU Law*, 9-27; Pech, L., '*A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, in *European Constitutional Law Review*, Vol. 6, No. 3, 2010, 359-396.

[361] Treaty of Amsterdam Art. 1(8)(a). Mangiameli argues that the introduction of the word "values" is legally insignificant because «the inclusion of 'values' into a legislative or constitutional act produces the effect to make them legal. Once inserted in a legal text, these values become 'principles'», Mangiameli, S., *The Constitutional Traditions Common to the Member States in European Law, as a Tool for Comparison among MS Legal Orders in the Construction of European Fundamental Rights*, in *Italian Papers on Federalism*, No. 3, 2016, 8; Advocate General Pikamäe argued against the autonomous applicability of Article 2 TEU, but acknowledged that it is widely considered possible: Opinion of Advocate General Pikamäe at para. 132–33, Case C-457/18, *Slovenia v. Croatia*, 11 December 2019. See also Opinion of Advocate General Tanchev at para. 50–51, Case C-192/18, *Commission v. Poland*, June 20, 2019.

[362] In Terhechte, J. P., *Artikle 2. Werte der Union*, 78-80.

[363] See Alexander, L., *Legal Objectivity and the Illusion of Legal Principles*, in Klatt, M. (eds.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford University Press, Oxford, 2012, 115-131.

The European case-law on the question of the terminology and the direct applicability of the content of Article 2 TEU did not express itself clearly and unambiguously until the "twin" judgments C-156 and C-157. First of all, if we limit ourselves to the most recent case law, in *Yassin Abdullah Kadi and Al Barakaat v. Council and Commission*, the judges, referring to Article 6(1) TEU - as formulated in the Amsterdam version - rejected the possibility that certain provisions contained in the Treaties could «authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms […]».[364] In this particular case, we can see how the judges of the Court of Justice have given full binding force, and thus direct applicability, to the principles contained in Article 6(1) of the Treaty on European Union, as reformulated by the Treaty of Amsterdam.

However, with regard to the definition of "principles" and "values" in the current Article 2 TEU, it is interesting to note in *LM*, Case C-216/18, how the judges of the Court refer both to the «[…] values common to the Member States set out in Article 2 TEU […]»[365] and to the «principles set out in Article 2 TEU».[366] Similarly, in judgments C-156 and C-157, the Court uses the two terms completely interchangeably, to the extent that it states that «the principles of democracy and [...] equal treatment [...] are values on which the European Union is founded […]».[367] This suggests that the Court does not consider the terminological distinction between "values" and "principles" to be legally meaningful, that it uses one and the other to express the same concept: namely, their legally binding and independently applicable effect by the Court as a parameter for its own decisions.[368]

In the light of the case-law of the Court of Justice,[369] the fact that the terms "principles" and "values" can be used synonymously in the context of the Union's legal system appears to be of crucial

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[364] ECJ, Case C-402/05, *Yassin Abdullah Kadi and Al Barakaat v. Council and Commission*, 3 September 2008, para. 303.

[365] ECJ, *LM*, Case C-216/18, para. 48; *L & P*, Joined Cases C-354 & 412/20 PPU at para. 39. See also ECJ, Case C-14/19 P, *European Union Satellite Centre v. KF*, 25 June 2020), para. 58; ECJ, Case C-418/18 *Patrick G. Puppinck et al. v. Commission*, 19 December 2019, para. 64.

[366] *L & P*, Joined Cases C-354 & 412/20 PPU at para. 57. See also ECJ, Case C-327/18 PPU, *Minister for Justice and Equality v. RO*, 19 September 2018, para. 47; ECJ, Case C-272/19, *VQ v. Land Hessen*, 9 July 2020, para. 45. Preambular 2 CFREU distinguishes between the "values" of human dignity, freedom, and equality and the "principles" of democracy and the rule of law. Article 21 TEU refers to Article 2 values as principles.

[367] ECJ, Case C-650/18, *Hungary v. European Parliament*, para. 94.

[368] Muraviov, V., *Principles and Values of the European Union as a Legal Basis for European Integration*, in *European Studies*, Vol.6, No.1, 2019, 73-94.

[369] However, there are several cases which support the view that fundamental values must be implemented in primary or secondary law before they can have their legal effect. For example, Article 2 cannot be applied independently of the provisions of the Treaty which give it more specific effect. The provision through which Article 2 can be invoked must therefore be sufficiently specific. Article 19(1) TEU is the clearest example of such an implementing provision. This argument parallels two related aspects of EU law: direct effect and, confusingly, the distinction between rights and principles in Article 52(5) of the Charter of Fundamental Rights of the European Union. The founding values themselves are not sufficiently clear, precise, and unconditional to be invoked directly, but can only be applied indirectly through the Treaty provisions that are. They work by excluding some interpretations and imposing others. See ECJ, Case C-502/19,

importance for the consolidation of the elements of the European Union's constitutional identity, since it gives precise content to Article 2 TEU within that system. Indeed, the Court of Justice gives full meaning to the content of Article 2 TEU by pointing out that it contains values which form part of the very identity of the European Union, and which are binding on the Member States.[370]

Here, the judges of the Court of Justice, in a very clear manner, confer a fully normative character on the values contained in Article 2 TEU, from which legally binding obligations are derived for the States and, implicitly (as will be seen more clearly in the *Kadi case*), also for the organs of the Union themselves. This is because these values form part of the Union's identity, which are shared with the Member States.

«It follows that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State […]. Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession».[371]

In other words, the Court considers that the Member States are thus obliged to respect the values enshrined in Article 2 TEU as a necessary and indispensable condition for the full enjoyment of all the other rights deriving from the legal order of the European Union. In addition, the judges, echoing what they had already said in the *Repubblika case*, also established the permanence of the obligation to respect the values on which the Union is based, according to which the legal order, in order to be common, must necessarily be based on stable and lasting values which cannot be changed

Criminal Proceedings Against Junqueras Vies, 19 December 2019, para. 63; ECJ, *Puppinck et al. v. European Commission*, Case C-418/18, 19 December 2019, para. 64; ECJ, Case C-293/03, *Gregorio My v. Office National Des Pensions (ONP)*, 16 December 2004, para. 29; ECJ, Case C-126/ 86, *Fernando R. Giménez Zaera v. Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, 29 September 1987, para. 11. In the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 32), the Court would have referred to the value of the rule of law contained in Article 2 TEU, but it would have specified that this value is concretised in Article 19 TEU. Therefore, in order to be applicable, the values contained in Article 2 TEU would have to be concretised in other provisions of the Treaties. However, since the values other than the rule of law, which the contested regulation improperly incorporates into the latter concept, are not clearly defined, the Court would be called upon to clarify, in particular, the concepts of 'pluralism', 'non-discrimination', 'tolerance', 'justice' and 'solidarity'. The binding interpretation of those concepts by the Court of Justice in the context of judicial review of decisions adopted under that regulation would therefore exceed the limits of the powers conferred on the European Union.

[370] ECJ, *Hungary v. Parliament and Council*, Case C-156/21, par. 232.

[371] ECJ, *Hungary v. Parliament and Council*, Case C-156/21, para. 126; ECJ, *Poland v. Parliament and Council*, Case C-157, para. 144. The Court of Justice has already expressed itself in this way: ECJ, *Repubblika*, C-896/19, 20 April 2021, para. 63; ECJ, *Asociaţia Forumul Judecătorilor din România e a.*, Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 e C-397/19, 18 May 2021, para. 162, and ECJ, *Euro Box Promotion e a.*, C-357/19, C-379/19, C-547/19, C-811/19 e C-840/19, 21 December 2021, para. 162.

or respected only at the time of the procedures for accession to the Union, but must be respected throughout the permanence of its structures. Indeed, the Court goes on to make it clear that

«the values referred to 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 European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».[372]

This passage, common to both judgments, is extremely important for the definition of the constitutional identity of the European Union, because it states that the values contained in Article 2 TEU define the identity of the Union, but it also makes it clear that this is a common legal order and that the values contained in this provision are (and must be) shared by the Member States. This statement highlights an extremely important point for the whole legal order of the Union and the relationship between it and the Member States because it says that the constitutional identity of the Union is not constructed or defined in opposition to the national identities of the Member States. Rather, the constitutional identity deriving from Article 2 TEU is an identity which unites the parties based on shared values in order to create a common order which is able to find its own language of synthesis.

In this way, the Court of Justice seems to be saying that there are values - which could also be called "meta-values" - which transcend the differences between supranational and national bodies and have a "universal" content, which is nothing other than the historical precipitation of the legal culture that has been created throughout history on the European continent. At a time of crisis for the rule of law, the judges of the Court of Justice seem to have wanted to confirm - this time in a clear and precise manner - which values are the "guiding star" not only for the Union itself, but also for its Member States. If we have said that this is not an identity defined in contrast to or in opposition to the national one, the judges have confirmed that the Union must nevertheless be able to defend these values.

Interestingly, this defence is directed precisely against the jurisprudence of some Member States, which in recent years have taken advantage of the obligation imposed on the Union institutions to respect the national identities of the Member States, as enshrined in Article 4(2) TEU. It is here that the Court of Justice seems to put a stop to this by stating that it has the right and the duty to act in defence of these values that form the basis of the European identity, that is, as Faraguna and Drinoczi write, to condemn those national identities that are in fact "unconstitutional" in relation to

[372] ECJ, *Hungary v. Parliament and Council*, Case C-156, para. 127; ECJ, *Poland v. Parliament and Council*, Case C-157 para. 145.

the values enshrined in the EU Treaties.[373] Although, as Article 4(2) TEU makes clear, the European Union respects the national identities of its Member States, which are inherent in their fundamental political and constitutional structures, «[…]so that those States enjoy a certain discretion in the implementation of the principles of the rule of law, it does not follow that the obligation as to the result to be achieved may vary from one Member State to another».[374]

Indeed, while Member States have different national identities, they adhere to a concept of the rule of law which they share as a common value of their constitutional traditions and which they have undertaken to respect by joining the European Union. Therefore, by not only making explicit the existence of a constitutional identity specific to the Union, but also by defining its content, the judges of the Court implicitly set limits to the application of Article 4(1) TEU. In fact, no national identity which is contrary to the founding values of the Union, and which should be the same for the Member States, can be respected by the Union and its institutions. To paraphrase a comment by Bonelli, the Court seems to have adopted and embraced the language of identity - hitherto the prerogative almost exclusively of national courts - precisely to combat the drift away from the Union's respect for national identities, a concept that has been extended to principles or values that cannot be part of this obligation. Thus, today, the Court «may have realised that silence and lack of commitment are not an effective response to the "abuse" of constitutional identity».[375]

However, the judges of the Court of Justice did not become modern-day "crusaders" for the belief in the European constitutional identity in order to wage war against the States, but to guarantee that minimum and accepted common denominator, contained in Article 2 TEU, which represents an entire legal world that has been created in the course of European legal history between the Union and the Member States. Really, the two judgments make it very clear that the defence of these values is the limit of the European Union's powers under the Treaties.

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[373] Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, 1. It is interesting to recall the joint reading that the Court makes, implicitly, in these two judgments, between Article 2 TEU and Article 19 TEU, in the light precisely of the intervention of the Court of Justice in the protection of the values enumerated in Article 2.

[374] Faraguna, P., Drinóczi, T., *Constitutional Identity in and on EU Terms*, 1.

[375] Bonelli, M., *Has the Court of Justice embraced the language of constitutional identity?*, in *Diritti comparati*, 26 April 2022. See also Atanasova, A., Rasnača, Z., *The rule of law crisis and social policy: the EU response in the cases of Hungary and Poland*, in Vanhercke, B., Sabato, S., Spasova, S. (eds.), *Social policy in the European Union: state of play 2022, Policymaking in a permacrisis*, ETUI, Brussels, 2023, 111-135; Bonelli, M., *Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation*, in *European Papers*, Vol. 7 No. 2, 2022, 507-525; Hoxhaj, A., *The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget*, 141; Spera, F., *The Rule of Law as a Fundamental Value of the European Union Identity in the Western Balkans: State of Play and Potential Challenges*, in Russo, T. (eds.), *EU-Western Balkans Cooperation on Justice and Home Affairs: Systems, Tools and Procedures to Strengthen Security Towards the EU Accession Process*, Editoriale Scientifica, Napoli, 2022, 134-151.

In conclusion, it can be said that the two decisions of the Court of Justice, with their explicit recognition of a constitutional identity of the European Union, seem to have opened a new phase in the identity relations between the European Union and its Member States. Acknowledging that the European Union is also the bearer of its own identity, which confronts those of the states, leads to the conclusion that the answers to constitutional conflicts in the European legal area lie not so much in the definition of special procedures, but in an interpretation based on dialogue between constitutional identities, which can be resolved on the basis of shared principles and values, without renouncing the content of the values of Article 2 and respecting the national identities of the Member States, as enshrined in Article 4(2) TEU, provided that these identities are not unconstitutional or, rather, in this case, contrary to the common principles on which the European Union is founded.

The content of the two "conditionality" judgments of the Court of Justice has been set out to establish three key concepts that are indispensable for the further study of the EU's own constitutional identity. First, the judges confirmed the legally binding value of the values contained in Article 2 TEU, thus denying them a merely political value. In particular, the Court recalled that the obligation to respect the Union's founding values is shared by the EU institutions themselves - first and foremost the Commission as the implementing body of the Treaties - and the Member States. Secondly, the Court of Justice - following a now well-established practice on the part of national constitutional and supreme courts - has sought to put an end to the abuse of the concept of constitutional identity by affirming for the first time the existence of a distinct identity of the European Union, not in opposition to that of the Member States, but as a synthesis of the values underlying the «community of constitutional culture»[376] which the Union represents. For this reason - and this is the third point we wanted to make in this paragraph - the Union can actively defend these values within the limits of the powers conferred on it by the Treaties.

3.11 CONCLUSIONS

The reconstruction of the constitutional identity of the European Union, to which this chapter is devoted, has been conducted along two main lines of research.

The first part of the chapter contains a synthesis of the constitutional identity of the European Union through an analysis of the law of the Treaties, which form the backbone of the Union's constitutional system.[377] For this reason, it was decided to study the content of the Treaties, which in

[376] If it is true that, as pointed out by AG Pedro Cruz Villalón in his conclusions to the Gauweiler case (Conclusions of 14 January 2015, P. *Gauweiler et al. v. Deutscher Bundestag*, C-62/14), the Union is not only a community of law, but also a «community of constitutional culture».

[377] See Schneider, F., *Is a Minimal Federal European Constitution for the European Union Necessary? Some*

themselves contain some important information for the reconstruction of this identity. Indeed, Article 2 TEU already explicitly states that human dignity, freedom, democracy, equality, the rule of law and respect for human rights constitute the values on which the Union is founded. However, these values are not to be interpreted as mere general statements, as they must find effective application within European law and in its application *vis-à-vis* the Member States and other international organisations. This conclusion – although later also confirmed by the Court of Justice – could already be identified precisely based on Treaty law and, in particular, by reading Article 2 of the Treaty on European Union in conjunction with other provisions thereof. It is in this perspective that the second part of this chapter was constructed.

More precisely, it emerged how the values on which the European Union is founded are strengthened, for example, by the fact that these must be respected and promoted for a State to be able to request the activation of the procedure for accession to the Union (Art. 49 TEU). Likewise, the Treaty provides for some special and elaborate procedures to enforce the values on which the European Union is founded (Art. 7 TEU). However, testifying to the importance of these values within the European legal order, not only does primary law provide for a procedure of a political nature for their protection, but also at the level of secondary law, with Regulation 2020/2092, a procedure of a financial nature has been introduced for their protection. In other words, the values underpinning the Union are also defended through a mechanism of economic conditionality. In addition to these, there is also a procedure to protect European values at the judicial level, namely with the infringement procedure enshrined in Articles 258 and 260 TFEU. It is therefore significant to emphasise that the values enshrined in Article 2 TEU do not only govern the internal space of the Union's legal order and its relations with the member states, but also its external action. In fact, the Union's action and role on the international scene must conform to those same principles and values that underpin and guide its international role.

From these elements, only hinted at here, it emerges how the European identity is already defined in the very text of the Treaties, so that there are values, legally binding, that regulate both the procedure of accession to the Union and its internal functioning and role on the international scene. Important elements for the identification of the European identity emerge, moreover, from the

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Preliminary Suggestions Using Public Choice Analysis, in *Homo Oeconomicus*, 2022, 3-18; Mangiameli, S., *The Constitutional Traditions Common to the Member States in European Law, as a Tool for Comparison among MS Legal Orders in the Construction of European Fundamental Rights*, in *Italian Papers on Federalism*, No. 3, 2016, 1-18; Shaw, J., *Process and Constitutional Discourse in the European Union*, in *Journal of Law and Society*, Vol. 27, No. 1, 2000, 4-37; Mearns, E. A. Jr., *The Constitution of Europe, by Joseph H. H. Weiler*, in *Case Western Reserve Journal of International Law*, Vol. 32, No. 1, 2000, 163-179; von Bogdandy, A., *The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe*, in *International Journal of Constitutional Law*, Vol, 3, No. 2, 2005, 295–315.

procedure for revising the Treaties, which - although it does not provide for an eternity clause - in Article 48 TEU enshrines the existence of two separate revision procedures, and the part of the Treaty on European Union that contains the fundamental principles must be subject to aggravated revision.

Moreover, the case law of the Court of Justice has established its competence to exercise not only formal, but also *de facto* substantive control over the revision procedure, since the courts have repeatedly rejected international agreements that could,[378] by their approval by the Union, have introduced tacit amendments to the system of the Treaties and that would have run counter to the principles underlying the Euro-unitary order, just as emerged in Opinions 1/91, 1/09, 2/13 or, again, in the *Kadi* and *Pringle* cases. [379] This confirms that the Treaties not only contain an amendment procedure with what may be termed aggravated procedures, but also implicit substantive limits to the revision procedure precisely in the context of those values that constitute the core of the Union's constitutional identity. [380] However, the definition of a European identity also passes through the introduction - which took place with the Maastricht Treaty of 1992 - of European citizenship, which in fact put into practice in the daily lives of millions of citizens those values on which the Union is founded and, in this way, consolidated and propagated them.

The second part of the chapter, on the other hand, was devoted to the reconstruction of the constitutional identity of the European Union and its constituent elements through the analysis of the case law of the Court of Justice. The choice to start precisely from the two judgments C-156/21 and C-157/21 of February 2022, in which the judges of the Court of Justice not only affirmed for the first time and explicitly the existence of an identity proper to the European Union, but also identified its content within the values enshrined in Article 2 TEU, became necessary precisely because of the innovative content that these two judgments brought with them.[381]

Indeed, the two judgments made it possible, starting from the affirmation of the existence of an identity of the European Union order, to analyse the values on which this identity is based and how they have been affirmed within the order. In fact, starting from the analysis of the conclusions reached by the judges in the two "twin" rulings of 2022, it was possible to reconstruct, by retracing some important decisions of the Court of Justice, the interpretative process that led to the definition of the identity of the European Union. The two "conditionality" judgments are naturally the result of

[378] See paragraph 3.9 of this chapter.

[379] ECJ, Opinion 1/91; ECJ, Opinion 1/09; ECJ, Opinion 2/13, 2013para. 168; ECJ, ECJ, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, para. 281; ECJ, *Thomas Pringle v Government of Ireland*, Case C-370/12, para. 27.

[380] Faraguna, P., *Constitutional identity in the EU – A Shield or a Sword?*, in *German Law Journal*, Vol. 18, No. 7, 2017, 1617-1640.

[381] ECJ, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21, para. 127; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, Case C-157/21, para.145.

a European jurisprudence that has increasingly moved towards a "constitutionalisation" of EU law, to the point of "embracing" the concept of identity. In fact, this development towards an increasingly clear consolidation of European law in constitutional terms can already be seen, albeit in embryonic form, in the *Van Gend en Loos* and *Les Verts* cases, in which it was declared that the European Community constitutes a new legal order in the field of international law and that it is based on the principle of the rule of law.[382]

Thus, thanks to the jurisprudence of the Court of Justice, a nucleus of values underpinning the Union was gradually defined, so much so that European judges began to use them as "counter-limits" theory to amendments or additions to Union law, as demonstrated in the *Kadi* case[383] or, again, in opinions 1/91 and 2/13 of the same Court.[384]It was precisely these European "counter-limits", which emerged for the first time in the case law of the Court of Justice, that represented a decisive step in defining the identity of the Union. Indeed, the judges affirmed the existence of certain principles and values that play a fundamental role in the Union's primary law and that can neither be diminished nor violated by the modification or integration of the Euro-unitary legal order.

The initial jurisprudential affirmations of the values that constitute the founding core of Union law and of the fact that they also constitute an obstacle to its amendment have progressively found more and more confirmation in the judgments of the Courts, reaching their highest expression in the two "twin" judgments: C-156/21 and C-157/21 of February 2022. These two judgments in fact represent the synthesis of an important strand of case law of the Court of Justice, which found its maturity and highest expression in these two rulings.

For this reason, the chapter has not only been devoted to the two most recent cases, but has also been enriched by this earlier jurisprudence, which constitutes the logical antecedent necessary to reconstruct and understand the development of the constitutional identity of the European Union. Indeed, European Union law is characterised precisely by this peculiar nature of constantly evolving living law, as can be seen from the definition of the Union's identity, which has progressively evolved from the definition of the principles underpinning the legal system to define and make its own the concept of identity.

Since these premises, it can be concluded that the Union's legal system already possessed, in its primary law, the essential elements for the reconstruction of its constitutional identity, which the Court of Justice explicitly established in the "twin" judgments, without forgetting, however, that these

[382] ECJ, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case C-26/62; ECJ, *Parti écologiste "Les Verts" v European Parliament*, Case C-294/83, para. 23.
[383] ECJ, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, Joined Case C-402/05 P and C-415/05 P, para. 281.
[384] ECJ, Opinion 2/13, para. 168 and ECJ, Opinion 2/13, 2013.

are the logical outcome of case law that has been consolidated over time. What should not be overlooked, however, is that the definition of the constitutional identity of the European Union is still a work in progress and will certainly evolve over time, even if its central and unalterable core is already largely and firmly established by the provisions of the Treaties (Articles 2, 3, 7, 48, 49, 258 TFEU and 260 TFEU) and the judgments of the Court of Justice (Case C-156/21 and C-157/21), as this chapter has attempted to reconstruct.

Finally, looking to the future, on 22 November 2023, the European Parliament adopted a proposal to amend the Treaties of the European Union and called on the European Council to convene a Convention to reform the Treaties.[385] This reform proposal is the result of the Franco-German Declaration of 22 January 2023,[386] in which the two countries sought to respond to the threats to European identity with a series of proposals to amend the Treaties that could develop and strengthen the legal construction of the Union. This initial initiative was followed by the Report of the Franco-German Working Group on Institutional Reform of the EU, entitled "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century" of 18 September 2023, which defined the guidelines and subjects to be reformed. In short, the proposal aims to strengthen the Union's capacity to act and to give European citizens a stronger voice.[387]

In particular, the reform proposal foresees a new decision-making system to avoid deadlocks through qualified majority voting and the use of the ordinary legislative procedure; the recognition of Parliament's full right of legislative initiative and its role as co-legislator for the long-term budget; and a revision of the rules on the composition of the Commission (renamed "European executive").[388] Also, with a view to strengthening democratic instruments, the proposal provides for the introduction of a full right of legislative initiative for the Parliament and instruments of direct democracy, including the possibility of European referendum. In addition, the proposed reform of the Treaties has also taken into account the prospect of a possible enlargement to include new Member States. Indeed, the accession of new states to the Union represents a major challenge for the resilience of the European institutions themselves and for the Union's capacity to absorb new members.[389]

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[385] European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

[386] French-German Declaration, 22 January 2023.

[387] Report of the Franco-German Working Group on Institutional Reform of the EU, "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century", 18 September 2023.

[388] See Profeta, A., *Il progetto di riforma dei Trattati europei: cambiare "tutto" affinché "nulla" cambi. "Sailing on high seas: Reforming and enlarging the EU for the 21st century"*, in *Diritti Comparati*, 23 November 2023; Duff, A., *Towards common accord? The European Union contemplates treaty change*, in *European Policy Centre*, 31 October 2023, 2-11; Pench, L., *Making sense of the European Commission's fiscal governance reform plan*, in *Policy Brief*; No. 17, 2023, 1-15.

[389] European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

However, we would like to highlight a particular aspect of the proposed amendment, which concerns the protection of the rule of law and which, in our opinion, is in continuity with the theme of European identity. In fact, in the September 2023 report, the Working Group defines the rule of law as «a non-negotiable constitutional principle for the functioning of the EU and a condition for accession to the EU».[390] However, it also adds that the EU's current capacity to implement the value of the rule of law and the other contents of Article 2 TEU is not sufficient.

In particular, the conditions laid down in Article 49 TEU for the accession of a new State cannot be effectively imposed on existing Members in the event of regression. In response to this problem, the report recommends broadening the scope of financial conditionality instruments by applying them not only to violations of the rule of law (as is already the case with Regulation 2020/2092), but more generally to systematic violations of the values enshrined in Article 2 TEU. This proposal can be implemented by using the "flexibility clause" provided for in Article 352 TFEU or by amending Article 7 TEU.

Particularly ambitious is the proposed reform of the procedure for determining serious and persistent breaches of the Union's values (Article 7(2) TEU), which is currently ineffective due to the excessive threshold for its activation (unanimity) in the European Council and the fact that the Council is not obliged to proceed. The reform proposal calls for the current provision to be amended to require a qualified majority of 4/5 in the European Council and, in order to ensure an effective response to serious and persistent violations, to add a time limit of six months within which the intergovernmental institutions are obliged to act, without prejudice to the automatic adoption of sanctions after five years from the start of the procedure in the event of prolonged inaction by the Council. In addition, the report calls for serious and persistent breaches of values, such as a permanent breach of trust with other Member States, to be accompanied by equally serious sanctions, such as loss of membership.[391]

It is significant that the Working Group, in the context of the proposed revision of the Treaties, has paid so much attention to the principle of the rule of law, and to the values of Article 2 TEU on which the Union is founded in general, in order to strengthen its role in the European order and to ensure that it is better protected. Perhaps this is also a sign of the growing importance of the issue of identity in the European debate. Nevertheless, the path towards defining a full identity for the European Union is still evolving and there are still many missing pieces, especially regarding the relationship with the national identities of the Member States.

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[390] Report of the Franco-German Working Group on EU Institutional Reform, "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century", 5.

[391] Profeta, A., *Il progetto di riforma dei Trattati europei: cambiare "tutto" affinché "nulla" cambi*, 1.

The proposal to amend the Treaties itself seems to lack some aspects that could have strengthened the identity dimension, such as citizenship, a greater focus on the rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union, and a more ambitious vision about the enlargement of the Union.[392] Just as Schuman argued in his famous declaration of 9 May 1950 that «Europe will not be built all at once or according to a single plan»,[393] so the definition and consolidation of its identity will still require a long and complex process.

[392] See Montanari, L., *Il nuovo cantiere sulle riforme dei Trattati europei: quello che non ho trovato*, in *Osservatorio sulle attività delle organizzazioni internazionali e sovranazionali, universali e regionali, sui temi di interesse della politica estera italiana*, December 2023, 1-9; Karjalainen, T., *EU Enlargement in Wartime Europe. Three Dimensions and Scenarios*, in *FIIA Working Paper*, Vol. 136, 2023, 4-18; Parandii, K., *Eastern Europe Joins the Western Balkans. A New Start for the EU's Enlargement Policy*, in *GMF Report*, 2023, 4-28; Callies, C., *Reform the European Union for Enlargement!*, in *Verfassungsblogout*, 6 July 2023.

[393] Declaration of Robert Schuman, 9 May 1950.

CONCLUSIONS

Pluralism and multiculturalism represent an epochal challenge not only to societies, but also to the constitutional order that must regulate this growing complexity. The issue becomes even more intricate when the question of pluralism is linked to that of constitutional identity.

The present work has followed this path, placing at the centre of the study the framing of constitutional identity in two societies characterised by their complexity and plurality: Bosnia and Herzegovina and the European Union. We investigated whether one of the possible answers to the challenges posed by pluralism may lie precisely in the concept of constitutional identity and its application within stratified and pluralistic social contexts.

As a matter of fact, the theme of identity places at the heart of its analysis the profile of the essential and invariable elements of a constitution, which make it unique because it is endowed with certain intrinsic and unrepeatable characteristics compared to other constitutions or legal systems. It is precisely within the specific characteristics of each constitutional text - more specifically, in this research, Bosnia and Herzegovina's constitution and EU Treaty - that we have considered it possible to identify a hard core of values and principles that could act as a synthesis of diversity, as points of contact and encounter between the diversities that may exist in an increasingly fragmented society. According to this view, constitutional identity can therefore represent a "common language" within an increasingly plural society.

To demonstrate that identity can be an element of synthesis and not just of division between "us" and "them", in this study we have adopted the notion of constitutional identity as the identity proper to the constitutional document itself, with the fundamental elements constituting identity to be found within the constitutional document and in its interpretation by the Constitutional Court and the Supreme Court. The peculiarity of this approach lies in the fact that the limits of the search for identity are fixed and circumscribed within the text of the constitution and its judicial interpretation. In this way, the defined identity takes on a strictly legal value, detached from political assessments of the characteristics of the population subject to this constitution, such as language, religion, or ethnicity. This makes it possible to discern an identity that is closely linked to the legal principles underlying the constitutional text and, in particular, to those of liberal constitutionalism.[1] Indeed, within the framework of this research, in an attempt to define the constitutional identity of the legal systems of Bosnia and Herzegovina and the European Union, we have resorted precisely to the concept of the identity of the constitutional text and the courts' interpretation of it.

[1] Rosenfeld, M., *Constitutionalism, Identity, Difference, and Legitimacy*, 18.

This approach makes it possible to analyse the principles and values that underlie the constitutional text and that serve as a "catalyst", namely an element of synthesis within the plural society that characterises these two legal systems. In other words, identity has been understood here as the expression of a limited core of values, widely shared even in plural societies, capable of providing the necessary legal basis for peaceful coexistence and thus of uniting the different souls of a society around principles and values that are legal in nature and, as such, widely shared because they are the guarantors of pluralism itself and of respect for minorities.

The approach to identity adopted here can therefore be described as strictly philological, since the identity sought here is precisely that of the constitution. For this reason, the core of this research has focused on how constitutional identity is framed within the constitutional text.

This study on constitutional identity, in which the identity element has been analysed within the constitutional text itself, has essentially identified the three main dimensions within which the identity element has been reconstructed in this work. Indeed, the shaping of the constitutional identity of the systems examined here has been reconstructed starting from the genetic moment of the constitution, that is, from the historical, political, and sociological characteristics that determine not only the content of the constitution, but also the very principles that define the identity of a legal system. This is followed by an analysis of the constitutional text, in particular about the existence of "eternity clauses", which reveal the unchangeable core of the constitution and, as such, the core of the fundamental principles on which the identity of the constitution is based. In the attempt to reconstruct and define the constitutional identity, we have also analysed the role of case law, which has had the merit of determining the core of the supreme principles underlying the constitution. In particular, we have reconstructed the generative moment of the constitution of Bosnia and Herzegovina and the "non-formalised" constitution of the European Union.[2] Indeed, in these two specific systems, the generative moment of the constitution and the manner in which constituent power is exercised have profoundly influenced the values and principles that have determined the identity of the constitutional text. In fact, the constitution of Bosnia and Herzegovina, as an example of a heterodirected constitution, insofar as it is an annex to an international agreement that put an end to the war that affected the country in the 1990s, best demonstrates how the constituents, precisely in order to avoid any religious, linguistic or ethnic connotations, placed certain legal principles that can be defined as "neutral" at the centre of the order. Indeed, Article II of the constitutional charter states that the country's legal system is based on the supreme principle of respect for human rights and fundamental freedoms. It is significant that, in a society deeply divided by the events of the war and

[2] Fossum, J. E., Menéndez, A. J., *La peculiare costituzione dell'Unione europea*, 111; Pernice. I. Mayer, F. C., *La Costituzione integrata dell'Europa*, 47.

in some important respects still segmented along ethnic lines, it was decided to make the protection of rights and freedoms the supreme principle of the order. In this way, framers sought to define constitutional identity around "neutral" values, insofar as they were based on the principles of liberal constitutionalism and as such potentially sharable by the majority of the population and potentially able to provide a solid basis for (re)building a deeply divided society.

By analysing the constitutional identity of the European Union as it emerges today from the text of the founding treaties, however, it is possible to understand how it has been defined since the values set out in Article 2 TEU. Principles such as human dignity, freedom, democracy, equality, the rule of law and respect for human and minority rights become the very essence of the Union's constitutional identity. Here, too, it is easy to understand why the drafters of the Treaty - even though they took these principles from previous treaties (Maastricht, Amsterdam, Nice) with minimal variations - specifically wished to identify the axiological foundations of the European order in those values that are the fruit of the liberal constitutionalism that is a cornerstone of the history and legal tradition of the European continent. Moreover, these values have the characteristic of being widely shared, and each Member State, or aspiring Member State, should always strive to uphold them and draw inspiration from them, precisely to ensure the highest possible level of guarantees for its citizens.

In the study undertaken in this thesis to frame the elements that define constitutional identity in plural societies, a particular means of analysis was to examine the preambles of the two constitutional orders chosen as case studies. In fact, the preamble is not only an integral and preliminary part of the constitution, but also plays an important role in establishing the values that the constituents wished to place at the heart of the constitutional order. The establishment of these principles in the preamble very often constitutes a kind of logical-legal premise from which the entire system is derived and constructed.

For this reason, the study of the preamble of a constitutional charter can be a valuable starting point for examining the reconstruction and definition of the constitutional identity of a system. In the case of Bosnia and Herzegovina, for example, the confirmation of the content of the constitutional identity as based on respect for human rights and freedoms can be found precisely in the preamble, where it is stated at the beginning that the constitution is based on respect for human dignity and its defence. Similarly, the preamble to the Treaty on European Union gives a precise indication of the values that inspired the drafting of the Treaty itself. In particular, it states that «the universal values of the inviolable and inalienable rights of the human person, liberty, democracy, equality and the rule of law»[3] are the inspiration for the Treaties and, more generally, for the legal order of the European Union.

[3] Preamble of Treaty on European Union, second paragraph.

In order to formulate the elements that define constitutional identity, it becomes really relevant to verify the presence of "eternity clauses", whereby certain parts of the constitution cannot be amended during constitutional revision. In the face of such clauses, it is easy to understand that the founding fathers of the constitution wished to give special additional protection to certain principles in the face of the constitutional revision process, which is usually already aggravated by the presence of formal limits to revision.[4] The importance of the "eternity clauses" is further confirmed by the consideration that the constitutional identity represents the axiological dimension of the text, namely the core of values and principles around which the essence of the constitution is developed and with which its work is consistent. In fact, Schmitt had yet used the concept of the "eternity clause" to identify the *Verfassungidentität*, namely the unchanging essence of the constitution, since it was, in his view, an explicit indication of the principles to be safeguarded to preserve the essence of the constitution.

Specifically, in the case of Bosnia and Herzegovina analysed here, the constitution provides for an explicit substantive limitation on the revision of the constitutional text, whereby the principle of the protection of rights and freedoms, enshrined in the Preamble and Article 2 of the constitution, cannot be limited, or otherwise altered *in peius*. In this way, the framers wished to prevent the revision of the constitution from altering what is at the heart of the "spirit" of the country's constitution, namely the protection of rights and freedoms. In the case of the European Union, on the other hand, an analysis of the text of the Treaties does not lead to the conclusion that an "eternity clause" has been inserted to protect a specific part of the text or, again, specific principles. However, the existence of two separate procedures for revising the Treaties - the "ordinary" and the "simplified" - together with certain articles of the TEU (Articles 2, 7, 48, 49) implicitly show that the "founding fathers" and, above all, the successive reformers of the Treaties also wished in some way to impose a substantive limit on the revision of the Treaties and, in particular, to preserve the values enshrined in Article 2 of the TEU and in the Preamble.

An important research tool we used to reconstruct and define the elements that replace the identity of a constitution was the jurisprudence of the courts. Indeed, as has been clearly demonstrated in the constitutional order of the European Union, the decisions of constitutional or supreme courts can have a significant impact on the identification of the identity of a constitution. Indeed, it was the Court of Justice - with the "judgments on conditionality", C-156/21 and C-157/21 - that not only clearly defined the existence of an identity proper to the Union, but also identified its specific content by identifying it in Article 2 TEU. As the Bosnia and Herzegovina case shows, even if the Court does not express itself in specific and open terms on the constitutional identity, the latter can be implicitly

[4] Cloots, E., *The Meaning of the Identity Clause*, 144.

reconstructed since the specific competences exercised by the Court itself. In fact, the Constitutional Court of Bosnia and Herzegovina has never explicitly adopted the vocabulary of constitutional identity; nevertheless, in addition to the functions that can be described as "typical" for a constitutional court, the Court of Bosnia and Herzegovina also exercises specific control over the protection and observance of rights and freedoms. In fact, it is the court of last resort for possible violations of rights and freedoms brought by citizens. In this respect, too, it can be understood from the functions of the Court that rights and freedoms and their guarantee constitute the very essence of the constitutional identity of Bosnia and Herzegovina.

The present research has attempted to demonstrate that it is not only possible to determine the components of constitutional identity, but also that the concept of identity itself can be given concrete value by attaching it to the elements that define the axiological basis of a constitution. Specifically, the study we have conducted in this thesis has framed the constitutional identity of the constitutions of Bosnia and Herzegovina and the European Union based on the information provided by the constitutional texts themselves, which has allowed us to reconstruct the axiological dimension. The identity that has emerged is characterised by being defined by the principles of liberal-inspired constitutionalism, whereby principles such as the rule of law, the separation of powers, the protection of rights and freedoms that can constitute the skeleton that distinguishes a plural society. Especially today, when pluralism has become an element that defines the majority of contemporary societies and has a twofold effect on them. On the one hand, pluralism tends to enrich contemporary societies; on the other hand, it is also a destabilising factor, since the juxtaposition of different world views and conceptions can potentially create fissures, which often have constitutional repercussions. Contemporary societies are particularly challenged by migratory phenomena, where the introduction of diversity has been abrupt and often beyond the control of state institutions.[5] In this regard, the question of how to reconcile these tensions arising from identity conflicts within a legal system such as the constitutional one, which is based on the idea of pluralism, whereby diversity - understood in ethnic, cultural, religious, and political terms - can be peacefully reconciled to unity in the sense of coexistence in difference, is becoming increasingly pressing in contemporary legal systems.

The pluralist dimension of contemporary societies is therefore a fundamental and unavoidable aspect of reconstructing the theme of constitutional identity. Indeed, identity, as understood in this work, presents itself as a "catalysing" element of the diversity that pluralism inevitably entails. In other words, constitutional identity represents the "lowest common denominator" which, based on widely shared legal principles that are "neutral" with respect to the identities of individuals and

[5] See De Haas, H., *et al.*, *International Migration: Trends, Determinants, and Policy Effects*, in *Population and Development Review*, 885; De la Rica, S., Glitz, A., Ortega, F. (eds.), *Immigration in Europe*, 3-77.

groups, succeeds in forming an identity based on the meta-principles of the legal order. A truly inclusive constitutional identity succeeds in guaranteeing the right to diversity of the various components present in society, but also in defining a language and a (legal) space within which the different "souls" of society can dialogue and coexist more or less peacefully.

At a time like the present, when the identity argument is mainly used to create distances and rifts between the undefined "us" and "them" that make up society, we have tried in this research to rethink the identity theme and to link it directly to the concept of constitution and its content. This approach appeared not only the most correct from a strictly philological point of view - since the noun "identity" explicitly refers to the "constitution" and not to the legal culture of an order or a nation - but also, because it allowed us to go beyond the surface of the constitutional text, that is, beyond the mere datum of positive law, in order to try to reconstruct and identify the elements that instead constitute the profound essence of a constitution. Moreover, looking for the elements that define identity within the constitution can act as a "bridge" not only between citizenship and the constitution, but also between the different groups that make up society.

In fact, it seems to us that the constitution, as the result of a compromise between different visions of the State and society in the exercise of constituent power, is, because of this genetic characteristic, the most appropriate place of encounter and synthesis for the reconstruction of an increasingly pluralist society. The identity of the "community" can indeed be based on the principles of freedom, respect for the inviolable and inalienable rights of the individual, democracy, equality, and the rule of law. These principles are in fact derived from liberal constitutionalism and are not based on the community of linguistic, religious, or ethnic elements, but on principles derived from law, which place the citizen in a position of equality with the other members of society and before the State and its institutions. It is precisely this "egalitarian" character in the enjoyment of rights and in the face of duties that defines a community in which different subjects and visions can coexist. From this point of view, identity loses the almost negative connotation[6] that it has acquired in recent years - as an element of claiming certain characteristics that tend to exclude minorities or other population groups that do not identify with these values - and acquires a "syncretic" value capable of allowing identification with principles of a legal nature that can manage pluralism. This makes it possible, on the one hand, to create a small but solid core of widely shared principles that derive directly from the constitutional text and, on the other hand, to preserve and guarantee the diversity that is the very essence of pluralism, without which it would no longer make sense to speak of a

[6] On this specific idea, refer to the considerations of Fabbrini, F., Sajó, A., *The dangers of constitutional identity*, in *European Law Journal*, Vol. 24, No. 4, 2019, 457-473; Halamai, G., *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, in *Review of Central and East European Law,* Vol. 43, 23-42.

constitutional identity, since one would only be defining principles that must be respected and shared insofar as they derive from a constitutional imperative.

Even if this approach to the complex and often elusive issue of constitutional identity might be described as "irenic" or even overly positive and idealising, it is not the result of an excessively optimistic and idealistic view of constitutional identity in plural societies. In fact, the main purpose of this reconstruction of the theme of identity has been to explore how and to what end identity should be framed in relation to the society that this constitution governs, since it cannot be divorced from the social context that it is meant to regulate.

The choice to frame the issue of identity within the constitution and to define its content since an analysis of the constitutional text and its interpretation has made it possible to highlight the constitutional mechanisms that operate in the delicate balance between the recognition of different identities within a plural society and the promotion of a shared sense of belonging through the constitution. Certainly, the existence of a particular constitutional identity does not necessarily and immediately correspond to the construction of a system capable of "catalysing" diversity within generally shared principles. Nevertheless, it provides a basis for consolidating a "common language" based on the values inherent to constitutionalism. Moreover, we considered that framing elements of identity within the constitutional text itself was the most appropriate place to reconstruct the principles around which a pluralist society can find its "community" dimension.

The subject of constitutional identity remains a largely open question with flexible contours. Suffice it to say that doctrine is still divided on both the subject of identity and the elements that define its content. Nevertheless, this work has tried to make its little own contribution to this broad debate. The underlying hypothesis of this entire research has been to show that identity can take on sharper contours when its content is sought within the constitutional text. In this way, it has been possible not only to reconstruct constitutional identity within two specific legal systems, that of Bosnia and Herzegovina and that of the European Union, but also to identify certain principles that can serve as a synthesis of the diversity present in contemporary societies. For this reason, since the research conducted here, it is possible to state that constitutional identity, in an increasingly plural world, constitutes a "bridge" between constitutions and the society, because «the constitution is not a mere legal norm, but the fundamental norm which *constitutes* the people, the political community as a whole».[7]

[7] Martí, J. L., *Two different ideas of constitutional identity*, 21. The Supreme Court of Canada has already spoken in these words in *Reference re Secession of Quebec* [1998], 2, S. C. R. 217 (Can.), «The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those

principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession».

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