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Indice-Sommario **2017, n. 3**

Editoriale

Immigrazione e principio di solidarietà p. 1
Ugo Villani

Saggi e Articoli

Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti 5
e “incoraggianti” sviluppi giurisprudenziali
Lina Panella

Us and Them: Restricting EU Citizenship Rights Through the Notion of Social 34
Integration
Stefano Montaldo

Dalla direttiva 2011/95/UE alla proposta di Regolamento qualifiche: quale futuro 56
per la protezione internazionale nell’ordinamento UE?
Francesca Perrini

Lotta al terrorismo e riconoscimento dello *status* di rifugiato nel quadro normativo 71
e giurisprudenziale europeo: un rapporto problematico
Valentina Zambrano

Commenti e Note

Movilidad, soberanía e “interoperabilidad” de los sistemas penales en la 91
Unión Europea
Luis Francisco de Jorge Mesas

European Judicial Space and Diplomatic Relations: A Uniform Conflict 107
of Law Issue?
Stefano Dominelli

The National Identity, in the Service of National Identities 132
Efthymia Lekkou

Le frontiere fisiche e le frontiere del diritto dell’Unione europea nei Territori 147
d’oltremare e negli altri Territori speciali: limite o opportunità per l’integrazione
europea?
Luigimaria Riccardi



THE NATIONAL IDENTITY, IN THE SERVICE OF NATIONAL IDENTITIES

Efthymia Lekkou*

SUMMARY: 1. Introduction. – 2. The national identities, a risk of disintegration. – 2.1 Primacy versus national identities. – 2.2. National identities versus primacy. – 3. The national identity, a driving force to the integration. – 3.1. The merger of common constitutional values of EU and national legal order. – 3.2. The path to a supranational identity. – 4. Conclusion.

1. Introduction

Can identity be identified? Identity can have several qualifications at a political, religious, philosophical, ethnic, legal level. Identity can be defined as the permanent and fundamental character of an individual, a group or a people which constitutes its individuality, its singularity. If identity is the quality of what makes someone unique and distinct from the others, the national identity would therefore be what singularises one country from another.

Is it appropriate to talk about identity or even national identity in the context of the European Union (thereinafter EU)? The EU is a union of states which have their own national identities, renamed by the latter to constitutional identity¹ and which resume their stables, permanent and fundamental features. The member states (thereinafter MS) often invoke their national identities against the European project of integration. However, MS make part of the EU which represents their interests and should consequently have its own identity. Could someone affirm that the EU identity is the addition of the national identities? Or is it something else? The very existence of a European identity should strengthen (or not....) the feeling of belonging to the EU.

Double blind peer reviewed article.

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¹ See, to that effect, *L'identité constitutionnelle saisie par les cours constitutionnelles*, in *L'identité constitutionnelle saisie par les juges en Europe*, Paris, 2011, pp. 63-155.

What answer is offered by the founding treaties to the perpetual questioning of national identity and EU identity? The EU solemnly recognizes, by virtue of the article 4§2 of the Treaty on the EU (thereinafter TEU), the national identity of MS, which is an autonomous term of the EU law and is defined, after the treaty of Lisbon, as “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. Does that recognition guarantee the sense of belonging to the project of economic integration transformed into a political integration since the treaty of Maastricht? In other terms, can we affirm that the national identity is a feature of the EU and allows the advent of a EU identity²?

The national identity could be proven to be an appropriate instrument against the national identities defended by MS. The questioning about the national identity inherent to MS or the EU identity cannot be analysed without reference to the very nature of the EU which is also on a quest of identity, of determination of its legal nature. The appearance of the three Communities in the early 1950s was a process previously unseen in international public law whose audacity and modernity had to be accepted. As the Court of justice recently recalled in a case where the legal nature and the special characters of the EU were at issue³, the founding treaties of the EU, unlike ordinary international treaties, established “*a new legal order*, possessing its own institutions, for the benefit of which the MS thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals”⁴. Thus, the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation. Stemming from an independent source, the EU law integrates the national law using two mechanisms: primacy over the laws of the MS⁵ and direct effect of a whole series of provisions which are applicable to their nationals and to the MS themselves⁶. Furthermore, MS are engaged, in a process of creating an ever closer union among the

² J.CHR. BARBATO, J.D. MOUTON (dir.), *Vers la reconnaissance de droits fondamentaux aux États membres de l'Union européenne ?*, Bruylant, Bruxelles, 2010 and, in particular, the contribution of D. RITLENG, *Le droit au respect de l'identité constitutionnelle nationale*, p. 21.

³ Regarding the procedure for and conditions of accession to the European Convention of Human Rights (ECGR) laid down on the protocol 8 and the declaration n. 2 on article 6§2, accordingly to which the accession to the ECHR should make provision of preserving the specific characteristics of the Union and the Union law. Court of Justice, Full Court, opinion of 18 December 2014, *Accession of the European Union to the ECHR*, case C-2/13, par. 157.

⁴ See, in particular, Court of Justice of the European Union, Grand Chamber, judgment of 5 February 1963, *Van Gend & Loos*, case C-6/62, p. 1; Court of Justice of the European Union, Grand Chamber, judgement of 16 July 1964, *Costa*, case C-6/64, p. 593; Court of Justice of the European Union, opinion of 8 March 1911, *Agreement creating a Unified Patent Litigation System*, case C- 1/09, par.65.

⁵ See, to that effect, Court of justice of the European Union, Grand Chamber, *Costa*, cit.; Court of Justice of the European Union, Grand Chamber, of 7 December 1970, *Internationale Handelsgesellschaft*, case case C-11/70, par. 3; Court of Justice of the European Union, Grand Chamber, opinion of 14 December 1991, *First Opinion on the EEA Agreement*, par. 21; Court of Justice of the European Union, Full Court, opinion *Agreement creating a Unified Patent Litigation System*, cit., par. 65; Court of Justice of the European Union, Grand Chamber, judgement of 26 February 2013, *Melloni*, case C-399/11, par. 59.

⁶ Court of Justice of the European Union, Grand Chamber, *Van Gend & Loos*, cit., p. 12.

peoples of Europe and share within the EU a set of common values on which the EU is founded, as stated in Article 2 TEU⁷. In such a legal structure, the MS are bound by the obligation of sincere cooperation towards the EU⁸ and should ensure, in their respective territories, the application of and respect for EU law⁹.

It results that integration is the key to understand the specificity of the EU and the EU law as well as the need to establish and protect the national identity. Nevertheless, the treaties admit a certain diversity, even better, tolerate limitations to the primacy of the EU law. If, in some cases, diversity is equivalent to the regression, it is undeniable that she carries out a potential dynamism, because she arranges a space of liberty for the exercise of competencies of MS considered as sensible.

In reading the treaties, the respect by the EU of national identity of MS constitutes a dictated form of diversity. The new redaction of the TEU, after the treaty of Lisbon, invites us to reflect on a renewed form of integration, more flexible and open to other principles ensuring the application of the EU law which risk to alter the legal nature of the EU. The process of integration is marked by successes and dark steps. Such as the failure of the treaty at 2004. A comprehensible failure in the context of a process of exceptional integration offered by the EU. The challenge to be taken up is to achieve the modernity of the EU law by renewing the concept of integration, by searching remedies to the conflicting relations between national law and EU law due to the new significance acquired by the national identities¹⁰. It follows that the national identity of MS becomes a driving force to the integration (II) in contrast to the national identities defended by MS which can hinder the integration (I).

2. The national identities, a risk of disintegration

MS have accepted to limit their sovereign's rights for the benefit of the EU, albeit within limited fields, and to transfer powers on the EU. Not always convinced by the process of integration, they refuse the integration of the EU law as part of their legal system on the grounds of constitutionality¹¹. National identities, and more specifically, constitutional identities can engender a disintegration of the EU law. MS have the natural tendency to invoke their constitutional specificities in order to avoid the

⁷ See to that effect, S. PIERRE-CAPS, *Crise des valeurs de l'Union européenne ou crise des valeurs nationales*, in *Revue du marché commun et de l'Union Européenne*, 2017, n. 610, p. 402.

⁸ Set out in the first subparagraph of Article 4(3) TEU. they should take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.

⁹ Court of Justice of the European Union, Full Court, opinion *Agreement creating a Unified Patent Litigation System*, cit., par. 68 and the case-law cited.

¹⁰ See, inter alia, *The EU at a crossroads, Challenges and perspectives*, Cambridge Scholars publishing.

¹¹ C. GREWE, J. RIDEAU, *L'identité constitutionnelle des États membres de l'Union européenne: Flash Back sur le Coming-out d'un concept ambigu*, in *Mélanges Jean Paul Jacqué, Chemins d'Europe*, Paris, 2010, p. 319.

application of the EU law¹². In this case, the principle of primacy regains its authority as a constitutional principle and sets aside the national identities (A). Nevertheless, the primary law, permits, in some cases, the national identities to take hold over primacy (B).

2.1 Primacy versus national identities

The EU has a new legal order *sui generis*, in other words: an autonomous legal order. The protection of that legal order has been one of the cornerstones of the case-law of the Court of Justice for more than 50 years¹³. This autonomy is not only characteristic of the relationship between EU law and the domestic law, but must be respected also *vis-à-vis* third countries and international organisations in the sense that the latter should respect the original character of the EU legal order. Within the EU, competences and responsibilities are distributed among national and EU authorities on the basis of numerous provisions of primary and secondary law¹⁴. The constitutional structure of the EU is therefore seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU.

The integration of the EU law to the national law is ensured by the principle of primacy, an essential feature of the EU legal order which ensures that the executive force of the EU law doesn't vary from one state to another in defence to national law. The principle of primacy introduces a hierarchic vision of the articulation of both EU law legal order and national legal order. In case of conflict, the European law prevails over national law. MS have not accepted the European legal system on a basis of reciprocity but they have undertaken unconditional obligations, an irreversible engagement *vis-à-vis* the EU. Combined with the principle of direct effect¹⁵, the primacy of the EU law is incompatible with chronological considerations as regards its relationship with national law. The provisions of EU law render inapplicable by their entry into force any conflicting provision of current national law but also preclude the valid adoption of new national measures to the extent to which they would be in non compliance with EU provisions¹⁶.

¹² V. CONSTANTINESCO, *La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales: Convergence ou contradiction ? Confrontation ou hiérarchie ?* in *Mélanges en l'honneur de Ph. Manin, Union de droit, Union des droits*, Pedone, 2010, p.34.

¹³ See, for the leading cases, Court of Justice of the European Union, *Van Gend & Loos*, cit.; Court of Justice of the European Union, *Costa*, cit.; Court of Justice of the European Union, *Internationale Handelsgesellschaft*, cit.; par. 3. More recently, Court of Justice of the European Union, Full Court, opinion *Agreement creating a Unified Patent Litigation System*, cit., par. 65.

¹⁴ Opinion of the advocate general J. KOKOTT, delivered on the 13 June 2014 in the case C-2/13, *Accession of the EU to the ECHR*.

¹⁵ See Court of Justice of the European Union, *Van Gend en Loos*, cit.; Court of Justice, judgment of 9 March 1978, *Simmmenthal*, case C-106/77.

¹⁶ Court of justice of the European Union, *Simmmenthal*, cit., par. 14-17.

Moreover, it is settled case-law that rules of national law, even of a constitutional order, cannot be allowed to undermine the scope and the effectiveness of EU law on the territory of that State¹⁷. The argument of constitutional identity and of the protection of fundamental rights constitutionally guaranteed cannot prosper in that case. Such reservations in respect of the relationship between EU law and national law are no doubt to be found in the case-law of a number of constitutional courts in the Member States of the EU¹⁸.

With the insertion of the Charter of fundamental rights of the EU (hereinafter Charter) to the primary law after the treaty of Lisbon¹⁹, the question of the relevant protection of fundamental rights is even more highlighted. Furthermore, the failure of the treaty of 2004 establishing a Constitution for Europe and the decision not to write the principle of primacy to the treaties²⁰ pushed the French constitutional judge to declare that the constitutional specificities under the form of fundamental rights could be opposed to the EU law and defeat the principle of primacy: either because they constitute general principles of EU law or because resulting from common constitutional traditions of MS; either because one of the fundamental rights protected by a MS doesn't have a equivalent in the EU level²¹.

Article 53 of the Charter confirms the respect of the level of protection offered by international law instruments or national constitutions. Thus, in a legal situation entirely determined by the EU law, the MS have no marge of discretion, the principle of primacy precludes the application of national standards of protection of fundamental rights, deriving from national constitutions having precedence over the provisions of EU law, even if the national standards are higher than these set out in the Charter²². MS are not authorised to compromise the primacy, unity and effectiveness of the EU law as inasmuch as it would allow a MS to avoid the application of EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights

¹⁷ Court of Justice of the European Union, Grand Chamber, *Melloni*, cit.; See, to that effect, inter alia, Court of Justice of the European Union, *Internationale Handelsgesellschaft*, cit.; par. 3; Court of Justice of the European Union, judgement of 2 July 1996, *Commission v. Luxembourg*, case C-473/93, par. 38; Court of Justice of the European Union, Grand Chamber, judgement of 8 september 2010, *Winner Wetten*, case C-409/06, par. 61.

¹⁸ Perhaps best known in that context are the reservations of the German Federal Constitutional Court regarding what may be referred to as 'ultra vires review' and 'identity review' (see judgments of the Bundesverfassungsgericht BVerfGE 89, 155, in relation to the Treaty of Maastricht, and BVerfGE 123, 267 in relation to the Treaty of Lisbon), and the theory of 'controlimiti' developed by the Italian Constitutional Court (see, in that respect, Corte Costituzionale, judgment n.170 of 8 June 1984, *Granital*).

¹⁹ Art 6§1 TEU

²⁰ Confirmed in the declarations annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007. See, to that effect, P. CASSIA, *Primauté du droit communautaire - L'article 1-6 du traité établissant une Constitution pour l'Europe et la hiérarchie des normes*, in *Europe*, n. 12, December 2004, étude n. 12.

²¹ Judgement of the French constitutional court, CC, n. 2007-560 DC, 20 December 2007, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

²² Court of Justice of the European Union, Grand Chamber, *Melloni*, cit., par. 56. See, inter alia, C. HAGUENAU-MOIZARD, *Primauté - Identité constitutionnelle et mandat d'arrêt européen : l'exploitation de la jurisprudence Melloni par la Cour constitutionnelle allemande*, in *Europe*, n. 3, Mars 2016, étude n. 2.

guaranteed by that State's constitution. The wording of Article 53 of the Charter doesn't establish an exception to the principle of the primacy of EU law. On the contrary, the words "in their respective fields of application" were chosen by the drafters of the Charter so as not to infringe that principle.

In addition, it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties and, consequently the respect of the principle of primacy. The EU, this new legal structure in a quest of identity, is based on the rule of law which implies a complete system of legal remedies and procedures designed to confer on the judicature of the European Union jurisdiction to review the legality of acts of the institutions of the European Union and of the MS²³. The European jurisdiction forms part of the very foundations of the Community²⁴.

In that context, it is for the national courts and tribunals and for the Court of Justice to ensure consistency and uniformity in the application and interpretation of EU law in all MS and judicial protection of an individual's rights under that law²⁵. The reference for a preliminary ruling, provided for by article 267 TFEU, is the procedural instrument for protection of the principle of primacy. The national judge is transformed to a defender of the principle of primacy. Owing to a functional duplication, and called upon, within the exercise of its jurisdiction, to apply provisions of EU law, the national judge is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means²⁶. It follows that in order to ensure the primacy of EU law, national courts should be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

If the treaties organise the obligations of MS as regards the application of the principle of primacy as a result of their European engagement, it should be noted that they provide a more manoeuvring space to MS by virtue of various legal instruments established by the treaties. In that manner, the EU law tolerates some spaces of national identities versus the principle of primacy.

²³ Court of Justice of the European Union, Grand Chamber, judgment of 29 June 2010, *E and F*, case C-550/09; Court of Justice of the European Union, Grand Chamber, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation*, case C-402/05 P and case C-415/05 P, par. 281-282; Court of Justice of the European Union, judgement of 25 July 2005, *Unión de Pequeños Agricultores v. Council*, case C-50/00 P, par. 40; Court of Justice of the European Union, judgement of 23 April 1986, *Les Verts/Parlement*, case C-294/83, par. 23.

²⁴ Court of Justice of the European Union, Grand Chamber, *First Opinion on the EEA Agreement*, par. 35 and 71; Court of Justice of the European Union, Grand Chamber, judgement of 30 May 2006, *Commission v. Ireland*, case C-459/03, par. 123 and case-law cited.

²⁵ See, to that effect, Court of Justice of the European Union, Grand Chamber, judgement of 13 March 2007, *Unibet*, case C-432/05, par. 38 and case-law cited.

²⁶ Court of Justice of the European Union, Grand Chamber, judgment of 22 June 2010, *Melki and Abdeli*, case C-188/10 and case C-189/10.

2.2 National identities versus primacy

From the outset, it must be observed an absolute authority of the community law over the national constitutions under the principles of primacy and direct effect. If it is a right vision of the relationships between EU law, it is not a complete one²⁷. The argument of the specificity of the community legal order or, since the treaty of Lisbon, European legal order, is more related to the existential need to differentiate the three Communities and the EU from the international law rather than to establish a hierarchic subordination of national law to EU law. If the national identity of MS is officially protected by the treaties since the treaty of Maastricht with the introduction of a new article F§1, nonetheless, the idea of protecting the national identities is omnipresent from the very beginning. By its first judgements, the Court of justice outlines that despite the unconditional character of the obligations undertaken by MS, the treaties grant the MS with a liberty of unilateral action, by clear and precise provisions or authorize them to derogate from the treaties under special authorisation procedure²⁸.

In other words, the treaties admit a certain degree of regression of the principle of primacy as a counterweight to the enhanced cooperation²⁹, a more dynamic form of integration in the sense of progression. The respect of constitutional identity is guaranteed under other naming³⁰. The process of integration doesn't ignore the national identities and either dictates or advocates the diversity. In the first case, diversity is related to the rights of MS linked to their status and aims to temper the limitation of sovereignty resulting from the transfer of powers to the EU³¹. To that end, principle of subsidiarity³² is an isolated reference in the treaties in the service of a better distribution of powers. Furthermore, the principle of institutional and procedural autonomy³³ established by the Court of justice is another instrument to avoid broad interference in the rules considered as fundamental within the national legal systems³⁴. It is clear from settled case-law of the Court of Justice that, in the absence of EU legislation governing a matter, it is for each MS to lay down detailed procedural rules governing legal actions and to designate the competent courts for safeguarding rights which individuals derive

²⁷ A.B. CAPIK, *Five decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited* in *Research handbook on EU institutional law*, p. 379.

²⁸ Court of Justice of the European Union, *Van Gend en Loos*, case C-26/62; Court of Justice of the European Union, *Simmmenthal*, case C-106/77.

²⁹ TEU, title IV.

³⁰ Opinion of the advocate general POIARES MADURO delivered on 8 October 2008 in the case C-213/07, *Michaniki*, par. 31-33.

³¹ Opinion of the advocate general J. KOKOTT in the case C-2/13, cit.

³² Art. 5§2 TEU. The same article provides in par. 1 for the principle of conferral of powers.

³³ Court of Justice of the European Union, judgment of 15 September 1998, *Edilizia Industriale Siderurgica / Ministero delle Finanze*, case C-231/96.

³⁴ M. AVBELJ, *National procedural autonomy: concept, practice and theoretical queries* in *Research handbook on EU institutional law*, cit., p. 421.

from EU law³⁵. Moreover, primary law gives solutions to potential conflicts between EU law and national law, and organises a compatibility sought out, *in fine*, by MS who are the constituent authorities of the EU. The treaties advocate a diversity sometimes in contradiction with EU principles: the procedure of revision of treaties³⁶ authorises the MS to opt out of the application of treaties under the form of protocols³⁷ or declarations formulated by some MS³⁸.

Moreover, the primacy of the EU law takes a step back when MS invoke their general interest on the grounds of derogations to the economic provisions of the treaties established by the treaties³⁹. MS also have the capacity to develop, within certain limits, their own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement⁴⁰. The protection of fundamental rights is such a legitimate interest which, in principle, justifies a restriction of the obligations laid down by the EU law⁴¹. The question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights was treated before the entry into force of the Treaty of Lisbon and the integration of the Charter in the primary law. The national authorities relied on the need to respect fundamental rights guaranteed by both the European Convention of Human Rights (thereinafter ECHR)⁴² and the national constitutions. It seems that fundamental rights, formerly used as an instrument of constitutional resistance to the primacy of the Community law, become a «solvent» of antinomies, a federating tool of loyalties⁴³. Without being totally eliminated, the risks of normative collision are reduced.

These faculties offered to the MS can be resumed under the autonomous concept of public order⁴⁴. Thus, the conception of public policy doesn't have to be shared by all MS as regards the precise way in which the fundamental right or legitimate interest in

³⁵ Court of Justice of the European Union, judgement of 16 February 1976, *Rewe*, case C-33/76; Court of Justice of the European Union, judgment of 16 December 1976, *Comet*, case C-45/76; and, more recently, Court of Justice of the European Union, judgment of 8 February 1996, *FMC and others*, case C-212/94.

³⁶ Art. 49 TEU.

³⁷ For ex. Protocol n. 32 on the acquisition of property in Denmark and Protocol n. 35 on article 40.3.3 on the Constitution of Ireland

³⁸ For ex. The common declaration annexed to the treaty of accession of Greece which prohibits the entry and stay of women in the mountain of Athos in Greece justified on religious and spiritual grounds.

³⁹ Art. 36 TFEU, 51 TFEU and 56 TFEU; Court of Justice of the European Union, judgement of 20 February 1979, *Rewe-Zentral (Cassis de Dijon)*, case C-120/78.

⁴⁰ Court of Justice of the European Union, judgment of 14 October 2004, *Omega*, case C-36/02 in *Europe* 2004, comm. 407, note D. SIMON. See, inter alia, Court of Justice of the European Union, judgment of 28 November 1989, *Groener*, case C-379/87 as regards the promotion of the linguistic requirement imposed as part of a policy for the promotion of the national language.

⁴¹ Judgement of 12 June 2003, *Schmidberger*, case C-112/00, par. 74.

⁴² The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Court of Justice of the European Union, judgement of 18 June 1991, case C-260/89, *ERT*, par. 41; Court of Justice of the European Union, judgement of 6 March 2011, *Connolly v Commission*, case C-274/99 P, par. 37; Court of Justice of the European Union, judgement of 22 October 2002, *Roquette Frères*, case C-94/00, par. 25.

⁴³ L. SCHEECK, *Le dialogue des droits fondamentaux en Europe, Fédérateur de loyautés, dissolvant de résistances ?*, in E. BRIBOSIA, L. SCHEECK, A. UBEDA DE TORRES, *L'Europe des Cours: loyautés et résistances*, Bruxelles, Bruylant, 2010, p. 19.

⁴⁴ Court of Justice of the European Union, *Omega*, cit.

question is to be protected. But it must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society⁴⁵.

The primacy of the EU law is after all a question of field of application of the EU law. The protection of fundamental rights can be guaranteed by national constitutions when a situation falls out of the scope of the EU law. The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations⁴⁶. In a situation not entirely determined by the EU law, such as in *Jeremy F*⁴⁷, the MS enjoy a margin of appreciation by the application of their own standards of protection of human rights⁴⁸. Conversely, in case of a situation entirely determined by the EU law, the MS have no margin of discretion, even if the national standards are higher than these set out in the Charter.

3. The national identity, a driving force to the integration

With the treaty of Maastricht, the process of integration takes a further step: MS accept to transfer new responsibilities to the EU, new legal entity created, in the matters of security. MS need to increase their sense of belonging to the political integration. and, throughout the procedures of revision, they impose the obligation on EU to respect their national identity.

MS obtain more margin of discretion in sensible domains on the grounds of the protection of their national identity. This autonomous concept of the EU law contributes, by its various applications, to a renewed concept of the relations between EU law and domestic law. EU and national legal order converge across the emergence of constitutional values shared by the EU and MS (A). Furthermore, the obligation to respect the national identity is paving the way to a supranational identity (B), which would be the sum of national identity and EU identity.

3.1 The merger of common constitutional values of EU and national legal order

The political will to construct a political union and give birth to the EU distinguished by its own identity will be expressed in the founding treaty of the EU, the TEU and

⁴⁵ Court of Justice of the European Union, judgment of 14 March 2000, *Église de scientologie*, case C-54/99, par. 17.

⁴⁶ Court of Justice of the European Union, *ERT*, cit., par. 42; Court of Justice of the European Union, *Roquette Frères*, cit., par. 25.

⁴⁷ Court of Justice of the European Union, judgment of 30 May 2013, *F.*, case C-168/13 PPU.

⁴⁸ Court of Justice of the European Union, Grand Chamber, judgment of 26 February 2013, *Åkerberg Fransson*, case C-617/10 REC.

more specifically in the article F§1 in the terms of which *the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*. For its first official appearance, the national identity is directly linked to the democracy as a system of national government. Concurrently, the preamble confirmed the attachment of MS to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. At the same time, the respect of fundamental rights, is guaranteed by the ECHR, and as they result from the constitutional traditions common to the MS, as general principles of Community law.

The respect of national identity of MS by the EU was considered at the very beginning as having a political and not a judicial significance. Under the influence of the Court's case-law, the preservation of national identity becomes a "*legitimate aim respected by the Community legal order*"⁴⁹. The treaty of Lisbon will strengthen the obligation of the EU to respect the national identity of MS inherent to their fundamental political and constitutional structures, inclusive of regional and local self-government. This structural form of the national identity refers to the central political institutions of MS, their political regime, the autonomy of MS in the allocation of their internal powers⁵⁰, the organisation of the administrative powers over the national territory⁵¹. This neutrality of the EU legal order vis-à-vis the organisational structure of MS is based on the principle of the sovereignty of States. However, the internal choice of the form of the state cannot be invoked in order to avoid European obligations⁵².

The national identity, under its functional dimension, includes the privileges which permit MS to ensure the territorial integrity of the State, maintain law and order and safeguard national security. In addition to the structural and functional identity, the national identity has an essential substantial aspect which involves the issues of nationality, voting right and European citizenship⁵³, the abolition of titles of nobility by national constitution⁵⁴, the protection of a State's official national language⁵⁵, except for

⁴⁹ In the context of a case where the Member State relied on that in order to justify the exclusion of nationals of other Member States from access to posts in the field of public education (see Court of Justice of the European Union, *Commission v Luxembourg*, cit., par. 35).

⁵⁰ Opinion of the advocate general TRSTENJAK, delivered on 3 February 2009, *Horvath*, case C-428/07.

⁵¹ Court of Justice of the European Union, judgment of 21 December 2016, *Remondis*, case C-51/15, par. 40-43; Court of Justice of the European Union, judgment of 10 September 2009, *Sea Sarl*, case C-573/07. See, to that effect, Court of Justice of the European Union, judgment of 12 June 2014, *Digibet and Albers*, case C-156/13, par. 34.

⁵² Court of Justice of the European Union, Grand Chamber, judgment of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, case C-212/06.

⁵³ Court of Justice of the European Union, Grand Chamber, judgment of 2 March 2010, *Rottmann*, case C-135/08.

⁵⁴ The judgment of the Court of Justice of the European Union delivered on the 22 December 2010, *Sayn-Wittgenstein*, case C-208/09, is the first application of art. 4§2 after the entry into force of the treaty of Lisbon.

⁵⁵ Court of Justice of the European Union, judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, case C-391/09, par. 86-87.

the religion⁵⁶. The Court of justice seems to adopt a neutral position as regards the religion as a substantial component of the national identity of MS.

It follows from the above that although the notion of national identity belongs to MS, its content of the national identity is defined, analysed and refined by the Court of justice. However, the latter cannot build the meaning of the national identity without reference to national law. In that effect, do MS have the marge to add new aspects of their national identity accorded by their domestic law? Such as the protection of fundamental rights? National authorities and especially constitutional courts make reservations on grounds of constitutionality and, in that way, extent the scope of national identity to the constitutional identity in the sense of the specificity of the nation legal order⁵⁷. The Court of justice refers rarely to the constitutional identity of MS⁵⁸. The term is present but not expressly pointed out in the case law except for the *opinion juris*⁵⁹.

The national and European judge should work, in a basis of mutual confidence and empathy, to the merger of a community of values composing the national identity⁶⁰. The *Arcelor* affair⁶¹ is a judgement with a major bearing, in terms of procedures for cooperation between the Court of Justice and the national courts. Asked to rule on the conformity of a Directive with the French Constitution, the *Conseil d'État* was faced with the impossible task of having to reconcile the irreconcilable: how to protect the Constitution within the domestic legal order without breaching the primordial requirement of the primacy of EU law⁶². It requested the assistance of the Court of Justice in guaranteeing the observance by EU acts of the values and principles also recognised by its national constitution. The existence of analogous European constitutional values reconciles what is irreconcilable: the European Union and the national legal orders are founded on the same fundamental legal values.

Instead of a solution in terms of hierarchy, the *Arcelor* affair offers the occasion to the Court of justice to operate a material rapprochement of the EU and the national legal order given their common constitutional foundations. This solution explains the apparent paradox in this affair which lies in the fact that the challenge to the validity of a directive in the light of the EU's principle of equal treatment has arisen from a challenge to the constitutionality of the directive.

⁵⁶Court of Justice of the European Union, Grand Chamber, judgment of 14 March 2017, *G4S Secure Solutions*, case C-157/15.

⁵⁷ See, inter alia, French Constitution Court, decision n. 2006-540 DC, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*.

⁵⁸ See, to that effect, D. SIMON, *L'identité constitutionnelle dans la jurisprudence de l'Union européenne*, in *L'identité constitutionnelle saisie par les juges en Europe*, Pedone, Paris, 2011, p. 27

⁵⁹ Opinion of the advocate general POIARES MADURO, delivered on 8 October 2008 in the case C-213/07, *Michaniki*, par. 31-33

⁶⁰ M. VERDUSSEN, *Justice constitutionnelle*, Larcier, 2013, p. 121 s.

⁶¹ Opinion of advocate general POIARES MADURO, delivered on 21 May 2008 in the case C-127/07, *Arcelor Atlantique and Lorraine and others*, par. 15-18.

⁶² A. LEVADE, *Identité constitutionnelle et exigence existentielle: Comment concilier l'inconciliable?* in *Mélanges Ph. Manin*, cit., p. 76.

How should judges fulfil their obligation to ensure the respect of this common constitutional heritage? While it is the duty of the national courts to guarantee the observance of those values *within the scope of their constitutions*, it is the responsibility of the Court to do likewise within the Community legal order. Article 6 TEU expresses the organic identity between EU law and national constitutions and ensures that national constitutions are not undermined. It prevents any conflict with them by anchoring the constitutional foundations of the EU in the constitutional principles common to the MS. At the same time, that structural congruence can be guaranteed only organically and only by the EU within the scope of EU law, through the mechanisms provided for by the Treaty. EU law having thus incorporated the constitutional values of the MS, national constitutions must adjust their claims to supremacy in order to comply with the requirement of the primacy of EU law within its field of application.

3.2. The path to a supranational identity

National identity has become a benchmark for both the national and European judge. Can someone go further the concept of national identity and attempt to prove that national identity is a component of another identity? Of the EU identity?

The respect of the national identity is an obligation of the EU aimed to counterweight the obligation of sincere cooperation on the MS. This obligation, as mentioned above, is explicitly stated for the first time upon a revision of the treaties, a reminder of the obligation being regarded as necessary by the MS in view of the further integration provided for. However, before its introduction to the treaties, the concept of national identity was considered as a component of the European identity, shaped by MS since the 1970s during summit conferences either inside the European Council or the Council of the EU.

The first textual reference to the European identity was in the Copenhagen declaration of 1973⁶³. Defined with the dynamic nature of the Community in mind, the fundamental elements of a European identity would be the respect of the values of the legal, political and moral order of MS; the preservation of the rich variety of their national cultures, the defence of the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and the respect for human rights. The nascent concept of European identity goes along with the project of establishing a system of political co-operation which will be concretised with the treaty of Maastricht. The question of a European identity arises when MS decide to transform the project of economic integration into a political one which potentially can infringe their constitutional values.

Although the term of EU identity does not figure in the treaties since the appearance of the EU, its fundamental elements are incorporated to the primary law, under the

⁶³ Of 14 December 1973, Bull. 1973, P. 1927

treaty of Amsterdam, as founding principles of EU transformed to founding values after the treaty of Lisbon⁶⁴. The importance of these values is underlined by the new procedure of political control specified by the same provision the application of which can lead to the suspension of the voting rights of the MS in the Council. At the same time, these principles are imposed to the countries applicants to accession. Therefore, the identity of the EU derives from the article relevant to the conditions of admission (49 TEU). The EU finds its identity, its fundamental characters, to these values. The EU is based on the fundamental premise that each MS shares with all the other MS, and recognises that they share with it, a set of common values on which the EU is founded: the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail⁶⁵.

Moreover, these features of the EU identity are validated by MS during the intergovernmental conferences and ratified by European parliaments⁶⁶. The CFR, also, recognizes, in its preamble, the role of the EU for the preservation and the development of these common values while respecting the national identities of the MS. These common values, shared by the EU and the MS, form the constitutional foundations of the EU and offer to the latter a permanent character. MS can be identified to these values which strengthen their feeling of belonging to the EU.

Furthermore, the EU is a legal entity which owes respect to the national identity of MS. This constitutional obligation on the EU is another fundamental character of its identity. However, instead of introducing the term of EU identity, MS opted for the insertion to the treaties of the national identity. One should observe that MS didn't choose the term of constitutional identity because less neuter and subject to various and conflicting applications by national courts. At that time, national identity aimed to set back any evolvment towards a supranational system which would infringe upon in national sovereignty. This same reasoning is all the more applicable in the choice not to introduce the EU identity to the treaties. The establishment of national identity would be an argument and a support to invoke and later to establish the right to withdrawal of a member state⁶⁷. The withdrawal should therefore be the expression of the maintenance of the national identity on the grounds that EU infringed upon its national sovereignty. Seen in that perspective, national identity authorises MS not to apply EU law. Each MS has the discretion to invoke its constitutional specificity in the sense of principles and rules of law which do not have an equivalent at the EU level and to protect, in that way, it's fundamental national interests. Practically, this means that there are as many national identities as there are MS.

⁶⁴ See for example, D. SIMON, *Hongrie: valeurs de l'Union versus identité constitutionnelle des États Membres*, in *Europe*, nn. 8-9, Août 2013, repère 8.

⁶⁵ Art. 2 TEU.

⁶⁶ Art 49 TEU.

⁶⁷ Art. 50 TEU introduced by the treaty of Lisbon.

The national identity permits a productive dialogue between European and national judge in a context of legal pluralism: each one has reason for in its own legal order. Instead of a federalist hierarchy of rules of law, the national identity as a component of the EU identity is at the origin of a European constitutional law. National constitutional traditions are already consecrated as European traditions throughout article 4§2 TEU. National values are absorbed within the European values. The material merger of EU and national legal orders is furthermore operated on the basis of the article 6§3 TUE⁶⁸, considered as a process of absorption of the conflicts and a remedy to the primacy.

The recognition of the national identity, and, subsequently, of the EU identity is inherent to the right of MS to leave from the EU. Should therefore the EU be closer to a federation of states because of the MS right to the respect of their national identity? If the EU is undoubtedly a union of states which remain sovereign subject to limitations approved by their constitutions, she is also an even closer union of peoples and citizens. The EU is a supranational entity composed by sovereign states.

The national identity and, furthermore, the EU identity, renews traditional concepts such as integration, feature of the EU, and constitutionality, feature of the MS. The EU is not only identified to the integration but also to the respect of fundamental rights, rule of law, democracy, liberty. This dynamic instrument of national identity, considered initially as a serious brake to further integration, contributes, *in fine*, to more integration because it gives birth to a supranational identity, the EU identity. This new form of identity can bring European citizens closer to the EU. Founded on the material convergence between national and EU law, on a basis of shared principles and values, the supra-national identity of the EU strengthens the ongoing process of constitutionalizing of the EU.

4. Conclusion

The EU has more than ever the existential need to revise the forms and the finalities of the integration. The EU is at a crossroads, a defining moment of its existence, therefore major changes are necessary⁶⁹. She has to deal with a multi-level crisis – the Greek debt crisis, an unstable neighbourhood bringing waves of refugees – which risks to call into question the European project. The most recent crisis, the BREXIT which is nothing else than the application for the first time of the article 50 TEU, presents for the eurosceptics a solid argument against the European integration. One wonders if the Community idea of the founding fathers still stands the test of time. More than ever, there is an existential need to insist on the bonds of the European project with the

⁶⁸Court of Justice of the European Union, Grand Chamber, judgment of 27 June 2006, *Parliament v. Council*, case C-540/03.

⁶⁹ Laeken Declaration on the future of the European Union, Bull. EU 12/2001, pp. 19-23; For a detailed account, see, *inter alia*, P. CRAIG, *The Lisbon treaty: Law, Politics, and a Treaty Reform*, Oxford, 2010, p. 1; J.C. PIRIS, *The Constitution for Europe: A legal analysis*, Cambridge, 2006, p. 38.

expectations of the European citizens. Unfortunately, the last one, and among them, the British citizens don't feel concerned by the European affairs. However, the three Communities and, since the treaty of Lisbon, the EU are or are supposed to be a "even closer union among the people of Europe". The people of Europe, and, furthermore, the European citizens should share the feeling of belonging to the EU. The latter needs to be more visible, more transparent and attentive to the mobilisations of the European citizens.

In the current political context in which Europe is confronted, the question of how best to integrate European people should find an appropriate question. The recognition of the national identity of MS, whose content is of a variable geometry et might differ from one MS to another, is the first step towards reconnecting European citizens with the EU. The respect by the EU of the 28 national identities can ensure the citizens of MS that the EU prefers the dialogue to conflict as regards her relationship with her members. Furthermore, the next step should be taken in the next revision of treaties. The European constituents should consider the opportunity of expressly including in the founding treaties the EU identity. MS should therefor hold discussions about the content and the consequences of such a further step of the integration. If the EU has, *in fine*, her own identity as well as MS, then the very legal nature of the EU should be clarified. Federal state? Federation? Something else? Who knows? Stay tuned.

ABSTRACT: From the outset, Community law had an absolute authority on national law. The primacy of the EU law has always been one of its fundamental characteristics which ensures its uniform application on the territory of the Member States. The respect of the national identity, introduced to the primary law since the treaty of Maastricht, aims to give a margin of discretion to MS and to counterbalance the effects of the integration. The process of exceptional integration offered by the EU is marked by successes and failures. The EU has to deal with very difficult European issues, with crises at different levels, concerning the euro zone, the immigration, the lack of confidence of European citizens at the European institutions highlighted by the BREXIT. Does the EU have the capacity to respond at the crises? The challenge to be taken up is to achieve the modernity of the EU law by renewing the concept of integration. The respect of national identity by the EU which paves the way to a supranational identity could be the appropriate remedy to the conflicting relations between national law et EU law.

KEYWORDS: Primacy – National identity – Constitutional identity – Supranational identity – fundamental rights.