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Final Thesis

In Varietate Concordia:
National Constitutional Identities
in the framework of
European Integration

Supervisor
Ch. Prof. Antonio Trampus

Assistant supervisor
Ch. Prof. Stéphanie Novak

Graduand
Alessandra Pozza
876137

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ABSTRACT

Il concetto di *identità nazionale costituzionale* è emerso ultimamente come l'argomento più rilevante alla base del dialogo tra le corti costituzionali nazionali e la Corte di Giustizia, e sembra aver sostituito il termine *sovranità* come perno del dibattito sul rapporto tra diritto nazionale e diritto europeo. Questa nuova corrente identitaria del discorso costituzionale rappresenta, infatti, il vero campo di battaglia tra la dimensione costituzionale nazionale e quella europea. Partendo dal presupposto che le identità sono sempre costruite, nella presente tesi dapprima si illustrerà il significato dei multiformi concetti di identità, andando anche a chiarire la differenza tra identità nazionale e identità costituzionale, spesso - ed erroneamente - usate come sinonimi. Successivamente, si fornirà un excursus di carattere storico riguardante la nascita dell'idea di nazione e delle identità nazionali, dimostrando come l'identità nazionale si sia solidificata di pari passo con lo sviluppo dello stato nazionale nel XVIII e XIX secolo; in questo contesto, si avvalorerà la tesi secondo cui la nascita dell'Unione Europea nel XX secolo sia stata una risposta efficace alla degenerazione del concetto di identità nazionale - ovvero il nazionalismo. In terzo luogo, si proporrà un'analisi della cosiddetta *identity clause*, andando a sottolineare come il Trattato di Lisbona non sia riuscito a incorporare una clausola di supremazia sulla preminenza del diritto dell'UE sul diritto contrastante degli Stati Membri, ma abbia effettivamente formulato una regola giuridicamente vincolante sulla priorità del diritto costituzionale di alcuni Stati membri sul diritto dell'UE. Infine, si ragionerà sul futuro dell'Unione Europea, attualmente in grave crisi economica ed ideologica, sottolineando come il sogno – rinnovato – di *unità nella diversità* sia, forse, la risposta più adeguata a questo periodo di recessione.

INTRODUCTION

"What must change – and has already done so in Europe – is the self-image of nation-states, which must learn to see themselves not so much as independent players but as members of a larger community."

Jürgen Habermas

Trying to understand what the prospects of European integration among identities are, starting from the very notion of the term, passing through the identity conflicts that it has helped to foment in past centuries, to arrive at the conclusion that, today, a fragmented Europe at the mercy of such conflicts is a weak Europe: this is the objective of this research work. The analysis, precisely, of the term identity, declined in its various facets, and the role it has played in the historical and legal process of European integration.

The motivation behind this work lies in the deep interest that I have developed over the years for this issue: nowadays most people have no idea what Europe or the European Union is, considered as a supranational union of cold and abstract states, which is not sure what it is for, if not to serve as a "scapegoat" for all the critical things that happen in our countries. In my opinion, however, the European Union is one of the most beautiful realities we can think of and aim for: Europe means modernity, freedom, prosperity, solidarity and harmony. I, like all my peers, have no memory of what borders are, we are used to the Euro, to move from one country to another with low-cost flights, to hear people speaking languages other than our own since we were children. We have grown up in a climate of globalization, of exchanges between cultures, of ease of movement, and all this thanks to the European Union. Today, we are going through a period of recession of the European project, dictated both by the strongest economic crisis that Europe has ever had to deal with since 1929, and by the unexpected monster of the global pandemic of Sars-CoV-2; a recession that has allowed to awaken the monster of nationalism, which the European Union had always tried to destroy, bearer of hatred and suspicion towards the "other". We are witnessing the rebirth of national (and nationalist) collective identities, blind to what history has taught us: before the European Union, Europe was the scene of the most terrible and bloody wars of all time, always in the name of a nation. The European project was

born to put an end to these carnages, so that nothing similar could ever happen again. This is why we must have the courage to continue to believe in a project that is based on dialogue and solidarity, that knocks down walls and opens its ports, that welcomes, that recognizes the fundamental rights of every man and offers hospitality to those who seek a better life, to those who escape, to those who see in Europe the alternative, a project that meets inequalities in order to overcome them and that looks at the future of young people in international horizons. Thanks to the European Union, I have been able to take part twice in the Erasmus+ project, which has played a fundamental role in my university career, both in terms of study and personal growth, making me, even more than I already was, a proud European citizen. The Erasmus+ project is the great success of the European Union, at a time when the European project is constantly being questioned: thanks to this experience younger people learn that the true beauty and richness of Europe is multiculturalism, that a united Europe is not a utopia and that the only real European identity is diversity.

As for the structure of this thesis, in the first chapter the concepts of identity are identified and introduced, outlining their connection with the theme of nationalism. Starting from the assumption that identities are always constructed, the concepts of collective identity and national collective identity are first introduced, and then we deal with their "degeneration", namely nationalisms. Subsequently, the concept of constitutional national identity, often confused and used as a homonym of national identity, is analyzed and explained. Hence, this is a chapter mainly of philosophical and socio-anthropological character, which goes to lay the foundation for subsequent discussions.

The second chapter, on the other hand, is almost entirely historical. It focuses, therefore, on the construction of the identity of nations or, better, the idea of nation: the birth of national identity is analyzed through symbols, myths and cultural constructions. Subsequently, three different historical periods of Europe in which the idea of nation has played a leading role are identified: pre-French Revolution Europe, post-French Revolution Europe and 20th century Europe. The European Union, from this point of view, is thus seen as a strong response to nationalism, born to avoid unnecessary wars and bloodshed in the name of a state or a race, in the hope of preserving peace and defeating suspicion of the foreigner. An idea that proved to be

the right way, ensuring, for more than half a century, peace and progress to the growing number of states that are part of the community.

If in the second chapter we look at history to underline how the European Union has allowed the creation of a union of states in peace and solidarity between them, with a view to cooperation and development, in the third chapter we show how, however, the ghost of national and constitutional identity of the Member States is still a reason for conflict at the jurisprudential level. We analyze, therefore, the most relevant cases of both national constitutional costs and the European Court of Justice, in order to expose the - underestimated - problem of how the identity clause is revealed from the beginning as a potential antithesis to the provisions on the homogeneity of the European Union remaining, nevertheless, the element that makes possible the very motto of the EU, *in varietate concordia.*

Having developed the entire research work on the theme of identity conflict, the last chapter looks at the future of European constitutional integration among identities. The new identity crisis and the birth of new fundamentalisms that the European Union is experiencing today can be linked to the failure of the Constitutional project of 2005, not only due to the victory of the "no" to the referendum vote in France and Holland, but to a series of "cracks" in the integration process, such as economic and monetary union carried out without the foundations of a true political union or the complete underestimation of globalization. There is a need, therefore, for a real European constitutional patriotism, like the one that allowed the founding of nation states in the 18th and 19th centuries, which would allow member states to recognize the European Union as a real element of their national identity, and not as an enemy of it. We need a new constitution for Europe, based not only on identity clauses, but also on solidarity among states; a constitution legitimated by the European people, which presents itself as a project for the future and which expresses a new, plural, collective identity.

Crucial to the writing of this paper were the theoretical contribution of Benedict Anderson in *Imagined communities: reflections on the origin and spread of nationalism*, at the basis of the theory of identity construction, and the analysis of national constitutional identity from the perspective of European Union law provided by Monica Claes in *National identity: trump card or up for negotiation?*. Very inspiring was also the recent contribution of Claudia Berchtold, titled *Solidarity in the*

EU: wishful thinking or status quo?: analysing the paradox of EU solidarity and national sovereignty in civil protection in the context of Art. 222 TFEU (Solidarity Clause), which addresses the issue of solidarity between Member States and the threats of national sovereignty. Finally, literature and philosophy texts, critical texts, manuals of EU and international law, judgments of national constitutional courts and of the European Court of Justice, official publications, newspapers, essays, statistical studies and websites, in English, Italian, French and Spanish, have been widely quoted: a set of tools and languages extraordinarily different from each other, demonstrating that it is possible, clearly, a unity in diversity.

CHAPTER I

INTRODUCTION TO THE CONCEPT(S) OF IDENTITY

CONTENTS: 1.0 What is identity? - 1.1 Collective identity - 1.1.1 From social identity to collective identity – 1.1.2 Collective identity as cultural identity – 1.2 National (collective) identity – 1.2.1 Theories of nationalism – 1.3 Constitutional identity – 1.3.1 Two concepts of constitutional identity: identity of the constitution and identity of the people

1.0 WHAT IS IDENTITY?

"Identity" is a term that has always been used with a very wide range of meanings; there is neither a unique meaning nor a set of multiple meanings from which it is possible to derive a common concept.

Since the identical, in Latin *idem*, means the same thing, we find ourselves unable to give a concrete answer to the question: what is identity? However, some authors have done so.

For Aristotle, identity or selfhood is a mode of unity, and therefore is attributable to what it is. For Leibniz, it is the ultimate foundation of truth, since all true propositions are ultimately reduced to identical propositions, through the analysis of notions. For Hegel, the principle of identity is a pure emptiness: it says nothing. Wittgenstein thinks the same thing, from another conceptual perspective: statements of the type 'a=a' say nothing, they are pseudo-flooded, and the adjective 'identical' has no meaning, since identity is neither a property of objects nor a relationship between them. For Russell, on the other hand, identity is a logical relationship that can be perfectly studied and characterized (Canal, 1997). For Husserl identity is absolutely indefinable. For Engels there is nothing that is identical to itself: identity has to be relegated in his study to that of ideal objects, as happens in mathematics. For Saussure it coincides with the value of the linguistic sign, and therefore it is pure negativity with respect to the other values of the system. For Lacan, the proposition "a is a" is not only untrue, but also absurd, and marks a whole stage in thought, which he qualifies as a "theological stage". For Hume the question of personal identity constitutes the most abstruse problem of philosophy (Echeverría, 1987).

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In this complex, it is clear how from the beginning the conception of the subject and identity was questioned, not as an individual essence, but as an identity as such.

The logical result is to question the reality of the self, of the other, and of their coexistence in order to overcome the loneliness of man in the world.

What the word "identity" should mean, or rather describe, then, depends on the specific use of the term in a given context and the discipline from which this use is derived. Generally, two specific definitions are considered: philosophical and socio-anthropological.

In philosophy, "identity" (from the Latin *identitas*, derived from *idem*, "same thing") is a term and a principle that indicates the equality of an object with respect to itself: an entity is recognizable because it has certain characteristics that make it what it is; in other words, that distinguish it from all other entities. In general terms, the concept of individual identity implies recognizing a stable axis in the subject, which once constituted, except for some moral deviation, is maintained over time giving the person the experience of selfhood, continuity and integrity and above all self-recognition. Thus, the feeling of identity is the knowledge of the person of being a separate and distinct entity from the others (López & Dorantes, 2014). By identity we understand the unity of the individual in time in the comparison with himself, which is related to his continuity and selfhood, considering the achievement of individuation-differentiation as the prerequisite.

From this derives the sociological and anthropological definition, according to which identity is qualified through belonging to a given group, i.e. it is the perception that the individual has of himself within society. It is part of the collective identity what each person is, as it is inserted in its most immediate social networks (family, kinship, friendships, neighborhood) than the broader areas to which it must or wants to refer (living environment, neighborhood or rural hamlet, country or city, economic, administrative or ethnic region, nations). The identity thus understood is something that is found in people and places all over the world.

These two levels, individual and collective, apparently independent of each other, are inseparable: only by taking both into account can you give a more or less complete meaning to the term "identity". An individual, in order to belong to a group, or rather to relate to the other and to differentiate himself from it, needs to have and know his

own specific individual identity. Indeed, according to Erik Erikson, psychologist and psychoanalyst of the middle of the last century, personal identity is rooted in the surrounding society and culture: an individual's sense of self is shaped by social roles and expectations (Erikson, 1968).

Having become increasingly applied to groups, the discernible trend over time of identity, a term that was originally intended to explore the individual and personal, is therefore not an inappropriate amplification of the concept, but rather immanent in its dual nature.

1.1 COLLECTIVE IDENTITY

As mentioned above, in generic terms collective identity can be defined as a state of consciousness, the feeling more or less explicit of belonging to a group or category of people or being part of a community. Such a feeling of belonging or communion emerges from a unity of interests or condition; and a reflective movement is strengthened from self to other, by dialectically opposing a "us" to "them" (López & Dorantes, 2014). Collective identities are developed where several people with concordant identity characteristics feel united, in order to form their own group that stands out from other groups, distinguishing, in particular, who "is inside" from who "is outside".

Social groups of all kinds use characteristics that unite their members as a reference to mark their boundaries and homogeneity serves to legitimize the relationship between the members of the group. However, "most collective identities resemble t-shirts more than skin, i.e. they are, at least in theory, optional and not inevitable" (Hobsbawm, 1999): the members of the group may be very different from each other, in terms of interests, status, education, etc., but to feel part of a group is sufficient "a fundamental and consequential sameness that causes them to feel solidarity among themselves" (Fligstein, 2009). To a large extent, the connection between the members of a given group is imagined and constructed, since individual differences are ignored for the sake of similarity and hidden by the latter. A feeling of collective identity is built through manipulations ideological, symbolic and ritualistic; although there is no doubt that such ideologies and symbolism gravitate to previous sociological and cultural realities, the which will tend to be realized, reaffirmed and recreated. Indeed,

it is so: among the most important common denominators of academic activity on collective identity, there is the fact that this concept is considered constructed, dynamic and learned, rather than natural, fixed or of divine origin. Men and women look for groups to which they belong, with certainty and forever, and the differences between the individuals are ignored, or rather disguised, by the similarity; the homogeneity among the members is only a cover. In this sense, "collective identity is a matter of identification by the individuals who are part of it: it does not exist per se, but always and only to the extent that determined individuals profess it" (Assmann, 1997).

This point of view reflects the influence of postmodern and constructivist currents of thought in the 20th century, which share a substantial disbelief in the existence of "objective truth" and "definitiveness", conceptual or otherwise.

1.1.1 FROM SOCIAL IDENTITY TO COLLECTIVE IDENTITY

Distinguished from the collective identity is the "social identity", which emphasizes the subjective meaning of a social group for the individual member and the degree of identification of the individual with that social group. In other words, social identity refers to an individual's membership of the group and how the individual relates to that membership.

The theoretical reflection on collective identity has as its antecedent the approaches made to social identity. From the perspective of social psychology, Henry Tajfel develops a theory of social identity, conceiving it as the psychological bond that allows the person to be united with his group; he considers that to achieve this bond, the person must have three characteristics:

- To perceive that he belongs to the group.
- To be aware that by belonging to that group, it is assigned a positive or negative qualifier.
- To feel a certain affection derived from the awareness of belonging to a group (Chihu, 2002).

As we can observe, for Henry Tajfel, belonging to the group is the essential ingredient of social identity, because at the same time that he feels part of a group, the individual is different from the members of other groups to which he does not belong; for this

reason it is said that the source of identification of the individual is the group itself, but the others also play an important role, since when he experiences that he is different from the others, the belonging to the group is reaffirmed (Brown, 2019).

Social belonging, then, consists of the inclusion of individuals in a group, which can be "through the summation of some role within the community or through the appropriation and interiorization, at least partially, of the symbolic-cultural complex that serves as an emblem of the community in question" (Giménez, 2000). This implies that there are two levels of identity, the one that has to do with the mere adscription or group membership and the one that supposes knowing and sharing the contents socially accepted by the group; that is, being aware of the traits that make them common and form the "we".

So far we can say that social identity is generated through a social process in which the individual defines himself, through his inclusion in one category - which implies at the same time his exclusion from others -, and depending on the way the group is included, the identity is either ascriptive or by conscience. Furthermore, since the individual is not alone, his belonging to the group goes beyond what he thinks about himself, it requires the recognition of the other individuals with whom he relates; that is why it is said that identity "emerges and is reaffirmed to the extent that it is confronted with other identities, in the process of social interaction" (Giménez, 1996). Now, when individuals as a whole see themselves as similar and generate an internal collective definition, we are faced with the collective dimension of identity.

1.1.2 COLLECTIVE IDENTITY AS CULTURAL IDENTITY

The fundamental premise is that there is no society without culture, since the formation of a society entails the formation of its culture; this emerges in the very process of constituting the group; then the sum of the group experiences shapes the culture of the group.

Anyway, what is culture? This question has had infinite answers. In the field of anthropology, the positions vary, from the definition of Edward Tylor, who conceives culture as the set of knowledge, norms, habits, customs, values and aptitudes that man acquires in society; others, like Ruth Benedict, reduce it to the institutions that maintain a functional relationship with the psychological constitution of the

individuals; other scholars again (for example Leslie White) reduce it to the ideas of a purely mental phenomena, that is to say, to the meanings and values that are beyond the senses (Maldonado & Oliva, 2010). For the anthropological cultural materialism current, culture comprises all aspects of life, socially learned, both the way of thinking and the way of acting. Authors such as Clifford Geertz point out that culture is a network of meanings according to which individuals interpret their experience and guide their actions.

To make it easier, we will consider culture as a system of beliefs, values, norms, symbols and collective practices learned and shared by the members of a community, which constitute the framework of their social relations. To say that culture is a system of beliefs, values and norms implies that the members of each society generate a set of maxims, from which they give meaning to their actions and interpret the events of daily life; hence it is said that culture is "[...] the medium in which individuals are formed and from which they extract the keys and explanatory content as well as the decoding, interpretative and evaluative tools that allow them to interact with the rest of the people who make up or share such a culture" (Maldonado &Oliva, 2010).

But these "ideational" repertoires are not permanent and stable, certainly during the process of socialization the subjects acquire, through the institutions, the repertoires of ideas by which they guide their behavior; but it is not a question of the automatic programming of identical human beings, on the contrary, we are talking about subjects with different intentions, aspirations and capacities. This implies that in the collective practices with which they interact among themselves, they learn new behaviors that can modify their ideas (Tappan Merino, 1992). The proposition that complements the concept of culture is that both ideas and behaviors are learned and transmitted in certain social contexts. This means that in order for new members to integrate into society and interact with others, it is necessary for them to learn repertoires, and this requires certain mechanisms of transmission, which also depend on the social context in which they are found. That is, the prevailing conditions, the historical-temporal moment.

Therefore, the formation of culture is a dialectical process, insofar as through interaction repertoires of ideas are generated, which individuals materialize in their behaviors, and these, in turn, entail changes in the norms, values, beliefs and ideals

learned and transmitted by certain mechanisms (Maldonado & Oliva, 2010). These repertoires of ideas and specific collective practices are the features that characterize the members of a community.

To sum up, culture and identity go hand in hand but they are not the same thing, identity is an effect of culture "identity is the roots that give a support and sense of belonging, but it must exist in a land, where those roots are fixed and a substance that nourishes it, and that is culture" (Tappan Merino, 1992). This implies that the identity does not arise spontaneously, on the contrary, it is a construction that the members of the community carry out, from the culture that they possess, in a determined social context. Furthermore, identity is not only an effect of culture, it is also a necessary condition for it to exist, precisely from the cultural representations, norms, values, beliefs and symbols that individuals internalize throughout their lives.

1.2 NATIONAL (COLLECTIVE) IDENTITY

According to Franco Remotti, national collective identity is, ideologically speaking, a substance. It is a substance equal to what Aristotle defined in *Metaphysics*: substance is that thing outside of which there is nothing that that same substance needs or depends on. The substance, or rather the identity of "us" (which can be understood as biological, historical, cultural, economic), is complete. And precisely for this reason it gives security: we know that we have something in common and that makes us different from others; we have something that cannot be shared with otherness (Remotti, 2010). Security is the key word of national identity thinking. The identity representation that is based on the idea of this substance (which is complete and gives security), forces those who adhere to this image and representation, to turn their gaze on the "us" and only on the "us".

In general, the creation of a collective identity rooted in the common aspects becomes more difficult the larger and heterogeneous the group, as more individual interests, behaviors, etc. need to be reconciled. Nations, then, are nothing more than "imagined communities" (Anderson, 1983), and this comes from the fact that collective identity is always a construct: for a political body to exist, some form of identification, "some bogus form of common origin" (Salza, 1999) is necessary to overcome existing differences and divisions, so that the members of that political body feel part of a

group that presents a (presumed) homogeneity. Obviously, the larger and heterogeneous the group, the more complex it becomes to identify common characteristics and aspects. An obvious example are groups defined by geographical scope: although it may still be fairly simple to find common features among local community members (e.g. attendance at the same schools or a shared socio-economic background), regional-level shared features might already be less tangible (e.g. cultural similarities such as a particular dialect spoken), becoming even more vague at a supra-regional level (e.g. a common history or religion) (Prutsch, 2017).

Yet, the assumption of collective identity has been applied more frequently to describe the processes of construction of nation-states ("national collective identity"), which, in fact, represent very diverse and large groups. From the seventeenth century, the nation-state was the model par excellence for the organization of society, not only at the political-territorial level, but also at the socioeconomic and social cultural level. This is why the birth of national identities can be made to coincide with the birth of national states: the evolution of a collective feeling - based on references to a common language, religion, history and territory - plays a decisive role as a political instrument in generating a sense of belonging in individuals that makes them feel part of a unity (Prutsch, 2017). Moreover, (collective) identity can be easily conditioned through political action, thus giving the hope of a "unity" and a "belonging" in line with what is desired at the political level. In the case of nation-states, identity policies aim at proving the reasonableness and validity of this specific political body, starting from the foundation: the "creation" of a people that share common characteristics.

The national identity meets three requirements that are also essential to conceive a healthy community relationship with others. First, this desire and this need for rootedness: the need to give oneself origins. The human being needs to have the reference of a home, every ego has an original homeland to which it refers and this homeland can obviously be labile, it can be conceived not as a territory, but as a culture, as a religious belonging, as a religious community, but in any case there must always be the recognition, the necessary value of the meaning of a homeland. The rootedness is the need to give oneself an identity, an origin and also a past, because the past allows people to recognize who they are. In the second place, national identity is the way to concretely fit into a vision in which collective identity takes on its

meaning, that is, the "us", the necessity of the "us", the need to conceive one's own self in a living dialectic, synergic, even conflictual when this is the case, but in any case in a dialectic in which the other is present, and the other is present only through a vision of collective identity. That is, it is not possible to conceive reality, to conceive political life through an atomistic system, a system of incommunicable monads, but it is necessary to conceive it through these vital relationships between groups, between realities, between presences that are different. Finally, it is necessary to recognize that in order to feel close to each other, it is essential to understand that destiny is the same, that the other person lives travails that are mine, that besides having common legacies, landscapes, memories that belong to us, we also have a common destination (Prutsch, 2017). In this sense there is the need to think about a national identity, a rootedness, a collective identity, and finally a common destination.

Thus, the need to delineate the identity traits shared by the members of the nation in order to be able to detect them empirically and to find, at the same time, a new way to denote terminologically the concept of "collective identity" that clearly designates what is common becomes an imperative.

The British sociologist Anthony Smith, with a view to reconstructing the roots of individuals' feelings of belonging to their nation, has identified five constituent elements of national identity:

1. a historical territory or homeland, signifying the roots, tradition, continuity and timelessness;

2. common historical myths and memories, which locate the beginning of the nation, the people and their national character so early that they are lost in the mists of a mythic time;

3. a common mass public culture, or "invented traditions": a set of practices, of a ritual or emblematic nature, which seek to inculcate certain ideals and norms of behaviors by repetition that indicates continuity with a suitable historical past;

4. common legal rights and duties for all members, through bureaucratic procedures, social rituals and educational structures, by means of which the state shapes mental structures and impose communal principles of vision and division;

5. a common economy and territorial mobility.

The author also highlighted the weight of the allegorical experience of values. An essential identity value is determined by historical memory, which exalts the origins and the past; a second element are the rules of coexistence that regulate the relationships between individuals and groups, institutions, religious life; the third and more incisive is the language through which the members of a community communicate with each other; another value is the set of relationships of kinship; finally, the last data is the territory in which the group lives (Smith, 2010).

In any case, the definition of a nation in terms of identity requires a high level of imagination, also with a view to considering the enormous number of individuals, in all their diversity, who amalgamate to become one common entity. Thus we return to the concept of nation as an "imagined community" coined by Anderson, since "even the members of the smallest of nations will never know most of their countrymen, nor will they be able to meet or speak with them, even if in the soul of each one will live the image of their communion" (Anderson, 1983). At the same time, a nation represents a community because "despite the inequalities and exploitations that may prevail, the nation is always conceived in terms of deep, horizontal camaraderie. At the end of the day, it was this fraternity that allowed so many millions of people, over the last two centuries, not so much to kill as to die, in the name of such limited imaginations" (Anderson, 1983). What Anderson wants to emphasize is that, in creating a collective identity, the inter-group differences are consciously accentuated in order to highlight the unique character of one's own nation and to distinguish it from the others; the result is an obvious favoritism towards the ingroup: the essentialization of "identity" and "nation" leads to nationalism, which leads to elevate one's own nation above the others, to consider it superior and to justify its imposition on other groups. (Prutsch, 2017). Nationalism as a social and political movement invokes a unified community, which tends to be characterized as "special", and is willing to actively and resolutely realize the desired *Gemeinschaft* ("community") and the goals of the nation, sometimes even by militant and violent means.

1.2.1 THEORIES OF NATIONALISM

According to Brubaker, asking "what is a nation?" encourages one to define the nation in substantive terms; encourages one to treat nations as concrete entities (Brubaker, 2004). The nation is not an entity of any kind. It is a claim, an instrument of action and a goal at the same time. In Brubaker's definition, the nation is not an ethno-demographic or ethno-cultural fact; it is a political claim. It is a claim on the loyalty of people, their attention, their solidarity. If we understand the nation not as a fact but as a claim, then we can see that "nation" is not a purely analytical category. It is not used to describe a world that exists independently of the language used to describe it. Rather, it is used to change the world, to change the way people see themselves, to mobilize loyalty, to ignite energy and make demands (Brubaker, 2004). We must say that the nation is primarily a category of practice, not a category of analysis. The nation, then, does not exist without the construction of a discourse through which individuals identify with it. It simultaneously constitutes the core and the ultimate goal of the group identity discourse articulated by nationalism. (Sutherland, 2005).

In the book *NationaI Identity*, Anthony Smith cites two influential scholars of nationalism: Gellner, which affirms that "nationalism is not the awakening of nations to self-awareness; it invents nations where they do not exist - although it requires some pre-existing distinctive features - with which to work, even if they are purely negative" (Smith, 1991). According to him, it was the need of modern society for cultural homogeneity that created nationalism, and therefore nationalism is sociologically rooted in modernity. Smith also refers to the characterization of Kedourie: "Nationalism is a doctrine invented in Europe in the beginning of the nineteenth century" (Smith, 1991). Arranged in this way, in the framework of the polemic, Smith takes the word: "I shall define nationalism as an ideological movement aimed at achieving and maintaining autonomy, unity and identity on behalf of a people and led by some of its members, to constitute an actual or potential 'nation'" (Smith, 1991)

Hobsbawn also conceptualizes both nations and nationalism as "social engineering" products. According to him, what needs special attention in this process is the concept of "invented traditions", which he understands as a series of practices, usually governed by tacitly accepted rules of a symbolic nature, that try to inculcate certain values and norms of behavior through repetition, which automatically implies a

continuity with the past. According to Hobsbawn, the most important "invented traditions" are three: the development of primary education, the invention of public ceremonies and the mass production of public monuments (Hobsbawn & Ranger, 2012). The result of these processes, whose apogee was the period between 1870 and 1914, is that nationalism became a substitute for social cohesion through a national church, a royal family or other cohesive traditions; all thanks to the role of politics.

Anderson focuses, instead, on the cultural roots of nationalism: according to him, in fact, in 18th century Europe we witnessed the decline of ancient cultural conceptions (such as the gradual decline of dynastic domains) and this offered the historical and geographical space suitable for the birth of nations and nationalisms; "No surprise then that the search was on for a new way of linking fraternity, power and time meaningfully together" (Anderson, 1983).

All these influential scholars are part of the modernist approach, according to which the essence of nations and nationalism would lay its foundations in modern processes such as capitalism, industrialism, the birth of the bureaucratic state, urbanization and secularism. However, as we have seen, there are two different interpretations of such processes: Hobsbawn, Smith and Kedourie, for example, emphasize the role of politics and power struggles in the birth of nations, while Gellner and Anderson give priority to socio-cultural factors.

To sum up, the great limitation of nationalism, then, lies in the fact that it adulterates the healthy conception of belonging to a national community. Nationalism is the interpretation of national identity through the will of power, therefore based on intolerance. The will to power proposes a national identity based on exclusivism, that is, "my nation", the primacy of my nation over others: a form of Darwinism applied to states, nations, collective entities. A form of exclusivism and national selfishness. In this sense, therefore, national identity finds in nationalism the enemy, its false friend, its caricature (Iiritano, 2004). From this idea of nationalism then come those errors, which often change into horrors, represented by that escalation that goes from xenophobia to intolerance towards the other, to the rejection or suppression of the other. It is a progression that arises precisely from the idea that my nation, my identity must prevail over the identities of others. Here, nationalism necessarily marries in this phase with a centralist type of thought and political articulation, that is, the idea that

my homeland must prevail over others; it is an idea that conceives the homeland as a sort of navel of the world, in which my homeland must necessarily be right and primacy over that of others. Hence the centralist tendency of nationalism and the strong tendency towards a "statology" (Iiritano, 2004). The idea of the nation is combined with the primacy of the idolatry of the state. When the nation is elevated to absolute value, the risk is just that of idolatry, that is to create a form of civil religion substitute of the transcendent one. The danger of nationalism is therefore the danger that the sense of the national community is adulterated through the will of power.

The national collective identity, and nationalisms too, are therefore the result of a long evolution that is not affirmed in a day, and therefore cannot even dissolve in an instant; it can only evolve over time acquiring new values and losing others. Each population is, consequently, what its history has led it to be until that moment but inserted in the framework of a complex of other populations. Europe, in this sense, is one of the most fertile places for the creation of these communities, a territory where a set of peoples has seen the light of day based both on a common inspiring motive and composed of a plurality of variations.

1.3 CONSTITUTIONAL IDENTITY

Clearly, the notion of constitutional identity might overlap with the notion of national identity. Anyway, to differentiate the two terms in a simple way, we might say that some nations or political communities can have their own collective identity without having a constitution at all; in such cases, there may well be a national identity, or a political one, or even a legal identity, but no constitutional identity.

The doctrine of constitutional identity was developed for the first time, and thus invented, by the German Constitutional Court in the 1950s. Anyway, it connects with and influential and much older tradition of thought on the idea of political identity. One of the first historical references to this idea can be found in Aristotle, more specifically in book 3 of *The Politics,* in which he asked "On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State?" (Barker, 2012). His answer necessitates that we differentiate the physical identity of a state from its real identity. Thus, "The identity of a polis is not constituted by its walls" (Barker, 2012). Instead, the identity of a polis

is constituted by its constitution, which for Aristotle refers to the distribution of the offices in a polis as well as the specific culmination towards which the community aspires. When this culmination mutates or when the offices are distributed in a different way, the constitutions in not the same anymore, and the identity of the state is then transformed; a polis might physically retain its recognizable features but project a dissimilar identity if its "scheme of composition" is altered. This conception of constitutional identity implicates an understanding of the constitution as the basis for both legal and social relations within a polis. Thus, assimilating the identity of the state with the essence of the constitutions implies that a city cannot change its constitution without defy itself (Jacobsohn, 2006). This consequence could appear extreme, in the sense that it would mean that, for example, the identity of Ireland changed with the substitution of the constitution of 1922 with the 1937 document, or even that Poland mutated its identity with the adoption of its post-Communist constitution. This statement seems completely meaningless nowadays, and this would therefore lead to say that what is constitutive of the identity of a polis or a state seems to be rooted more in extraconstitutional elements (such as culture) than in the language of a legal document.

The very notion of constitutional identity, then, remains quite unclear.

In his book *Constitutional identity,* Michel Rosenfeld affirms that "this is an essentially contested concept as there is no agreement over what it means or refers to" (Rosenfeld, 2012). Another expert on the idea of constitutional identity, Gary Jeffrey Jacobsohn, asserts that the concept is not clear, and argues that "clarifying the concept of constitutional identity should engage the interest of constitutional theorists" (Jacobsohn, 2006).

The undeniable thing is that, as seen before, both people and nations are the result of a concrete historical-social-cultural construction and, in short, we are the result of a particular context and content and, therefore, peculiar and distinctive. However, national identity or sensibility should not be confused with constitutional identity. The need for a collective or national identity, as well as its convergence and divergence with respect to the notion of constitutional identity, is easy to grasp if we understand the importance of a "social bond" and the benefits of "community cohesion" or "social stability" in a given order, which also applies to the constitutional realm (Martínez

López-Sáez, 2019). Indeed, individuals and citizens in general need a minimum core of common elements and values that are shared and that allow them to relate to each other and provide a sense of belonging.

Therefore, it can be stated that the concept of "constitutional identity" lacks a generally accepted definition. Nonetheless, an increasing number of legal scholars, but also courts, mention the concept of constitutional identity, some of them even asserting that it should be at the heart of constitutional theory.

Michel Rosenfeld, university professor of law and comparative democracy, conscious of the existing ambiguity about the concept, proposes distinguishing three different "general meanings" attached to such concept:

1. the "identity that derives from the fact of having a constitution";
2. "the content of the constitution is what provides different elements of identity";
3. "the context in which a constitution operates seems bound to play a significant role in the shaping of its identity" (Rosenfeld, 2012).

The first meaning considers constitutional identity to be the identity of the constitution itself as a document: its main features and countenances; who is the constitutional subject and who is the constituent; what is included and what is not; what form of government it creates; what collective identity it conveys. This approach permits to rise a huge range of classifications, the same Rosenfeld distinguish in this sense between a German, Spanish, American, European and transnational model.

The second connotation likens constitutional identity with constitutional culture. Culture, in the anthropological definition, it's "historically transmitted pattern of meaning, embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life" (Oomen, 2016). Legal culture, on the other hand, id defined as "the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away" (Oomen, 2016). Putting these concepts in relation to the constitution, constitutional law and culture are then intertwined in a dialectical relationship, according to which constitutional law both arises from and regulates culture; there is a precise subset of culture that includes extrajudicial beliefs about the substance of the Constitution. One

term often used to point at a marked and significant constitutional culture is "constitutional patriotism", or *Verfassungspattriotismus.*

The third meaning, finally, wants to examine the relationship between the text of the constitution and national identity. Both the concept of the nation (an imagined community) and of the constitution (an expression of the popular will) are 18th century inventions[1], with strata of national history visible in national constitutions. Moreover, the bond between constitutional identity and national identity is quite complex; national identity can be a justification for progress in constitutional theory, defined as "the expansion in the protection of individual rights and liberties" (Teitel, 1992), but can also be invoked to counter such progress. Thus, constitutional identity can refer both to sameness (continuity) and to selfhood, in the sense of expression of ideas about the collective self.

1.3.1 TWO CONCEPTS OF CONSTITUTIONAL IDENTITY: THE IDENTITY OF THE CONSTITUTION AND THE IDENTITY OF THE PEOPLE

All the meanings mentioned above (the identity of the constitutional text, constitutional identity as constitutional culture, the identity of a constitutional practice) are different and, overall, they are not totally independent from each other. But, according to José Luis Martí, university professor of legal and political philosophy, they can be restated according to a basic distinction between two diverse ideas of constitutional identity:

1. the identity of the constitution;
2. the identity of the people or the political community.

As stated by him, the very notion of constitutional identity usually refers to something essential or constitutive, something stable and permanent in a constitution, which relates to the essence of a particular political community (Martí, 2013). Any change to this essence, then, entails not only and amendment but also a revolution. The features of the constitutional identity of a specific country are so fundamental that they should be protected and preserved from change. That's why they are seldom deep-rooted within the constitution itself.

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[1] These terms are discussed in more detail in chapter 2.

The identity of the constitution and the identity of the people, ruled by the constitution, usually come together. The main problem is to be found in the idea of constitution itself: the constitution is not a simple legal norm, but the essential and fundamental norm that constitutes the people. A change in the core of such constitution of the people, then, seems to provoke an alteration in the identity of people itself. Thus, in modern constitutional democracies, there is no differentiation between the two ideas of constitutional identity, but they are two different things.

According to the first concept of constitutional identity as the identity of the constitution, our constitutional identities depend in large scale on the values and principles protected by (and essential for) our own constitutions. Anyway, it is clear that not all clauses and principles in the constitution are equally important: not every single element is part of its constitutive core; "not any change *in* the constitution entails a change *of* the constitution" (Martí, 2013). This means that we have to distinguish between two types of constitutional change: meagre amendments and constitutional revolutions. In order to produce a revolution, (i.e. a change *of* the constitution), some significant changes have to be introduced, changes that are so noteworthy that the resulting constitution would be a different one. But what kind of components can be essential in a constitution?

If we consider the constitution *as a text*, the essential elements would be those written dispositions that are definitional for the text, i.e. "a subgroup of written dispositions among all those which form the whole text" (Martí, 2013). However, is it possible to reduce the idea of a constitution to the text itself? The answer is no, for three main reasons:

1. Not all the constitutions are written. Reducing the idea of a constitution to the constitutional *text* would mean that, for example, Britain lacks constitutional identity.

2. Any alteration of any part of the text would change the constitutional identity. But, as seen above, there are elements in every constitution that are not part of its definitional core; this means that some changes are possible without altering the essence of the constitution.

3. The constitution is not a mere legal text. The text itself is nothing without the interpretation: the constitutional text needs to be interpreted in order to generate norms.

Thus, it has been demonstrated that it's impossible to consider a constitution as a mere text. The constitution has to be considered as a set of core principles, values and rules, which are the result of the interpretation; the determination of the fundamental content of a constitution implicates the authoritative interpretation of the words stated in the text based on complicated constitutional practice. The constitution has to be considered, then, as a *constitutional norm.* Again, once the set of values, rules and principles that form the constitutional norm have been identified, the question is: what are the essential and definitional parts in such norm? In most cases, most fundamental elements come in the form of principles and values, such as democracy or human dignity; rules are seldom left for the organic part, making it difficult to find a definitional element. One way that is useful to establish the difference between essential and non-essential elements is to pay attention to what the constitution says in itself: for example, there are articles (the first 12) of the Italian Constitution that are defined as inviolable and that can never be revised even through a constitutional referendum. To guarantee the inviolability of these rights, which are those of the man and the citizen, there is Article 2 of the Italian Constitution which states that "the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality takes place"[2]. A revision of these rights, therefore, would not be a revision but a subversion of the democratic order that governs the country. Similarly, also the German constitution proclaims some clauses as unamendable: dignity, democracy, rule of law and federalism. Thus, if a constitution itself declares some of its parts as unamendable, it seems normal to take those elements as the essential core that must be preserved as the identity of the constitution (Martí, 2013).

Now, if we agree to consider the identity of the constitution as a set of values, the issue is: what is considered to be the identity of the Italian constitution seems to be,

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[2] *"La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità"*.
https://www.cortecostituzionale.it/documenti/download/pdf/Costituzione_della_Repubblica_italiana.pdf

more or less, substantively the same as the German constitutional identity, in fact both constitutions share almost the same set of core principles and values. Do Italians and Germans have the same constitutional identity, then? It could seem so, except for the fact that they are addressed to different people in different territories.

Consequently, the constitution is also the norm that constitutes the people to whom it is addressed; that is why the concept of constitutional identity can be also conceived as the identity of the people themselves.

According to José Luis Martí, there are three possible meaning for the constitutional identity of the people:

1. the idea of national identity;
2. the deeply constitutive view of constitutional identity
3. the idea of the people as a constitutional authority.

The first one is the idea of national identity. If we take as an example Spain, it is a nation with a number of distinctive national features: theorists of nationalism have struggled for centuries in order to find those features or makers (like common history or common language) that give an appropriate account of the idea of nation. But as stated above, constitutional identity and national identity are two different things: Michel Rosenfeld argues that the constitutional identity is a collective identity of the people subject to the constitution, but it differs from other collective identities, such as national ones; "one can easily conceive of the French or the German nation without reference to a constitution" (Rosenfeld, 2012). Furthermore, if we take into analysis pluri-national constitutional states - such as Spain, it is even more evident that constitutional identity is conceptually different from national identity. As an example, the Basque country or Catalonia may live together with other nations under the same constitution and within the same state territory; but there is no common national identity between a Basque or a Catalan or someone living in the Andalusian countryside, even though they belong to the same constitutional people.

Constitutional identity, then, is given by the constitution, which constitute the people subject to it (Martí, 2013). Nevertheless, constitutions tend to say little about identity of the people: in the Italian constitution, for example, there is no article describing the Italian people according to features a, b or c. But maybe those features can be found somehow implicit in the articles, through a deep analysis by constitutional

interpreters. For example, going back to Article 2 of the Italian Constitution ("the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality takes place"), it doesn't say anything about identity features, but we can discern that the person is first of all a subject, a subject who subsists autonomously, who belongs to himself and who is the source of his choices and acts; in the ontological consistency of this singularity is founded the unique and unrepeatable value of each person. Moreover, by recognizing the absolute value of personal dignity in the subject, the person is led to recognize this value in every other person. The principle of responsibility involves not only being with the other but also being towards the other of the person who expresses his original openness to what is other than himself.

The second meaning given to the constitutional identity of the people is the deeply constitutive view. Above, it has been stated that constitutional identity is the identity of the people that are constituted by the constitution and singled out by it. Nonetheless, according to Jacobsohn, if we agree with this statement, consequently we would have to agree to the fact that any change of the constitution would change the constitutional identity of the society. Technically speaking, the people under the first constitution and the people under the new one would be two different people (Jacobsohn, 2006). Thus, there must be some pervasive and pre-existing identity that presupposes continuity. The people, then, cannot be constituted by the constitution; there should be an neutral, non-constitutional criterion to identify the people that are giving themselves a constitution; "a people that must be pervasive even in the case of a change of constitution" (Martí, 2013).

The third, and last, meaning of the constitutional identity can be seen as an intermediate point between the idea of national identity, i.e. non constitutional and the deeply constitutive view, i.e. toughly related to the constitution. The idea of people as a constitutional authority states that Italy, for example, as a people or political community, must have a peculiar identity that allows us to identify it as the author of the Italian constitution, and not only subject to it. Consequently, this identity is pervasive and independent from a particular constitution enforced at a particular time (Martí, 2013); the elements that define the Italian people as a constitutional authority must be independent of the constitution (even though they are mentioned or collected

in it) and pre-constitutional. According to the political approach, these elements derive from the actual will of Italians to be part of the Italian people: this approach, thus, is independent of national, religious, ethnic or cultural markers. On the other side, according to the moral approach, the Italian people as a constitutional authority would be constituted by a set of common political and moral principles and values, which should be expressed and protected by the Italian constitution, and then the people subject to such constitution would also be identified by such principles and values. Unfortunately, here again we face the same problem mentioned above: if the identity of the people is defined only by a set of principles and values, what if different people share the same set? One answer could be that there is no significant difference between two states that agree on the same set of values, and thus no difference at the level of constitutional identity, even if they have different national identities (Martí, 2013).

The idea of constitutional identity is far from clear. However, it is easily distinguishable from national identity, as some nations or political communities possess their collective national identity without having a constitution. Constitutional identity, therefore, seems to be based on a set of basic values and principles (such as human dignity, democracy and freedom) that are inviolable and preserved by the constitution, that have been given by peoples to themselves as constitutional authors and that, in turn, constitute the people. The principles, the norms of the Constitution are the product of a past, of particular political-social experiences, of ideas and cultural models; at the same time, they look to the future, they are made to last in time, they have the ambition to indicate a project of society inspired by some fundamental values that the republican order, in the case of the Italian Constitution, as a whole (State, system of autonomies, social articulations, citizens), is committed to achieve. But it is. above all, the contents of the Constitution that give substance to the idea of unity, a unity that was not a result already achieved but a goal to be rebuilt according to completely renewed logic, and to be preserved for future generations.

European constitutions give us inclusive and pluralistic democracy, based on a rigorous balance of power and an accurate system of guarantees and limits to the majority, because it is true that "sovereignty belongs to the people", but it is equally true that it must be exercised "in the forms and ways (i.e. within the limits) provided

for by the Constitution[3]"; a legal and political system open to dialogue and integration with other States - and peoples - and with international and supranational organizations (the process of European integration represents the most important outcome of this international projection of the State); a project of society in which the human person represents the point of synthesis of rights, duties, collective relations and solidarity, and in which equality before the law is completed by the recognition of equal social dignity and the search for material conditions and concrete equality, through the protection of social rights and those institutions that can favor social mobility and the correction of market distortions and the unequal distribution of wealth and property; one State based on the principle of secularity, religious freedom, equality and pluralism of all beliefs.

Therefore, given that these values and principles are present and shared in (almost) all European constitutional identities, it is natural to wonder why national constitutional courts struggle so hard to take further steps towards the political construction of the European Union. The European Union, founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, should be, through a European constitutional authority, an added guarantee of protection. Moreover, as seen above, the experience of multi-national states that have apparently successfully managed to separate the constitutional project from the national one, should have shown Member States that sharing some common political institutions with other states in no way endangers national identity.

However, before we get to talk about the constitutional (and national) identity of the Member States in the context of European integration and constitutionalism, it is worthwhile to proceed with a brief historical excursus about the birth of the idea of nation and consequently of national identity, analyzing the birth and development of such a fundamental concept.

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[3] Article 1 of the Italian Constitution: "La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione".

CHAPTER II

HOW IDENTITIES ARE MADE: THE CULTURAL CONSTRUCTION OF NATIONS

CONTENTS: 2.0 The birth of nations – 2.1 The forge of national identity – 2.1.1 The formation of national languages – 2.1.2 History and myths – 2.1.3 Historical national monuments – 2.1.4 The invention of traditions – 2.2 The idea of nation before the French Revolution – 2.3 The idea of nation in the 19th century – 2.3.1 The subjective idea of nation – 2.3.2 The objective idea of nation – 2.4 The idea of nation in the 20th century – 2.5 The birth of European Union as a response to nationalism(s) – 2.5.1 The forge of European identity – 2.5.2 EU policies: from the Copenhagen Declaration to the "Europe for citizens" programme – 2.5.3 The European identity between historical memory and future

2.0 THE BIRTH OF NATIONS

As mentioned in the previous chapter, for sociologists and anthropologists, identity is a construct, an artifact that springs from the interaction between the individual and society, and is, therefore, something attributed from outside that changes according to circumstances (Remotti, 2010). For the social sciences, the concept of identity does not refer to the concept of substance but to a subject that is formed in a social context. "In social environments, subjects do not have, cannot have, a natural consistency: they are not realities in themselves, autonomous, independent of contexts. Their existence is deeply social and depends on the 'recognition' they are able to obtain" (Remotti, 2010). Identity, therefore, is invented, constructed, imagined. However, in order to have even clearer the term "identity" and, specifically, "national identity", it is also necessary to outline the historical process that laid the ideological foundations of this word: the birth of nations.

Nations have been among the predominant features of recent history and, for nearly two centuries, have been a major player in social and political life. They form the basis of our social consciousness, our understanding of reality 's cognitive context. In our lives, they play such a crucial role that vast numbers of individuals are prepared to make great personal sacrifices in the struggles needed to gain or protect their nation's

political sovereignty (Tanil, 2012). The history of Europe and the world in the nineteenth and twentieth centuries cannot be understood without the concept of "nation" and without the related words of "nationality" and "nationalism".

Nation is commonly defined as a community of individuals settled in a territory and linked together by a commonality of historical traditions of language, customs, religion and awareness of the existence of these links. Smith defines it as "a named human population sharing an historic territory, common myths and historical memories, a mass, public culture, a common economy, and common legal rights and duties for all members (Smith, 1991). The nation is different from the state, because "the state refers exclusively to public institutions, differentiated from, and autonomous of, other social institutions and exercising a monopoly of coercion and extraction within a given territory" (Smith, 1991). Anyway, when one reflects on the complex affairs of peoples and states, beyond this general formulation, it is difficult to establish in more precise terms what the essence of the "nation" consists of and to identify objective criteria capable of fixing that concept with certainty. Already in 1882 the French historian Ernest Renan said that the idea of nation was "a clear idea in appearance, but easy to be seriously misunderstood" (Renan, 1882); and in the same period the English economist Walter Bagehot wrote in turn, always about the nation: "we know what it is if we are not asked precisely; but we encounter some difficulty in illustrating and defining it in a few words" (Skinner, 2001).

The term "nation" derives from the Latin word *natio* (from *nasci* = to be born) and therefore preserves in its etymology the original meaning of "birth", "lineage", thus designating a group united by ties of kinship. From here, by definition, the more modern meaning of nation has developed: "a [large] group of people who are characterized by a consciousness of their unity (historical, social, cultural) and the willingness to live communally" (Masolo, 2002), with a sense of solidarity and internal cohesion such that its members feel different and distant from those who belong to other, analogous, groups.

The term "nation" in its modern meaning, that is, referring to a community at the base of a state, is a fairly recent historical product: it appeared in fact between the eighteenth and nineteenth centuries – in particular, after the French Revolution - establishing itself definitively in the theoretical debate around the middle of the

nineteenth century. During the eighteenth century, the term was used in a broadly generic sense, being associated both to the idea of a group and to that of a generic political or cultural community; at the end of the century and during the nineteenth century, European political philosophy tried to define the distinctive features of the nation and the answers, divergent between them, were basically two. For some - and especially for German theorists, from Herder to Fichte - the nation was essentially a living organism, developed thanks to the unconscious action of a "superior force", identified in the national genius and the popular spirit. For the others - as for Mazzini - the nation was instead a matter of conscience, and therefore the decisive element was the will to live in common, to be a "homeland".

In this sense, the nation is a product of modern history (between the 18th and 19th centuries) and has been linked to the need for integration on the part of urbanized masses, uprooted from the agricultural context that had provided them in the past with an area in which to recognize themselves. Modern nations have defined their physiognomy and their borders in parallel with the formation of the corresponding territorial states to which the idea of nation has provided the necessary ideological foundation.

With respect to the tendency to objectify the idea of nation, suffering from the European imperialist orientation of the late nineteenth century, the French historian Ernest Renan highlighted, during a famous conference in 1882, the subjective datum of the concept of nation, which, beyond any objective link, he identifies with an "everyday plebiscite" of citizens who intend to form a unitary body, manifesting the will to live together (Renan, 1882). At the center of Federico Chabod's reflection there is, instead, the role played by Romanticism in giving strength to the national feeling, in reaction to the universalizing tendencies of the Enlightenment: the Romantic movement, in fact, re-evaluating the historical singularity and individuality of the various nations, emphasized their identity components such as language, customs, traditions of the past (Chabod, 1961).

The research on nationalism of the last twenty years of the twentieth century has highlighted both the artificial nature of nationalism and the process of construction of nations triggered by it. With the aim of nationalizing political mentality, the first protagonists of nationalism set in motion the invention of tradition, a process through

which they reinterpreted the history of the domination of ethnic formations of ancient origins in terms of national history, assigning a historical mission to the nation and prophesizing its glorious future. With a "culturalist" approach, Benedict Anderson questioned the assumption regarding the legitimacy of the presumed primordial reality of the nation, defining it on the level of those particular cultural constructs - for example, the anthropological categories of kinship or religion - referring to complex systems responding to a stratified set of social and individual needs (Anderson, 1983). Contrary to Renan, Eric J. Hobsbawm argues that the only factor necessary to create a nation is the will to be one. The nation is not something primary and immutable on the social level, but belongs to a recent and particular historical period: it is affirmed when it is related to a specific form of modern territorial state, the nation-state, and when it is within a particular level of development on the economic and technological level, as in the case, for example, of the affirmation of standardized national languages, both written and spoken, which could not have imposed itself before printing, large-scale literacy and mass education (Hobsbawm, 2012).

To sum up, the 19th century in Europe was characterized by revolutions (i.e. the French Revolution), national movements, communist uprisings, persecutions, and several wars that gave rise to the nations we know today. The transition of Europe from kingdoms to nation-states, however, was not solely due to insurrections, political alliances and secret societies; "it was made possible by a cultural revolution in thinking which defined what 'nations' are and how they behave" (Thiesse, 1999). In other words, the true birth of a nation is the moment when a group of people declares that it exists and somehow tries to prove it.

2.1 THE FORGE OF NATIONAL IDENTITY

As we seen, a nation is defined today as a group of people who are conscious of their unity and internal cohesion. But such a consciousness had to be created and developed. At the end of the 18th century, national identity was a theoretical concept rather than a social reality; before this period, in fact, nations did not exist in a modern, i.e. political, sense. The idea is part of an ideological revolution: to transform a nation into a self-conscious community, it was necessary to create a common and indivisible heritage. Nations are, then, cultural constructions (Thiesse, 1999).

René Char, a French resistance fighter against the Nazis and a poet, wrote in *Feuillets d'Hypnos* that "our inheritance is not preceded by any testament". At first glance, it may seem like a paradox: how is it possible to have an inheritance without a testament? In reality, inheritance is chosen. In the "catalog" of historical events, historical facts and relevant personalities of the past of a country, we choose those that seem more consistent with the values we want to be associated with our identity. Therefore, it is the chosen inheritance that establishes what the testament is, that is, those historical facts that we consider part of our identity.

During the 19th century scholars, intellectuals, writers and artists worked intensely in order to create a common language, a common story and a common culture. By defining seminal events, heroes, national symbols, they transformed what used to be kingdoms and subjects into nations and citizens.

As will subsequently be seen, there are two opposing conceptions regarding the process of nation building, and many European nations are based on one or the other (Nevola, 2007). According to the subjective idea of nation, which lays its foundations in the French Revolution, the roots of national feeling lie in the willingness of citizens to adhere to a common process. According to the objective idea of nation, rooted in the Germanic Romantic Movement, membership is determined by cultural and ethnic criteria. Both processes, however, were part of modern nation-building, forged during the 19th century, which consists in constructing a rich legacy of memories through a common language, common history and a common culture.

2.1.1 THE FORMATION OF NATIONAL LANGUAGES

Nowadays it seems natural to identify a nation with a language, which is generally peculiar to that territory. However, during the Enlightenment the European linguistic landscape was completely different from today's, and state borders rarely coincided with linguistic borders. Within the same state or even within the same city, people used different languages depending on their rank or communication context. French, for example, was the language of culture, spoken in almost all the courts of Europe; on the contrary, in the kingdom of France, the number of inhabitants who did not speak it was very high. Most of the inhabitants of the French countryside and suburbs spoke dialects that existed only in oral form. This situation changed with the French

Revolution: if before 1789 the use of French (or "the language of the king") was considered by most French people as a mere symbol of high rank and prestige, after the date French became the national language and speaking it was a duty for all citizens. From that moment on, the language became a symbol of a community that had become sovereign (Thiesse, 1999). For the first time, the language was associated with the nation. Language became an affair of state, because the state had to provide "the united and indivisible Republic" with a national language and make the people grow through education and knowledge of French. The very idea of "united and indivisible Republic", whose motto was *Fraternité, Liberté, Egalité*, was irreconcilable with the linguistic division and differences between the former provinces of the monarchy. The revolutionary class saw this fragmentation as an obstacle to the spread of their ideas and declared war on dialects. One of the most influential members of the ruling class, Abbot Henri-Baptiste Grégoire, published in 1794 a famous report entitled *Rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française.* In the report, he denounced the linguistic situation in the newborn French Republic that "with thirty different dialects", was still "a Tower of Babel", when in terms of freedom, instead, it excelled among other nations (Flaherty, 1987). For Grégoire, it was an intolerable paradox that only less than 3 million people, out of a population of 25 million, spoke the national language, French. The word "language" began to be used only with reference to French. Everything that was not French was called "feudal idiom".

Furthermore, also in the rest of Europe the homogenization of the language became an indispensable tool to make the nation a social and cultural whole. In some cases, it was a matter of generalizing the use of a pre-existing language, either among the elites (the case of Germany) or the people (as happened in France); in other cases a written language already existed, but it was archaic, and had to be enriched and modernized, for example Italian: heirs of a stereotyped and discredited written language, the Italian writers of the first half of the century tried to reconcile a return to their prestigious origins with the revitalization of language through living speech, in this case the Tuscan language. In some other cases the language was even elaborated from scratch. Moreover, the promotion of the language was fundamental, too: cultural associations were created to finance the publication of newspapers and magazines in the newborn

national language and schools were opened where it was taught. Evidently, linguistic unification was achieved more quickly by the richer states, which could afford to finance a better and more widespread educational program.

2.1.2 HISTORY AND MYTHS

"The birth of the nation was undoubtedly a concrete historical process, but not a purely spontaneous phenomenon. In order to reinforce the fidelity of an abstract group, the nation, as previously the religious communities, needed rites, feasts, ceremonies and myths. In order to define itself and merge into a single, rigid entity, it needed a constant commitment to collective cultural activities and the creation of a unifying collective memory" (Sand, 2020). The founding myths, those in which the roots of national identity should be rooted, are to be sought in history or, starting from history, are to be invented, as Hobsbawm explains about traditions: "All invented traditions, in fact, where possible, resort to history as legitimation of action and cement of group cohesion. So that historians, even when they do so unconsciously, contribute to creating, demolishing and restructuring images of the past that do not belong only to the world of specialist investigation, but also to the public sphere of man as a political being" (Hobsbawm & Ranger, 2012).

The nations, at the beginning of the nineteenth century, did not yet have their own history. It was only later that patriotic and liberal intellectuals began to produce the first accounts tracing the past of each community through the centuries. National histories are fundamentally different from monarchical ones: unlike kings and kingdoms, a nation should never occupy the territories of its neighbors; instead, through the centuries, the members of that nation did nothing but resist oppressions and invasions, suffering endless sufferings, while defending with their heads held high the land inherited from their ancestors (Thiesse, 1999).

The two fundamental principles of national identity, namely primordial unity and continuity over the centuries, hide the diversity of regional histories and conflicts between the same regions or areas of the same nation. In contrast, all moments of strategic union between different people in the nation are given great importance. National history highlights events and exemplary figures that serve as examples for future challenges. It creates a collective memory, which is disseminated through the

school and the works of artists and writers. A clear example was the historical novel, which first appeared at the beginning of the 19th century at the hands of Walter Scott, used as a fundamental instrument for the spread of collective feeling towards national history through the identification of people in its characters. The novels of the Italian Risorgimento (published in the 1830s) also celebrated the resistance against foreign oppressors and glorified the resistance of northern Italian cities against the invasion of the Holy Roman Empire under the leadership of Frederick Barbarossa (Della Peruta, 1996). These novels helped to forge a sense of common identity among Italians even before the unification of the state in 1861.

The countless historical paintings of the 19th century had the same role: they were then reproduced or imitated as decorations in domestic objects, bringing national history into the homes of the population. With the development of modern cities, statues of the great men of the past became very common in squares and public places in cities.

2.1.3 HISTORICAL NATIONAL MONUMENTS

With the development of national history, a new element of the collective heritage emerged: the historical monument. Before the 19th century, in fact, the ancient buildings were defined only by their function and the owner could make his property what he wanted. Many Romanesque or Gothic churches, for example, were modernized according to current fashion. However, with the new concept of the nation that began to spread in the nineteenth century, a higher community right was imposed on the ancient buildings, which were considered related to the national historical identity. Many scholars, writers and artists devoted themselves to researching these national monuments to determine which ones deserved the devotion of the community. One example was Victor Hugo, who in 1831 published a historical novel entitled *Notre Dame de Paris*: in the book, the cathedral of Paris became a kind of hero, giving readers lessons in medieval history and Gothic architecture, which until then had been underestimated (Flaherty, 1987). A few years later, a Commission of Historic Monuments was officially established, whose aim was to catalogue the buildings that were to be preserved and/or renovated. At the same time, the German bourgeoisie was mobilized around a great challenge launched by some Rhineland

scholars: the restoration of Cologne Cathedral, which became a metaphor for the construction of German unity.

A national monument is a historical element that contains within it some crucial values that a given community publicly exposes, so that everyone can recognize themselves in those values, in those symbols or in that personality. Raising a monument is equally loaded with meaning. When you raise a monument, you do so on the assumption that the monument embodies a memory, an identity, a shared history. A model is presented. In the same way, the demolition of a monument is also an act loaded with meaning. It means that the values of the community have changed, and consequently the symbols must also change. The famous Bastille, symbol of the French Revolution, is an example of this: after the Bastille was taken, it was razed to the ground; a gigantic monument was demolished in order to show that the very meaning of the monument, i.e. the values of the *Ancient Regime*, was erased by the new values of the Revolution, i.e liberty, equality, fraternity. Another example is the popular revolt of students, workers and intellectuals against the communist regime that broke out in Budapest in 1956: one of the first images that went around the world is the demolition of the statue of Stalin. Thus, the problem with symbols, such as national buildings and statues, is the value that they enclose in themselves and what is the identity that, by maintaining the monument or tearing it down, a community wants to make public physically exposing the shared values.

The issue of national monuments has also come up for discussion again very recently, especially after the riots and protests of the *Black Lives Matter* movement triggered by the killing of an African American by an American law enforcement officer. Today, the demonstrations of the movement are targeting statues or symbols that can recall the disvalues of slavery, which nowadays are no longer part of the common heritage of the United States. That of tearing down these symbols is a gesture aimed at reaffirming that, with the end of the American Civil War in 1865, the disvalues of slavery and the inequality between whites and blacks have been replaced by democratic values. However, the *Black Lives Matte*r movement on this level has gone further: it no longer only targeted the symbols of pre-revolution South America, and therefore of racism and slavery, but it wanted to question any monument, of any

historical moment, of any personality (for example the statues depicting Cristopher Colombus) that does not correspond to all the current values of a democracy.

The question is therefore very topical: is it right to demolish historical monuments for a question of "coherence" with today's democratic values? Here, too, we will have to make a choice, deciding which is the legacy we want to be transmitted to us by a specific national monument. The statues of Christopher Columbus, for example, symbolize the discovery of America, an extremely important historical fact without which, perhaps, the USA would not exist today, not everything that happened after 1492. Just as the Edinburgh National Library, named after David Hume, should not change its name simply because Hume wrote to a friend in a letter to invest in a plantation (and therefore slave) company. What is the point of thinking that David Hume is not the most advanced symbol of the Enlightenment and, instead, seeking and criticizing small moments of his life with our modern, current criteria?

The solution could be to make memory work alongside history. Memory, in fact, is choice and is censorship, there are people to whom you do not have to erect statues or monuments, there are symbols and personalities that represent disvalues and cannot be part of a memory that is also the identity of a people. History, instead, does not need and should not censor anything.

2.1.4 THE INVENTION OF TRADITIONS

In the nineteenth century, the figure of the peasant became the representative key of every European nation. The peasants were perceived as a sort of living museum of national origins, given the link with the traditions of their ancestors and their intimate relationship with the national land. During the 1800s, ethnographic research multiplied, in order to reveal the authentic foundation of national cultures. The first scholars, at the end of the 18th century, claimed that the traditions were about to fade forever; finding them and rediscovering them became a patriotic goal. That's why the "invention of traditions" (a term coined by Eric Hobsbawm) or in any case their "improvement", played a crucial role in the construction of the different national folklores throughout the 19th century.

"Invented tradition" means a set of practices, generally governed by openly or tacitly accepted norms, and endowed with a ritual or symbolic nature, which aim to inculcate

certain repetitive values and norms of behavior in which continuity with the past is automatically implicit. In fact, where possible, they generally attempt to affirm their continuity with an appropriately selected historical past (Hobsbawm & Ranger, 2012). The historical past in which the new tradition is rooted does not need to be too far away, it does not need to be lost in the supposed mists of time. Even revolutions and progressive movements, by definition moments of rupture with the past, have their own past to defend, although this is abruptly interrupted at a certain date, 1789 for example. However, where reference is made to a certain historical past, it is a characteristic of "invented traditions" that the aspect of continuity is largely fictitious. In a nutshell, these are responses to situations that are not at all new, which take the form of references to ancient situations, or which construct a past precisely through almost obligatory repetitiveness.

The invention of a tradition occurs more frequently when a rapid transformation of society weakens or destroys the social models to which the "old" traditions were informed, producing new ones to which they are no longer applicable; or when the old traditions, their institutional careers and their promoters no longer prove to be adaptable and flexible enough, or are in any case eliminated: in short, when changes in supply or demand are large and rapid enough (Hobsbawm & Ranger, 2012). There are periods of history characterized by rapid changes, transformations and conflicts, in which traditions are born and established, destined to be transmitted between generations. The changes have been particularly significant over the last two hundred years; it is reasonable to assume, then, that it is during this period that the greatest number of instant formalizations of new traditions have accumulated. The birth of modern nations is a period characterized by the invention of many traditions: flags, hymns, festivals, celebrations of national heroes. These are the symbols through which an independent country proclaims its identity, its sovereignty; and as such they impose immediate respect and loyalty. In themselves, they reflect the entire ancestry, thought and culture of a nation (Thiesse, 1999).

Today, for example, when we think of the Scots we are reminded of their *kilts*, the tartan woven skirt that indicates with the colors and design the clan to which it belongs, and the bagpipes. Kilts and bagpipes are typical Scottish traditions, but it was not always so. These traditions were born in the late eighteenth century, when

Scotland had already become part of the United Kingdom with England: the need to invent a typical Scottish tradition was born from the desire to stand out from the English, to claim an identity.

2.2 THE IDEA OF NATION BEFORE THE FRENCH REVOLUTION

The determination of individual national identities with a more explicit political value was evident between the 16th and 18th centuries. At first the Protestant Reformation broke the universalism of the Catholic Church and led to the formation of "national Churches" more or less closely controlled by a sovereign. But even more important for the birth of the modern nation was the consolidation of some great territorial states in Western Europe: Spain, France, England. This strengthening occurred during the transition from the Middle Ages to the modern age, through long conflicts that fed an embryonic national feeling, such as Spain's struggle against the Ottoman Empire and the Hundred Years War (1337-1453) between France and England. In these countries the dynasties that held them progressively concentrated in their hands an ever-stronger power, reduced the influence exercised in the past by the nobility, created efficient bureaucracies and armies and started the unification of administrative and judicial systems (Palmer, 1940). In this way, the premises were laid for the formation - in a more or less long time - of a modern national consciousness, connected with a state that tended to present itself more and more as an expression of a community no longer made up of classes or "orders" (nobility, clergy, professional categories or social groups in their various articulations and forms of representation) but of a set of individuals who identified themselves in a state territory and in common origins and experiences. While in these "territorial nations" (as they were called) the feeling of their distinct physiognomy and identity already appeared widespread and strong in the mid-eighteenth century, in Italy, in the Germanic world and in the regions of Central Eastern Europe the birth of an auroral national consciousness was later and took a different path. In these countries a solid dynasty or another strong center of power capable of engaging in the construction of a unitary state was long lacking; therefore, the formation of an embryonic national identity was a long and difficult process, which was essentially based on the search for common historical, artistic and literary traditions. The feeling of a particular identity, then, began to take shape during the

18th century mainly through cultural work that aimed to reconstruct a set of specific roots of individual peoples, a collective heritage made up of language and literature, myths and monuments, historical traditions and customs, memories and common aspirations (Rigney, 2018). Alongside the "territorial" nations, with an accentuated political connotation, "cultural" nations were thus delineated, that is, as communities distinct from one another by virtue of their culture and civil traditions.

In this context in the last decades of the eighteenth century, through a variety of paths, was concretized the modern idea of nation, destined to become an element that would influence with an extraordinary evocative power on the next historical course.

The first organic reflections on the theme of the modernly conceived nation are those, elaborated towards the end of the 18th century, by Jean-Jacques Rousseau and Johann Gottfried Herder. The thought of Rousseau is characterized by his resolute hostility towards Enlightenment rationalism. In his view, the Enlightenment, with the pretension of framing the world and life within the leveling rules of an abstract and universalistic reason, did not take into account the specificity of the human person and stifled essential values for the individual, such as fantasy and feeling (Melzer, 1996). Animated by this pre-Romantic sensibility attentive to the value of particularity, Rousseau also outlined the idea of an individuality of the various nations, understood as cultural and spiritual entities formed in the long course of history, which would have to remain faithful to their own constitutive characters and promote the love of the homeland, reacting to a cosmopolitanism that negates national elements. "It is the national institutions - he wrote - that form the genius, character, tastes and customs of a people, that make it that particular people and not another, that inspire that ardent self-love founded on roots that are impossible to eradicate" (Rousseau, 1985).

Rousseau's conception of the nation was also marked by a strong political emphasis with revolutionary implications (Melzer, 1996). In fact, his nation referred to the "general will", to the desire of the community for action aimed at the constitution of a state based on popular sovereignty and democratic freedoms, essential for national existence.

In Herder, compared to Rousseau, the sense and the political value of the nation are less strong, but that of national individuality is much more alive. For the German thinker, nations are a natural and fundamental element in the history of mankind.

Nations, endowed with their own spirit, appeared to him cemented by cohesive factors such as traditions, customs, territory, religion and above all language, considered as the expression of a people's character and way of thinking (Iggers, 2014). According to Herder, therefore, beyond the human nature common to all, there was a natural and primordial diversity of nations, permanent entities with their own life for centuries or millennia, whatever the political and state events that had involved them. Every nation, he said, "has its own riches and properties of spirit, character and country"; a spiritual and cultural heritage to be jealously defended and preserved.

Herder also rejected race as the constitutive moment of the nation, because races, given their mixture, did not seem to him a valid criterion of national identification. However, within his cultural and spiritual vision of the nation, an element of naturalistic and geographical-environmental type was insinuated, that of the lineage, linked to a common soil and blood. And this ethnic connotation had a much greater importance in the reflections of a younger compatriot of Herder, the German scholar Friedrich Schlegel, one of the greatest representatives of Romanticism. In his *Philosophical Lessons*, Schlegel insisted in fact on the central importance of the single ethnic lineage, linked by bloodline, so that the more distant and primordial were its origins, the more excellent the nation-strains excelled: "The more ancient and pure is the strain, the more the customs are; and the more the customs are, the greater and truer the attachment to them, the greater will be the nation" (Iggers, 2014).

As can be seen, between the end of the eighteenth century and the beginning of the nineteenth century, conceptions of the nation were emerging in which various and fluid elements were present - in an interweaving that was often difficult to untangle - whose coexistence made it very difficult to arrive at a univocal definition of the national entity. Alongside the "political" and "voluntarist" vision (i.e. based on the political participation of free citizens and the desire to recognize themselves in the nation) developed by Rousseau, Herder's essentially spiritual vision and Schlegel's vision emerged, which instead gave ample space to bloodline and commonality and purity of blood.

2.3 THE IDEA OF NATION IN THE 19TH CENTURY

According to historians, the process that led to the formation and consolidation of nation states in Europe, and which occupied much of the nineteenth century, was triggered by the French Revolution. The formulation of the ideas of nation on which we dwelt was a reflection at the level of theoretical elaboration of the growing importance that the element of nationality had begun to assume in the concrete historical-political reality (first among the intellectual elites and then in ever larger portions of the various populations), as evidenced by the events related to the French Revolution. In France from 1789 onward, the nation's path accelerated abruptly, and proceeded in the direction of a resolute characterization in a political sense (Fehér, 1990). In the revolutionary years, in fact, the idea that the essential requirement of a nation was not blood, but political citizenship became general: that is, popular sovereignty, the commonality of civil and political rights (with systems of government centered on elected parliaments) extended and guaranteed to all citizens of a nation. And already in the Declaration of Human and Citizen's Rights of August 1789, the axiom that precisely "in the nation resides the principle of all sovereignty" was stated, thus establishing the identification between "nation" and "people". As a result of this politicization of the concept of nation, the principle of nationality also became increasingly important: that is, the need for all nations with their own distinctive identity and individuality to recognize themselves in a nation state that was the common homeland for the universality of its citizens.

Revolutionary France, the great Nation par excellence, carried out assiduous propaganda in favor of the ideas of freedom and nationality; and in the European countries where the republican armies arrived, groups of patriots or *Jacobins* (as the defenders of the ideals of 1789 were called) became apostles of the new principles, often paying with their lives for their generous impulses. The circulation of national and liberal idealities was instead hindered by Napoleon, who intended to reshape Europe by subordinating its peoples to the expansionist hegemony of imperial France. But Napoleon's intrusions into the lives of the peoples incorporated into the empire or becoming part of its sphere of influence stimulated by reaction the national feeling of the peoples who felt their identity threatened and ended up strengthening the idea of nation, which increasingly coincided with that of homeland (Fehér, 1990). In this

regard, it is enough to recall the bloody national war conducted by the Spanish against the French from 1808 to 1814 and the deep enthusiasm aroused in Germany in 1813-1814 by the watchword of the War of Liberation, i.e. the call for a united German nation in the fight against Napoleon.

The idea of nation was the very heart of that ideological revolution that went so far as to transfer political sovereignty from the hands of the monarch to the people and transform a hitherto feudal society into one composed of social groups, each with its own duties and rights. The nation, since then, was no longer the property of the king or the emperor, to whom powers could be delegated for its administration, but existed independently of the ruler. The nation was a community of people who shared the same origins, a kind of large family, which therefore implied the principles of equality and brotherhood among its members (Thiesse, 1999). And it was precisely by proclaiming these principles of brotherhood and political equality, even between the richest Parisian aristocrat and the poorest of the peasants, that the idea of nation overthrew the *Ancient Régime*: at the beginning of the 19th century, people no longer had to identify themselves according to their social status, their belonging to a local community or their religion (making cultural heterogeneity a characteristic of pre-Revolution reigns), people had to be able to identify themselves through a common heritage. This heritage had to be developed in such a way as to give people the feeling of belonging to the same, large, family or nation.

In some cases this feeling of national belonging was affirmed within territorial states that had already defined their borders for some time (this is the case of France and Spain); in other cases it was a matter of bringing together in a single state structure different territories that had never had any political unity between them (Italy and Germany, for example); another type of state was finally born from the disintegration of the great multinational empires, such as the Austrian and Ottoman ones, which survived until the twentieth century. (Fossati, 2011). Whatever the process followed, the basis of everything was the national sentiment, which developed along two fundamental strands: the objective theory, i.e. the existence of the nation state is linked to objective factors, which therefore transcend the human will, and the subjective theory which, on the contrary, highlights the will of individuals in organizing themselves politically.

2.3.1 THE SUBJECTIVE IDEA OF NATION

The first strand is the one that took place in the civic, voluntary and inclusive nations, characteristics of Western Europe (especially France). This vision sees the roots of national feeling in the willingness of citizens to adhere to a common project. People choose to belong to a nation through a "social contract" between free citizens and political leaders. It is the model of the nation as *demos* (i.e. of people as political identity).

One of the effects of the French Revolution was to take sovereignty from the king and to attribute it to the people which constituted the nation. "The principle of all sovereignty resides essentially in the Nation": this is what article 3 of the Declaration of Human and Citizen Rights of August 26, 1789, reaffirmed in the constitution of September 3, 1791, proclaims. In few words, the French constituents assigned to the concept of nation the political centrality that will be fully theorized in the nineteenth century and placed at the foundation of the wars of independence and national unity. People who recognize their individuality with respect to that of other peoples, proclaim themselves a nation and, as a nation, claim to be governed in accordance with their specificity, within the territorial boundaries that belong to them (Fehér, 1990). The nation is born by an act of conscience and will: the conscience of a geographical, linguistic and cultural individuality and the will to translate this individuality into an autonomous and independent political subject.

According to the French historian Ernest Renan, in fact, the nation is "a soul, a spiritual principle. Two things that are in fact the same constitute this soul, this spiritual principle. One is the common possession of a rich legacy of memories; the other is the current consent, the desire to live together, the will to continue to honor the heritage that we received undivided" (Renan, 1882). In other words, according to the historian, the nation is a great solidarity; it presupposes a past but is summed up in the present through consensus, the desire to continue to live together. "The existence of a nation is a daily plebiscite" (Renan, 1882). This famous formulation emphasizes the conscious adherence to a project that citizens propose to realize together; the nation is rooted in the present more than in the obsessive search for a common past. Renan's intervention was in dispute with the annexation of Alsace-

Lorraine in 1870 by Germany, on the grounds that German was the most widespread language in that region. Anyway, according to Renan, national membership has an elective basis and cannot be imposed on the basis of other criteria (such as the language) that contradict the free choice of citizens (Fossati, 2011).

In Italy many exponents of the *Risorgimento* supported the same idea of the French Revolution: for the men of *Risorgimento*, especially Mazzini and Cavour, the idea of nation was indissolubly linked to that of freedom. It was the desire to adapt the institutions of the Savoy Piedmont to the liberal models of the most advanced states (France and England) that pushed Cavour to the anti-Austrian commitment and, finally, to the awareness that freedom and independence could not be permanently achieved otherwise than through the realization of national unity. For Mazzini, national unity was inconceivable without the affirmation of political freedom: independence is emancipation from foreign tyranny and freedom is emancipation from domestic tyranny. Again, to Mazzini we owe the most peremptory proclamation of the intimate bond existing between the nation and humanity, which - in concrete political terms - is identified with Europe. He did not consider it an end but a means to achieve a wider union: "nations are the individuals of humanity, just as citizens are the individuals of nations" (Fossati, 2001). The birth of nations would have allowed that of the Young Europe of Peoples, destined to replace the old dynastic Europe. Mazzini was echoed by Pasquale Stanislao Mancini in a famous speech pronounced at the University of Turin on January 22nd 1851, for whom the principle of nationality is that of political freedom applied to territorial constituencies, the transfer of the principles of the French Revolution to relations between people and people. Recognizing the principle of nationality means recognizing inviolability and protection to all nations, coexistence and agreement of the free nationalities of all peoples.

2.3.2 THE OBJECTIVE IDEA OF NATION

The second strand, that of the objective idea of nation, is the one that lays the foundations in the common elements that would form a nation long before it is given political expression. These elements are language, religion, natural territory, cultural traditions, but also some physical and psychological characteristics of the person that

refer to the concept of "race". This approach, which identifies the foundations of the nation in a bond rooted in tradition, territory and history, is typical of organic nations, based on *blut und boden* (blood and earth). It is the model of the nation as *ethnos* (i.e. as lineage) and has found its most vigorous application in German nationalism.

If the nineteenth-century model of nation - even in its various declinations - established itself in Italy and France as the self-awareness of a people of its individuality, eager to live governed by free institutions in peaceful relations with other nations, this was not the case in Germany. German thought, in the furrow traced by Schiller and Herder, identified in blood, soil and language the reason for its national identity. Those naturalistic elements, which Mazzini considered only the "visible form" of the nation, destined to remain similar to "corpse without motion and breath of creation" if deprived of the self-awareness of the nation and its intimate bond with humanity (Della Peruta, 1996), were regarded as constitutive elements of the nation and the full legitimacy of the "unconscious nation" was theorized.

It is the organicist concept of *Volk*, i.e. people (the German version of that collective entity that the French and Italians call nation), that is the main mythology that supports the long and troubled process of building a unitary state in Germany. Since the *Volk* is a historically living organism, an ethical-spiritual unity that makes itself visible and finds its complete form of existence in the State, becoming aware of the cultural unity of the nation, it means at the same time thinking about its political-institutional projection, its realization as a State. Liberalism and nationalism are, in Germany, the closely connected faces of a movement that assumes the people (organically conceived) and the State (which is its main expression) as the immanent teleology of the historical movement. In this context, the people-State is the main reference quantity and liberalism itself takes on idiomatic contours that differentiate it considerably from the models developed in France and Great Britain: it is a liberalism that considers freedom, property and individual rights important, but does not intend them as attributes of the subject as such, but as subjective juridical conditions matured in the course of a long historical process and inseparable from the link that connects the individual to the people-State (Iggers, 2014). It is the belonging that founds the rights and defines the individual identity; and the body of reference is now a typically post-revolutionary nation; a symbol of identity capable of mobilizing individual and

collective energies and a symbol of legitimization of a new and unitary state political order.

The deeper we get into the nineteenth century, the more the nation assumes a dominant position in the sky of jus-political concepts everywhere. It is around the nation that the representation of both the individual and the political system gravitates. It is on belonging to the nation that the ethical-political identity of the individual depends more and more closely and at the same time the nation is the noun capable of legitimizing the state by making it the indispensable means of the duties and rights of the subjects.

The second nineteenth century saw the triumph, in the West, of the nation-state. The State has now become the obligatory form of the political system, proposing itself as the legal-institutional incarnation of the national community. The genesis of the nation-state has presented very different characteristics according to the historical-social contexts taken into consideration, but the final result is a relatively unitary political form (Latham, 1997). Of course, the different political systems (German, Italian, French and so on) remain, even in the second half of the 19th century, specific and different political-institutional realities: however, it is not undue to assume them as different concretizations of a homogeneous ideal model or type, characterized by the mutual implication of the national ideology and the political form of the state.

2.4 THE IDEA OF NATION IN THE 20TH CENTURY

Until the 1870s, the idea of nation, closely associated with the principle of freedom, had been one of the strong points of European liberalism and democracy, and had exercised great effectiveness on the events that led to the formation of the unitary state. But after the formation of the German Reich the concept of the nation underwent a radical transformation, which resulted in the birth of modern nationalisms. The propagandists and theorists of the new nationalist currents, more and more consistent and combative since the last decades of the nineteenth century, replaced the essentially spiritual and cultural connotations of the nation as it was understood by Herder or Mazzini, those of a nation that based its identity on biological and naturalistic factors, such as "earth and blood". This change of perspective also implied a resolute rejection of liberal-democratic values and humanitarian and universalistic principles aimed at

achieving a brotherhood of peoples (Iggers, 2014). In fact, the nationalists became supporters of an exasperated and degenerate patriotism, of a sacred selfishness, which wanted a strong, centralized state, animated by the will of power, ready to exercise its dominion over other peoples and nations through conquest, force and aggression.

The Germanic conception of the nation, understood as the highest expression of selfish particularism, prevailed throughout Europe for over half a century, from the last twenty years of the nineteenth century to the end of the Second World War. It prevailed, despite its universalist roots and the evolution of absolute states in a liberal and democratic sense, and even though the dominant ideologies - Christianity, liberalism and socialism - were also characterized by a strong universal inspiration. It was affirmed because better than any other it lent itself to the construction of an ideology capable of satisfying the new demands that the industrial revolution was creating.

This turbid and exasperated vision of domestic and international politics, which led to contempt and fanatical intolerance towards the foreigner, also made extensive use of racist theories that had begun to circulate since the mid-nineteenth century in France, England and especially in Germany. Racism had had one of its main precursors in the French diplomat Arthur de Gobinau who, in 1853-1855 published a ponderous essay on the inequality of human races, fruit of a disorderly and amateurish historical and anthropological erudition. Gobineau, animated by a pessimistic vision of the destinies of humanity (condemned to a degrading decline due to the spread of revolutionary and democratic principles in 1789), affirmed the existence of a hierarchy among races and assigned the primacy to the "white species" and in particular to the Aryan Germans (Iggers, 2014).

The aberrant ideas of racism were the cornerstone of the doctrine of National Socialism elaborated by Hitler in the years immediately following the Great War and exposed in the work *Mein Kampf*, published in 1925. For Hitler, Styria was an eternal struggle between the blond Aryan race, embodied by the Germans, biologically superior and culturally creative, and the inferior races, beginning with the Jews. The Führer of Nazism was pathologically obsessed with the Jews, considered corruptors, exploiters of the peoples who hosted them, and responsible for every form of moral decomposition: from liberalism to democracy, from pacifism to Bolshevik

communism, incarnation of the Jewish race, which was to be eradicated from the body of the German people by expulsion, deportation and then - as will happen during the Second World War - by physical extermination.

Nationalist ideologies had a very strong influence in the development of imperialism, which took the form above all of colonial expansion and conquest, at a much faster pace and on a much larger scale than in the past, so much so that by 1914 the most powerful states had completed the division of the world into spheres of direct or indirect domination. But nationalism, with its exasperated patriotism and its aggressiveness against other peoples and countries, was also one of the triggering causes of the First World War, because it contributed to create a climate of tension and hatred destined to provoke an immense bloodbath.

The peace treaties that in 1919-1920 established the new world order after the end of the Great War tried to take into account to a greater or lesser extent the existence of the various nationalities and the right of peoples to self-decision. But the arrangement established in Paris, despite having eliminated some of the hotbeds of nationalistic and nationalistic tension existing in Europe before 1914, left open the questions posed by the existence of national minorities within the various states, old and new (Della Peruta, 1991). The situation was particularly complicated in Central and Eastern Europe, because here the ethnic intertwining hindered the formation of cohesive states in terms of nationality. The difficulty to arrive at geopolitical arrangements able to make states and nations coincide explains the development in the defeated countries of strong trends for the revision of the treaties of 1919-1920 and the periodic bursting of nationalistic claims. These were particularly virulent in Germany, where they facilitated in 1933 the coming to power of Hitler and the consolidation of the Nazi regime, responsible for the outbreak of the Second World War.

In the war humanity showed the worst of itself: to the practiced extermination of the Jewish people and the atrocities carried out by the Germans on the Eastern front was answered, on the Allied side, with the bombings in Germany and Japan and, on the Soviet side, with the savagery carried out in the conquered territories. The idea of nation, born to assure to the people freedom and peaceful coexistence, was transformed in the German hand in the ideology that considered the adversary a genetically inferior enemy, that one had the duty to destroy, and in the Calvinist hand

in the conviction that the wars between nations were struggles between reprobates and elected ones, in which the enemy was the incarnation of Evil (Della Peruta, 1991).

In general, the nineteenth century has been defined "the century of nationality", while the twentieth century, especially in its first part, seems to be dominated by another type of interest, having been crossed by movements and agitated by ferments of a wider dimension. Socialism, liberalism and fascism express well, on an ideological level, the historical-social reality that has been imposing itself in the century just ended, projected on an international rather than national and local level. In reality, nationalism has never completely disappeared, but it has changed its skin, camouflaging and integrating itself into the new historical-political context, and even playing, as some people claim, a role of liberation or, at least, of restraint with respect to the excesses and devastation produced by those totalitarian or totalizing movements (Redner, 2017). The outcome of the conflicts, produced by these ideologies, and the socio-economic evolution of Western society have led to a "globalized" world, where every aspect of human life is so interconnected that it can only be governed by supranational organisms, of which it is possible to note in recent years the proliferation and strengthening, albeit among many resistances, of their ability to intervene.

The emergence of globalization, according to many scholars and observers, should lead to the formation of a global culture in which the system based on the existence of states based on the idea of nationhood should be overcome in order to give rise to supranational aggregations of states. And in this regard, the model of Europe is sometimes proposed, where many states have long since embarked on the path that should lead to a supranational federation that is strongly integrated on the political and economic level.

As far as Europe is concerned, in spite of the progress made towards integration, the idea of Europe has not yet taken deep roots in the collective mentality, in the conscience of the populations it does not have the immediacy and importance proper to the individual historical national identities. And, always in Europe, after the crisis of the USSR, which between 1989 and 1991 caused its disintegration and the birth of the Commonwealth of Independent States (CIS), there has been the proliferation of ethnic conflicts in the former Soviet peripheral territories (Tajikistan, Azerbaijan, Armenia, Chechnya, etc.). The fall of the communist regimes was also followed by

real civil wars in Albania and Yugoslavia, where after the proclamation of the independence of Slovenia and Croatia, bloody conflicts were ignited, with deportations of populations - the so-called ethnic cleansing - and massacres. And all this while bitter national tensions continued to occur in Northern Ireland and the Basque Country, in Spain. In essence, within the European Union, national interests are able to validly counter any attempt to make Europe something more and different than a large common market.

2.5 THE BIRTH OF THE EUROPEAN UNION AS A RESPONSE TO NATIONALISM(S)

The idea of a united Europe is a very old idea. The concept of a single European state has repeatedly been the subject of reflection by philosophers, such as Kant, who, in 1795, wrote in his *Perpetual Peace* that "international law must be founded on a federalism of free states; by writers, like Victor Hugo, who gave his famous speech about the United States of Europe on the stage of the Paris Peace Congress in 1849, saying "a day will come when man will see these two immense sets, the United States of America and the United States of Europe"; and by politicians, such as Giuseppe Mazzini, who declared that the new epoch is destined to organize a Europe of peoples, as independent as their internal mission, associated with a common purpose.

However, it has always been a difficult idea to put into practice, since, for many centuries, the differences between the states that make up Europe have been stronger than the basic bonds that have always united them. In particular, in the 20th century, Europe found itself facing two world conflicts that razed it to the ground. It is no coincidence that the push towards the creation of a united Europe, what is now called the European Union, was born from the negative outcome of the two World Wars, particularly after the catastrophes and tragic events of the Second, such as the spread of Nazi-Fascist ideas, the hunt for Jews, the Holocaust, deportations, the physical elimination of homosexuals and nomads, the first weapons of mass destruction and the use of the atomic bomb. It is estimated that the dead were more than 71 million, including 48 million civilians. Europe was devastated, both materially and morally (Dinan, 2014): economic crisis, political instability, cities completely razed to the ground to rebuild, mass emigration of the population. The "old continent" had lost all

its power and all its prestige, giving way to the United States and the Soviet Union. After the Second World War, Europe, in fact, was turning into a pawn in the hands of the two new world powers, which had even divided it into two blocks, the eastern and western ones, even going so far as to erect a wall to divide Berlin. It was therefore clear that Europe needed a new process of integrated unification, based on international agreements between the states of the old continent, capable of turning the black page of the nationalisms of the past twenty years. The idea of European integration was thus born to avoid useless wars and bloodshed in the name of a state or a race, in the hope of preserving peace and defeating suspicion towards the foreigner. An idea that proved to be the right way, ensuring, for more than half a century, peace and progress to the increasingly numerous states that are part of the community.

The first steps of integration began in the 40s, when Altiero Spinelli, then prisoner of Nazi Germany, wrote the *Ventotene Manifesto*, officially entitled *For a Free and United Europe*, considered the first manifesto of a united Europe that aspired to the creation of a federal Europe, once the war was over.

Subsequently, several personalities, intellectuals, politicians and representatives of civil society, called the Founding Fathers (including Konrad Adenauer, Robert Schumann, Jean Monnet and Alcide de Gasperi) gave great impetus to European integration. The first, great, step came at the end of the 40's and beginning of the 50's, in particular on May 9, 1950, with the Schumann Declaration. The French Foreign Minister made a speech in which he convinced every one of the need to start creating a common market for coal and steel: he launched the idea of a community that was not the usual international organization bound by unanimous voting, but a concrete community, specialized in a limited sector and endowed with supranational powers, in which nations should be willing to gradually renounce portions of their national sovereignty for the common good. Thus, in 1951, in Paris, the Treaty that constituted the European Coal and Steel Community (ECSC) was signed. The primary will of the French minister was to share with the Germans the production of coal and steel, in order to stop fighting for the management of coal and steel resources, thus eliminating, essentially, one of the causes of war between the two countries. However, the arrival point for the French Foreign Minister was to form an economic union between the

European states, taking away some of their powers (although limited to the control of coal and steel) and entrusting their management to the supranational and independent High Authority, based in Luxembourg, which had the task of enforcing common rules for the production and trade of steel and coal. Thus, even though Schuman's project was mainly aimed at Germany, Italy, Luxembourg, Belgium and Holland also enthusiastically adhered to it (Dinan, 2014). For the very first time, six European states reached an agreement, hence kick-starting the integration process. The establishment of new unitary bodies, such as the High Authority, the Assembly, a Council of Ministers, a Court of Justice and an Advisory Committee helped to take a first concrete step towards the formation of an Economic Union of European states.

The enthusiasm aroused by the signing of the Treaty of Paris and, therefore, the constitution of the ECSC, led the six states, in particular France, to the conception of a project that went well beyond the economic field, whose objective was a military collaboration of the member states in order to create a European defense system. However, this idea never came to a material consolidation; in 1954, in fact, France and Italy did not sign the Treaty that would establish the European Defence Community (EDC).

After the failure of the EDC, the federalist thrusts weakened and the idea of continuing through the so-called "economic functionalism" matured; according to this theory, the progressive transfer of functions from nation states to supranational technical-administrative bodies would have caused political effects, bringing also the moment of decision (i.e., the political moment) at international level (Dinan, 2014). Thus, already in 1957, with the Treaty of Rome, the European Economic Community (EEC and EURATOM, the European Atomic Energy Community) were born, and hence the creation of a common market started. With the establishment of the EEC and the creation of the common market (based on the four freedoms of movement: of goods, people, services, capital), two fundamental objectives were achieved: the first, the transformation of the conditions of trade and production on the territory of its six member states; the second, a step towards a closer political unification of Europe. In particular, the signatories agreed to: to lay the foundations for an even closer union between the peoples of Europe; to ensure the economic and social progress of their countries through joint action to remove trade and other barriers between them; to

improve the living and working conditions of their citizens; to ensure balanced trade and fair competition; to reduce the economic and social gap between the various regions of the EEC; to gradually abolish restrictions linked to international trade through a common trade policy; to abide by the principles of the United Nations Charter; to unite their resources to preserve and strengthen peace and freedom and invite the other peoples of Europe to share this ideal by joining their efforts (Dinan, 2014).

The first twelve years after the signing of the Treaties of Rome were a sort of "transitional period": the Community endeavored to achieve all the priority objectives it had set itself by creating a common market in all economic sectors through the realization of the "four freedoms", the imposition of competition rules on States (control of aid granted with public funds) and especially on companies (fight against restrictive agreements on competition) and, at external borders, through the establishment of a common customs tariff.

From the 1970s until 2013, the process of enlargement continued; in parallel, therefore, to greater economic and political integration, the borders of the Communities were enlarged, culminating in 2013 with the entry of Croatia into the formation of a Europe of 28. In 2016 the United Kingdom voted for the exit and thus, to date, there are 27 member states.

The great internal market was completed with the abolition of border controls: this last point was clarified with the Schengen Agreement of June 14, 1985, a set of rules and provisions, integrated into the law of the European Union, by which the signatory states favored the free movement of citizens within the Schengen area, mainly by abolishing border controls, and encouraged greater judicial cooperation against organized crime, thus constituting a single system of control at the external borders. Today there are 26 Schengen signatory countries, of which 22 are members of the EU. Another important date for the integration process was February 7, 1992, when the Maastricht Treaty was signed and, with it, what until then had been referred to as the EEC became the European Union (EU) and incorporated the three historic Communities (EEC, ECSC and Euratom) based on three major "pillars":

- the policies provided for by the Treaties and the European institutions, aimed at promoting a balanced and sustainable development of economic activities,

good levels of employment, gender equality and economic and social cohesion;

- the Common Foreign and Security Policy;
- the cooperation in the field of justice and home affairs, including rules for border crossing, the fight against terrorism, judicial cooperation, the creation of a European police office, the fight against illegal immigration and the common policy on political asylum.

The Maastricht Treaty also entailed the broadening of the EU's action plan, in particular through the strengthening of regional and structural policies, which aimed to support the growth and economic development of the various regions of the EU. In addition, the "Maastricht convergence parameters" (i.e. the political rules and the economic and social parameters necessary to admit new states willing to join) were set. Moreover, there was the affirmation of the principle of subsidiarity, i.e. the principle that the EU intervenes and acts only when the objectives set cannot be satisfactorily achieved by the member states; in other words, the competence to act in the various matters lies with the member states, however, when they fail to achieve the objectives set, only then the EU can intervene, being therefore subsidiary to the member states. The Maastricht Treaty also gave new impetus to economic and monetary union, which led to the introduction of the Euro in 2001 on international markets and in 2002 as the current currency in the countries of the so-called Eurozone. In 1997, the Treaty of Amsterdam marked an important step towards reducing the democratic gap: the powers of Parliament were enlarged, making it an increasingly successful co-legislator. In addition, it also made changes to the second and third pillars, allowing for greater regulatory harmonization among the members, in matters such as justice, foreign policy and common security. It was also institutionalized the power to proceed, among the states that intend to pursue certain common policies, even in the absence of the will of all members.

There was then the proclamation of the Nice Charter in 2001, the Charter of Fundamental Rights of the EU (CFR), and later, in 2004, there was the attempt to adopt a European constitution. The Treaty establishing a Constitution for Europe was composed of 448 articles, plus a preamble, divided into four parts: fundamental provisions, Charter of Fundamental Rights, internal and external policies, general and

final provisions. What this Treaty provided for was more competences for the European Parliament, a more authoritative Council, the establishment of a European Union Foreign Minister, a clearer division of competences. However, the Treaty never became part of the EU rules, since it was not ratified by all states.

But precisely from this "failure" began the work of the Lisbon Treaty, which took the articles of the Treaty establishing a Constitution for Europe as a point of reference, aiming to recover its most significant contents (Dinan, 2014). Thus, on December 13, 2007, the twenty-seven heads of state and government of the EU signed the new amending treaty, which came into force on December 1, 2009, after being ratified by all member state parliaments. The Treaty of Lisbon took up most of the institutional and political reforms provided for by the Constitution, but presented in a different form: the Constitutional Treaty was to repeal the founding treaties of the EU and replace them with a single text called the Constitution for Europe; on the other hand, the Treaty of Lisbon did not replace the founding treaties, but only amended them. This formal change did not imply legal consequences, it was only symbolic and political: the idea of a "constitutionalisation" of Europe was abandoned and European law continued to be regulated by international treaties.

The fundamental changes made by the Lisbon Treaty were, therefore, five:

- the reform of the institutions and improvement of the EU decision-making process: it modified the rules concerning the composition of the Commission, the European Parliament, the Committee of the Regions and the European Economic and Social Committee; it created two new functions in the institutional architecture, the President of the Council and the High Representative for Foreign Affairs and Security Policy; it abolished the old pillar structure and proceeded to a new division of competences between the EU and the member states.

- The strengthening of the democratic dimension of the EU: it increased the powers of the European Parliament and gave a more important role to national parliaments within the EU.

- The reform of the EU's internal policies: it strengthened the Union's competences for border control, asylum and immigration, judicial cooperation in civil and criminal matters, and police cooperation.

- The strengthening the EU's external policy: the Union acquired the legal personality necessary to negotiate and be a contracting party in international treaties; the common security and defence policy became the subject of a section in the founding treaties.

- It gave legal value to the Nice Charter. Thanks to the CFR, today, the status of European citizen allows individuals to enjoy rights that they could not enjoy as simple national citizens. The movement of people, guaranteed by the right of movement and residence within the Union, together with the right not to be discriminated against on the basis of citizenship, sex, race or ethnic origin, religion, disability, age or sexual orientation, contribute to make each of us European citizens, not only formally but also substantially (Prutsch, 2017), to move closer and closer to the creation of a "European identity".

2.5.1 THE FORGE OF EUROPEAN IDENTITY

If it is true that the process of unification of Europe under the same flag started even at the end of the 50s, it is also true that today, despite half a century in which treaties have been ratified, monetary unification, free trade of goods and people, the adoption of a Charter of Fundamental Rights have been reached, the widespread feeling is still one of hostility towards the Union and its bodies. There is a lack of a sense of belonging, a lack of a common identity in which to recognize oneself, and this is revealed by studies and statistics which, although they reveal some small progress, reveal the difficulty for citizens to recognize themselves as Europeans, in the deepest sense of the term.

Eurobarometer, in the report published in June 2019, in the section investigating citizens' trust in the Union, reveals that 46% respondents tend not to trust Europe itself, compared to 44% who respond positively. They are joined by 10% of undecided people who do not know what to answer. Overall, in the EU the pro-European feeling has increased by 2%, reaching the result "best since June 2014", as emphasized by the European Commission. Nonetheless, the absolute majority of respondents in favor of the European Union is registered in 18 out of 27 member states (Lithuania, Denmark, Estonia, Luxembourg, Finland, Portugal, Sweden, Malta, Bulgaria, Hungary, Cyprus, Ireland, the Netherlands, Poland, Austria, Romania, Belgium and Latvia), plus the

relative majorities of Germany (48% confident against 42% untrusting) and Spain (47% against 47%)[4].

If we take into analysis the case of Italy, we can find it in the group of Eurosceptics. Italians still do not trust the EU. The newly published Eurobarometer survey sees the share of Italian skeptics at 55%. Only France (56%) and Greece (66%) have a more skeptical share of the population than Italy. If the volume of those who claim to have confidence in the European Union increases by 1% (to 37%), it is because it has finally formulated its own opinion among those who said they "do not know". Thus, the undecided are those who have changed the Italian data. Those who were skeptical remained skeptical. So much so that, in 2019, to the question "does your voice in Europe count?", the answer was "yes" for less Italian people than British, who were struggling with the abandonment of the EU (38% against 41%)[5].

Looking only at the founding countries of what is today the EU, in three of these six countries public opinion no longer believes in the integration project. This is the case of Italy, as seen. But it is even more the French case. In France the convinced pro-Europeans are even less than in Italy (33%), and those who tend not to trust are more than in Italy (56%). And in Germany, as seen, Germans are divided, and the absolute majority is not there. Today only the members of the Benelux (Belgium, the Netherlands, Luxembourg) still enjoy the support of their public opinion[6].

Another analysis of European public opinion regarding the feeling of belonging, shows even more problematic results: 46% of European citizens consider only their nationality, which thus remains the first element of the identity of Europeans; on the contrary, only 3% of respondents consider themselves to be European only. Some admitted the juxtaposition of national identity and European identity, but, for 41% of them, it is the national identity that prevails over the European one, while only 7% of them consider themselves first European and then of their own nationality.

But what is the cause of this feeling of not belonging? One could put all the blame on the euro, which according to many has done nothing but increase the cost of living,

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[4] For further information and graphics consult *Spring 2019 Standard Eurobarometer 91* at https://ec.europa.eu/commfrontoffice/publicopinionmobile/index.cfm/Survey/getSurveyDetail/surveyKy/2253

[5] Ibid.

[6] Ibid.

but it would be all too trivial. In fact, so far there is an increasing demand to enter the eurozone (e.g. Romania) while leaving the EU there was only Brexit, which had nothing to do with the coin.

The real cause has been, and still is, the defense of one's own "national collective identity". People are convinced that the development of a European identity would be followed by an inevitable loss of the values and the characteristic (and characterizing) elements of each state's national identity. But this is not the case. Not necessarily, in fact, a European identity would replace the national ones, as most people tend to believe; it would be, more than anything else, an inevitable integration of the latter (Prutsch, 2017). National identities are therefore not obstacles to the formation of a European identity, but on the contrary they are a first act.

It should also be considered that there are still ongoing processes that even lead to further fragmentation within the same countries, think in the past of the split between the Czech Republic and Slovakia, the recent Spanish tensions for the independence of Catalonia - not to mention the Basque Country - and the never-quenched Italian instincts of secessionism in the north.

Despite this, "European identity can in any case mean nothing more than unity in the plurality of nations" (Habermas, 2001) which, paraphrased, is nothing more than the very motto of the European Union, that is, "unity in diversity". Thinking European means recognizing the multiplicity and diversity of Europe, perhaps even being proud of it: united in diversity, united despite diversity.

From the historical reconnaissance addressed in the previous paragraphs, it is clear that contemporary Europe is a Europe of difference and diversity and that its distinctive character is the extraordinary complexity of cultural heritage, in which different realities coexist in both conflicting and cooperative forms (trade and war) without losing their specificity (Martinelli, 2011). In the new Europe the plurality of cultures - which for centuries contributed to a semi-permanent state of local and general wars - can today be considered a common good and a fundamental resource for the development of a free and prosperous community, peacefully diversified internally and open to the outside world. In any case, identification with Europe and the EU continues to be an ongoing process and is relatively weak compared to national identities. There is still no precise outline of how to proceed with the elaboration of a

supranational identity, especially in view of its exclusive of most national forms of identification.

As already pointed out, identity is a composite and constructivist concept and its application to communities of the size of a nation requires a certain difficulty; if we then examine identity on a transnational or supranational level, in our case on a European level, the task becomes even more challenging, given the national, linguistic and cultural diversity of the continent (Prutsch, 2017). As with other forms of collective identity, the fundamental questions are on what basis European identity is based and what is (or should be) the substance of that identity. In this regard, there are two basic conceptions:

1. Europe as a cultural community of shared values, which constitutes a "cultural identity";

2. Europe as a political community of shared democratic practices, which constitutes a "political identity" (Cerutti & Rudolph, 2001).

According to the first concept, the assumption is that any community is based on cultural foundations and that cultural identity rests on a common language, culture, history. Applied to the EU, this theory would support the thesis that the success of European integration lies in "creating" an identity rooted in history and based on shared values; values that would serve as a starting point and guidelines for political action. However, this conception of identity has been the subject of several criticisms; according to scholars, in fact, it is not applicable to the European Union, as it is typical of nation states, which build their inclusiveness through the exclusion of others. Johan Gottlieb Fichte, in his *Addresses to the German Nation*, pronounced under Napoleon's occupation, defines the traditional foundations of national identity, based on a homogeneity of language, religion, racial origins, character, history, culture, customs. This essentialist vision of collective identity is profoundly inclusive and exalted: "If the specificities were to be erased in favor of mixtures in which nations mingle with others, [...] everything would dissolve into a single and inseparable corruption" (Fichte, 2008). It is clear that this concept identity is inconceivable for the European Union, which promotes the values of tolerance and whose motto is "unity in diversity", neglecting and conflicting with the realities of the EU such as transnational and multicultural entity. In addition, it was precisely the extremity of this conception

of identity, based on nationalistic and particularistic assumptions, to smooth the way to the violence and genocides of the twentieth century, thus rendering it unusable as a model for the future.

The concept of Europe as a political community, on the other hand, focuses on "political identity" and sees the need to separate culture from politics to allow the development of a pan-European sense of belonging (Prutsch, 2017). The most widespread concept of European political identity is that of *Verfassungspatriotismus* (constitutional patriotism), coined in 1979 by the German philosopher Dolf Sternberg, according to which people should develop an attachment to the basic political values of liberal democracy, the rule of law and the open economy rather than national culture: the emphasis is therefore placed on the aggregating capacity of democracy rather than the ethnic identification of individuals, an indispensable element in modern states, characterized by the coexistence of several linguistic, cultural and group identities (Tonkiss, 2013). After all, certain values transcend European diversity, in fact the Charter of Fundamental Rights of the European Union proclaims, since the preamble: "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law"[7]. Given this sharing of values common, the "constitutional patriotism" is therefore able to supplant the panoply of identity national, forming the common denominator that unites European citizens in their diversity, even exalting their multiculturalism. However, even the concept of *Verfassungspatriotismus* as the basis of a European political identity has raised several criticisms, especially with regard to the abstractness of the idea and the lack of attractiveness: a political identity based largely on rational-democratic institutions and practices would be completely lacking in emotional commitment to the political body. In conclusion, it is clear that a combination of both political and cultural commitments will be crucial (Prutsch, 2017). Cultural conceptions of European identity resemble too much the traditional model of nationalism, which builds inclusiveness through the

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[7] For the whole text consult *Charter of Fundamental Rights of the European Union* at
https://www.europarl.europa.eu/charter/pdf/text_en.pdf

exclusion of the other, going against the motto "united in diversity"; on the other hand, the alternative of an exclusively political identity is all too weak to ensure the emergence of a shared trans-European sense and concepts such as the one of "constitutional patriotism" appear overly abstract and elitist. What can be advanced is, therefore, the proposal of a European identity, of a "Europeanness", both at a cultural and a political level: Europe, in fact, has both identifiable elements of a political community, such as EU bodies and institutions, and cultural elements, such as the common influence of Greco-Roman philosophy.

Shared values and attitudes are a resource to build political union, increasingly necessary in the globalized world, but with full awareness that the European identity is not only the result of a common historical path and a shared memory, but also the construction of a future project; it does not consist in the passive preservation of past values, but in the realization tension towards political unity that requires a daily commitment of citizens and European institutions. The European project, born from the will to put an end to the secular European civil wars and from the perception of common economic interests, has developed thanks to the sharing of ethical principles and social norms (civil rights, rule of law, freedom to undertake, welfare state, critical science, interculturality) and can be defined as the attempt to achieve unity through diversity, denying the old belief that everything that is different is also hostile and renouncing to build identity on the opposition between "us" and "them" (Martinelli, 2011). European identity is made possible by the common cultural heritage that innervates the different European *ethnos*, but it can only develop through the growth of a European *demos* defined in terms of a set of shared rights and duties, capable of consolidating the bonds of citizenship within freely chosen democratic institutions.

2.5.2 EU POLICIES: FROM THE COPENHAGEN DECLARATION TO THE "EUROPE FOR CITIZENS" PROGRAMME

Starting from the founding Treaties, the European political *elites* have always tried to add to the existing national collective identities a transnational level of Europeanness, aiming to create a sense of belonging to Europe that transcends the economic and institutional dimension (Prutsch, 2017).

In 1973 the first important step towards a normative and official declaration of identity was taken, thanks to the Copenhagen Declaration on European identity: the nine countries then members of the European Community felt that the time had come to draw up a document European identity, which would allow for a clearer definition of their European identity as well. relationship with other countries in the world, their responsibilities and their role in the issues international. It was established to define this "identity" from a dynamic perspective, and with the intention to further strengthen it in the wake of the progress of European integration. Propose to define the European identity involved:

- to review the common heritage, special interests, the common specific obligations of the Nine and the state of the process of unification of the Community;
- to question the degree of cohesion already achieved by the Nine with respect to the rest of the world and the responsibilities deriving from this cohesion;
- to consider the dynamic character of European construction.

In the text of the Declaration it is clearly stated how the States, having taken note of the errors of the past - related to an excessive defense of one's own interests details - and committing to consider the variety of national cultures and the dynamism of identity European, would undertake to emphasize not only the common cultural elements, but also the values and the fundamental principles such as representative democracy, the rule of law, social justice and the respect for human rights, towards an even more cohesive united Europe. To date, the Copenhagen Declaration remains probably the most significant statement in favor of the European identity ever made by political circles, standing out for its prescriptivism and for being able to strongly explain the principle of unity versus diversity (Delanty, 2007).

Nevertheless, the failure of the project of a "Constitution for Europe" in 2005 was a clear sign of citizens' disappointment with the policies implemented by the *elite* of the European Union and underlined how the promotion of a common identity was the key to continue the project of European integration. It was also clear that it was necessary to start again with a programme "within the reach of the citizens" gradually moving towards a bottom-up model of identity building. Thus, with the Decision n. 1904/2006/EC of the European Parliament and of the Council, dated 12 December

2006, the new programme "Europe for Citizens 2007-2013" was launched[8], aimed at the promotion of active European citizenship through a series of calls for proposals, having predefined annual deadlines, in order to involve citizens and different categories of entities - such as municipalities, provinces, nonprofit organizations, voluntary associations, universities, etc. - in the process of European integration. The main objectives of the program were, therefore, the following:

- the construction of a more tangible Europe for its citizens, united and enriched by its cultural diversity;

- the development, starting from the valorization of the pluralism of community realities, of an identity European unity based on common historical and cultural experiences;

- the creation of a sense of belonging to the European Union based on the recognition of shared values;

- the exchange of experiences between citizens from different geographical areas, in order to promote the intercultural dialogue, thus contributing to the valorization of cultural and linguistic diversity.

The Programme, therefore, aimed to encourage a participatory reflection on the founding values, such as democracy, freedom, solidarity, respect for human rights, and the future of the European Union and, consequently, to strengthen active European citizenship and civic engagement, considered the key elements to promote (European) identity (Delanty, 2007). The emphasis, this time, was therefore placed on citizens, called to participate directly in the (political and other) affairs of the Union: Europe for Citizens was able to change the general vision of Europe, promoting it as a political community made up of responsible and active citizens, starting with the common cultural elements.

This change, not by chance, coincided with the increase in legal and practical importance given to the concept of "European citizenship" (formally established by the Maastricht Treaty): the Lisbon Treaty, in fact, introduced a new form of public participation of European citizens through the citizens' initiative, which since 1 April

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[8] For the whole text consult *Decision no 1904/2006/ec of the European Parliament and of the Council of 12 December 2006 establishing for the period 2007 to 2013 the programme 'Europe for Citizens' to promote active European citizenship* at
https://ec.europa.eu/citizenship/pdf/lexuriserv_en.pdf

2012, allows one million citizens from at least a quarter of EU Member States to ask the European Commission to propose legislation in one of its areas of competence. Together with the Europe for Citizens programme, the citizens' initiative has not only marked the assimilation of the political-theoretical concept of "constitutional patriotism" (Prutsch, 2017) by the European Union, but also the gradual transition to a bottom-up identity building, conceived as something born at the level of the individual citizen through his or her concrete actions[9].

The positive results obtained by the Programme thanks to the focus on the citizen and citizenship, have pushed the EU to keep this issue as a central element of the EU identity policies of the last decade, as demonstrated by the new generation of the programme "Europe for Citizens 2014-2010", approved by the Council of the European Union in April 2014 (Regulation no. 390/2014)[10]. In the framework of the "global intent to bring the Union closer to its citizens" (Article 1), in addition to the elements of continuity with the 2007-2013 edition, the main objectives are two:

- to raise citizens' awareness about historical memory, common values and goals of the Union;
- to stimulate democratic and civic participation at European level.

The aim is, once again, not only to strengthen the participative quality of the processes that lead to political decisions, thus promoting political identification, but also to make tribute to European historical memory, giving importance to cultural identity.

The question that, then, arises spontaneously is: the approach currently adopted by the EU for to promote the "European memory" is suitable for the strengthening of the common cultural identity in Europe?

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[9] For an impact assessment of the "Europe for Citizens" programme for the period 2007-2013 consult *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of theRregions on the implementation, results and overall assessment of the "Europe for Citizens" programme 2007-2013* at https://ec.europa.eu/citizenship/pdf/evaluationreportefc2007-2013_en.pdf

[10] For the whole text consult *Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020* at https://eur-lex.europa.eu/legal-content

2.5.3 THE EUROPEAN IDENTITY BETWEEN HISTORICAL MEMORY AND FUTURE

Very often, and erroneously, the concept of "historical memory" is superimposed on that of "collective memory"; it is therefore necessary to emphasize the distinction, before continuing.

Collective memories are based on the past in order to build and legitimize the identities of individual groups, be they social, political, ethnic or religious; such memories are conflicting with those of adverse groups and more generally tend to exclude others. Historical memory, defined by Maurice Halbwachs as "an ocean in which all partial memories flow" (Halbwachs, 2020), arises when a relationship of "critical appropriation" is established with the past, which consists not in insisting on one's own roots, but on the contrary in assuming awareness above all of the darkest aspects of one's own history and taking charge of it (Habermas, 1987). Collective memories, therefore, tend to project a particular vision of the past onto the present, while historical memory presupposes a more distant, critical and self-critical view of the past: it is only in this way that the past can help us understand the world in which we live, and it is from here that the European Union intends to start again for the construction of a European identity. As previously mentioned, in a supranational context the perception of the past is extremely heterogeneous, given the presence of multiple cultural, social or educational divisions, and it is also difficult to identify historical moments or events that can be considered common.

Nevertheless, since the 1990s, the European Union has always endeavored to keep history alive, thanks to various initiatives designed to raise awareness of issues such as the Holocaust and the crimes of Stalinist Russia[11]. The emphasis that the European historical commemoration dedicates to totalitarianism continues to be present in the already mentioned program "Europe for Citizens 2014-2020", for which one of the main objectives is to promote reflection on the causes of totalitarian regimes in modern European history, to foster tolerance, intercultural dialogue and peace as

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[11] An outline of the EU's agenda for promoting historical memory and an overview of the instruments available for the reminiscence of totalitarian regimes in Europe was provided in the Commission's report to the European Parliament an the Council on *The memory of the crimes committed by totalitarian regimes in Europe*. Consult at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0783&from=FR

means to overcome the past and build the future. At the same time, however, concentrating Europe's efforts for transnational historical commemoration in the Holocaust and National Socialism, as well as in Stalinism, is problematic for two reasons:

1. promotes a vision of partial history that proposes a distinction exclusively between "white" and "black", which sees Europe's dark past as the only logical alternative to its promising future. This teleological and simplistic vision not only does not do justice to the richness and complexity of European history and puts aside other crucial aspects, such as colonialism, but also prevents a better-informed understanding of the process of European integration;

2. elevating National Socialism and Stalinism to the category of negative myths from which the Union originated, reduces interests to a critical examination of the stereotypes and untouchable aspects of one's own national history.

Therefore, an attempt is made to defend a critical "European culture of commemoration" instead of a unique and imposed "culture of commemoration" (Prutsch, 2017) ; to do this, knowledge is needed that generates a "reformulation of the past" in a critical form and on a national scale, based on common European principles and values. Thus, among the fundamental requirements of this "culture of commemoration" we find:

- to approach Europe's past from the basis of the main European values, such as tolerance and democracy;

- to create a space for open debate that stimulates mutual understanding and peace, both internally and between the various European countries;

- to base the judgments of the past solely on the analysis of "historical facts", thus renouncing the notion of "historical truth".

This strategy would seem appropriate for the multiplicity of historical memories existing in Europe and, at the same time, would encourage their nation examinations through a point of view common transnational.

Although the European Union cannot carry out the "reformulation of the past" (Prutsch, 2017), which is a responsibility of the member states, it can still actively promote and support national initiatives in this regard. The Union cannot limit itself to using the power of persuasion to put pressure on States to act, but must also have

recourse to existing European programs, which include Europe for the citizens, through which it is possible to finance historical or commemorative multinational projects, and the Erasmus+ program, aimed at fostering transactional exchange among young people at a cultural level, training, work and volunteer work. Such programs, in full swing, are seeing not only a growing interest among young people and the European and national institutions, but also an enormous economic effort to strengthen the tools that lead young people (and not only), even in the cultural diversity of origin, to integrate themselves in a transactional community as the foundation of the European citizen.

CHAPTER III

THE PROTECTION OF NATIONAL CONSTITUTIONAL IDENTITIES

CONTENTS: 3.0 United in diversity – 3.1 The advent of national identity: from Maastricht to Amsterdam – 3.2 A new context: from Nice to Lisbon – 3.3 National and constitutional identity on the jurisprudence of the constitutional courts – 3.3.1 Pre-Lisbon case-law – 3.3.2 Post-Lisbon case-law - 3.4 National and constitutional identity in the jurisprudence of the Court of Justice – 3.4.1 Pre-Lisbon case-law – 3.4.2 Post-Lisbon case-law – 3.5 Conclusions

3.0 UNITED IN DIVERSITY

The term "national identity" (or "national constitutional identity") has been used so frequently in recent times that it seems to have replaced the term "sovereignty" as a pivot in the debate on the relationship between national and European law, and on the limits of European integration. However, both terms express the same sense of national "we", a feeling of community that seems to be challenged by the process of European integration. The notion of national identity, in a sense, has been vastly utilized as a counterpoint to the notion of integration. The idea of national traditions and diversity among member states, which must be respected and protected, therefore seems to counterbalance the idea of an even more united European Union (EU), of integration, unification and convergence of principles. Nonetheless, at the basis of the founding principles of the European Union there has always been the desire to safeguard the cultural differences and national traditions of each of the member states. European integration has never been understood as "absorption" of states and their national traditions and cultures; on the contrary, throughout its history, it seems to have been a point of balance between what states do - and are - in common and what remains national.

No matter what, the process of European integration is necessarily based on a certain degree of tolerance, acceptance and trust between member states. It may seem obvious, but it is not. In fact, at first sight, the values mentioned above were not taken as an objective of European integration; after all, the primary intention was to

overcome the antagonism and centuries of wars and rivalry between France and Germany through the creation of economic knots and, only afterwards, those knots would create the need to tolerate each other so much that even the idea of attacking the neighbor became impossible. This goal has certainly been successfully achieved: no century of the previous millennium has seen such a long period of time without wars between Western European countries. Moreover, the outbreak of a war between two member states of the Union is completely unimaginable today. This does not mean that the states have weakened, on the contrary. The EU is a community created and entrusted to the states that unite it, despite many developments that have made states intentionally or involuntarily less important within the enterprise of European integration. The process of European integration has been taken much further than just industrial cooperation and economic integration. The advanced forms of economic integration, once poured into the monetary sector, require political coordination and cooperation which, in turn, require tolerance, acceptance and trust between states that must coordinate their policies and take European decisions on the matter. By now there is cooperation in sensitive areas such as criminal law, prosecution of public crimes, foreign policy and defense policy, and in these matters states as political entities (rather than as economic facilitators) are cardinal institutions in the European project. None of these states can be set aside if they are to be part of the integration project in these areas. If we want to come to terms with the demands of European integration, we must recognize that the states that have joined the European Union are "others" to each other. They are "others" to each other both in what is different from each other and in what they have in common (Besselink, 2010). States are political orders and legal orders. The acceptance and trust of other states inevitably implies also the acceptance and trust in these other political and legal orders and cultures. This is a crucial starting point to understand the challenges and risks when integration into the European Union is faced.

The idea of protecting cultural traditions and national diversity, indeed, is not new. In fact, diversity has always been one of the strongest core values of the European Union, so much so that it has also become its motto. *In varietate concordia*, (translated from latin into "United in diversity"), was adopted in 2000 with the aim of emphasizing that, through the EU, Europeans are united in working together for peace and

prosperity and that the different cultures, traditions and languages in the Union are nothing more than a positive asset for the continent. The motto, therefore, embraces multiculturalism as an objective of European integration, but also implies that unity and community are a fundamental value for the economic and political development of the Union.

The Treaties of Maastricht and Amsterdam marked a turning point in the process of European integration in the direction of increasing its political and constitutional component. The Treaty on European Union, in the version following Amsterdam, declares that the Union is based on principles that can be defined as constitutional (art. 6), raising them to conditions of access for countries aspiring to become members (art. 49), providing a sanctioning mechanism for Member States that do not comply with them (art. 7), and considering them characterizing elements of the Union's action towards the outside (art. 11)[12]. Additionally, the TEU mentions the existence of "constitutional traditions common to the member states" (art. 6)[13], almost suggesting that they are based precisely on those fundamental principles that underlie the Union. Alongside these provisions, indicative of a sort of constitutional homogeneity (Atripaldi & Miccù, 2003) of the European Union, the TEU, since its first version, guarantees respect for national identity. The so-called *national identity clause* made its first entry in 1992 with the article F of the Maastricht Treaty; this codified form endured the posterior treaty revisions (with a small change, including the detachment from any reference to democratic principles, operated by the Treaty of Amsterdam) until the unfortunate Constitutional Treaty added the constitutional angle. The Lisbon Treaty replicated this last version obliging the EU to respect the national identities of the Member States intrinsic to their essential political and constitutional structures, giving birth, consequently, to the concept of national constitutional identity (Saiz Arnaiz & Alcoberro Llivina, 2013). Thus, enunciated at first briefly, then in more detail, the *identity clause* is revealed from the outset as a potential antithesis to the provisions on the homogeneity of the European Union, giving rise to several questions about its actual scope and suitability to interfere with the integration process.

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[12] For the whole text consult *Consolidated version of the Treaty on European Union (97/c 340/02)* at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997M/TXT&from=EL

[13] Ibid.

3.1 THE ADVENT OF NATIONAL IDENTITY: FROM MAASTRICHT TO AMSTERDAM

The concept of identity was introduced into Community acts in 1992, with the Maastricht Treaty, both as a "national identity" and as a "European identity". The concept of European identity referred to the Union acting on the international scene as a single collective actor, instead of individual member states acting on their own behalf[14]. The other reference to the concept of identity introduced in the Maastricht Treaty was the concept of national identity. Article F(1) TEU reads "The Union shall respect the national identities of its member states, whose system of government are founded on the principles of democracy"[15], placing it as a condition for the respect of the national identity (but, even before, of the EU membership itself) of the Member States their recognition in a democratic system of government.

However, it is not clear what the real objective of this short provision was, nor what exactly it wanted to express. According to Monica Claes, Professor of European Comparative Constitutional Law at Maastricht University, several circumstances may explain why the drafters thought it was important to include it. First of all, the newly born European Union was seen as an important step in the direction of an even closer union (Claes, 2013). By adding new policy areas, and thus confirming the transformation of the Union from a mere economic organization to a real political union with competences in areas such as political cooperation and foreign policy, justice and home affairs, the Maastricht Treaty might have been seen as a threat by the member states; they were scared, in fact, of losing a substantial part of their sovereignty at a time when, after the fall of the Berlin Wall, some European states had just regained possession of it. Furthermore, the feeling of the European public was changing, and Euroscepticism was growing, with many complaints about the transformation of the European Union into a superpower threatening the national

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[14] Article 2 of the TEU stated that "to assert its identity [of the Union] on the international scene, in particular through the implementation of a Common Foreign and Security Policy, including the progressive framing of the Common Defence Policy", should have been one of the objectives of the Union. For the whole text consult *Treaty on European Union* at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf

[15] Ibid.

identities, national interests and cultural diversity of the member states (Hooghe & Marks, 2007). Moreover, the Treaty established a common European citizenship, which would complement the national citizenships of the Member States; the ultimate aim of this European citizenship, with a view to bringing Europe closer to its citizens, was to create a European identity among the European peoples. In addition, the Treaty confirmed the objective of an ever-closer union among the peoples of Europe. Consequently, it is likely that the drafters of the Maastricht Treaty thought that this step towards greater integration should be counterbalanced by a reference to national identities, which the Union would continue to respect (Claes, 2013) and protect.

It should be specified, however, that the Maastricht Treaty referred to the concept of national identity from a political rather than a cultural point of view, and in fact it was closely linked to the democratic system of government of the member states. Moreover, the newly established identity was that of the Member States, not of their peoples, nations or citizens (Claes, 2013). Again, it had to be clear to everyone that the objective was to preserve the uniqueness and independence of the member states and to confirm that the European Union would not automatically become a federal union by absorbing the states.

In any case, also due to the fact that the relevant provision F was not justiciable (Claes, 2013), the provision never assumed legal value. It served more symbolic and political functions, as advocated by Monica Claes. In the years following the approval of the EU Treaty, European jurisprudence did not comment much on the "identity clause". The only case in which Article F(1) played a role in the case-law was concerned with the preservation of Luxemburg's cultural identity, and not, therefore, in the context of the democratic systems of government of the Member States. In Case C-473/93 *Commission v Luxembourg* [1996] ECR I-03207[16], the Luxembourg government, by imposing Luxembourg citizenship as a requirement for access to various sectors of the civil service, was accused of violating Article 48 of the EC Treaty and Regulation 1612/68, both on the free movement of workers. Luxembourg referred in its defense to par. 4 of the same art. 48, which excludes from the scope of operation of the rule jobs in the public administration and, seeming to adhere in part to the thesis of the

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[16] For the whole text consult *Case C-473/93 Commission of the European Communities v Grand Duchy of Luxembourg* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0473

"cultural dimension" of the concept of national identity, emphasized the peculiarity of the teaching sector, in the provision of which only the citizens of the Grand Duchy are considered capable of transmitting the traditional and constitutional values of the country, taking into account its peculiar characteristics. Therefore, Luxembourg tried to give an interpretation of national identity by recognizing it in a linguistic-traditional sphere which, however, had significant legal implications not only on the national system but also on the European one, going against one of the rights of citizenship. The Court held that the measures ordered by Luxembourg were contrary to Article 48 in that national identity, protected by the Treaty, could be safeguarded by less restrictive measures than by a general exclusion of nationals from other Member States (for example, by providing that nationals of other Member States have access to public employment provided that they meet the same requirements as Luxembourg nationals, including linguistic knowledge).

The Treaty of Amsterdam renumbered and revised the provision; in fact, it graphically breaks the hendyadis between national identity and the democratic system. The paragraph n. 1 of art. F (then art. 6) is in fact expressly dedicated to the founding principles of the Union, defined common to the Member States, while at n. 3 only the statement on the respect of national identity remains ("The Union shall respect the national identities of its Member States"). The inclusion of the reference to the common principles and values was to be seen as a reflection of the on-going constitutionalisation of the European Union, that is "the injection of the principles of constitutionalism at EU level" (Claes, 2013). Moreover, the Union was preparing for the accession of former Soviet countries, and needed to make the requirements for membership explicit, in terms of respect for the values of constitutionalism such as the values of democracy, the rule of law and the respect of fundamental rights. Finally, the reference to these founding values common to all states fitted in the faith that the expression of common values would have helped to consolidate a common sense of belonging and a European identity, and would have contributed to a deeper identification of citizens with the EU.

However, the reference to those common European values and national identities continued to be quite anonymous, a statement that seemed to simply repeat the obvious and ubiquitous consideration underlying European integration, i.e. that the

EU and its member states respect the values of constitutionalism, that the EU does not plan to absorb national identities, and that unity cohabits with diversity.

3.2 A NEW CONTEXT: FROM NICE TO LISBON

With the evolution of the treaties, the identity clause also underwent a partial transformation. In the preamble of the Nice Charter, immediately after the enunciation of the values on which the Union is based, it is stated that "the Union contributes to the maintenance and development of these common values, while respecting the diversity of the cultures and traditions of the peoples of Europe, the national identity of the Member States and the organisation of their public authorities at national, regional and local level"[17]. The aforementioned provision, although included in the preamble of an act whose effectiveness at the time was different from that of the Treaties, was significant since it mentioned national identity as a *tertium genus,* with respect to both the cultural dimension (which precedes it in the list) and the legal-political dimension (which follows it), without, however, resolving the question of its real meaning. This seemed to happen with the Constitutional Treaty, in which the concept of national identity finds a more complete definition, having been moved to a separate Article I-5, entitled "The Relations between the Union and Member States". The text read: "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"[18]. What appeared new here, in Article I-5, compared to its predecessors, was the reference to the equality of member states, their essential state functions, as well as the specification of national identities as "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government"[19]. However, the reference to national identities found in the Constitutional Treaty is to

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[17] For the whole text consult *Charter of Fundamental Rights of the European Union (2000/C 364/01)* at https://www.europarl.europa.eu/charter/pdf/text_en.pdf

[18] For the whole text consult *Treaty establishing a Constitution for Europe (2004/C 310/1)* at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2004%3A310%3ATOC

[19] Ibid

the institutional characteristics of the member states and not to cultural identities, language, religion and cultural traditions; in this light, the provision is nothing more than a confirmation of the realities of the existing relationship between the Union and the Member States (Claes, 2013), and it just repeats the promise that the Union would never interfere with the national institutional structure.

The principle of respect for national identities is therefore closely linked to the principle of "equality between member states", which is reminiscent of the principle of sovereign equality under international law and confirms that the EU remains a Union of States. The same applies to the second sentence, which says that the Union respects the "essential State functions" of the member states, and mentions three of them: ensuring territorial integrity, maintaining law and order and safeguarding national security. The goal of the provision was to bring clarity to the core elements of national identity and statehood, as well as to more clearly delineate competences between member states and the Union (Guastaferro, 2012).

In the context of the European Constitution, the "identity clause" also acquires a very precise meaning in that it immediately precedes the "supremacy clause" referred to in the following art. I-6, underlining that the prevalence of European law must stop before the supreme principles of the constitutional orders of the member states.

The Lisbon Treaty reproduces article I-5 of the Constitutional Treaty in article 4(2), adding: "In particular, national security remains the sole responsibility of each Member State"[20], but does not mention article I-6. The primacy provision has been deleted from the corpus of the Treaty and it has been downgraded to Declaration 17 to the Treaty, which confirms the "well settled case-law of the Court of Justice". Although the supremacy clause is not taken up in the terms expressed by the Constitution, the identity clause is maintained in the same broad formula provided therein, as a bulwark of national prerogatives but also of the process of European integration, as evidenced by the decision not to accept the amendments that proposed the reference to sovereignty (Von Bogdandy & Schill, 2011).

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[20] For the whole text consult *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)* at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2007%3A306%3ATOC

The new wording of art. 4 takes on considerable importance in the design of relations between the Union and the States, not only because it declines the clause of national identities by rooting it in the "fundamental, political and constitutional structure" of the States, including territorial decentralization, but also because it places alongside it the limit of the "essential functions of the State", identifying them as the safeguarding of territorial integrity, the maintenance of public order and the protection of national security, the latter being particularly accentuated. From a dichotomous perspective, the clause confirms its role as a limit to the applicability of EU law (Bilancia & D'Amico, 2009); from a perspective of integration and not of mere opposition between the domestic and European legal systems, it sanctions the overcoming of the principle of hierarchy and the consequent absolute supremacy of EU law over that of the member states, preparing the system for interaction between the different interpreters of the law (Bilancia & D'Amico, 2009). The identity clause of Article 4(2) TEU not only calls for respect for national constitutional identity, but is understood as allowing domestic constitutional courts to invoke, under certain circumstances, constitutional limits on the primacy of EU law.

In this light, Article 4(2) TEU has been interpreted in two different but complementary ways. First, it has been read as safeguarding constitutional singularities, i.e. protecting the specific constitutional elements of a particular member state. From this point of view, the purpose of article 4(2) would be to guarantee constitutional singularities against the primacy principle, precisely because such singularities would define the true essence of each member state. Thus, Article 4(2) would protect those elements that reflect the differences between member states in such a way as to prevent them from being swept away by the unifying force of European integration. On the other hand, the second interpretation takes a different direction: Article 4(2) would not defend and safeguard the differentiating constitutional elements of member states, Article 4(2) would instead protect the basic constitutional elements of member states. Thus, it is not important whether those basic elements are unique or shared by the states, what is important is that European integration should not undermine the basic structures and values embraced by member states at the constitutional level (Von Bogdandy & Schill, 2011).

Here we are faced with two sides of the same coin, one national and one supranational: article 4(2) TEU on the one hand and the limits to European integration set by national constitutions on the other. Article 4, which "opens" the European system to the national systems, can in fact be read as a specular rule to the European clauses contained in the Constitutions of many Member States, which instead open the constitutional system to Europe (Burgorgue-Larsen, 2011). The new wording of art. 4(2) TEU, however, still does not definitively solve the problem of the meaning of national identity and which elements, ascribable to the "fundamental structure", can actually be included, thus giving rise to two further questions: does national identity coincide with constitutional identity? And, if so, which is the competent body to identify its contents? As seen in chapter 1, on the first question, some scholars seem to consider the two concepts exchangeable, even using the expressions "national identity" and "constitutional identity" as synonyms. Others, however, maintain that the two identities do not coincide insofar as they are expressions of two different systems, the national identity of the European one and the constitutional identity of the national one. According to others, again, national identity would contain constitutional identity. Constitutional identity can in fact be considered as the set of those constitutional principles that constitute a limit both to European integration and to constitutional revision, finding expression in the so-called counter-limits. Its determination is left to the national Courts and can therefore present aspects of clear differentiation between one Member State and another (Jamieson, 2002). National identity, on the other hand, is a European concept. Its constituent elements do not necessarily coincide with the principles expressed by the Constitution but can also be derived from case law and the Treaties (Martin, 2012). It can be assumed that it includes the essential functions of the State, as per Art. 4(2) TEU, but it is not excluded that it also includes other aspects, provided that they can be ascribed to a minimum common European denominator. On the basis of this reading, constitutional identity and national identity would seem more reasonably two distinct and only partially overlapping sets rather than perfectly coinciding or concentric.

As far as the second question is concerned, i.e. which body is competent to pronounce on this matter, the answer again changes depending on whether the two identities are considered overlapping or not. If it is accepted that the national identity coincides with

the constitutional identity, its interpretation should be reserved exclusively to the national courts. This, however, would be a *vulnus* to European integration because, despite the presence of many values common to member states, to which article 2 TEU refers, the content of this identity can vary from one country to another (Von Bogdandy & Schill, 2012) and European law would be limited before all the elements that national judges want to define as proper to the identity of their country. If, on the other hand, one accepts the thesis of the divergence between the two concepts, the determination of national identity, as a European concept, should then fall to the body that is institutionally the interpreter of European law (Von Bogdandy & Schill), namely the Court of Justice. Even this choice, however, if made exclusively, would be reductive, since, as already mentioned, national judges are the best connoisseurs of the constituent elements of the identity, whether constitutional or national, of the State to which they belong. The majority doctrine is therefore in agreement in identifying the true interpreter of national identity in the dialogue between the Courts. The Court of Justice is undoubtedly the subject called upon to pronounce on the national identity referred to in Article 4(2), as this is mentioned in the Treaty, but its activity must benefit from the valuable contribution of national jurisprudence (Claes, 2013).

Both types of rules (national and European) create what Pedro Cruz Villalón has described as a "reciprocal meta-constitutionality" (Villalón, 2004), i.e., a balanced confluence of two different constitutional orders (EU order and national order). This confluence is achievable thanks to similar mandates in both orders concerning the intensity and content of the European integration process (Saiz Arnaiz & Alcoberro Llivina, 2013), especially regarding its limits.

European Union law, in essence, would enjoy a sort of primacy, but with reservation, by virtue of which its primacy over the law of the Member States should stop in front of the supreme principles enshrined in their constitutional charters. In art. 4.2 TEU, that is, there would be a real overcoming of the "absolute primacy" (sustained for years, in a pretextual way, by the jurisprudence of the Court of Luxembourg), and a contextual incorporation at the highest normative level - that of the Treaties - of the jurisprudence of national constitutional courts which have allowed limitations of state sovereignty in favor of the EU only on condition that their own fundamental principles and inviolable rights were not violated (Guastaferro, 2011).

Starting from this premises however, the positions of the doctrine have then substantially diverged, giving rise, in short, to two different interpretative reconstructions. On the one hand, in fact, there are those who have argued that, in this way, the principles and fundamental rights of member states would no longer be configured merely as a limit set by their constitutional systems to be opposed to supranational law, but would have become a limit which operates from within the European legal system itself (Groppi, 2006) and, therefore, through the reference to the constitutional structure, the European legal system would have recognized for the first time the theory of counter-limits (Vecchio, 2012), realizing, in fact, their Europeanization. On the other hand, there are those according to whom only apparently "the question of the counter-limits could be said to have been resolved by reason of Articles 4(2) and 6(3) of the Treaty on European Union, which would have incorporated the counter-limits into European Union law, transforming them from external counter-limits into simple internal limits (of the Union order)" (Luciani, 2016). This reconstruction, according to this doctrine, would represent nothing more than "a clumsy attempt to neutralize the counter-limits, which, once they were really absorbed within the European Union system, could be easily administered by its institutions, Court of Justice in the lead" (Luciani, 2016), which would entail a real distortion of the theory of the counter-limits because "the system against which the counter-limit is erected (...) would claim to be the manager, with blatant *contradictio in adiecto*" (Luciani, 2016).

3.3 NATIONAL AND CONSTITUTIONAL IDENTITY IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURTS

3.3.1 PRE-LISBON CASE-LAW

The clause of respect for the national identity of Member States, understood as that minimum core of their constitutional law which Community legislation cannot violate, was developed in national constitutional jurisprudence well before its introduction into the Treaties. In fact, the pronouncements of some Constitutional Courts are well known which, recalling the existence of a *domain reservé* of national identity and, above all, of constitutional identity - even if sometimes differently denominated - and of the values underlying it, have in fact marked important stages

in the process of European integration, affixing to it the already mentioned counter-limits.

It is the case of the well-known *Solange I*[21] ("as long as") judgment. In May 1974, the German Constitutional Court handed down a judgment that raised several questions in the then EEC. The *Bundesverfassungsgericht* ruled on a question of legitimacy raised by the Frankfurt Court, in relation to certain provisions of a Community regulation: it stated that it felt authorized to revise the compatibility of secondary law of the EEC with the German fundamental rights "as long as" Community law did not have a catalogue of human rights, adopted by a Parliament, which was corresponding with the level of protection provided by the fundamental rights under the German Basic Law. In this decision, after reaffirming that Community law did not form part of the national legal system, nor could it be brought under international law, the Court of Karlsruhe stated that it was a peculiar system that "emanates from autonomous sources of law", and added that the mutual autonomy and independence of the Community system and the German system meant that neither the Community judge with regard to German law, nor the Constitutional Court with regard to Community law, could rule on it. The German Constitutional Court acted under the impression that the judges of the Court of Justice were only interested in the smooth operation of the common market without even considering human rights. As a matter of fact, at that time, the Community Treaties did not contain any provision making human rights part of the Community legal order, and the Court had not yet recognized human rights as an unwritten element of that order. Even though the decision was outlined in broad terms, talking generally about the identity of the Basic Law as the constitution of the Federal Republic of Germany, "it was essentially confined to human rights as one of the main components of that identity" (Tomuschat, 2014).

Thirty years later, the Spanish *Tribunal Constitucional*, in its decision on the Treaty Establishing a Constitution for Europe, highlighted that the EU constitution was founded on the respect for the national identity of the Member States together with their basic constitutional structures, and on the values that are established in the

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[21]Judgment of May 29, 1974, 37 BVerfGE 271, 14 Common Mkt. L.R. 540 (1974). Available at https://www.servat.unibe.ch/dfr/bv037271.html

foundation of their constitution[22]. It, therefore, confirmed the existence of harmony between the European and Spanish basic values and read in the identity clause a evidence that an infringement of the fundamental principles of the Spanish constitution would at the same time add up to an infringement of Article I-5 of the Treaty, and thus would be invalid as a matter of EU law too (Claes, 2013).

A few years before the entry into force of the Lisbon Treaty, the notion of constitutional identity was raised in a decision concerning the constitutionality of a French law transposing a directive. In June 2006, the *Conseil constitutionnel* considered that the constitutional obligation to transpose a Directive finds its boundaries in a rule or principle "inherent to the constitutional identity of France, except when the constituting power consents theretho"[23]. The French Constitutional Council would only assume jurisdiction to examine the constitutionality of implementing Acts when French constitutional identity was at risk. In all other cases, where a tension was present among the French Constitution and the secondary EU law, the *Conseil Constitutionnel* would not implement its jurisdiction. "Furthermore, the reservation based on France's constitutional identity is not absolute: the constitutional legislature can consent to a deviation from France's constitutional identity" (Claes, 2013). For sure, it was not clear what exactly was covered by the concept of "France's constitutional identity"; nevertheless, the concept seems inspired by the mention to national identities included in the European Treaties. In essence, this sentence states that only if no equal standard existed at the European level – in which case the constitutional identity of France would be at risk- that the Council should review the constitutionality of the relevant decision. On this view, the notion of constitutional identity, therefore, is related to what is not shared with other States, i.e., to what is specific to France (Reestman, 2009).

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[22] Tribunal Constitucional (España), Declaración 1/2004 (13.12.2004). Available at: http://www.issirfa.cnr.it/tribunal-constitucional-espa-a-declaracion-1-2004-13-12-2004-055.html

[23] Décision n° 2006-540 DC du 27 juillet 2006. Available at: https://www.conseil-constitutionnel.fr/decision/2006/2006540DC.htm#:~:text=Le%20Conseil%20constitutionnel%20a%20%C3%A9t%C3%A9,7%20juillet%202006%2C%20par%20M.

3.3.2 POST-LISBON CASE-LAW

The introduction, and the confirmation, of the identity clause in the Treaty of Lisbon, in 2009, has not put an end to the defense of their borders by national courts, some of which have even expressed themselves, with reference to the entry into force of the Treaty, with pronouncements destined to mark the history of European integration on the issue of "interpenetration" between legal systems. The reference is, of course, to the *Lisbon* judgement[24] of the German Federal Constitutional Court.

In June 2009, ruling on the compatibility of the Lisbon Treaty with the German Basic Law, the constitutional judges drafted a lengthy judgment in which, in addition to taking stock of the relationship between EU law and German constitutional law, they theorized for the first time, in addition to the control of compatibility with the standard of protection of fundamental rights guaranteed by the Basic Law (*Solange I*), an *Identitätskontrolle* placed to protect the core of German constitutional identity. And although the *Bundesverfassungsgericht* did not consider that the German constitutional identity was violated by the Lisbon Treaty, the German judges did their best to ensure that the constitutional identity of Germany was protected. The German courts did their best to specify which constitutional goods could be endangered by an uncontrolled expansion of EU law. In paragraph 252 of the judgment, the judges of the drew up a veritable list of "sensitive" matters from the point of view of the protection of constitutional identity. It is stated that "for the capacity of self-determination of a constitutional state, the following are considered to be of a constitutional state, the following have always been regarded as particularly sensitive: 1) decisions on substantive and procedural criminal law; 2) the possibility of having a monopoly of force, of police force internally and of military force externally; 3) the fundamental decisions in fiscal matters on the revenues and expenditures - also motivated by social policy - of the public hand; 4) the conformation of the conditions of life to the welfare state; 5) decisions of particular cultural importance, e.g. on family law, the school system, education and relations with religious communities"[25].

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[24] Leitsätze zum Urteil des Zweiten Senats vom 30. Juni 2009. Available at:
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/06/es2009063
0_2bve000208.html
[25] Ibid.

Thus, what the *Bundesverfassungsgericht* sets out to protect under the heading "constitutional identity" is what it considers to be the core of the German Basic Law, "namely its inviolable (supra-constitutional) core principles protected by the *Ewigkeitsklausel*, which even the constitutional legislature itself could not dispose of without nothing less than a constitutional revolution in the form of a new constitution adopted by the German people acting as the original constituent power" (Claes, 2013). Remarkably, these principles are exactly those which Article 2 TEU declares as the foundational principles of both the Union and its Member States. In a sense, Article 2 TEU "europeanizes" (Claes, 2013) these essential constitutional values, in a way comparable to the modus in which the CJEU europeanized fundamental rights after *Solange*. In the end, the German Court's conception of "constitutional identity" is intrinsically linked to German sovereignty and statehood of Germany, which are believed to be defended by the Constitution, as well as to German democracy.

The issue of constitutional identity has also been addressed by national constitutional courts in some Eastern European member states. The Czech Court, for example, in 2008 ruled that the power to review the constitutionality of the EU was reserved to itself, but it underlined that it would only exercise it in "exceptional cases", such as one of "abandoning the identity of values" or "exceeding the scope of conferred powers" (Faraguna, 2016). In 2009, the Polish Court, on the other side, put the concept of constitutional identity on an equal footing with the sovereignty of the Polish State, stating that "the unchallengeable competences of the organs of the state formed the constitutional identity of the state" (Claes, 2013); essentially, it saw the idea of national identity in Article 4(2) TEU as a parallel of the Polish concept of constitutional identity.

The approaches of national constitutional courts are various. They permit the primacy of EU law over national law (including constitutional law) in general, but not over the essence of the constitution, specified as matters of constitutional identity (Faraguna, 2016). These constitutional courts recall the authority for preserving the inviolable constitutional identity of their states; this indicates that they all reserve the right to revise EU law, but only in exceptional cases. The case-laws just explained show that the concept of national (or constitutional) identity is closely related to the concepts of

sovereignty, independence and national democracy. Nonetheless, it is clear that there are two different approaches: French and German. In the French approach, the emphasis seems to be on what differentiates France from other countries and from the common European constitutional heritage; in the German case, on the other hand, the emphasis is on the core of the Constitution, whether the values contained in it are shared by other member states or not. In all cases, however, the constitutional courts present themselves as defenders of national constitutional identity, as if to restrict the authority of EU law and question European integration.

3.4 NATIONAL AND CONSTITUTIONAL IDENTITY IN THE JURISPRUDENCE OF THE COURT OF JUSTICE

3.4.1 PRE-LISBON CASE-LAW

However, accepting the thesis according to which the true interpreter of the clause in Art. 4 is the Court of Justice, better if with the contribution of the national courts, the real scope of the clause itself must be reconstructed primarily through the words of the Court. In this regard, until the approval of the Lisbon Treaty, the Court in Luxembourg did not have occasion to frequently pronounce on the identity clause and, even when requested to do so by the Advocates General or the parties, it preferred to resolve cases on the basis of other provisions. In this line of jurisprudence, we can recall (in addition to the already mentioned case of the Luxembourg teachers, for which see above) a judgment which, while not expressly using the expression "national identity", does in fact make its content explicit and three cases in which identity is instead not only mentioned but given meaning in the words of the Advocates General.

The first judgement, *Omega*[26], is inspired by the prohibition, opposed by the German authorities, to the exercise of a gaming activity based on the simulation of murders, considered threatening to public order "because of the fact that, according to the prevailing conception of public opinion, the commercial exploitation of games involving the simulation of murders affects a fundamental value enshrined in the

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[26] *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62002CJ0036

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fundamental Constitution, namely human dignity"[27]. In this case, while recognizing that the respect for human dignity is, in Germany, an "autonomous fundamental right", the Court states that its compatibility with Community law derives primarily from the fact that fundamental rights - and human dignity among them - are also an integral part of Community law itself, as its general principles and in connection with the constitutional traditions common to the Member States. The restriction to the freedom of movement of services that the contested prohibition entails, if proportionate, is therefore justified not only by the need to protect national public order but, more generally, by the need to safeguard a principle, respect for human dignity, which is also protected in the European order. Significantly, however, the Court admits the possibility that derogations to the freedom of movement take place in different ways from one Member State to another, since this differentiation, in itself, does not undermine the necessity and proportionality of the measures taken. The court, therefore, on the one hand reaffirms that the fundamental principles of the Member States, even when they affect the level of rights, are in fact often shared at European level, but on the other hand recognizes the possibility that the various systems may implement different ways of protection (and consequent limitations of European freedoms) but not incompatible with EU law (Safjan, 2012).

Real references to national identity are instead contained in the Conclusions of three relevant cases, all drafted by Advocate General Poiares Maduro.

The first one, in order to challenge the language regime applicable to the recruitment procedure and internal procedure of Eurojust, the Court stated that "the respect for linguistic diversity is one of the essential aspects of the protection recognized to the national identity of the Member States, as it results from art. 6, n. 3 EU and 149 TEC"[28] and therefore reaffirms the fact that the protection of national identity includes the choices of a State on the use of language. In the pre-Lisbon case-law, Article 6(3) EU was also invoked some other times in cases involving language issues: in order to contest a decision of the Commission to publish numerous vacancy notices for senior management positions in the Office Journal of the European Union and for the

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[27] Ibid.

[28] Case C-160/03 *Spain v Eurojust* [2005]. Available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-160/03. In particular, opinion of AG Maduro, point 24.

position of Director General of OLAF in English, French and German only[29] and to defend a language knowledge requirement for the profession of lawyers in Luxemburg under a home country professional title[30]. In these cases, the orientation was to the safeguard of the national cultural identity of the States instead of to the more political form of it, but the Court barely ever went in for the claim, and decided on different bases; "it never showed itself very sensitive to this kind of claims based on Article 6(3) EU" (Claes, 2013).

The second relevant case, *Marrosu, Sardino* and *Vassallo[31]*, relates to the competitive procedure for recruitment in the public administration in Italy, which is considered an element identifying the constitutional identity of our country and as such deserving of protection under Art. 6(3) EU. In this case, concerning the application of the regulation on fixed-term employment in the case of the public administration, the Italian Government and the referring judge justified the difference in treatment between the private and public sectors by the need to respect constitutional requirements, i.e., the conditions that guarantee the impartiality and efficiency of the authorities, as required by the *Corte costituzionale*. In the opinion of AG Maduro (point 39) we read: "undoubtedly, national authorities, and in particular constitutional judges, should be given the responsibility of defining the nature of the particular national characteristics which may justify this difference in treatment. Indeed, they are in the best position to define the constitutional identity of the Member States which the European Union has undertaken to respect. However, the fact remains that the Court has the duty to verify that this assessment is in conformity with the fundamental rights and objectives which it ensures are respected in the Community context". Poiares Maduro thought this defence based on a constitutional principle an illustration of Italy's constitutional identity and qualified it as a rightful objective which may substantiate exclusion of conversion of fixed term contracts into contracts of indefinite

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[29] Case T-185/05 *Italy v Commission* [2008]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62005TJ0185

[30] Case C-193/05 *Commission v Luxembourg* [2006]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62005CJ0193

[31] Cases C-53/04 *Marrosu and Sardino* and C-180/04 *Vassallo* [2005]. Available at: https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A62004CJ0053 and at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0180

duration, and then continued to the proportionality test, which was for the national court to decide (Claes, 2013). Nonetheless, the Court did not refer to Article 6(3) EU. The third reference brings to a broader sphere of national identity, putting it in relation to constitutional identity. The *Michaniki* case[32] originated from the prohibition of participation for certain tenderers in public contracts, established by Greek law for certain categories of companies in order to guarantee transparency and equal treatment in procedures, but not contemplated by Community law. In his conclusions, Maduro recalls that the respect, by the European Union, of the national identity has been imposed since the beginning of the integration process, just to allow the advancement of the same while respecting the political individuality of the States. He mentioned Case C-437/93 *Commission v Luxembourg* [1996] as an example, therefore implying that he considered the notion of national identity in Article 6(3) EU to also include State's cultural identity (Claes, 2013). While expressly stating that national identity includes the constitutional identity of the Member States, the Advocate delimited, however, the scope of the clause, specifying that it does not include all the rules of national constitutional law, under penalty of "detachment" of national systems from the Community one and the risk of giving rise to discrimination. In this specific case, the power of the Greek authorities to provide for cases of prohibition of participation in public contracts, which may therefore justify a limitation of the obligations imposed by Community law, falls within the protection of national identity if the principle of proportionality is respected. Yet, the relevant Greek constitutional provision did not, in this case, meet with the principle of proportionality.

In all three of the cases cited above, however, despite the considerations spent on this point by the Advocate General, the Court does not rule on the clause of the then Article 6(3) EU. Member States, referring courts and Advocate General used the notion of national identity both referring to cultural identities of the member states (e.g language) and their constitutional structure, in the context of fundamental choices reflected in their Constitutions (eg. *Marrosu and Sardino, Vassallo, Michaniki*). Nevertheless, the Court did not deal with these cases in terms of national or constitutional identity; as a matter of legal technique, the duty of the Union to respect

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[32] Case C-213/07 *Michaniki* [2008]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0213

national identities is very close to other instances where EU law leaves room for manoeuvre to the national systems (Claes, 2013).

3.4.2 POST-LISBON CASE-LAW

After the entry into force of the Lisbon Treaty, thanks perhaps to the more detailed formulation of the provision on national identity and the disappearance of the limits on the jurisdiction of the Court of Justice imposed by the previous version of the Treaty (art. 46 EU), the clause in Article 4(2) TEU becomes the object of more frequent use by the Court itself. However, looking at the jurisprudence of the judge in Luxembourg, from the very first applications of art. 4(2) TEU it is already possible to see how the Court of Justice does not interpret respect for the identities of the Member States as an "external" (and therefore "absolute") limit to the process of integration, but as a "relative" limit, i.e., as a legitimate interest of the State that can be balanced with other interests worthy of protection.

There are two recent cases referring to national identity which were decided after the entry into force of the Treaty of Lisbon: *Sayn-Wittgenstein*[33], decided on 22 December 2010, and *Runevič-Vardyn*[34], decided on 12 May 2011. In both cases, the situation concerned a conflict between national constitutional identity on the one hand and, on the other, the freedom of movement under Article 21 TFEU and the right to privacy. The first relevant case, *Sayn-Wittgenstein*, is destined to mark the history of the identity clause, reaffirming its relevance and potential "limiting" suitability with respect to EU law. The protagonist of the case was an Austrian-born, German-adopted woman with Austrian citizenship, demanding the right to have her title (Fürstin von Sayn-Wittgenstein), acquired from her father after being adopted, inserted into the Austrian register of civil status. It was argued that, being her an estate agent, the impossibility of using the title of Fürstin would damage her freedom to provide services. In compliance with national laws prohibiting titles of nobility, the Austrian authorities refused to register her surname in full, as it resulted from the adoption and

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[33] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0208
[34] Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0391

as she had used it, including for professional purposes, for several years in Germany. According to the Austrian government, allowing registration of a noble title would be incompatible "with the fundamental values of the Austrian legal order, in particular with the principle of equal treatment enshrined in Article 7 of the Federal Constitutional Law and implemented by the Law on the abolition of the nobility." While the ECJ recognized that national identity may be taken into consideration in a proportionality analysis, it explained that reliance on national identity should be treated as a public policy justification (Rodin, 2011) that, in accordance with previous case law (see: *Omega*) has to be interpreted strictly as a "genuine and sufficiently serious threat to a fundamental interest of society." The Luxembourg court acknowledged that in the context of Austrian constitutional history, the law on the abolition of the nobility might, as an component of national identity, come into the line of account in the balancing of legitimate interests with the right of free movement of persons established by EU rules. The justification, put forward by the Government of Vienna, on the Austrian constitutional situation, was brought back to the sphere of public order, in the name of which the Court had already admitted the non-recognition of the surname of a citizen, as attributed to him in another member state; it should be remembered in fact that the protection of public order can constitute a reason for derogation from a fundamental freedom only when understood in a restrictive sense, i.e. when its determination is left to the discretion of the member states, but with the control of the EU institutions and only if the same objectives cannot be achieved with less restrictive measures. As stated in the *Omega* case, Member States may adopt different measures to protect public order interests. Regarding the Austrian Government's reference to the principle of equality, the Court pointed out that it was compatible with EU law and was also protected by the European legal order. Referring then to Art. 4(2) TEU, the Court stated that the Union respects the national identity of its Member States, "which also includes the republican form of State". In conclusion, the refusal by the Austrian authorities did not cause an unjustified prejudice to the freedom of movement, since the aim, pursued by the State, of preserving the principle of equality by prohibiting its citizens from any form of use of noble titles was not disproportionate with respect to "the achievement of the fundamental constitutional objective" pursued, pertaining, in this case, to public order (Besselink, 2010). With

regard to the content of the Austrian national identity, the Court considered the republican form of state and the principle of equality, which is also protected by EU law, to be constituent elements of such identity. It is evident, however, that the declination of the principle of equality that the Luxembourg judge accepted - and which implies the abolition of noble titles - presented elements of diversity with respect to that of other European legal systems, in which such titles are instead allowed. It could therefore be said that this particular way of understanding the principle of equality constitutes the distinctive element of Austrian national identity, which the Court recognized and because of which it consents to the derogation of one of the fundamental freedoms. The importance of the *Sayn-Wittgenstein* pronouncement is immediately grasped by the doctrine, which underlines how the affirmation of the legal and not only political value of the clause, its suitability - affirmed for the first time - to limit economic freedoms (Besselink, 2010), which have always been the object of particular protection by the Court of Justice (Faraguna, 2016), as well as the competence of the Court itself to pronounce on it, are derived from it (Faraguna, 2016).

The second relevant case, *Runevič-Vardyn*, concerned the compatibility with articles 18 (prohibition of discrimination) and 21 TFEU. The protagonist was a couple, Mrs. Runevič, a Lithuanian citizen belonging to the Polish minority and her husband, Mr. Wardyn, a Polish citizen, who required to maintain the original spelling of her family name. The Lithuanian authorities refused to do so in compliance with their country's legislation, which provides that a person's surnames and forenames may be registered in civil status documents only in a form that respects the spelling rules of the official national language (without diacritical marks, ligatures or other modifications of the Latin alphabet used in other languages, for example Polish). The ECJ first highlighted that a "person's forename and surname are a constituent element of his identity and of his private life", and added that the free movement guaranteed by Article 21 TFEU was related to the case. Nevertheless, the defense of a State's national language, as an element of Lithuania's national identity protected by Article 4(2) TEU, is an important value that the European Union must recognize and respect. Consequently, national identity had to be balanced with both free movement and the right to private life. Regarding the tension between the free movement guarantee (Article 21 TFEU) and

the national identity provision (Article 4(2) TEU), the ECJ used the *Sayn-Wittgenstein* line of reasoning. "If it is within the scope of Article 21, a national restriction on the freedom of movement can be justified only subject to a proportionality test" (Rodin, 2011). In this ruling, then, the Court accepted the national identity in its traditional and linguistic meaning, but in any case, suitable to limit one of the freedoms guaranteed by the Treaty. However, unlike in *Sayn-Wittgenstein* case, the Court does not carry out the balancing act between the interests involved directly, but leaves it to the national judge. Indeed, the Court states that the national court will have to assess whether the prohibition at issue in the present case strikes a fair balance between the applicants' right to respect for their private and family life and the State's legitimate protection of its official national language and its traditions

There's also a third case which is worth to be analyzed. In the same days as the *Vardyn* judgment, the Court examined the compatibility with articles 43 (freedom of establishment) and 45 EC (which excludes from the application of the provisions on freedom of establishment the civil service) of the legislation of some Member States, insofar as they reserve access to the profession of notary to their own nationals. Among the countries involved, Luxembourg alone recalled (as in the above mentioned ruling on teaching in 1996) that, given the necessity of the use of the Luxembourg language in the exercise of the professional activity in question, the nationality requirement aims to "ensure respect for Luxembourg's history, culture, tradition and national identity within the meaning of Article 6(3) EU"[35]. As was already the case at the time, however, the Court made it clear that the aim of safeguarding the national identity of the Member States could be usefully protected by other means. This pronouncement reiterates that the use of the national language can be traced back to the concept of national identity in the Treaty, but adds nothing more in this regard.

It is clear that, in both *Sayn-Wittgenstein* case and *Runevič-Vardyn* case, the identity clause was interpreted in a narrow way but remained a component of the balancing analysis. However, in the first case, this balancing was carried out by the Court of Justice while, in the second case, it was left to the judgment of the national court. The reason for this lies in the fact that, in the *Sayn-Wittgenstein* case, a republican form of

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[35] Case C-51/08 *European Commission v Grand Duchy of Luxembourg* [2011]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0051

government (such as Austria is) is non-negotiable and one would never expect a national court to leave it aside in spite of freedom of movement; in the *Runevič-Vardyn* case, on the other hand, although language certainly represents an element of national identity, it is not impossible that a national court would allow exceptions for personal names (Rodin, 2011). If in the first two cases analyzed the ECJ had a choice between balancing national identity and EU freedoms itself or referring to a national court, in the *Luxembourg* case it would not have been possible. In infraction proceedings, in fact, letting the national court decide would obviously mean a resolution in favor of the Member State. In all three cases, however, national identity was perceived as a legitimate aim which, as an exception to freedom of movement, had to be interpreted restrictively and subject to a proportionality test.

3.5 CONCLUSIONS

In the light of the doctrinal debate and, above all, of the pronouncements of the national constitutional courts and the Court of Justice examined, we can return to the initial question of what national identity is and what is the relationship between article 4(2) TEU, which provides for it, and article 2 TEU which, in apparent antithesis, establishes respect for values common to the member states. What must not be forgotten is that the identities of the member states have developed and consolidated over the centuries (see Chapter 2) well before the birth of the European Union and that, consequently, they exist separately from the EU and despite the EU. They will continue to exist whatever form or structure the EU takes in the future.

The identity clause, at first expressed very laconically and later clarified and extended (but never fully indicative of its real meaning), has been identified since its first formulation as a provision capable of constituting a limit to the law of the Union, to the point of considering its introduction as a form of European "constitutionalization" of the counter-limits. The Lisbon Treaty, on the other hand, specifying that national identity refers to national constitutional and political structures (Rodin, 2011), has also placed a limit on the claims of Member States, stressing that they cannot claim a domestic law in order to justify a violation of a Treaty.

Its interpretation, therefore, is up to the Court of Justice, since it is provided for in a provision of a Treaty but, given that the concept is inherent to the fundamental,

political and constitutional structure of the Member States, the best interpretation can be given only with the contribution of national jurisprudence and courts. Again, since it contains a "mirror mechanism" (Claes, 2013) and refers to national circumstances, the participation of national actors is necessary; on the other hand, only the Court of Justice has the power to decide whether the claim based on national identity can be recognized and guaranteed as EU and allow an exception to the uniform application of EU law. In essence, open and clear communication - or "negotiation" (Claes, 2013) - is essential.

Indeed, Article 4(2) TEU created the potential for a new balance between national constitutional identity and market freedom; in this sense, Member States would be free to define the core of their national constitutional identity while the Court of Justice would be tasked with interpreting the broader framework in which European identity operates in the Union. An overly broad interpretation of the identity clause, therefore, could damage the effectiveness of EU law and even halt the course of European integration (Rodin, 2011), while a too weak interpretation would reduce the same clause to a declaration of intentions, without actually protecting the Member States (Martin, 2012). To the detriment of the strong conception, it must be kept in mind that not every constitutional provision must be considered constitutive of national identity (Von Bogdandy & Schill, 2011). It must not simply be policy choice, but must be an essential element for the recognition of a national constitutional order, and also differentiated from other constitutional orders. If this were not the case, however, the clause itself would be ineffective because the constitutional status of a provision does not in itself imply its prevalence over European law. On the other hand, an excessively weak notion of national identity, which would reduce the clause to a sort of political manifesto, in addition to nullifying the effect of the provision, was refuted by the Court itself in the *Sayn-Wittgenstein* judgment.

It is appropriate, then, that with the identity clause one gives coverage only to those elements of national constitutional law which are truly constitutive of the "identity" of the State, the failure to respect which would prejudice the self-identification of its citizens in the same (Reestman, 2009). As for the coincidence of national identity with constitutional identity, the problem is not relevant in itself but insofar as it allows national identity to be read as that part of the constitutional identity of a country which

truly constitutes an indefectible element, and which is susceptible to protection in the European order.

Understood the flexibility of the content of national identity, adaptable to the various state realities, its lowest common denominator - as well as fundamental limit - remains, however, the respect of art. 2 TEU: the protection guaranteed by art. 4(2) TEU can in no case result in the violation of one of the principles set out in art. 2 TEU. Understood in this way, the identity clause does not stand in opposition either to art. 2 or to the concept of "common constitutional traditions", but rather is one of the elements which makes *in varietate concordia* possible, allowing individual states to derogate from those impositions of EU law which would be incompatible with their national identity.

CHAPTER IV

AMONG IDENTITIES: THE EUROPEAN CONSTITUTIONAL INTEGRATION AND ITS FUTURE

CONTENTS: 4.0 Identity conflicts and the crisis of the European Union – 4.1 The failure of the Constitutional Treaty as an impetus to new nationalisms – 4.1.1. Motivations – 4.1.2 Causes – 4.1.3 The new fundamentalisms – 4.2 Fundamentalisms and identity – 4.3 The future of European integration among identities – 4.3.1 Tolerance and solidarity – 4.3.2 A new Constitution for Europe?

4.0 IDENTITY CONFLICTS AND THE CRISIS OF THE EUROPEAN UNION

As has been seen in the previous chapters, conflicts are the basis for regulating the relations of any community (Faraguna, 2016). Conflicts did not simply underlie the formation and affirmation of nation-states in the nineteenth century, but subsequently underpinned the evolution of European public law.

In the context of the debate - or conflict - between national constitutional courts and the EU, in fact, counter-limits stand on the one hand as a solution, and on the other hand as a source of the tension between constitutional reasons for the EU and the preservation of the constitutional identity of member states. As a matter of fact, the constitutional identity of a state can be considered both as an instrument of defense of its constitutional sovereignty and, on the other hand, as an instrument of an interpretative solution to the possible contrast in the multilevel system. Since the entry into force of the Maastricht Treaty, the question of identity has not only become the object of great doctrinal attention, but has also become a matter of law, after the introduction of the principle of respect for the national identity of Member States in the Treaty on European Union. Constitutional national identity, moreover, has increasingly become the subject of rulings, not merely in the jurisprudence of national constitutional courts, but also in the jurisprudence of the Court of Justice itself. The conflict, in this case, can only end with a collaboration between the two courts, through a clear and effective communication.

In recent years, also globalization has played a fundamental role in fostering identity conflicts. The process of economic, social and cultural standardization, inherent in and defining the word globalization, produces in turn what might be called a "reflex effect": that is, it develops strong and intense identities in contrast to the more limited homogenization that such standardization presupposes (Bauman, 2013). Such identification processes lead to the creation of communities that do not identify with globalized standards but with collective images, which acquire value at the local level and are considered a response to the increasingly global dimension of this world (Von Bogdandy, 2005). In this line, among the major risks related to globalization, we find the risks of radicalization, social polarization, identity threats and fears to this uncertainty[36], which in turn would feed the populist and nationalist rhetoric that have been questioning the legitimacy of the Union in recent years. Indeed, many citizens feel that globalization constitutes a direct threat to their identity and traditions, questioning cultural diversity in favor of homogenization[37]. These difficulties would favor the development of different fundamentalisms that only undermine the idea of European constitutional progress elaborated in these years of integration (Häberle, 2012).

4.1 THE FAILURE OF THE CONSTITUTIONAL TREATY AS AN IMPETUS TO NEW NATIONALISMS

It is certainly not possible to give a precise date of the day in which the "new" fundamentalisms began their ascent again. However, we can say with some certainty that the failure of what was called the Treaty adopting a Constitution for Europe was the first real "push" for the resurgence of nationalist rhetoric. In order to understand the crisis in which the EU is currently immersed and to make progress in its resolution, it is necessary to analyze the motivations and causes behind the negative votes in France and the Netherlands and the opposing positions in other member states.

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[36] These difficulties have been enumerated by the European Commission itself in *Reflection paper on harnessing globalisation*, in which it criticises globalisation and its negative effects, considering them one of the main causes of the crisis. Available at: https://ec.europa.eu/info/publications/reflection-paper-harnessing-globalisation_en
[37] Ibid.

The "deconstruction" of Europe began in the early 1990s, with the debates around the ratification of the Maastricht Treaty. Since then, the future of Europe has appeared particularly problematic and a good number of convinced Europeans have begun to become disenchanted. As globalization gave rise to further fears, people realized that Europe did not guarantee better purchasing power, better regulation of world trade, a decrease in relocations, a reduction in crime, a stabilization of employment markets or more effective control of immigration; quite the contrary (Acar, 2009). In many ways, the construction of Europe did not seem to be a remedy for globalization, a bulwark against generalized deregulation on a planetary scale, but rather a stage in that same globalization. Many have seen it as "the vector for a demolition of all deep-rooted values in the name of a globalism without memory and without face" (Vernochet, 2007). Criticism from the right and the left, national fears and social anxieties thus added to one another and disenchantment began to spread in the most diverse circles (Acar, 2009). The final outcome was the "no" vote in the May 2005 referendum on the draft Constitution.

The draft, a meaty text of no less than 448 articles, began with a quote from the Greek historian Thucydides: "Our Constitution is called a democracy because power is in the hands not of a minority but of the greatest number"[38]. The main points were:

1. Introduction of a permanent president of the European Council, who serves two and a half years;

2. Designation of a European foreign minister;

3. Streamlining of the Commission;

4. Extension of subjects, which may be approved not by unanimity but by majority vote;

5. Expansion of Parliament's powers through various mechanisms that may represent an element of balance between the institutions called upon to produce legislative texts;

6. Creation of a European Agency for Armaments, Research and Military Capabilities in order to meet the needs of strengthening EU defense;

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[38] *Draft Treaty establishing a Constitution for Europe.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003XX0718(01)&rid=1

7. Improvement of coordination processes between member states in terms of economic policies[39].

The history of the failure of the so-called European constitution has - as it is well known - its origins in France where, on May 29, 2005, citizens rejected the Constitutional Treaty by referendum (with a significant margin of votes: 55% against 45%). A few days later, it was the turn of the Dutch who, with an even higher majority (63%), also voted against the Treaty on June 1, 2005.

However, it is clear that it is not possible to place all the blame for the failure on France and Holland. According to José Ignacio García-Valdecasas Medina, professor and researcher in the field of sociology at the Carlos III University of Madrid, we must separate into motivations and causes. For classification purposes, motivations can be divided into political (pro-sovereignty, anti-system, pro-European and opportunistic) and socio-economic (popular fear, punishment of the political class and general discontent). The causes can sometimes overlap with the motivations, but in general they have their own entity: the consideration of Europe as a scapegoat, the irresponsibility of a part of the political class, the ambiguity of the European project and its remoteness, the oblivion of the recent past and the disappearance of the Soviet threat, the impact of globalization and the new global geopolitical and geo-economic situation, the phenomenon of immigration, the insecurity of citizens often associated with the disappearance of borders in Europe and the enlargement of the European Union (García-Valdecasas, 2006)

4.1.1. MOTIVATIONS

Among the political reasons of the failure of the European Constitution, first we find the "sovereigntist position" (García-Valdecasas, 2006). These people usually come from the right or extreme right opposed to European integration and the elements of supranationalism that it involves. They rejected the Treaty establishing a Constitution for Europe in order to defend the nation-state. This piece of public opinion has been and will always be against any proposal coming from the EU and whatever the evolution of the European project will be.

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[39] Ibid.

Secondly, we find the "anti-system position" (García-Valdecasas, 2006). This group was formed by the anti-globalization movement, which considered the European Union as a promoter of globalization, and the extreme left, which saw in the European project a threat to the popular classes.

Third, there is the "pro-EU rejection" (García-Valdecasas, 2006). The rejection of the European Constitution by its federalist group may seem paradoxical, but some pro-Europeans argued that the pace of European integration should have been faster and rejected the proposed Constitution for not taking the definitive and irreversible step towards the federation of Europe and the overcoming of the nation-state.

Finally, we find the "opportunists" (García-Valdecasas, 2006), those who opted for the "no" vote in the hope that it would strengthen their positions within their political groups and improve their personal options for the future.

Among the socio-economic motivations, on the other hand, we find first "fear" (García-Valdecasas, 2006), which can in turn be divided into political, economic and social fear. The first one was caused by a sense of loss of internal cohesion due to the enlargement, which had inevitably led to a change in internal power relations and an excessive race for integration and supranationalism, arousing in citizens the fear of an excessive transfer of competences to the EU. The second fear, economic fear, was caused by a sense of excessive liberalization of the economy, which would lead to the dissolution of the welfare state and the total domination of globalization, from which the EU should have defended its citizens (Acar, 2009). Social fear, finally, was caused primarily by immigration and security. In fact, the European Union was blamed for the migratory wave caused by the expansion to the East and the consequent increase in crime, including organized crime.

The second socioeconomic motivation was "the punishment of the [domestic] political class" (García-Valdecasas, 2006). It is, in fact, well known that a large part of the "no" votes expressed in France and Holland were more an expression of discontent with their own national government than an outright rejection of the adoption of a European Constitution. In a referendum, in fact, one must be clear in formulating the question, and citizens must be careful to separate what the purpose of the referendum itself is from the person who proposed it.

Finally, the last motivation, is "general discontent" (García-Valdecasas, 2006). In those years, there was an air of disapproval towards the EU mainly because of the euro, which had been in place as an official currency for a few years.

4.1.2. CAUSES

At the base of the positions contrary to the Constitutional Project, several causes can be enumerated. First of all, we find "the European Union as a scapegoat" (García-Valdecasas, 2006). After the ratification of the Maastricht Treaty in 1992, blaming the EU for any problem occurring within its borders had become à la mode. The political class, the economic and social sectors and, more generally, civil society, did not miss any opportunity to export their failures and conflicts - both potential and real - to a higher context, namely Brussels. It had become almost natural to draw a clear line between the European Union and the Member States, as if they were two completely distinct entities, as if the EU were not also made up of the heads of state and government or the ministers of the member states. And it is precisely the latter who are sometimes to blame (García-Valdecasas, 2006). It often happened that it was the same political leaders who participated in the decisions in Brussels, only to desolidarize with the same cause for which they had shown themselves to be in favor at the European level; in this way they could put the blame on the European institutions as if they were abstract and unreachable entities.

The second cause is the "ambiguity of the European project" (García-Valdecasas, 2006). In the twenty years preceding the fateful "no" vote, in fact, there had never been a debate, even an explanatory one for citizens, about the essence of the project of European integration. The result has been that citizens have felt transported into the decisions without really being part of them. When there was the enlargement from 12 to 25 members, it was perceived in Europe a weakening of the principle of solidarity that had been until then one of the pillars of the European project (Golinowska, 2009). The same has been true for the constitutional project: there has never been a real informative debate on what would have been the better Europe once the Treaty was ratified. And so, an ambiguous and never clarified project ends up acquiring a dose of indecipherable mystery and producing a divorce between the ruling class and the people. In fact, the campaign and the opinion polls conducted in

those years showed that the most disadvantaged strata of society did not feel involved in the project, believed that it did not concern them and were convinced that it was of no benefit to them (Slootweg, 2019). In addition, the results of the polls conducted between 2003 and 2005, also showed that the Constitutional Treaty was supported on a large scale by people over 65 years of age and the more educated classes; that is, by those who know best about Europe's recent past (Slootweg, 2019). The third cause, in fact, according to Professor García-Valdecasas is "the disappearance of the Soviet threat and the oblivion of the recent past." With the disappearance of the Soviet threat, the European project had lost one of its most solid pillars. It had lost a reason for its citizens to unite against a real, tangible, dangerous enemy. After the fall of the Soviet Union, it was clear to everyone that there would never again be a threat of such caliber, a threat that would somehow force Europe's citizens to remain united.

Globalization and the new international situation also played into the hands of the "no" vote in the referendum in 2005 (García-Valdecasas, 2006). The rejection of the constitutional treaty by a segment of public opinion was a rejection of a new world, which threatened the privileges acquired until then. A rejection based on the belief that by withdrawing into ourselves we would defend ourselves better. It was an irrational claim because it established an unattainable goal by pretending to freeze the current reality (Acar, 2009). The philosopher Habermas formulated a similar idea: "If there is anything that can be interpreted with certainty from the electoral vote, it is the following message: not all Western nations are willing to assume in their countries and on a global level the cultural and social costs of the loss of an equilibrium of well-being that the neoliberals propose as the price for obtaining a more rapid increase in well-being" (Habermas, 1998). This position is rational because it sets a partially attainable goal: the maintenance of the current relative equilibrium, even at the risk of a collective impoverishment that, one assumes, will be shared by all. The last cause, and also perhaps the most current, is the "unchecked immigration and the threat to security" (García-Valdecasas, 2006). After the expansion to the east and the elimination of border controls, citizens felt increasingly threatened by the growing presence of immigrants who could move freely from one state to another that would inevitably lead to an increase in crime and terrorism.

At the time, the failure of the Constitutional Treaty demonstrated that the public opinion's concerns were well-founded. "The European peoples and their leaders are very different today from those who 25 years ago led Europe out of the crisis of the late 1970s, created an internal market without frontiers following the Single Act, moved towards economic and monetary union and laid the foundations for a possible political union. Where there was optimism, security and confidence in the future, there is a slight pessimism, various fears and a lack of confidence in ourselves and in each other, even though the current situation of stability and prosperity in Europe shows that the process over the last 50 years has been a success that all our neighbors continue to want to join" (García-Valdecasas, 2006). However, the integration process was accused of multiple failures. And that's where fundamentalisms find fertile ground.

4.1.3 THE NEW FUNDAMENTALISMS

In 2005, the anti-European coalition formed by an extreme nationalist right and an extreme anti-globalization left seemed unthinkable and unlikely. However, it was slowly growing among what we could call the "cracks" of European integration: from the monetary economic union without political union, to the bureaucratic enlargement that had just incorporated the Eastern countries without really integrating them, passing through the total confidence by the European institutions in the progress of integration without considering the new threats of globalization and the new geopolitical balances after the fall of the Soviet Union. Therefore, as seen above, the betrayal of the Constitution is not consummated in the ballot box of the referendum in May and June. It was born much earlier; the "no" to the constitutional project is simply the point of arrival.

The failure, however, is also inherent in the hypocrisy of wanting to define as a Constitution a project of reform and simplification of the treaties that remains far from a true constituent process (De Fiores, 2008). This would imply a re-founding of sovereignty and democratic legitimacy; it would require shifting the center of gravity of European power from the various capitals to Brussels. A people that gives itself a Constitution puts it as the foundation of its citizenship (De Fiores, 2008): one should therefore be first a European citizen, and only secondarily an Italian, French or

German. But in the intentions of the governments that launched the European Convention in 2001, there was no delegation of sovereignty, no transfer of legitimacy. The extension of the powers of the Commission, which was to become a true European government, was deleted. The right of veto was maintained for foreign and fiscal policies. And, above all, the principle of democratic legitimacy remained firmly anchored in the twenty-five capitals of the EU, as demonstrated by the fact that the ratification process was not entrusted to a pan-European referendum, as would have been democratically logical (De Fiores, 2008), but to the summation of national ratifications, which never arrived.

The work of the Convention first and then of the Intergovernmental Conference was marked by mutual distrust. No one really wanted to cede power to an entity they could not control. And it was precisely here that nationalisms began to peep out again. They have resumed to impose themselves as defenders of the national interest that had been put at risk by a European Constitution that, precisely, it was thought would have compromised the particular roots of each people belonging to the European Union.

On 23 June 2007, therefore, a document attached to the "Conclusions of the Presidency of the European Council" announced: "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned". A few months later, precisely on 13 December 2007, the heads of state and government of the 27 member states signed the Lisbon Treaty, but the term Constitution will never be used again. The decision to provide Europe with a "Constitution worthy of the name" was abandoned. Although the provisions of the Lisbon Treaty are identical in substance to those contained in the Constitutional Treaty, they are no longer constitutional provisions, let alone have the ambition to be so. From that moment, from the loss of an instrument that should have contributed to the creation and consolidation of a European "we", added to a more extensive and clarified version of the identity clause in the Lisbon Treaty, the European Union failed to assuage the identity conflict; failed to instill in European citizens a sense of loyalty and trust in its institutions and to fortify the perception of sharing a common identity (Voeten, 2017). All of this, in addition to undermining the fragile foundations of a European constitutional patriotism, goes to fuel the populist phenomenon. The sense of distance between European institutions and citizens, accentuated by the failure of

the European Constitution, the technocratic perception of supranational institutions and the relentless protection of national constitutional identity by national courts, are some of the elements on which European populisms leverage, which in many cases take on the guise of new nationalisms/sovereigntists. Starting from these shortcomings, it is no coincidence that in the political agendas of many populist parties a plurality of attempts has appeared to aim to re-propose the nation as a ground for the establishment of its identity. So much so that today we can witness an attempt to renationalize the European space with the reappearance of terms such as nation and nationalism that globalism seemed to have overcome. Reacting to the fear dictated by the lack of a European identity and, furthermore, because of the effort to overcome this absence through courts that seek to rationalize the human rights narrative, in Italy, France, Hungary and many other countries, new nationalisms have proposed their own demagogic narratives with the aim of restoring the place that historically allowed people to create and share their identities and that, apparently, has not gone completely to ruin (Techau, 2016).

4.2 FUNDAMENTALISMS AND IDENTITY

Fundamentalisms are a danger to constitutional law (Haberle, 2012) because of the intransigence of some doctrines that assert the intangibility of certain content in stark contrast with the open and plural conception of the cultural and integrative dimension of European constitutional law, whose objective is to legally configure and share a series of values, from pluralist democracy to human dignity (Giddens, 2000). It is not, therefore, just a matter of a legal conflict between constitutional law and fundamentalisms, but of the risk of fundamentalisms for the coexistence and shared culture of values from which an identity has been constructed in the constitutional and democratic state of law (Haberle, 1996). The Constitution is not only normativity as a guarantee of pluralism. The Constitution is also integration that revolves around the culturally shared values from which identity is born and affirmed in the form of constitutional patriotism (Haberle, 1996), which must be nurtured in a progressive, adequate, and convenient manner as a response in the face of populist fundamentalism.

Today, starting from the fact that collective identities are always constructed, we can expressly speak of legitimizing identities and identities of resistance (Castells, 2004). The first ones are aimed at extending and rationalizing power by seeking the adherence of its members, while the latter are in opposition to the former.

In view of this, as seen in Chapter 2, in recent years a legitimizing identity has been articulated by and for the European Union, an identity that has developed concurrently with the integration process and relates dialogically, especially through the Courts, with the constitutional identities that legitimize member states (Sánchez, 2007). However, this European identity remains apparently weak in its integrative capacity due to its emotional weakness in the face of other identities, particularly state identities, which developed collectively and homogeneously at first, as well as with regard to nationalist-type identities of resistance.

Starting from this and taking into consideration the evolution of the judgments on the identity clause dealt with in chapter 3, we understand how European identity has been circumscribed to a constitutional identity of shared values (art. 2 of the Treaty on European Union) that interacts in a dialectical way with the constitutional identities of the member states (art. 4.2 of the Treaty on European Union). This process must be considered from the perspective of the historical development of a shared constitutionalism between the European Union and the states, by virtue of comparison and integration (Haberle, 2004), as if limits to integration were manifested by the states due to their own specificities and identities and the different degree of constitutional density achieved between their respective systems and the European one (Bon & Martorell, 2014).

In addition, it is necessary to take into account two structural deficiencies (Weiler, 2012) of this historical process, which have marked part of the crisis of the European integration process: on the one hand, the functional nature of integration to the market and community freedoms, which has genetically characterized the European Union (Weiler, 2012); on the other hand, the greater weakness of the democratic and social dimension of European integration compared to that of the Member States (Pérez, 2014). From these two structural deficiencies derive both the concern of citizens towards a European project based on the guarantee and promotion of a single market and community freedoms, and a certain fragility of the European identity despite

being considered an element of constitutional patriotism and an instrument of adherence of Europeans (Bon & Martorell, 2014).

Furthermore, as mentioned above, it is also appropriate to consider the problems associated with globalization. Globalization has imposed a rigid limitation on the ability of states to define, from a political and legal point of view, the government of their respective communities: it has, in fact, reduced the effective ability of states to protect their citizens through the development of appropriate and adequate public policies. Globalization has simultaneously produced processes of supranational integration (such as the European one) and, likewise, shared feelings of insecurity towards the uncertainty that pervades it (Bauman, 2013), fostering the development of strongly reactionary identity processes, through which to seek collective spaces of common defense of citizenship in the face of globalization (Castells, 2004).

In this context, European integration, from the perspective of creating a European citizenship at the political-legal level, has presented itself as a potential response to the inability of member states to cope with globalization. However, it has failed to mend the fracture that globalization has created in the member states, undermining their sovereignty because of the power ceded to the Union.

Today, in addition to all this, there is the economic crisis that began in 2008 (and never ended) and the EU's poor management of social policies. The loss of legitimacy before a large part of the citizenry, which became evident after the failure of the constitutional project, weakens integration both politically and socially. Thus, new reactionary and defensive identity processes have appeared, particularly of a nationalist kind. These are processes that, driven by fear, insecurity, feelings of marginalization and resentment towards others, are putting at risk the more relative and open identity that constitutional patriotism offers as a proposal for Europe (Art. 2 TEU).

4.3 THE FUTURE OF EUROPEAN INTEGRATION AMONG IDENTITIES

As seen above, therefore, the constitutional construction of legitimizing identities intends to seek the voluntary adherence of citizens, strengthening the legitimacy, precisely, of the political community. This approach is in accordance with Article 2 of the TEU, which defines the shared values, in which the Union identifies itself, in

order to consolidate European constitutional patriotism. This identity clause, however, is "a reflection of a common past rather than a genuine innovative and exciting project, which aspires to the adherence of citizens who feel European" (Zagrebelsky, 2009). It is not just a matter of conceiving the destiny of the Union as a mere necessity and a simple consequence, but of positively stimulating the future of integration, conceived as an authentic shared project; not in vain, the current process of constitutionalization of the Union on the one hand responds to the need to transpose integration at the constitutional level in the face of the effects of this process on the constitutional law of the Member States, on the other hand it is a process of reform of the material Constitution that the Treaties have been carrying out for some time (Callejón, 2007), rather than an authentic constituent process. In this way, one can understand the limited constitutional adherence that Article 2 of the TEU on citizenship currently produces in the abstract, particularly with respect to other more intense and closer identities, more felt by some than by others. It is opportune to re-propose a European identity that is more open to all and to the new challenges of Europeans, an identity that can promote integration within society (supporting it by means of citizens' adherence to new and old constitutional values), while maintaining a certain level of resistance to globalization. With regard to the latter, in fact, the reactionary character of European integration in the face of globalization acts as a legitimizing identity and adhesion factor in the face of the uncertainties it produces (Castells, 2004).

At the state level, then, it is appropriate that constitutions, without prejudice to the definition of their fundamental elements in the face of European law, refer to the active will to participate in European integration as a factor of internal constitutional (and also identity) progress, so that the constitutional patriotism defined at the state and European level is not only compatible but also complementary. In order to understand the relationship between national constitutional identity and European identity, it is necessary to consider the assumption that the internationalist openness of modern Constitutions - of which the so-called "European clauses" (implicit or expressed) are clear evidence - implies that membership of the European Union, sharing the values on which it is based and pursuing the objectives it intends to achieve, are an integral part of the same constitutional identity (Polimeni, 2017). If we accept this assumption, we can then say that the defense of national identity could

never be considered as a form of anti-Europeanism, insofar as anti-European state decisions would go against it, resolving itself into a degeneration of it, because they would produce the denial of a necessary constitutive element for constitutional identity to be correctly configured (at least as long as the country is a member of the Union), determined by the (self-)limitation of sovereignty, which allows a state to join the European Union, accepting its normative and jurisprudential production and allowing its application within the national system (Polimeni, 2017).

There is a need, therefore, of a search for a state and European constitutional configuration of different identities and origins, capable of enriching constitutional patriotism in the face of fundamentalism. On the contrary, it is extremely dangerous for European states to conceive European integration exclusively as a limitation for domestic constitutional law, presenting itself before state citizenship as a mere cause of its political restriction (Polimeni, 2017) and not as a factor of domestic constitutional progress.

4.3.1 TOLERANCE AND SOLIDARITY

However, in order to elaborate new perspectives for European constitutionalism, one should reflect not only on identity clauses, but also on tolerance and solidarity.

In this regard, then, the concept of tolerance can be conceived both as the respect by the majorities of the identities of minorities beyond the differences between them, and as the recognition by minorities of a minimum common denominator necessary from which to make effective integration with the majorities to endorse this coexistence[40]. Today it must be extended to the respect by the EU of the constitutional identities of member states (art. 4.2 TEU); the lack of effective recognition by the EU and its institutions of these national identities, which do not tolerate their fundamental and strictly characteristic, or essential elements, will produce not only conflicts between the highest jurisdictions but also feelings of national disaffection towards them, thus threatening membership. There is, moreover, the risk that European constitutional patriotism will be reduced to a mere functional integrating identity, especially if

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[40] This is how the European Court of Human Rights has expressed itself in relation to the new principle of "living together". Available at: https://www.coe.int/en/web/portal/topics-living-together

national identities act towards citizens as a resistance to European identity. It is necessary to support, therefore, tolerance as a remedy to resolve the conflict of identities that exist in a complex and plural constitutional Europe, so that, from a minimum common identity, difference and state singularity can be properly considered as an expression of their own constitutional values (Von Bogdandy, 2005). Regarding the strengthening of solidarity, a strong tool for configuring community relations and the resulting collective identity, it should go hand in hand with a deeper consideration of resilience, as the latter would go to strengthen solidarity, especially in times of severe difficulty or crisis for the community or group, containing special disruptive tensions of the community (Alaminos & Pervova, 2015) and therefore of its own identity.

The concept of solidarity is not only a principle of moral order but also a political priority underlying the project of European integration since its foundation. From the Schuman Declaration and the Treaties of Rome onwards, solidarity has been understood as the way to European pacification. The need to act in a spirit of solidarity in order to safeguard common European interests was then highlighted by both the Single European Act of 1986 and the Maastricht Treaty. In the 1980s, the concept of solidarity was more related to the need to build a common market, but then it gradually acquired a broader meaning with respect to the development of a European identity (Berchtold, 2020). In the Preamble of the Treaty on European Union, it is stressed that the purpose of the EU is to deepen solidarity, which is not only defined as a founding value of the EU (art. 2 TEU) but also as the basis for combating social exclusion and inequality (art. 3 TEU). Solidarity is also a guiding principle of European action in the international arena (art. 21 TEU) and its foreign and security policy (art. 24 and 31 TEU). Finally, Article 222 of the Treaty on the Functioning of the European Union not only continues this commitment but expands it by introducing a solidarity clause that commits EU member states to solidarity with each other in crisis situations caused by natural or man-made disasters and terrorist attacks (Sangiovanni, 2013).

However, despite the fact that the anchoring of the principle of solidarity in the EU Treaties seems to establish a strong collaboration between member states, solidarity as a basic principle of EU integration is often undermined by two factors. First, the fact that there are no stringent sanctioning mechanisms for countries that do not

promote solidarity actions; second, the nature of the solidarity response to a member state is predominantly based on national and political interests (Berchtold, 2020). Indeed, taking the case of Italy as an example, in the face of the explosion of the pandemic caused by the SARS-CoV-2 virus, the initial reactions of some member states were far from solidarity: for example, the unilateral closure of borders implemented by countries such as Austria, Spain and Malta or the limitations of political and economic cooperation with the temporary ban on the sale of medical equipment by some countries such as France and Germany.

However, after the initial period of reaction to the crisis, solidarity between member states has never ceased to exist. According to the European Solidarity Tracker of the European Council on Foreign Relations, from March to September 2020 there were 144 actions of medical aid with donations of equipment and mutual aid actions by medical personnel, 127 adjuvant actions such as the creation of humanitarian corridors to allow European citizens to return to their country of residence and 236 declarations of solidarity[41]. In addition, the European institutions have taken on a key role in coordinating a European response to the crisis: The Commission has allowed maximum flexibility on budgetary rules, the SURE instrument has started to subsidize national layoff schemes and the European Central Bank has decided to increase purchases of national bonds. In addition, the Next Generation EU package agreed in July 2020 will provide subsidies to the most affected countries (Russack, 2020).

Unlike previous crises, the Coronavirus pandemic affected all member countries symmetrically. No one was spared from the economic, social, political, and health consequences caused by the spread of the virus. This has prompted European governments to look beyond their borders to organize a collective response. The hope, today, is that the consequences of the SARS-CoV-2 pandemic may represent a precedent for the effective use of solidarity mechanisms, which will allow member states to strengthen cooperation and indeed integration. In addition, the perspective of European citizens also seems to have changed: according to a Politico poll, Covid-19 has allowed Europeans to become more aware of the plight of other citizens across

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[41] European Solidarity Tracker: Explore how the Coronavirus crisis tests European solidarity. Available at: https://ecfr.eu/special/solidaritytracker/

national borders, and three-quarters of respondents believe in the need for solidarity with one another (Gehrke, 2020).

4.3.2 A NEW CONSTITUTION FOR EUROPE?

If we consider, therefore, the consequences of the 2008 economic crisis still underway and those of the very recent crisis caused by the Covid-19 pandemic, it is clear that social policies continue to be fundamental for the effective maintenance of social cohesion, which is the prerequisite for genuine European constitutional integration. There is a need to consolidate a true European identity that forms the basis of constitutional patriotism, effectively shared by all Europeans, which is able to rebalance the loss of political participation by citizens of EU member states, caused by globalization and integration, not only in order to promote a European identity that legitimizes constitutional patriotism, but to avoid the advancement and strengthening of nationalist identities. One can think of the Brexit, based on the (false) promise of a return to strong, independent and sovereign citizenship.

To conclude, we need "more Europe" (Habermas, 2012) and, therefore, a Constitution of the Union. It is not enough to strengthen European integration with more constitutional law; the challenges that globalization imposes on European integration today require deepening integration. Otherwise, the constitutional tension between the European Union and its member states will increase out of all proportion. It is not possible to renounce to an authentic European Constitution that would allow to rethink and configure a new union and that would be able to respond to the existing conflict, both between globalized elites and local dimensions and between the different identities existing in Europe. A European Constitution that expresses a new plural collective identity, one of solidarity and that is accepted by Europeans (Habermas, 2012); a Constitution that is not only a response to globalization, but a project for the future, one of solidarity, based on shared values and that is experienced, felt and respected by public authorities and citizens, legitimizing it. Only in this way it is possible to build a true European constitutional identity.

CONCLUSIONS

The study conducted was able to show that both nations and Europe are cultural and political phenomena, both the result of paths of integration and unification. However, while the respective national processes have been completed over a very long period of time, giving nation-states their self-awareness and security within defined orders and boundaries, the status of the European Union - and thus its identity - remains precarious. There is uncertainty about its purpose. Its constitution is incomplete, just as its geographical form remains open.

Nevertheless, it must be remembered that Europe existed before nations and, on the other hand, nation-states existed before the European Union, which was founded by common agreement. Therefore, European consciousness also includes the identities of European nations, which are linked in many ways to the identity of Europe, so that it can even be said that European identity founds national identities and vice versa.

Though, as has been pointed out throughout the research work, since its founding, the European Union has been a battleground for identity conflicts. The protection of national interests has always been the trump card to play against any "uncomfortable" initiative taken at European level; Brussels has often become the scapegoat for everything bad that happened within the Member States. The failure, then, of the attempt to give Europe a Constitution, has given impetus to those nationalist and fundamentalist movements that would like to return to the nation-state closed in on itself.

Today, we find ourselves living a crucial historical moment for the European Union. If the ongoing pandemic has been yet another test for the EU as a whole, it has also reminded us how essential cooperation, solidarity, and a common European response to global challenges is, pushing the Union to take important steps, which have converged in the Next Generation EU plan. Even the Brexit, a sad chapter in European history that recently ended, not only did not cause the feared "domino effect", but ended up highlighting, with its complexity, how deep the ties between the EU and its member states are.

The time has therefore come to consider what direction the European Union should take.

First, it is necessary to recover the vision and ideals that inspired the Founding Fathers, combining them with concreteness and pragmatism, in order to adapt them to the challenges of our times and recover the momentum needed to face the future. Secondly, it is also necessary to strengthen the dialogue between the so-called *élites* and the European people, especially by pushing for the role of young people, who will play a fundamental role in the "rethinking" phase of the EU. Finally, a dose of courage and ambition is needed, to turn the hardest crisis of the last decades into an opportunity.

The current democratic institutional architecture of the European Union is very complex; it is a supranational, multi-level reality, in which the European people is nothing more than the sum of the peoples of the democracies that compose it, the result of a constant balancing act between national interests and the interests of the EU (Lavadoux, 2013). The various challenges that the Union has had to face, from the economic-financial one, to the migratory one, to the most recent one of the Sars-CoV-2 pandemics, have contributed to feed a certain mistrust of citizens in the European institutions, resulting in some cases in the illusion that a retreat into nationalism could be the solution.

What, then, could be the proposals for the future of the Union?

First of all, the EU must be given political impetus. The integration process that began more than sixty years ago is not yet complete, there are still those who see Europe only as an economic market and those who continue to imagine it as a political project to be realized. It is essential to promote truly common policies, in those areas where the added value represented by the European level is evident and that citizens consider a priority (Greer, 2019), such as immigration policy.

Furthermore, a more solid European integration should be accompanied by a stronger subsidiarity, accompanied by a certain degree of differentiation. In order to guarantee the concept, so much repeated in the course of this study, of

unity in diversity, the EU must preserve itself as a vast and diverse unity, but reflecting in depth on the conditions and forms of differentiation necessary to prevent political tensions and consequent disintegration (Greer, 2019). In any case, it is worth emphasizing and remembering that despite its diversity, the EU is based on a core of common constitutional values, which gives meaning and significance to the Union.

That said, renewal must rely on broad participation, so that it is not perceived as imposed from above and distant from the citizens, as happened in 2005 with the Constitutional Treaty. In this vision, the issues of representation and European citizenship must play a role of primary importance. However, talking about citizenship at a European level requires a new dynamic interpretation: in Western democracies, in fact, the concept of citizenship refers on the one hand to that of sovereignty, with a necessary reference to the State as the primary territorial sphere in which this is exercised (Suksi, 2018), and on the other to that of the people. In its progressive elaboration, a juridical dimension emerges, that of the rights and duties proper to citizens; a political dimension, with their direct participation in the government of the State; a social dimension based on the sense of identity belonging to a community linked to a territory (Suksi, 2018). From this point of view, it is immediately clear that talking about European citizenship is an oxymoron, or rather requires an analogical reinterpretation of the concept. On the one hand, in fact, the EU lacks the fullness of a sovereignty of the same type as that which remains in the hands of the States, on the other hand, it is not possible to affirm that there is a European people in the same sense in which it is affirmed for the individual member states. It is no coincidence that the term "Europe of the peoples" is used to underline its irreducible pluralism.

In any case, a concrete exercise for citizen involvement in the reform of the EU could be offered by the Conference on the Future of Europe, an important moment to gather the visions of citizens on a united Europe in a dialectical and participatory manner, but also to indirectly legitimize the decisions taken in

Brussels. This moment could open a new, real, constituent phase of Europe, as a response to nationalism, avoiding the mistakes made years ago with the failed project of a European Constitution. In this view, in the new phase that is envisaged today, the fundamental role of young people emerges. It is precisely among the new generations that we are seeing the emergence of a unifying spirit, a sense of common European identity linked to a desire for European constitutional integration.

To conclude, during the writing of this research work, I realized that even in the difficulties of our self-referential times, we need to trust in having that "wide look" that lies in the etymology of Europe (from the Greek *eurus*, "wide" and *op*, "eye") to look ahead with more tenacity and openness. The Europe that my generation wants is the Europe of the people, not of populism; it is the Europe that opens ports, not that raises walls; it is the Europe that invests in the future, that allows us to pursue our dreams regardless of borders and boundaries. Is Europe a utopia? Perhaps we could speak of a "realized utopia": countries with different languages and traditions, systematically at war with each other for centuries, have given life to a community united even in its differences. And now that the European project seems to be faltering under the blows of national selfishness and fear, perhaps what we need is that my generation, the one that has most enjoyed the benefits of Europe in terms of resources and freedom, the one that the press calls the "Erasmus generation", speaks out, in a debate often dominated by those who shout the loudest, to testify that, if there is a way out of this crisis - financial and ideal - it can only pass through the – renewed - dream of a *concordia in varietate*.

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