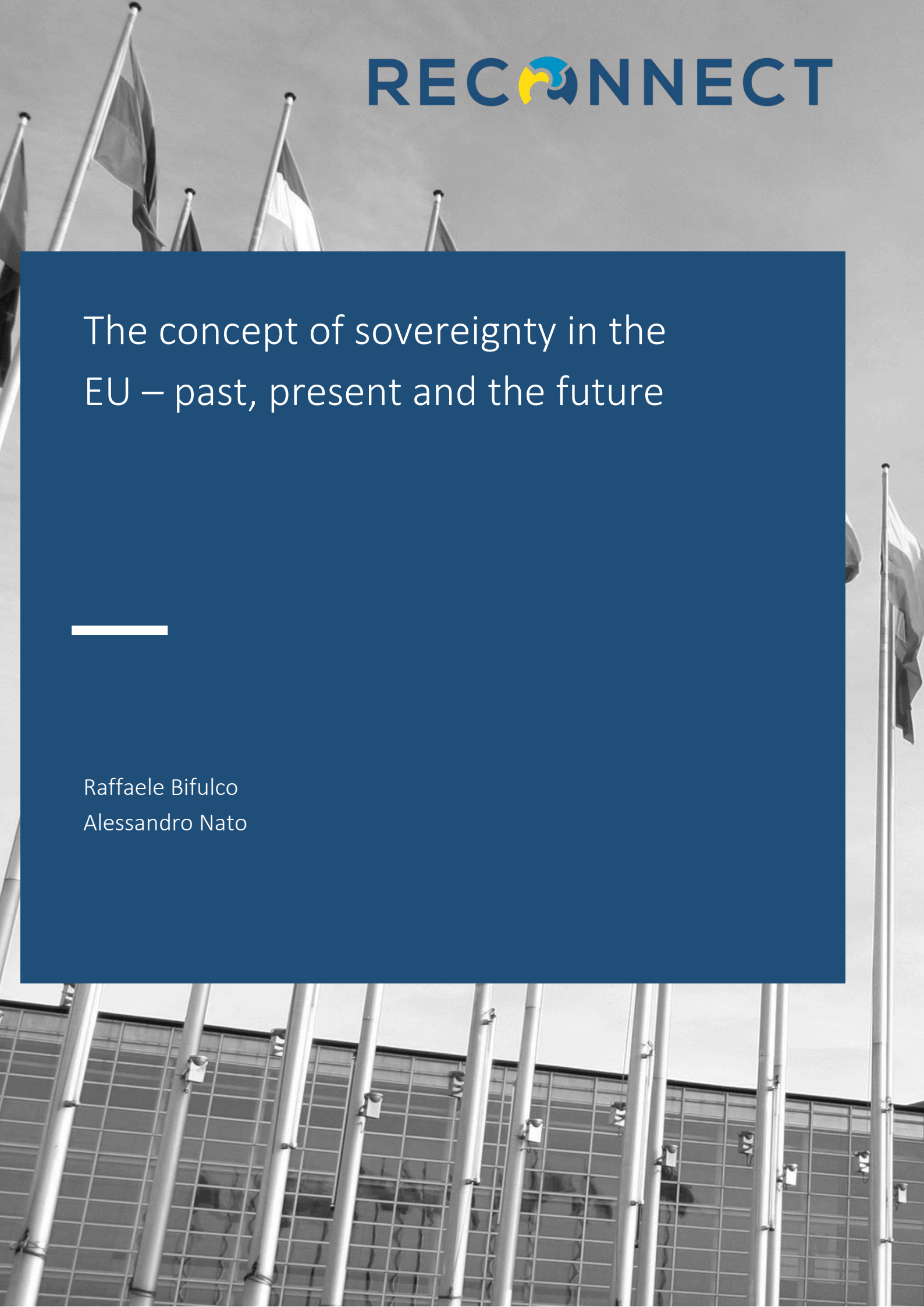

RECONNECT

The concept of sovereignty in the EU – past, present and the future

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The concept of sovereignty in the EU – past, present and the future

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Contents

Foreword

The deliverable focuses on the concept of sovereignty within the EU, observed through the prism of the distribution of powers between the EU and Member States. The choice of viewpoint is justified, because the history of the European Union is also the history of how power and therefore actual public policies have been progressively distributed. In the context of the discussion on the distribution of powers, the issue of the identity of those who have the authority to decide upon these powers is also considered, thus calling into question the notion of sovereignty. The analytical tools used are mainly those of the legal analysis.

Part A traces the historic origin and development of the concept of sovereignty, and also highlights the reasons as to why the issue of sovereignty in Europe takes on very specific features. Indeed, the progressive internal and external disarticulation/disaggregation of sovereignty takes on an intensity within the EU, which cannot be found in other legal systems. In conclusion, this first part also tests the limits of sovereignty: if sovereignty is a direct claim to the government of a particular community, there are problems of such a complex and global nature that no state sovereignty can individually resolve them. The issue of environmental protection is an example.

Part B is the key section of the deliverable. It initially considers the historical development of the European Union, again with regard to the distribution of powers and hence the relationship between the European Union and the Member States. However, the focus of the analysis is on the current situation. Following an exploration of the current legal framework of the distribution of powers and an in-depth study dedicated to those issues that will be subject to further development by the other research units of the Reconnect project, the analysis focuses on the main causes of conflict between European Union and Member State institutions. Some phenomena are particularly representative of the current crisis, such as Brexit and enlargement towards the East. Those crises have placed the concept of sovereignty under stress are thus taken into account. Particular attention is also paid to the most important jurisprudential conflicts between the European High Courts/ European courts of last resort which, through the principle of national identities, are reconfiguring relations between the EU and Member States. These conflicts, both jurisprudential and non-jurisprudential, highlight the difficulty faced by the EU institutions in keeping the emergence of state sovereignty under control. In this part, the review is not conducted solely with exclusive attention on rules and institutions, but also with regard to the most influential theoretical interpretations.

In Part C, the conclusions are drawn, and an attempt is made to map out the main theoretical guidelines that have emerged in the area of sovereignty. The review shows how the issue of sovereignty calls into question, in particular, the existence of a European people.

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Part A: Sovereignty in History

1. The emergence of the concept of sovereignty

The concept of sovereignty emerged in the Early Medieval Period in order to justify the powers of princes against the previous power structures, in particular the Emperor and the Pope. In that historical context, sovereignty involved the claim to possess all the power necessary to ensure civil coexistence in times of religious and civil conflict.

The first formulation of sovereignty is traditionally traced back to Jean Bodin: Bodin's 'République' is characterised by a 'puissance de commandement' (absolute power) capable of expressing itself against 'tous' (all society). The internal character of sovereignty is thus delineated. Bodin emphasizes, not only this horizontal dimension of the power to command, but also its absoluteness, which is the origin of what today is defined as external sovereignty. He who has no superiors is sovereign of the outside world: absoluteness as independence. A system that is independent of the outside and superior to everything and everyone inside is original, in modern terminology (BODIN, 1964 and 1988).

The expression of this 'puissance' (power) is, and will increasingly be over time, the law. Sovereignty and law increasingly tend to identify with one another. A paradigmatic junction concerning the relationship between sovereignty and law was observed by Thomas Hobbes, according to whom it 'is annexed to the sovereignty, the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being harassed by any of his fellow subjects.' As can be seen, the link is very close: the rules – which establish what is 'Good, Evil, Lawful and Unlawful in the action of Subjects' – represent 'the Act of that Power, in order to the public peace' (HOBBES, 1991).

The foundations are thus laid for the formation and progressive strengthening of the modern state which has its basis in territory, because within that territory it claims to be absolute. This implies a significant development from the medieval past: the formation of the state is accompanied by the territorialisation of the legislation (GRIMM, 2015). Gradually, the affirmation of sovereignty becomes part of a modernisation discourse (LOUGHLIN, 2003), linked to the idea of a power that insists upon a territory, a government and a people. This will put an end to the civil wars that had devastated France and England in particular.

2. Solidification

The great revolutions of the late eighteenth century shattered the concentration of power, thus achieving that separation of power which had been theorised first by Locke and then by Montesquieu during the previous two centuries. However, the division of power did not affect the indivisibility of sovereignty, which changed only in ownership, passing from the monarch to the people, but not its indivisible character. In other words, sovereignty remained intact in both its internal and external dimensions.

In Europe, the nation state strengthened and refined the concept of indivisibility. In particular, it was the German literature of the late nineteenth century that argued that dividing sovereignty would mean its denial. This point became clear in the discussions regarding the nature of the German federal state: unlike American pragmatism, the most influential section

of the German jurists did not consider it possible that there could be two sovereign entities, the Federation and the Member State, on the same territory (LABAND, 1901). In short, especially in Europe, the historical conditions favoured the emergence of a sovereignty *à la Bodin*, leaving other possible meanings in the background, such as that of Althusius, which valued popular and federal roots (FERRARESE, 2019) or that of Waitz, who managed to imagine a sovereignty divided between Federation and mutually independent Member States. These theoretical positions will be the subject of reinterpretation and attention from scholars of the phenomenon of the European Union. Indeed, part of the literature affirm that sovereignty is not incompatible with the presence of an entity which, while lacking the monopoly of public power, has the highest authority within a certain sphere of power. (MADURO, 2003; WALKER, 2003)

3. The external dimension

The notion of external sovereignty assumed a central role at the time of the disintegration of the medieval Respublica Christiana (JACKSON, 1999). The dissolution of this power structure gradually led to the formation of the so-called Westphalian system, named after the city, where in 1648 the peace treaties were signed that ended the Thirty Years War and the Eighty Years War. The Westphalian system was based on a set of state powers that recognized one another as independent and different. In particular, the principles underlying the system are provided by the mutual recognition of sovereign actors, by the significance of the territory on which the sovereign actors insist, and by the exclusion of external factors that may influence the state authorities. It is not a closed system, but rather one which is based on an awareness of the permeability of borders and the already existing interdependencies between states.

The interpretation of those who have specified, as the essence of the system, only the last factor, namely the 'exclusion of external actors'-principle only (KRASNER, 1999) is contrasted with the interpretation of those who emphasise the compromise and negotiating nature of Westphalian sovereignty. This last interpretation emphasises the discursive nature which distinguishes Westphalian sovereignty from the earlier imperial image of sovereignty, according to which the centralised power expands in concentric circles (WERNER/DE WILDE, 2001). In short, the Westphalian system aims to build a structure of de facto independent states that accept certain principles when they enter into mutual relations.

4. The articulation of internal sovereignty

Once the nation states were formed, sovereignty assumes different forms and concentrations in comparison with those present in the founding theoretical elaborations.

The United States plays an important role in the disarticulation of sovereignty. If, during the War of Independence against the motherland, the theme had been that of the divisibility of sovereignty, in the subsequent amendment phase of the *Articles of Confederation,* it was forced to address the question of the ownership of sovereignty. The idea of popular sovereignty will allow American constituents to successfully solve the problem. This represents a major innovation in comparison with the past, particularly compared with the English precedent in which Parliament was unable to establish itself as the possessor of sovereignty (1640-1660 and 1688). The Constitution of the U.S. is a tool for the affirmation of popular sovereignty, which ensures that Parliament becomes and remains an organ of the people.

The other problem that the American constituents had to resolve was that of the sovereignty of the Member States, which had no interest in having a sovereign federation rule over them. To those in the Convention who supported the idea that sovereignty was divisible, the anti-federalists replied that it was indivisible. As Grimm observes, 'a solution was offered in the form of a transfer of sovereignty from the people of the individual states to the people of the United States' (GRIMM, 2015b): thus neither the organs of the Member States nor those of the Federation, neither the individual states nor the Federation in its entirety became sovereign; only 'the American people' was sovereign.

This approach will also be used, with some variations, on the European continent, in the context of which the French Revolution initiated the process of constitutionalisation. As is well known, constitutions have the function of organising and regulating public power. In particular, it is the power of the State that is organised and subject to limits. Modern constitutions place the subject of sovereignty outside the Constitution itself, in a constituent power that belongs to the people. This meaning follows from the American and French Revolution. The sovereign people remain a present but latent entity, hardly ever emerging in the performance of public functions. It does not even emerge during referendums and constitutional revisions, so it can be said that 'the constitutional state has made the sovereign invisible. Popular sovereignty is not a reality, but an ascription. The sovereign remains only an abstract subject for the ascription of acts of public authority' (GRIMM, 2015).

5. The disarticulation of sovereignty towards the outside world

With regard to the external side, states will never be those isolated and autarchic entities which doctrine often represents. The Westphalian system was built on interdependent states with permeable borders. Otherwise, it would not be possible to explain why in the seventeenth century the states agreed to conduct negotiations in regulating their external relationships. For example, negotiations between Münster and Osnabrück were conducted for over four years (1644-8). As Werner and De Wilde affirm, the 150 years of war had shown that the deployment of pure military force was not enough to establish sovereignty. States were already interdependent. This is why they conclude that 'the essence of Westphalian sovereignty is its negotiated nature. The essence of Westphalian system, therefore, is not the creation of 'billiard-ball' states; rather it is the creation of a structure of the facto interdependent states that accept some basic principles in dealing with each other' (WERNER/DE WILDE, 2001).

Between the end of the First World War and the end of the Second World War, the Westphalian order definitively entered into crisis. This began with the foundation of the United Nations, which, although based on the sovereignty of states, begins to undermine external sovereignty. This organisation has the power to impose obligations on states and to affect their self-determination, including through military intervention. While states still remain the dominant players on the international stage, sovereignty is undermined many other international organisations will be established, in some cases with arbitral and dispute-resolving powers, which end up encroaching ever further on state powers. The prohibition on interference with the internal affairs of the states will increasingly lose substance, in favour of so-called humanitarian interventions (a very problematic doctrine: see U.N. General Assembly, res. 63/308).

In the course of the twentieth century, additionally to the global or universal dimension of the United Nations, sector-specific international organisations became increasingly numerous, including the World Trade Organization. These organisations will eventually further restrict the sphere of action of state sovereignty, since they will demand from states, within their own sphere of action, functional supremacy. While in the Westphalian period (state) sovereignty had always referred to territory, in the post-Westphalian period the normative claim is no longer linked to territory. Rather, it becomes a functional claim, linked to the sphere or powers of which a certain international organisation is the recognised as the bearer (WALKER, 2003).

In Europe, the establishment of the European Communities will accentuate this phenomenon in what could be understood as 'radical', but is widespread on the global level (WEILER, 1991). The current regime of international law means that states still retain a horizontal dimension of sovereignty, in the sense that each state retains the normative claim to its borders and no state can claim to dictate the law for other states. However, the absoluteness of sovereignty is on the decline at various levels. It is undermined by the progressive intrusion of external acts by international or supranational organizations. (GRIMM, 2015). This is especially true in the case of the United Nations: its action is influenced by the States with major economic and military power. The fact remains that, regardless of the strength of the individual state, each state has lost, the full control over its territory.

The consequence of these changes is that it will no longer be possible to interpret external sovereignty in the traditional sense, in terms of a state holding all the powers within its own territory in a completely independent fashion of other states. Even today's advocates of state sovereignty are forced to observe that it is no longer possible to understand sovereignty as theorised by Bodin and Hobbes. This understanding of sovereignty is now certainly outlived.

6. Is sovereignty still required?

The notion of sovereignty and the claim to sovereignty are therefore tenuous, especially in Europe. At the level of general international law, even the International Court of Justice is reluctant to use sovereignty as a means of resolving disputes, tending rather to deconstruct it in terms of the rights, duties and powers of the disputing states. The question therefore arises as to whether sovereignty is still a useful concept in legal interpretation.

The accusations that have been made against sovereignty have been different and relate to different purposes. There have been several challenges of the concept of sovereignty. Perhaps the most authoritative dates back to Kelsen (KELSEN, 1981), who defined sovereignty as an imperialistic concept that needed to be jettisoned (HART, 1954). From a different disciplinary perspective, more recently, sovereignty has been accused of no longer being suited to contemporary reality, so that there would be a strong and definitive separation between what has previously been understood by sovereignty and the current reality of globalisation (MACCORMICK, 1995). Another critical note concerns the multi-facetted character of sovereignty, which would have at least four meanings – domestic sovereignty, interdependence, international legal sovereignty, Westphalian sovereignty – without any connection between them (KRASNER, 1999). From an economic perspective – define, Rodrik demonstrated with great effectiveness the existence of a 'regulatory trilemma', according to which there can be no globalisation, national sovereignty and democracy as understood in the traditional sense. Rodrik argued that one can have two out of three only (RODRIK, 2011).

Despite the criticism, the concept of sovereignty strongly resurfaced in the years of the economic and financial crisis after 2007. The crisis has in fact brought to light various legitimisations or dimensions within the European Union, on the one hand the monetary dimension of the Union, and on the other the social and economic dimension of the Member States, causing a disconnect between them (DE GIOVANNI, 2013).

Furthermore, the more controversial the legitimacy of power, as for instance during civil wars, the stronger the claim of sovereignty. It is no coincidence that Bodin and T. Hobbes developed their theoretical proposals in times of great social turbulence. Furthermore, in the twentieth century, C. Schmitt and R. Aron reworked the relationship between sovereignty and exceptional situations. In short, this line of reflection highlights how, in historical periods characterised by the absence of tensions, sovereignty does not appear, as there seems to be no need for it; and it re-emerges in times of crisis and of the questioning of institutional and value structures (ARON, 1976).

Hence the idea that 'sovereignty' is a speech act to (re)establish the claimant's position as an absolute authority, and to legitimise its exercise of power' (WERNER/DE WILDE, 2001)[1] Due to the prevalence of large economic forces, part of the philosophical-political literature interprets the current political phase as the attempt to create a permanent state of emergency by national political forces.[2]

In conclusion, it must be noted that, despite the criticism, the concept of sovereignty persists and has been revived by the crisis that has enveloped Europe over the last decade.[3] While the term 'sovereignty' does not appear in the EU treaties – unless we consider Article 4 paragraph 2 TEU, as a negative recognition of member states' sovereignty – it is present in many of the Member States' constitutions, as well as in important decisions of the supreme courts and constitutional courts of the Member States concerning relations with the European Union EU (see part B). On the international stage, the attribution of sovereignty has been preserved and retains a central value, given that the UN recognises 193 out of 196 state organizations as being still 'sovereign'. Furthermore, the recognition of sovereignty serves to give acknowledgement to states in the international context (FERRARESE, 2019).

7. Limits to sovereignty: the example of environmental protection at international level and in the European Union

Sovereignty, however, also represents a limit to the solution of global problems. Several authors would argue that sovereignty of states is now a meaningless term, incapable of making

[1] Even Walker, 2003, 7, who expressly retained the position of Werner and De Wilde, held that the sovereignty, as a speech act, 'depends upon its plausibility and acceptance as a way of knowing and creating order in the world, which in turn depends upon its status as an 'institutional fact' – a fact whose authenticity and credibility depends upon the internalisation by key actors of a complex of rules and expectations which support and subscribe to the sovereign claim'.

[2] See Agamben, 2002, 'the voluntary creation of a permanent state of emergency has become one of the fundamental practices of modern States, even for those deemed 'democratic'; similarly, is Maier, 2014, who well accepts the presence of 'exceptional status' on this level.

[3] Walker, 2003, 9-10, describes the passage of the idea of sovereignty from the Westphalian era to that of the Post-Westphalian era as follows: in the former it was part of the meta-language and the language-subject, while today it is no longer part of the metalanguage but remains part of the language-subject.

demands for solutions to social problems. The case of environmental protection is one such example (BACKSTRAND/KHAN/KRONSELL,/LOVBRAND, 2010).

One of the important challenges of (post)modernity is increased sensitivity to environment and to new forms of sustainable economic development. The continuous processes of economic globalisation and environmental challenges threaten the current capabilities of national governments to manage these processes. Economic and environmental interdependence as well as the responses to current challenges put in place by nation states, giving rise to transnational and supranational forms of government, are accompanied by a redefinition of national sovereignty.

Environmental protection is an issue that affects all states, because the environment knows no borders. Environmental matters are thus particularly regulated by public international law. Environmental policies are located outside the 'three miles to which the Peace of Utrecht has for many centuries entrusted the axiological geographical structure of the Westphalian system' (CONTI, 2017).

Furthermore, environmental protection has been included in numerous international treaties which codify the principles developed by the International Court of Justice (BIRNIE/BOYLE/REDGWELL, 2009). In this context, the international environmental categories are instruments for the establishment of an international order based on wellbeing and peace between nations, constituting a limit to the sovereignty of states (BIRNIE/BOYLE/REDGWELL, 2009). At the same time, however, these limitations on sovereignty of nations are conditioned by the willingness of states themselves to cooperate in order to identify shared values which, if accepted, are transposed into the limits in the internal systems. The functioning of international organizations and particularly of the European Union and its relationship to its Member States are obvious cases.

The development of environmental regulation of the European Economic Communities has been particularly significant, and today most of the environmental standards adopted by the Member States are precisely the result of this European drive. The first action plan for environmental protection was adopted in 1973, albeit in the absence of an explicit provision in the Treaties. Awareness of the importance of environmental issues typo arose in view of increased jurisprudence and legislation of free movement of goods and in view of the development of the common market in general. The subsequent legislative steps progressively saw the emancipation of environmental policy from economic freedoms, finding express recognition within the treaties. Today, the need to ensure a high level of environmental protection for European citizens is expressly set out in Article 191, paragraph 2 TFEU.

The standardising nature of the environmental protection regulations in the legal area of the European Union may now be largely attributed to the creation and strengthening of European citizenship, which incorporates the right to live within a healthy ecosystem (CONTI, 2017). This creates a close connection between environmental standards and European citizenship, through a duty of responsibility and solidarity between citizens. It is for this reason that a number of principles have developed at European level, such as the 'polluter pays principle', 'the precautionary principle' and other constitutional principles for environmental protection (HEYVAERT/KINGSTON/ČAVOSKI, 2017).

To sum up, the EU has shown progressive change in its environmental policy: the construction of standards in the environmental field was created as a tool for ensuring the free movement of goods and services and fair competition between companies. However, it gradually became a feature of European citizenship, as participation in a community of nations that ensures the enjoyment of a high environmental quality for its citizens. With respect to the constraints arising from the participation of states in international environmental agreements and European Union environmental protection regulations, the environmental sovereignty of the state is essentially an ascending participation in the construction of shared policies and the downward implementation of these policies – an example of what has just been said is the recent circular economy package adopted by the European Union – (HANNEQUART, 1998). The EU and international law serve as the natural framework of environmental law. In this area, the role of national sovereignty appears to be limited to the upward phase of the regulatory process, as the technical nature of environmental protection standards deprive nation states of the autonomy of their application.

It is useful, however, to question how this sovereignty is 'threatened'. As it has been constructed and historically configured in this way, environmental protection undermines the traditional canons of national sovereignty within a horizontal dimension (protection of the environment as a human right and surpassing the concept of territory) and on a vertical level (in the internal and external relations of the state).

In relation to the horizontal dimension, the protection of the environment and the ecosystem requires, in the first instance, a review of the concept of territory, the cornerstone on which the concept of state sovereignty has been built.

There are essential requirements for the protection of goods for individuals and communities, and which are by their nature alien to the issue of territory. Therefore, these interests can be protected only at a global level. Above all, the protection of the environment and ecosystem is distinguished. The limits of territory, as the essential pillar of a state's sovereignty over it, can be said to be exceeded precisely in relation to this matter and, therefore, the regulatory powers linked to the protection of the environment must thus be identified as being outside of the state itself. In essence, in contemporary democracies, the role of the state itself must be reconsidered and made compatible with the recognised need to resort to multistate organisational solutions for the entrusting of tasks that the individual state alone cannot bear. (DE VERGOTTINI, 2014).

Yet what should be understood by territory, and what is its intimate connection with the environment and the ecosystem? Territory is that part of non-human nature over which, and within which the state exercises its sovereignty. Thus, 'the state is that human community which, within a given territory, and the 'territory' is a characteristic element, claims for itself (successfully) the monopoly on the legitimate use of physical force' (WEBER, 1980). Relations with the territory are therefore relevant for the identification of the space within which the state extends its range of action and, at the international level, for the identification of the borders and relations between different states. In the construction of the legal concept of state, therefore, the territory is a characterising element, in that it permits the location of the range of action of the state itself. It is for this reason that in the treaties on the general theory of the state, non-human nature has not assumed any importance in the past (JELLINEK, 1949).

However, the state is concerned with the non-human nature for two main reasons: for the distribution of scarce goods and in order to allow productive technological action that exceeds the forces of individual citizens or groups of them (Hobbes, 1976). In addition, to the two aforementioned elements, (interest in non-human nature for the allocation of scarce resources and the use of inputs) a third element directly attributable to climate change concerns about climate change has been added. This is 'the aggressor environment' which, due to the super-state dimensions and the threat it entails, has become legally relevant (GIANNINI, 1976).

Nevertheless, the non-human environment goes beyond state borders and administrative decisions within the state itself. The ecosystem, therefore, is not reflected in the territorial area over which sovereignty is exercised, and consequently environmental law, which is both state and international law, must face a crisis of legitimacy (VIOLA, 1996).

A second limit to the sovereignty of the Member States, which is assumed here to be vertical, is the result of the direct relationship between environmental protection and the protection of human rights. The close connection between the environment and the protection of human rights has been built according to this logical pattern: the defence of the environment is not only the defence of non-human nature, but also the protection of man from the damage caused by it.

In fact, ecological crises have a significant impact on human existence and therefore the issue of human rights cannot fail to be considered from an environmental point of view. The environment conditions the development of human personality in many ways. The protection of the environment and the protection of the person, then, are objectives linked by a mutual functionality (ANTON/SHELTON, 2011).

In essence, as has already been stated, 'human dignity has imposed itself as a value, the violation of which cannot be justified by sovereignty of an individual state in its management of the treatment of its own citizens, even if certain principles in environmental matters have taken on such a force as to undermine the tenacious resistance of states that claim their territorial sovereignty in the exploitation of resources, which, whilst they may possess them in terms of exploitation, cannot not do so indiscriminately, due to the naturalistic value of these resources, which makes them common goods shared by all humanity' (GRECO, 2000).

Therefore, in the interrelation between the protection of human rights and the environment, the lowest common denominator is represented by their transnational nature, aimed at common recognition in a supra-state dimension, so as to impose itself as a limit to the sovereignty and power of states, and as a guiding principle of the international community (PETERS, 2009).

As mentioned earlier, environmental law, which is both national and international law, faces a crisis of legitimacy. In relation to the dimension that is assumed here to be vertical, the protection of the environment enters into direct correlation with the concept of sovereignty in two dimensions: internal and external. In short, the theory of sovereignty is inadequate with respect to the environmental question as an internal problem of the state. In relation to the internal dimension, the crisis in the legitimacy of the state in relation to environmental matters is a crisis which manifests itself in three different ways:

- In a crisis of the law as a tool for dealing with environmental crises. The general and abstract legislation is based on the possibility of predicting the scope and significance of the consequences to be applied to specific cases (IRTI, 2014). In the environmental field, it is very difficult to predict the consequences of damage, the interests at stake and the injured parties. It is in essence difficult to predict behaviour that will pose a threat to the environment. Therefore, the law is always in pursuit and is late with respect to threats to the environment. Another limitation of the law is identified if the potential harm to future generations is then taken into account (BIFULCO, 2008). Furthermore, environmental legislation also includes tools to manage these challenges, such as the precautionary principle or environmental impact assessments;
- The second aspect concerns the combination of political choice and technical evaluation in the environmental field. Decisions concerning the environment are, in fact, characterised by a specific and direct relationship with the results of scientific investigation. The technical decision involves a compression of political and deliberative spaces. Yet at the same time, the decision-making and deliberative arrangements for proximity government reveal the limits of local decision making that is little inclined to make decisions impacting on its own community. This has given rise to the so-called phenomenon that is known generally by the acronym NIMBY (Not in My Back Yard), which refers to protests made by members of a local community against public interest works on their land (CECCHETTI, 2006);
- In the environmental field, another erosion of internal state powers, stems from environmental policies aimed at the introduction of an economic strategy for its defence. The concept is based on the assumption that the economic instruments supporting environmental protection are more effective and cheaper than the administrative structures designed for this purpose. Negative externalities, according to neoclassical economic theories, must be internalised by the market, lending an economic weight to environmental protection.

On the other hand, in consideration of the external aspect, it is well known that the relationship between states at the international level can be read as a relationship that exists for the purpose of the security of the states themselves. If the aim and development of international law can be linked to a balancing of state powers, in order to maintain national and international security, environmental protection policy is itself relevant, provided that environmental problems are posed as international security issues. It is the threat to climate change, the depletion of natural resources and the extinction of certain animal species that are driving states to cooperate with each other to adopt appropriate solutions to put an end to these threats. Thus, the independence of states, which is the result of the very principle of sovereignty, is weakened precisely within the environmental field. It can be said, therefore, that sovereignty exists only with regard to certain sectors, but not to others. Sovereignty is thus divided, and a 'higher or lower degree of sovereignty' has been referred to (GIDDENS, 1985) depending, from time to time, on certain sectors and interests at stake.

The most significant aspect of the erosion of sovereignty in the environmental field is attributable to those actions which a state may take with regard to non-human nature, which are capable of crossing its borders, transferring possible damage to another state. If, therefore, the principle developed at international level is that of the sovereignty of states over their

natural resources, at the same time the principle of good neighbourliness requires that each state conducts itself diligently in order to avoid behaviour that is harmful to the environment, the effects of which may extraterritorial (SCHRIJVER, 1997).

If, as mentioned, each state is sovereign over the use of resources pertaining to its own territory, an interference can and is considered legitimate, even in the light of the copious jurisprudence of the international courts, when, due to the principle of ecological interdependence, actions in one state are reflected within others.

Part B: The European debate on sovereignty and the sharing of competences between the EU and States

1. The specificity of the issue of sovereignty in the European Union

What has been said thus far shows the rise and transformation or even a crisis of the concept of sovereignty. Many authors agree that the post-World War II period triggered this crisis, which is further supported by the creation of the European Union. Even before the economic and financial crisis that erupted towards the end of the first decade of the new century, the literature had understood that the progressive transfer of competences in the Union by States was not complete. This chapter retraces the salient stages of the evolution of the EU, from the time of its 'invention' to the present day. The continuous thread of the analysis will be the distribution of competences between the Union and the Member States, with a focus on sovereignty.

Transfers of sovereignty or, as set out for example in the Italian Constitution, 'limitations on sovereignty' freely accepted by the Member States have led to a progressive transformation: states continue to declare themselves sovereign but know that in practice many powers – the powers that traditionally give expression to sovereignty – were transferred to European Union institutions. In this regard, Waever asked the following question in 1995: 'What does a state look like with two thirds of its sovereignty? How sovereign has the EU become, a fifth? A quarter? Sovereignty is an indivisible quality, whether a unit has it or not' (WAEVER, 1995).

Although sovereignty in the Labandian sense did not allow for division or plurality of sovereign centres, this is exactly the assumption that the EU calls into question. It has legislative, executive and jurisdictional power, although it does not have effective coercive power. In many respects the law it produces is immediately effective in the laws of the Member States and prevails over their right of constitutional and primary legislation. It has been called a 'monstrum simile', because there are no words and concepts to define its nature, the notions of federal state or international organization are not adequate to define or qualify it.

Competences and sovereignty in the EU are inseparably intertwined. The analysis will show how EU law, in a very broad sense, legislation, jurisprudence, legal theory, institutions, political parties, revolves around this theoretical and dogmatic problem, from its foundation. The analysis will also show how, although the phenomenon of progressive transfer of competences towards the Union is evident in a diachronic perspective, the union process is still far from taking the forms of a federal organization. Unlike other successful federal processes, the Union remains a *sui generis* experience. Why? Is it possible to imagine an answer to this European specificity? The answer may be in European history, in the excessive strong roots that national identities have had in the past, in fears of hegemonic positions that some States may have towards others, in diversified national interests and in any case ones difficult to reconcile.

However, the search for an answer to the question passes through an observation. In the perspective adopted here, the most characteristic feature of relations between the EU and Member States lies in the awareness of the spread among all European political actors of the following misalignment: in no other part of the world is the split between public and state powers so evident and accentuated. Yet this misaligned reality has not yet led to the idea of

divided sovereignty or, at least, this idea remains locked in at the mostly theoretical level (as we will see in the third part). In the federal states by association, on the other hand, it was the acknowledgment of the division of powers vertically that led to the idea of divided sovereignty; and this is due to the fact that, by identifying sovereignty with public authorities, the division of powers then also involves the division of sovereignty.

This such federal path has not been completed in Europe. Again, the reason is to be found in the concept of European *ius publicum*. As is known, the German federal doctrine of the late nineteenth century addressed the problem and solved it in a way that still influences the theoretical debate and above all the jurisprudence of the higher European courts. The path of indivisibility of sovereignty, etched by Paul Laband, will not be abandoned, but only refined and adapted to the times of an Empire that had now chosen the federal form.

Although aware of the division of powers no longer concentrated in the hands of the central state, German literature has been able to brilliantly preserve and revive the idea of undivided sovereignty through a conceptual change. In this doctrine, sovereignty is not identified with the public authorities, with the ownership and exercise of them. It is identified with the so-called Kompetenz-Kompetenz, for which the sovereign is the person who decides on the division of competences between the central and peripheral units (JELLINEK, 1900).

This clever theoretical shift has made it possible to 'save' sovereignty, to also consider it effective and, above all, to keep it in the hands of States. Indeed, it makes the essence of sovereignty no longer coincide with all public authorities, but with a residual and more restricted function, that of deciding the scope and ownership of competences.

Therefore, it is no coincidence that precisely this solution is found in the jurisprudence of the German Federal Constitutional Court according to which the sovereignty in the EU belongs to the Member States, which remain 'Masters of the Treaties' and have the competence of competence. Notoriously, it was affirmed in the Lissabon Urteil of the German Constitutional Tribunal at point 123. And this is because the EU lacks the power to self-determine itself with regard to its existence, its foundation, its competences. All this is in the hands of the Member States. The EU has only *enforcement* and secondary regulatory powers, which are not sufficient to denote the entity that holds them as sovereign.

During the analysis carried out in this part, it will be possible to see first-hand how this dogmatic position is not the patrimony of a certain legal tradition but is cross-cutting in many Member States.

1.1. Sovereignty as Property

Sovereignty can be understood, akin to property, as a disaggregated bundle of rights, privileges powers and immunities. The idea that sovereignty should be understood as a disaggregated bundle of rights, duties and competences is usually attributed to Hans Kelsen and H.L.A Hart. Hart has compared the sovereign to an individual rights-bearer (HART, 1954). Hans Kelsen explicitly argued that sovereignty either has a factual connotation or it should be understood as a bundle of rights, duties and competencies (KELSEN, 1981).

1.2. Joseph Weiler's 'The Transformation of Europe'

The most influential article ever published on the European Union depicts the process of disaggregating national sovereignty in Europe that developed through the consolidation of various constitutional doctrines – direct effect, supremacy, pre-emption, human rights and implied powers – which reconstituted and disaggregated the juridical foundations of the European constitutional regime, transforming the European Community from an international organization to a (quasi) federal entity. The Community's 'operating system' is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles (WEILER, 1991).

Weiler depicts the constant expansion of the scope of the EU's jurisdiction and describes how the European Court of Justice slowly allocated joint authority between the supranational and national legal orders. The content of Community-Member State discourse has changed, as well as the very architecture of the relationship (WEILER, 1991). He claims this transformation occurred in three distinct phases. In each of the phases a fundamental feature in the relationship of the Community to its Member States mutated; only the combination of all three can be said to have transformed the Community's 'operating system' as a non-unitary polity (WEILER, 1991).

1.3 The First period – 1958 to the mid – 1970s: the foundational period toward a theory of equilibrium

Weiler argues that the patterns of Community–Member State interaction that crystalized in this period conditioned all subsequent developments in Europe. He presents us with a paradox: from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration (WEILER, 1991).

A principal feature of the Foundational Period has been the closure, albeit incomplete, of the Member States' practice of seeking to avoid their obligations under the Treaty (WEILER, 1991). In order to explain the process of 'closure', whereby Member States were no longer able to avoid their Community obligations, whereby their sovereign rights were significantly limited, he sets out two dimensions of E.C. development: (1) the 'constitutionalization' of the Community legal structure; and (2) the system of legal/judicial guarantees (WEILER, 1991).

On the first, Weiler explains how starting in 1963 and continuing into the early 1970's and beyond,' the European Court of Justice in a series of landmark decisions established four doctrines that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states – the doctrines of direct effect, supremacy, implied powers and human rights. On the second, Weiler notes that the weaknesses of enforcement actions are remedied to an extent by judicial review within the judicial systems of the Member States in collaboration with the European Court of Justice – the preliminary reference procedure in which the national court is the final decision-maker. The empowerment was not only, or even primarily, of the European

Court of Justice, but of the Member State courts, of lower national courts in particular (WEILER, 1991).

1.4 The Second Period – 1973 to the mid-1980s: mutation of jurisdiction and competences

In the second period, one of political stagnation and decisional malaise, Weiler describes the steady expansion of EU competences into new areas. Another large scale mutation in the constitutional architecture of the Community concerned the principle of division of competences between Community and Member States– leading to the erosion of the limits to Community competences (WEILER, 1991).

Weiler sets out four modes of erosion of enumeration of competence: Extension is mutation in the area of autonomous Community jurisdiction (WEILER, 1991). Absorption is a far deeper form of mutation. It occurs, often unintentionally, when the Community legislative authorities, in exercising substantive legislative powers bestowed on the Community, impinge on areas of Member State jurisdiction outside the Community's explicit competences (WEILER, 1991). Incorporation is a term borrowed from the constitutional history of the United States and denotes the process by which the federal Bill of Rights, initially perceived as applying to measures of the federal government alone, was extended to state action through the agency of the Fourteenth Amendment. In the field of human rights, incorporation invokes no more than a combination of extension and absorption (WEILER, 1991) Expansion is the most radical form of jurisdictional mutation. Expansion refers to the case in which the original legislation of the Community 'breaks' jurisdictional limits (WEILER, 1991).

Weiler argues that the de facto usage of Article 235 of the Treaty of Rome,[4] from 1973 until the Single European Act, implied a construction, shared by all principal interpretive communities, that opened up practically any realm of state activity to the Community. The limits of jurisdiction and thus of internal sovereignty were entirely broken in this period provided the governments of the Member States found accord among themselves (WEILER, 1991).

1.5 The Third Period – 1992 and beyond

Weiler argues that 1992 and the Single European Act constituted an eruption of significant proportions. First, for the first time since the very early years of the Community, the Commission plays the political role clearly intended for it by the Treaty of Rome. Second, the decision-making process takes much less time. The policy agenda has an ever-widening scope, as does the increased perception of the Community and its institutions as a necessary, legitimate, and at times effective locus for direct constituency appeal (WEILER, 1991).

The key to the success of the 1992 strategy occurred when the Member States themselves agreed to majority voting (WEILER, 1991). The prevailing view was that Article 100a has become the 'default' procedure for most internal market legislation, and that the procedure of other articles is an exception (WEILER, 1991). Building on and combined with the constitutional and

[4] If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly [European Parliament], take the appropriate measures.

political developments of early periods, the disaggregation of Member States' sovereignty reached proportions that were difficult to envision when the Treaty of Rome was signed. Moreover, understanding disaggregated sovereignty (just as disaggregated property), as described by Weiler in the European Union context, allows us to consider how to amend legal relationships.

2. The first phase of the debate on sovereignty in European integration: community law from birth to the Maastricht Treaty

Community Europe was born in the historical context of the Second World War. It was characterized, on the one hand, by the aspiration for lasting peace between nations and a renewed protection of individual rights following the catastrophe of the two world wars and Nazism. On the other, it was characterized by the political, economic and cultural opposition between the West and the East. An example of the first trend can be found in the establishment of the Council of Europe, while as regards the second, we can cite the foundation of the U.E.O. and the N.A.T.O., from which the unfortunate attempt to build a common European defence will start. If we want to identify the essential strands of the theoretical debate from the foundation of the European Community until the Treaty of Maastricht, we can identify three different trends: the federalist one appropriate, the functionalist one and the intergovernmental one (ORTINO, 1993). However, it must be said that a clear separation between these three trends is not possible because there are multiple points of contact between the different perspectives. Furthermore, these different approaches are also the consequence of the point of view adopted. Not surprisingly, it has been noted that the first fifteen years of life of the Community generally determine different responses between political scientists and jurists regarding the comparison with the US federal experience (WEILER, 1991).

2.1. The federalist perspective

The beginning of the European integration process is characterized by the debate around the federal perspective of the United States of Europe. One of the first formulations of this theory can be found in the writings of Carlo Cattaneo (for a reconstruction, LAQUIÈZE, 2003). Later, it had been theorized by some post-war protagonists such as Briand, Stresemann, and Count Kalergi (GERBET, 1994) and found its highest formulation in the *Ventotene Manifesto* and in the birth of the European Federalist Movement (GERBET, 1994). However, from the first stages of European integration, this prospective has always remained a minority at the political level, all the more after the failure of the C.E.D. and the consequent political community (GERBET, 1994). This failure has cemented the opposition between the federalist and functionalist perspective (ORTINO, 1993). A different opinion seems to be another part of the literature (GRILLI, 2008), but this does not mean that echoes of the federalist perspective can be found in many times of the European legal and political life of the early years, as well as within the functionalist perspective itself. In addition to the shipwreck of the C.E.D. the weakness of the federalist perspective can also be seen in the failure of subsequent attempts at political union (GERBET, 1994) and in the substantial indifference by which the 1984 Spinelli Project is dropped (MORAVCSIK, 1998; GERBET, 1994). It should be borne in mind that the European federalist movement had initially supported the functionalist perspective, as the federalist one had appeared since the outset impossible to attain.

Manifestations of the federalist perspective can be found in the reports that before the High Authority C.E.C.A. and then the European Commission held before the Common Assembly and the European Parliamentary Assembly, in particular, in Hallstein's reports, in which the political character of integration was explicitly claimed. According to Hallstein, the EEC could be described as 'a federation in the making', as the method applied in relations between states was not merely international, nor fully federal (HALLSTEIN, 1963). In his speech in Rome in October 1964, Hallstein spoke of the European Communities as 'une création du droit': the birth of the Communities had given rise to 'un ordre juridique nouveau.' For Hallstein, European integration was a dynamic conception, and added: 'nous disons que intégration èconomique est le noyau de la fédération politique complete' (HALLSTEIN, 1965). In a slightly later intervention, Hallstein did not hesitate to compare the Treaty of Rome to a real federal constitution (HALLSTEIN, 1965). It is interesting to note how, like Hallstein, many jurist protagonists of the early stages of community integration, were politically convinced Europeanism was accompanied by a vision pragmatic and realistic in the analysis of the phenomena. For example, Paul Reuter, a close collaborator of Jean Monnet, pointed out that the links between Community law and national law were not perfectly harmonized as in a federal system. For Reuter, they were such as to clearly distinguish themselves from traditional relationships of international law (REUTER, 1961). In the conclusions to the case Algera explicitly speaks of a delegation of sovereignty to supranational institutions, albeit for a strictly determined objective (WEILER, 1991; GRILLI, 2008). In a comment on the ECJ Court of Justice, he argued that the ECJ itself was nothing more than an embryo of a real Federal Court: as well as the ECOC Treaty it was constitutional in character, so the Court of Justice also played a constituent role (GRILLI, 2008).

2.2. The functionalist and intergovernmental perspectives of the European Integration

The advancement of the integration process has led to a broad debate around functionalist theory. It was based on the observation that the federalist perspective encountered an insurmountable obstacle to the sovereignty of the Member States. The functionalist thesis formed the basis of Jean Monnet's political intuitions and presupposed a gradual sectoral evolution, with an integration in some economic sectors that would serve as a catalyst for political integration. The origin of functionalism can be traced in David Mitrany's post-first world war works, (MITRANY, 1933). Since the 1950s, these have been revised by the so-called *neo-functionalists* (MORAVCSIK, 1998) or by American scholars such as Ernst Haas (HAAS, 1958) and Leon Lindberg (LINDBERG, 1963). In a 1965 work dedicated to European integration, starting from the analysis of the diversity of views between Hallstein and Erhard, Mitrany did not hesitate to speak of functional alternatives, contrasting it with the regional fallacy and federal fallacy (MITRANY, 1965).

But, the functional perspective has many points of contact with the federalist perspective. The political militant for European federalism, Guy Héraud can be cited among European scholars in some way attributable to the functionalist orientation. In an article commenting on the draft statute of the European political community of 1953, he pointed out that this community did not constitute a state authority. In addition to missing a figure like this Head of State, there was no federal citizenship, there was an interstate body within the Community such as the Council of National Ministers. Furthermore, relations between Member States were still progressing, in many respects, still within the framework of international law and the community did not have full constituent competence (HÉRAUD, 1953: 600-601). For Héraud, the Community

constituted a supranational intermediate body between federation and confederation and therefore had to be framed within functionalist federalism (HÉRAUD, 1953: 606-607).

As for the intergovernmental perspective, this certainly had the greatest political exponent in Charles de Gaulle and its manifesto in the Fouchet Plan (on the sinking of the Fouchet Plan, GERBET, 1994; MORAVCSIK, 1998). It has become practically hegemonic on a political level following what has been called the constitutional crisis of the Community (MORAVCSIK, 1998; GERBET, 1994). The intergovernmental perspective has been hegemonic on the political level from as early as the late 60s, a fact also noted by Paul Taylor, who spoke explicitly of the Confederal Phase, specifically indicating the hegemony reached by this perspective (TAYLOR, 1975). Pierre Pescatore, at the time a judge at the Court of Justice (PESCATORE, 1970) also spoke of the intergovernmental element as still predominant in the context of European construction. In addition, Weiler, in describing the first fifteen years of the life of the European Community, Weiler underlined how the intergovernmental character became predominant at the very time when the Court of Justice transformed, in a federal sense, the relationship between the Community system and the Member States system. (WEILER, 1991).

2.3. The jurisprudence of the Court of Justice in the first phase of the integration process

The contribution of the jurisprudence of the Court of Justice in the construction of the Community legal order, fundamental for understanding the structuring of powers between the European Community and the Member States, merits further study. In this regard, some scholars have spoken of an exercise of constituent power (ITZCOVICH, 2006); while others have preferred to speak of building a constitutional framework in the federal sense (STEIN, 1991); others of a constitutionalisation of the community order (WEILER, 1991), still others have made a comparison with the superior jurisdictions of late common law (GRILLI, 2008: 159). A fundamental role has been played by advocates general, whose conclusions have almost always been accepted by the Court of Justice (STEIN, 1991). In particular, the importance of Advocates General Maurice Lagrange and Karl Romer clearly emerges (GRILLI, 2008; BURROWS, GREAVES, 2007).

Leaving aside the first rulings, which also lay the foundations for the subsequent jurisprudence (for a review, ITZCOVICH, 2006), it is with the *Van Gend en Loos*[5] case-law that the first stone is laid in the construction of the community building (STEIN, 1991; ITZCOVICH, 2006). The issue concerned Article 12 TEC, in particular, whether it produced a direct effect in favour of individuals, so as to guarantee them against state failure. The Court of Justice replied in the affirmative, stressing that the C.E.E. is a different order from the international one and as such it does not produce rights and obligations only towards States, but also towards citizens. With the affirmation of the principle of direct effect, the Court of Justice overturned the assumption specific to international law, according to which international legal obligations are addressed only to States (WEILER, 1991). Some scholars have even talked about starting a real process of de-internationalisation of Community law (ITZCOVICH, 2006).

[5] See European Court of Justice Judgement of 5 February 1963, van Gend en Loos, C-26/62, EU:C:1963:1.

Another fundamental ruling is Costa v. *E.N.E.L.*[6] which for the first time introduced the principle of the primacy of Community law over national law (for an analysis, see STEIN, 1991; ITZCOVICH, 2006). Costa v. *E.N.E.L.* originated from the same case in which the question of constitutional legitimacy was decided by the Italian Constitutional Court with ruling no. 14/1964.[7] The Court of Justice motivated its decision by stressing that the spirit and terms of the Treaty make it impossible for States to have a further unilateral measure prevail against an order accepted by them. In this perspective, the same direct applicability would be meaningless if a State could unilaterally cancel its effects with its own act: the transfer made by the States in favour of the community law implies a definitive limitation of their sovereign rights. It has been observed that the affirmation of the principle of the supremacy of Community law together with the principle of direct effect implies that Community laws must be considered hierarchically superior, in the same way as provided for in the federal states (WEILER, 1991).

In the same vein, there is also *Internationale Handelsgesellschaft,*[8] in which the Court of Justice argued that the *primacy* of Community law is also affirmed with regard to state constitutions and fundamental rights protected by them (STEIN, 1991; ITZCOVICH, 2006). This assertion will entail the subsequent reaction by the *Bundesverfassungsgericht* with the *Solange I* decision. Shortly thereafter is the *Commission v. Council* (C-22/70), a decision which in some respects constitutes a sort of European *McCulloch v. Maryland*, with the formulation of a real theory of implicit powers (for an analysis, STEIN, 1991; WEILER, 1991; ITZCOVICH, 2006).

The *Simmenthal*[9] case-law must be cited as one of the most relevant judgments in the process of constitutionalizing Community law and affirming its primacy.

In this judgment, the Court of Justice reverses the previous trend expressed in the *Lück* case-law.[10] The Court of Justice targets the vehicle identified by case-law no. 232/1975[11] to guarantee the prevalence of Community law (the declaration of unconstitutionality). According to the Court of Justice, the system constituted an obstacle to the immediate application of Community law (for an analysis, ITZCOVICH, 2006; STEIN, 1991).

Decisions relating to secondary Community law on the direct effect of the detailed directives include the *Grad,*[12] *Sace,*[13] *Van Duyn*[14] and *Ratti*[15] case-law. Lastly, this review should mention the '*Les Verts*' decision (C-294/83), in which the Court of Justice defined the EEC Treaty as the

[6] See European Court of Justice Judgement of 15 July 1964, Flaminio Costa contro E.N.E.L., C-6/64, EU:C:1964:66.
[7] See Italian Constitutional Court, judgement n. 14/1964 of 17 February 1964, IT:COST:1964:14.
[8] See European Union Court of Justice Judgement of 17 December 1970, Internationale Handelsgesellschaf, C-11/70, EU:C:1970:114.
[9] See European Union Court of Justice Judgement of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA, C-106/77, EU:C:1978:49.
[10] See European Union Court of Justice Judgement of 4 April 1968, Firma Gebrüder Lück v Hauptzollamt Köln-Rheinau., C-34/67, EU:C:1968:24.
[11] See Italian Constitutional Court, judgement n. 232/1975 of 22 October 1975, IT:COST:1975:232.
[12] See European Union Court of Justice Judgement of 6 October 1970, Franz Grad v Finanzamt Traunstein., C-9/70, EU:C:1970:78.
[13] See European Union Court of Justice Judgement of 17 December 1970, SpA SACE v Finance Minister of the Italian Republic, C-33/70, EU:C:1970:118.
[14] See European Union Court of Justice Judgement of 4 December 1974, Yvonne van Duyn v Home Office, C-41/74, EU:C:1974:133.
[15] See European Union Court of Justice Judgement of 5 April 1979, Procedimento penale a carico di Tullio Ratti, C-148/78, EU:C:1979:110.

constitutional charter of the Community and not as a mere document of public international law (underlines this aspect (WEILER, 1991). This confirms that phenomenon aimed at separating Community law and international law.

3. The second phase of the debate on the sovereignty in European integration: Maastricht Treaty as a further step towards 'an ever closer Union'

The adoption of the Treaty on the European Union has led to an attitude of the Constitutional Courts of the Member States to protect the spheres of national sovereignty. If by 1992 the relationship between Community law and national law could be considered clarified, the pre-eminence of the first over the second widely accepted, the period after the adoption of the Maastricht treaty fully reveals the resistance of national constitutional courts to integration. In essence, they claim the power to examine Union law to assess its compatibility with the national constitutional systems.

3.1. The Maastricht-Urteil

Emblematic of this trend is the ruling of the German Federal Constitutional Court of 12 October 1993, also known as the *Maastricht-Urteil*. With this case-law, the federal judges reserved the task of checking 'whether the acts of the European institutions and bodies respect or exceed the limits of the sovereign powers devolved to them' the German state.

The ruling concerns an appeal against the law authorizing the ratification of the Union Treaty for violation of the rights contemplated by Article 38 of the German Federal Law, which guarantees the German voter the subjective right to participate in the election of the Bundestag and the right to 'help determine the popular legitimacy of state powers at federal level and influence their exercise'.

Therefore, the eventual waiver of the *Bundestag* to its duties and functions outside the limits expressly provided for by the Federal Law itself, would result in a breach of the right of the German voter to determinate popular legitimacy of state powers. In other words, the Article 23, paragraph 1, of the federal law, which provides for the possibility for the federal legislator to confer on the European Union the autonomous exercise of sovereign functions, cannot lead to an emptying of tasks and functions of the Bundestag such as to undermine the democratic principle.

The offense against the aforementioned principle can be considered existing when the exercise of the Bundestag's powers is transferred to an organ of the Union or the European Communities formed by the Governments to an extent that makes it impossible to satisfy the minimum requirement of democratic legitimacy that cannot be renounced by the sovereign power towards the citizen.[16]

The attribution of sovereign functions requires the intervention of the legislator in order to assign the relative political responsibility of the *Bundestag and the Bundesrat*, 'as a national representative body (...)'. The democratic principle 'therefore does not prohibit the Federal

[16] See German Federal Constitutional Court, BVerfGE 89, 151, (Maastricht) of 12 October 1993, B/1/a.

Republic of Germany from participating in a community of states organized in a supranational form. However, this participation requires that legitimacy and a power of popular influence be ensured within the association of States'.[17]

On the one hand, if this can be considered sufficient for the purpose of respecting the democratic principle regarding the attribution of sovereign tasks in a static perspective. On the other hand, in an evolutionary perspective that involves the expansion of the tasks and functions of the Union, according to federal judges it becomes necessary 'to add to the legitimacy and influence transmitted by national parliaments a representation of peoples organized in a European Parliament, capable of providing further democratic support to the European Union. It is true that the Treaty of Maastricht, with the introduction of citizenship of the Union, weaves a lasting legal link between the citizens of the Member States which, although not comparable to the link deriving from the common belonging to a state, 'confers a legally binding form on the degree of homogeneity currently existing in fact. However, if the democratic principle is not intended to remain a 'merely formal imputation principle', it is necessary that the juridical link is preceded by pre-juridical assumptions 'such as the constant free confrontation in society between forces, interests and ideas. These political objectives are also clarified and evolved and on the basis of which public opinion predetermines the political will. This also implies that the decision-making processes of the bodies that exercise sovereign powers and their respective political guidelines are universally transparent and understandable and also that the elector citizen can communicate in his own language with the sovereign authority to which he is subject'.[18]

In the opinion of the Federal Court, although still considered non-existent, these could develop over time, also depending on the fact that the purposes and decision-making processes of the Union bodies are brought to the attention of the Nations, in order to form a European political conscience.

As long as the peoples of the Member States confer democratic legitimacy on the institutions of the Union through their national parliaments, 'the expansion of the tasks and functions of the European Communities meets the limits deriving from the democratic principle (...)' and 'states need spheres of sufficiently significant tasks, in which each people can develop and articulate themselves in a process of formation of the political will legitimized and guided by itself to give legal expression to everything that, with relative homogeneity, unites it ideally, socially and politically'.[19]

It follows that in a situation of a European shortage of the aforementioned assumptions, it is of fundamental importance that the German *Bundestag* remains 'the holder of tasks and functions of substantial political weight'.[20]

According to the German Federal Constitutional Court the Union Treaty meets the aforementioned criteria. In fact, it considers the independence and sovereignty of the Member States, 'where it obliges the Union to respect their national identity'. Even with the approval of

[17] See Ibidem, C/I/2/b.
[18] See Ibidem, C/I/2/b1.
[19] See Ibidem, C/I/2/b2.
[20] See Ibidem, C/I/2/b2.

the Treaty on the Union, the Federal Republic of Germany remains 'member of an association of States whose Community power derives from that of the latter and operates with a binding effect in the sphere subject to German sovereignty only by virtue of the German order of execution'.[21] Furthermore, the Treaty on the Union satisfies the need for legal certainty, since it clearly predetermines the exercise of the sovereign powers transferred to the European institutions and does not provide for any 'competence of competences', i.e. the power to autonomously acquire competences and functions. The treaty 'does not anywhere reveal the common will of the contracting parties to establish, with the Union, an autonomous legal entity, endowed with its own competences'. The Union 'does not have a separate legal personality in relation to the European Communities or to the Member States'.[22]

3.2. The case-law of the French Constitutional Council on the treaty of Maastricht

On this point, it is useful to recall the three rulings made by the French Constitutional Council regarding the adoption of the Treaty of Maastricht and which originate from an appeal lodged by the President of the Republic, pursuant to Article 54 of the French Constitution, in order to verify whether the authorisation to ratify the Treaty on the European Union should be preceded by a constitutional revision.

With the first of the three rulings, No. 308 of 1992, the *Constitutional Council* clearly assigns itself the task of verifying whether the international commitments undertaken by France and involving transfers of powers to a permanent international organisation, contain clauses contrary to the Constitution or violate the essential conditions for the exercise of national sovereignty.

That said, the Constitutional Judges consider that many of the provisions of the Treaty on the Union are contrary to the French Constitution. Among these, first of all, the attribution of the right to vote in municipal elections to Union citizens residing in a Member State other than the one of origin. This provision conflicts with Article 3 of the Constitution, under which 'national sovereignty belongs to the people who exercise it through their representatives and by referendum (...) suffrage can be direct or indirect under the conditions set out in the Constitution. It is always universal, equal and secret (...) all French citizens (...) who enjoy their civil and political rights are voters, under the conditions established by law'.

The infringement of Article 3 is indirect. The breach to national sovereignty is manifested where the election of municipal representatives affects the election of the Senate, whose composition results from a second-degree election. In essence, by allowing non-citizens to take part in the elections of minor territorial entities, the principle according to which national sovereignty belongs exclusively to citizens is infringed. The provision of a single economic and monetary policy is also, according to the *Council*, contrary to the French Constitution. This prevents France from forming part the economic and monetary union established by the treaty. Lastly, the attribution to the *Council* of the task of identifying third countries whose citizens must receive a visa for crossing the external borders of the Member States is also contrary to the Constitution. With this provision, the Treaty of the Union affects the exercise by the State of the powers that fall under the essential conditions of its sovereignty. For these reasons, the

[21] See Ibidem, C/II/1.a.
[22] See Ibidem, C/II/2/b1.

Constitutional Council believes that the authorisation to ratify the Treaty on the Union must be preceded by a constitutional review.

The second ruling, No. 312 of 1992, intervenes after the constitutional revision and originates from an appeal lodged in order to verify the permanence of a state of opposition of the treaty to the Constitution, despite the changes made. In this case, the *Constitutional council* does not detect any opposition to the constitutional text and authorizes ratification of the treaty. Finally, ruling No. 313 of 1992 is made after the ratification of the Union Treaty. In this case, the *Council* is asked to verify the compatibility of the law authorizing the ratification, adopted by referendum, with the Constitution. However, the constitutional judges declared themselves not competence to rule on the request. The possibility of examining a law approved by popular referendum falls outside the competence of the *Council*.

In conclusion, the adoption of the Maastricht treaty and the creation of a closer Union has encountered resistance. In some cases, such as the French one, the national legal order has adapted to the new EU order. In other cases, such as the German one, the new European Union was still considered as an association of State, which does not question the state sovereignty.

3.3. The European Parliament's Committee on Legal Affairs and Citizens' Rights Report on the relationship between international law, Community law and the constitutional law of the Member States

The position of the European Institutions about the relationship between domestic law and Union law should be taken into account. In this direction, it is important the report that, on 24 September 1997, the European Parliament's Committee on Legal Affairs and Citizens' Rights adopted a report on the relationship between international law, Community law and the constitutional law of the Member States (Report A4-0278/97). This was a reaction of the EU Parliament to the attitude of the constitutional Courts and national judiciary towards EU law, which indicated the possibility of EU Law. On the one hand, the report of the Committee on Legal Affairs and Citizens' Rights criticized the ruling of the German Federal Court on the Maastricht Treaty. On the other hand, it carried out a dogmatic reconstruction of the relations between national and supranational level. With regard to the German ruling, firstly, the idea that the transfer of powers to the European Community constitutes an 'emptying' of the democratic principle is not shared. According to the Committee, as the same Court recognizes in another passage of the ruling, apparently contradicting itself, in the law that sanctions membership of a community of States, the democratic legitimacy of the same community is based on majority decisions which are binding on the Member States. Secondly, the Federal Constitutional Court frequently uses the concepts of 'people' or 'national people' ('Volk' and 'Staatsvolk'), without however providing a definition, for the sole evident purpose of 'perpetuating the existence of the state, or rather, the existence of a specific State'. Thirdly, the Judges of Karlsruhe use the concept of 'association of States' (Staatenverbund) with regard to the Community and the European Union for the exclusive purpose of underlining the maintenance of the existence of the national States in their traditional form; that of recognition of the uniqueness and continuous evolution of the European phenomenon.

Fourth and lastly, the federal Courts reserve the right to ascertain in the future whether the legal acts of the European institutions and bodies respect or exceed the limits of the powers conferred on them. This essentially constitutes a verification of European law through national

Courts law on the basis of national constitutional law. Furthermore, for constitutional reasons, they declare that German state bodies could not apply in Germany those legal acts of European law which were no longer covered by the law approving accession.

According to the Committee, the aforementioned powers of assessment and non-application are in open contradiction with the principle of supremacy of European law, as well as with the *Foto Frost* ruling by the European Court of Justice, according to which national bodies have no right to declare the legal acts of the Community institutions as being null and void.

There then follows a proposal for dogmatic reconciliation of the relations between international law, Community law and the constitutional law of the Member States. In line with the Committee, the traditional, typically state-centric, approach of international law would not adapt to the Union context, as it would systematically hinder the development of new organisations, such as the European Union. The principles of the creation of international law (*opinio juris ac necessitatis*) and its respect (*pacta sunt servanda*), exclude sociological entities other than States.

Therefore, the approach hitherto used for the solution of the relations between EU and national systems should undergo an essential change: not only should States be called upon to create international law, but this possibility should also be attributed to those sociological groups that have a 'universal vocation' field of activity. This 'would make institutions such as the EU equal players in the creation of that field of law on which all other law depends: international law'.[23] More specifically, it should also be envisaged to apply also to the Union those principles up to this point considered to be the exclusive competence of the States, including 'the EU would itself be competent for governing the validity of international law within its sphere of influence and be entitled to develop its domestic sphere of influence inwards, including the exclusive right to settle questions regarding the hierarchy between its own law and the law of its Member States'.[24]

In the Committee's view, the approach, already contained in the draft Treaty of Amsterdam, on the consolidation in writing of the supremacy of Community law, having to be understood correctly as supremacy 'the superiority of one law over another on the basis of its derogations, could be a useful power', which can manifest itself with a different intensity, to be identified through the principles of the respective legal systems.[25]

The Committee closes the relationship with the identification of a series of measures necessary for the acceptance of the supremacy of Union law by the Member States. It is essential that the democratic legitimacy of the European system is strengthened, with the contextual necessary strengthening of the role of Parliament, as an institution representing the plurality of the peoples of the Union. In this direction, the Treaty of Amsterdam, with the extension of the co-decision procedures, seems to constitute a decisive step forward. Furthermore, it would be necessary to avoid transfers of competences with an indefinite content and, finally, to develop a system of fundamental rights aimed at limiting the power of the institutions. Indeed, 'the

[23] See Report A4-0278/97, p. 11.
[24] See Ibidem.
[25] See Report A4-0278/97, p. 11-2.

individual can have confidence in the institutions only when their powers can, if necessary, be reliably limited'.[26]

3.4. Theoretical proposals of reconciliation of national sovereignty with European integration: the theories of constitutional pluralism

In the context resulting from Maastricht Treaty, characterized by an institutional change and a renewed attitude of national judges to European integration, legal theory put forward various proposals for reconciliation of national sovereignty with European integration. This explains the complexity of the relations between the Union and national systems. This section identifies the most relevant theoretical proposals.

Following the ruling of the German Federal Constitutional Court in the *Maastricht-Urteil*, a school of thought is taking shape which breaks with the traditional way of understanding sovereignty in the monistic sense and which admits the existence, indeed the coexistence, of more 'constitutional authorities'. Constitutional Pluralism, proposes to explain the relationships between the Union system and national systems and maintains that states are no longer the only locus of constitutional authority, but that they are accompanied by a new '*locus*' of authority, which includes supranational institutions. If this is the factual premise of 'pluralistic' thinking, the consequence is that the relationships between the two spheres or *loci* of authority cannot be explained in terms of hierarchy (WALKER, 2003). The theoretical proposal starts from a comment on the *Maastricht-Urteil*, in which Neil MacCormick starts from the premise of the existence of a plurality of legal orders.[27] He maintains that the most appropriate method of analysis must be pluralistic and non-monistic, interactive and non-hierarchical. In particular, the ordering of the Member States and the ordering of the European Union are distinct but partially overlapping and interactive, and between them the hierarchical relationships do not determine a general superiority of one system over the other (MACCORMICK, 1993).

The interpretative power of the highest authorities of the two systems, the national and the Union systems, must thus be considered ultimate in both cases. The European Court of Justice has the power to definitively interpret the rules of the Community system on the one hand, and Constitutional Courts of all the Member States have the same power as regards the rules of the relevant legal system on the other.

In other words, 'interpretative competence-competence is a feature of the highest tribunal of any normative system'. For MacCormick there would be no doubt that the Member States enjoy a sort of residual sovereignty consisting in the possibility of withdrawing from the Union and returning to their independence, even if this seems unlikely in the political context of Europe in the early nineties of the twentieth century. While it must be recognized that sovereignty has not been conferred on the bodies of the European Union, it cannot be maintained that it continues to be an absolute property of the Member States. Starting from

[26] See Report A4-0278/97, p. 13.

[27] In 'But state law', says MacCormick, 'is not the only kind of law that there is. There is also law between states, international law, and law of organised associations of states such as the EC/EU, law of churches and other religious unions or communities, laws of games and laws of national and international sporting associations. Non-state law has also the characteristic of being institutional normative order, but not that of being physically coercive' (MACCORMICK, 1993).

the premises of pluralism elaborated by MacCormick, Neil Walker describes the type of sovereignty that would be proper to the Union order, as well as all the multidimensional legal orders, which he calls 'late sovereignty',[28] opposing it to the 'early sovereignty', originally, belonging to traditional state political organisations (MacCormick, 1993).

The differences between the two types of sovereignty are structural. Traditionally, the claims of sovereignty have always been 'particular', in the sense that they had as their object a particular society or political community. These claims have been twofold, characterized by the identification of what is included in that specific area of sovereignty and which is, however, excluded from it. In other words, the claim of sovereignty has always had as its object identifying the boundaries of its extension. It can be said that typical characteristic of what Walker calls 'early sovereignty' is specifically 'territoriality'. In the post-Westphalian multidimensional order, borders are no longer merely territorial, but acquire a new form; they become 'functional'. Therefore, communities are no longer only territorial communities, but also functional ones (Walker, 2003).

Despite the structural difference, the same inclusion-exclusion logic mentioned remains in the new order. The claim to impose a maximum authority, even if no longer in territorial but in functional terms, remains and characterizes the new supranational types of regulations. This requires, according to Walker, a conceptual rethinking of sovereignty. In its traditional or 'early' version, sovereignty necessarily implies both autonomy and territorial exclusivity. Sovereignty is the supreme power of a political community within a defined territory. On the other hand, with the emergence of policies limited from a functional point of view and which do not claim global jurisdiction over a specific territory, in the new post-Westphalian order, after the Peace of Westphalia in 1648, it is possible to imagine sovereignty as autonomy without territorial exclusivity (Walker, 2003).

With the disappearance of the territorial element in the new type of sovereignty, functionally limited policies are applied in the territory of the Member States, without this involving a questioning of the national authority. The exercise of sovereignty of the European Union in a series of competences previously attributed to the exclusive jurisdiction of the Member States does not revoke the sovereignty of the latter as regards the residual areas of competence. Miguel Poiares Maduro continues the discourse on constitutional pluralism by imagining competitive sovereignty. Having cleared the field of hierarchical relations between the Union and national systems, he sees the pluralistic character of European constitutionalism as a welcome discovery, and not as a problem that needs to be solved. Maduro exemplifies his thought by resorting to the law of counterpoint, which in musical terminology indicates a method of harmonisation of different melodies that are not placed between them in a hierarchical relationship. Taking advantage of the law of counterpoint, it would be necessary to learn how to manage a non-hierarchical relationship between the different systems and institutions. All of this can be achieved through a process of reduction and management of conflicts between legal systems and by promoting communication between them, requiring the Courts to frame their decisions in the light of the European legal system (Maduro, 2003),

[28] Walker, as expressly stated, used the expression 'late sovereignty' 'to make sense of the new multi-dimensional order' (Walker, 2003).

which, according to Maduro, would be the result of close dialectical collaboration between national authorities and European institutions (MADURO, 2003).

Robert Schütze is also involved in the discourse on constitutional pluralism, whose position partially contrasts with that of the European 'pluralists' and, in particular, with Walker's idea that there would be no 'Archimedes point' – or 'sure basis of historical knowledge' (WALKER, 2002) – through which to interpret the relationship between the Union system and the systems of the Member States; their conflicts, that is, in terms of sovereignty (WALKER, 2002). Schütze's study concerns US federalism and the evolutionary line of sovereignty conflicts between states and federations. He argues that he history of American constitutionalism, from which the idea of 'divided' or 'dual' sovereignty originates, should act as a guide in the interpretation of relations between the European Union and the Member States, not only in the definitive abandonment of the idea of the indivisibility of sovereignty, but also in the identification of a legal model within which to subsume the European condition. For Schütze, historically there is a lens through which to look at the European phenomenon and that is American federalism. Constitutional pluralism implies federalism. It follows that the European Union, contrary to what Walker claims, is not a sui generis institution, but has a federal nature (SCHUETZE, 2008).

3.5. Theoretical proposals of reconciliation of national sovereignty with European integration: 'multilevel constitutionalism'

In some respects, close to the theories of constitutional pluralism, Ingolf Pernice and Franz Mayer propose a reading of the European constitutional phenomenon in terms of 'multilevel constitutionalism'. The European Union would constitute a composed constitutional system 'from a national level and from a supranational level of legitimate public power, which influence each other, involving the individual citizens or other subjects of law in different dimensions', that they call '*Verfassungverbund*' (PERNICE/MAYER, 2003).

Through national constitutional provisions that open up the possibility of joining supranational organisations, such as Article 23 of the *Grundgesetz* or Article 88-1 of the French Constitution, national laws are integrated into the supranational constitutional order and together they form what the two authors call the 'composite' or 'integrated constitution'. The legitimacy of this 'integration' would derive from a 'European social contract', which is manifested in the negotiation and ratification procedures of the treaties establishing both the Community and the Union. Through this new contract, the citizens of the Member States created new supranational institutions, established fundamental principles and common values, as well as identified procedures for exercising established power. Furthermore, they took on a new status vis-à-vis the Union and its institutions, that of citizens of the Union, through their governments or national parliaments (PERNICE/MAYER, 2003).

Thus, the citizens of Member States have 'adopted an additional identity, that of European citizens' (PERNICE/MAYER, 2003: 51). With the adoption of the new *status*, European citizens also change their position vis-à-vis the national systems of the Member States considered as a whole, acquiring new rights. In this sense, they represent the constituent power of the Union (PERNICE/MAYER, 2003). It is true that there is no European people in an ethnic or cultural sense. However, the European Constitution is characterized as a community of law, based on common values and on a common *status* of those citizens who found a new European identity, adding it to their local, regional and national identities (PERNICE/MAYER, 2003).

In terms of sovereignty, this European construction determines a necessary rethinking of the relationship between the national authority and the supranational authority. In fact, 'investing the European institutions of powers and competences with a view to achieving certain objectives represents an act that does not differ in principle from the creation of a national body to which a specific authority is conferred' (PERNICE/MAYER, 2003). Therefore, with regard to the competences of the Union institutions, it no longer seems correct to speak of delegation or transfer by national authorities, but rather of a 'reorganisation of the respective competence between the national public authorities and those of the Community by the interested parties, or by citizens' (PERNICE/MAYER, 2003).

3.6. Theoretical proposals of reconciliation of national sovereignty with European integration: the idea of 'constitutional tolerance'

Joseph Weiler's proposal constitutes a response both to the problem of the legal framework of the European situation and to the so-called *no demos* thesis elaborated by the German Federal Constitutional Court in the *Maastricht-Urteil*. For Weiler, Europe would have already found its 'federal way', even if this would not be rooted in a state-like constitution, but in the principle of constitutional tolerance. In traditional federations, the institutions of the federal state are located in a constitutional context which presupposes the existence of a constitutional *demos*, of a single *constituent pouvoir* composed of the citizens of the federation, on whose sovereignty, as a constituent power, and on whose supreme authority is based on the specific constitutional solution (WEILER, 2002). Although a federation seeks to guarantee the rights of the member states, 'the formal sovereignty and authority of the people who have thus united themselves to form a constituent power is greater than any other expression of sovereignty within the political community and therefore forms the supreme constitutional authority' (WEILER, 2002). In Europe this assumption is missing. Its constitutional architecture has never been adopted by an European *demos*. Therefore, European constitutional discipline does not enjoy the same type of authority that surrounds the constitutions adopted by federal states. The Union is a Constitution 'devoid of some conditions normally specific to constitutionalism' (WEILER, 2003).

However, the 'Sonderweg', the European constitutional 'particular path', rests on the diversity of the peoples of the Member States and on their 'uniting' politically through the principle of constitutional tolerance, which constitutes 'the metapolitical objective of the Community' and is contained in the Preamble to the Treaty on the European Community, under which States are 'determined to lay the foundations for an ever closer union of the peoples of Europe'. Regardless of how close the Union is, it must continue to be a Union of distinct peoples, of different political identities, of different political communities (WEILER, 2003). Unlike what happens in a normal democracy in which the citizen accepts the authority of the majority, in the European plan of tolerance 'the European peoples are subject to a constitutional discipline even if the European political collectivity remains composed of different peoples'. The individual agrees to be bound by precepts articulated not by 'his people', 'but by a community made up of distinct political entities, or by a people made up of 'others' (WEILER, 2003).

3.7. Theoretical proposals of reconciliation of national sovereignty with European integration a union of peoples that governs together

Francis Cheneval and Frank Schimmelfennig approach the problem of the democratic deficit of the European Union, from an innovative point of view, from a perspective that they define as '*transformationalist*' and formulate the thesis according to which Europe would be a '*democracy*' (thus developing the theoretical contributions of NICOLAIDIS, 2003, 2004, 2012, 2013), meaning by this a political system made up of multiple peoples.

In this narrative, the Union order would be a typical example of the transformation of democracy. From an evolutionary perspective, the latter can follow two main paths: gradualism and transformationism. The gradualist conception claims to apply the criteria of democracy typical of the nation-state also to supranational entities, with required gradual adjustments. This means that the idea of democracy remains tied to the existence of a single people, a community of politically equal individuals. In contrast, the transformationist logic, accepted by Cheneval and Schimmelfennig, rejects the idea that democracy at the supranational level can reproduce the dynamics of that of the nation-state, which presupposes the uniqueness of the people. For the two scholars, the demoi of the EU member states, 'will continue to possess the strongest collective identities, public spheres and political infrastructures, and enjoy the strongest legitimacy and loyalty on the part of individual citizens' (CHENEVAL/SCHIMMELFENNIG, 2013).

However, Cheneval and Schimmelfennig argue that democracy is a specific political order that takes into account the two fundamental subjects of liberal democracy, citizens and political leaders or '*statespeoples*'. A democracy governs their relations according to the following principles of a political and democratic order: First, sovereignty must be guaranteed to the individual *demos* with regard to the power of entry, exit and determination of the basic rules of the political order of multilateral democracy. Secondly, the principle of non-discrimination between citizens and 'statespeoples' must be respected. Third, both citizens and '*statespeoples*' must have the right to participate in the legislative process of the multilateral democratic order. Finally, both social forces must agree on the primacy of the law created at the multilateral level and on the creation of a common jurisdiction to which to attribute the task of supervising respect for democratic order. Applying the above principles to the European situation, Cheneval and Schimmelfennig note how the Union respects them all and must therefore be qualified as a '*demoicracy*'.

Finally, it is appropriate to account for the dispute between Dieter Grimm, former judge of the German Federal Constitutional Court at the time of *Maastricht-Urteil*, and Jürgen Habermas, originating from Grimm's essay entitled *Europea* '*Does Europe Need a Constitution?*'. In this essay, Grimm explains some of the arguments of the ruling on the Maastricht Treaty. He believes that the Union cannot, through a constituent process, convert into a federal state, lacking its democratic presuppositions, first of all the existence of a European people with a common political conscience. More precisely, it is not about the absence of ethnic homogeneity, but rather the lack of the existence of a society that intends to become politically united. The requirements that Grimm identifies as indispensable for a democracy come from 'not out of the people, but out of the society that wants to constitute itself as a political unit' (GRIMM, 1995).

In his response essay, Habermas agrees with Grimm's diagnosis of the European problem, on the seriousness of the democratic deficit. However, he comes to different political conclusions. While Grimm warns against any further erosion of state competences, Habermas recognizes that the European democratic deficit cannot be bridged with what he calls a 'statist shortcut' but rather needs to be deepened. According to Habermas, the understanding of the theoretical-communicative characteristics of democracy cannot be based on a concrete concept such as that of 'people', which, moreover, Grimm uses in the sense of 'collective identity', without, according to Habermas, providing a definition. According to Habermas, the ethical-political self-understanding of citizens cannot be considered as a historical-cultural *a priori* that makes the democratic formation of the will possible. Rather, it should be considered as the development of a circular process that is generated through the institutionalisation of communication processes between citizens. This is how national identities were formed in modern Europe. The political institutionalisation to be created with a possible European constitution could have an inductive effect of such a process. Already integrated from an economic, social and administrative point of view, Europe can be said to be based on a common cultural background: the sharing of the historical experience of having happily overcome nationalism. Therefore, given the desire to create a common political subject, there is nothing to prevent the consequent creation or institutionalisation of forms of communication between citizens, despite cultural differences. Ultimately, the European identity, 'can in any case mean nothing other than unity in national diversity'. Probably, concludes Habermas: 'German Federalism, as it developed after Prussia was shattered and the confessional division overcome, might not be the worst model' for Europe identity (HABERMAS, 1995).

4. The current phase of the debate on the sovereignty in European integration: Lisbon Treaty, multiple crises, and multiple conflicts on sovereignty in the European Union (special focus on competences)

The European Union represents a unique model of shared sovereignty at a worldwide level. In this type of *sui generis* order, power relations between national and supranational levels are in constant development. The Lisbon Treaty introduced changes with the aim of clarifying and making the distribution of responsibility between Member States and the European Union more efficient. Despite this, the path that leads to the creation of an increasingly closer union between European populations appears blocked to an extent not seen before by a series of crises and the pluralisation of sovereign conflicts which risks blocking the entire process of European integration. After the coming into force of the Lisbon Treaty, the European Union suffered repeated crises that caused major economic and political repercussions.

One such crisis is ongoing. From the beginning of March 2020 to today, the European Union has been facing the most difficult challenge since the beginning of the European integration process: the health crisis caused by the COVID-19 outbreak. This health crisis is turning into an economic crisis whose effects cannot be calculated at the moment. Although the threat is common, Member States have acted differently and autonomously to try to buffer the COVID-19 outbreak. The spread of the outbreak in the Member States of Southern Europe has caused considerable damage and forced the national authorities to lockdown, while the other Member States have closed borders and blocked exports of medical material. However, this overflowing of sovereignty did not produce positive effects. The COVID-19 outbreak has spread the same throughout the EU. Also, the situation was worse by the choices made by the European

institutions, which reacted late by lacking coordination both at the health and economic level. The Union is now split between the most affected Member States (Italy and Spain, supported among others by Belgium, France and Luxembourg) who need not-ordinary aid to face this serious crisis and the Member States (Germany, Austria, and the Netherlands) which, although affected by the epidemic, oppose solidarity measures, such as Eurobond to finance the answers necessary to overcome the crisis. The renunciation of solidarity measures does nothing but reaffirm the predominance of the intergovernmental method and the prevalence of the principle that every state is sovereign. In the context of the COVID-19 crisis, any supranational measures that provide to relocate part of Member States sovereignty to the EU and risk-sharing are necessary to respond to common problems and ensure the survival of the Member States. Despite this, the analysis of such dynamics cannot be dealt in-depth in this deliverable, since the COVID-19 crisis is ongoing, and the outcomes are unpredictable.

In this section, the following sovereignty conflicts generated by the tensions inherent in the division of competences between the EU and the Member States will be studied. Above all, these conflicts are generated by the limits of EU competences and the resistance of the Member States, which seek to maintain sovereignty in politically relevant sectors. These conflicting topics will be discussed in the following sections: economics crisis and new macroeconomics and fiscal governances (4.2); Marginalisation of European Parliament and national Parliaments (4.3); the Area of freedom, security and justice after migration crisis and terroristic attacks, with a focus on counter terrorism, immigrations and EU asylum policies (4.4); Brexit and the right to withdrawal as a theoretical case-study for the renegotiating of the sovereignty in the EU (4.5); the East enlargement and the conflict of rule of law (4.6); the dialogue between national constitutional courts and the EU Court of Justice (4.7)

These conflicts merit a detailed analysis and examination of the current competitive framework of the European Union, but first we will discuss about the limits of EU competences (4.1).

4.1. The Lisbon Treaty and the limits of EU competence

In the context of multiple crises and conflicts, the division of competences between the EU and Member States continues to create political tensions and increases legal problems within the multi-level European structure. A broad mandate, paired with the impulse of the institutions to expand their power of intervention and the large number of European and national actors (who oppose resistance) involved in the decision-making process, render increasing tension inevitable (TRIDIMAS, 2017). The legal framework outlined by the Lisbon Treaty places limitations on both the existence and exercise of the Union's competences.

The limits to the existence of Union competences stem from the principle of conferral. The Lisbon Treaty has reinforced both the wording and references to this principle (GOVAERE, 2011). The EU operates exclusively within the limits of the competences conferred by Member States in Treaties to achieve the objectives established by them (Article 5, paragraph 2 TEU). Competences that are not conferred to the Union remain in the hands of Member States.

The principle of the conferral of competences implies that the legitimacy of an action by European institutions must be examined in view of the framework of competences that Member States have granted to supranational actors by means of Treaties. The importance of this principle cannot be underestimated, as it determines the structure, functions, and exercise

of European Union law (GOVAERE, 2016). This division of competences emphasises the role of Member States and stresses that only they have the power to grant competences to the EU (Article 5, paragraph 1 TEU; 5, paragraph 2 TEU and Article 4, paragraph 1 TEU) (DE WITTE, 2017). In addition, the treaty tasks the EU with ensuring the consistency of its actions and policies, complying with the principle of attribution of competences (Article 7 TFEU). The principle in question also affects institutions, who can only perform the tasks assigned to them by the treaties (Article 13, paragraph 1 TEU).

Despite this, the conferral of competences by means of treaties is not immutable. Primary law contains two rules that can lead the Union to gain competences in areas where Member States remain responsible. Reference is made to Articles 114 and Article 352 of the TFEU. The Article 114 of the TFEU assigns competence to the EU to harmonise national laws, in order to achieve the objectives related to the functioning of the internal market. In addition, it can be used to remove almost all regulatory differences between Member States (DAVIES, 2017).

The flexibility clause contained in Article 352 of the TFEU entails the possibility of adding a new objective to those of the Union, exercising new or broader power than those existing, and creating new bodies through which to carry out EU actions. This clause can be a means of expanding EU competences externally and eroding the application of other rules of treaties and competences established by them internally (KONSTADINIDES, 2012). The provision contained in Article 352 of the TFEU must be read in conjunction with the subsidiarity principle in Article 5 of the TFEU, as well as in accordance with the protocol on the application of the principles of subsidiarity and proportionality. Although the flexibility clause may contribute to extending the European Union's powers of action outside the competitive perimeter as expressly outlined by European treaties, it should be specified that the power of European institutions to intervene must be counterbalanced by the power of national parliaments to monitor effective compliance with the principle of subsidiarity and loyal collaboration. In particular, according to the provisions of Article 6 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality, each national parliament has eight weeks to examine draft legislative acts to be adopted at European level. In addition, national parliaments can send a reasoned opinion to the Presidents of the European Parliament, to the Council and to the Commission on why they believe that the project in question does not comply with the subsidiarity principle.

This enhances the role of national legislators – and, where they deem it necessary to involve regional parliaments with legislative powers – in the political-decision-making circuit at European level through a procedure that allows opinions to be expressed on draft European legislative acts before their adoption, which may lead to the modification or even the withdrawal of the proposal by the European Commission if a certain majority is reached. As is evident, it is a channel of direct communication between the European institutions and state policymakers in the European nomopoietic process.

4.1.1 The exercise of competences in the European Union

The EU competence is either exclusive, shared or facilitative. The exercise of EU competence is governed by three principles. Treaties specify that the delimiting function of the principle of the conferral of competences must respect the principles of proportionality and subsidiarity, which regulate the exercise of the competences granted to the Union by Member States (Article 5 paragraph 1 TEU). In addition, the Union is obliged to respect national diversity and

the fundamental core of the constitutional identities of Member States (so-called identity clause pursuant to Article 4, paragraph 2 TFEU) (MILLET, 2014).

The subsidiarity applied only within the shared competence. The subsidiarity principle (Article 5 paragraph 1 TEU) has the function of outlining the supranational area of action upstream compared to the national area (DZURINDA, 2019; FABBRINI, 2018; ESTELLA, 2002). The EU can only act if and to extent that the objectives of the planned action cannot be sufficiently achieved by the Member States and can therefore be better achieved at the supranational level due to the size and effects of the action in question. The rule can be understood as a limit to the action of the Union, since Member States must individually do what is most advantageous for them (PIMENOVA, 2016). Subsidiarity also involves a comparative assessment of objectives that Member States could individually or jointly achieve. In addition to serving as a defence of the competences of Member States in the face of the risk of excessive Union action, the principle of subsidiarity is linked to the aim that decisions on the pursuit of European objectives are made at the most suitable level to allow European citizens to achieve their own needs and determinations.

The principle of proportionality (Article 5, paragraph 4 TEU) states that the content and form of EU action are limited to that necessary to achieve the objectives of treaties. It not only binds the Union, but also Member States. The latter must not contravene the principle of proportionality, as any infringement falling within the scope of EU law represents a violation that can be submitted to the Court of Justice. As regards Member States, the principle of proportionality often serves as a limit to the exercise of the right granted to them to make exceptions to the freedoms of Treaties, or, more generally, to the obligations deriving from them (HARBO, 2010). This principle involves an assessment of the suitability of the means used with respect to the objective pursued and implies that these means must be limited to those necessary for the achievement of the objective in question. The principle of proportionality referred to the Union is intended to act as a barrier to its action, and operates throughout the scope of the Treaties, including those in which the EU has exclusive competence (WEBER, 2012). The Article 5, paragraph 4 TEU expressly not only refers to the content of Union action, but also to the acts that can be adopted by the EU institutions.

The protection of national identity plays an important role within the exercise of competences. The establishment of the concept of constitutional identity falls within the European integration process and the relationship between the various legal systems that comprise the EU multi-level legal space, which is structured between internal and European legal systems. In an attempt to outline a potential definition of the axiological scope, it is reasonable to reference the content of Article 4, paragraph 2 TEU, according to which the European Union respects the national identity of Member States, which are inherent in their fundamental, political, and constitutional structure. This provision must also be read in conjunction with Article 2 TEU. The Article 2 TEU reconstructs the values on which the entire European architecture is based (VON BOGDANDY/SCHILL, 2011), as well as with Article 6, paragraph 3 TEU, which establishes that fundamental rights resulting from the shared constitutional traditions of Member States are part of European Union law as general principles.

Through a refined hermeneutic operation, the EU Court of Justice enhanced the importance of individual constitutional traditions in the European system of values, supporting their range of application in the constitutional actions at hand. There are many cases in which the EU Court

of Justice has periodically identified the ontological scope of the national/constitutional identity of the Member States or the protection of the official state language. However, as the Court of Justice itself has pointed out, this cannot legitimise a restriction in the balance of interests in view of the freedoms guaranteed by the European treaties (*ex pluris*, see CJEU, case-law on April 16, 2013, Las; Runevič- Vardyn, 12 May 2011; envoy., Commission et al., 24 May 2011) or the division of competences in the territorial articulation of States (CJEU, sent on 4 March 2004, case C-344/01, Federal Republic of Germany against Commission).

In all of these cases, the Court of Justice gives weight to the aforementioned Article 4, paragraph 2, TEU, identifying the rights and values that form part of the essential nucleus of national laws, which must also find an appropriate balance with the principles of the European Union. From this point of view, the protection of national identity would constitute a limit to the supremacy of EU law (GUASTAFERRO, 2012; CLAES, 2013; CLOOTS, 2015). National identity is filled with the values expressed in national constitutions (TIMMERMANS, 2017; CARTABIA, 2014), which justify limitations on the freedoms expressed in the European Treaties without ever leading to violations of the principles of the Charter of Fundamental Rights or the provisions of Treaties (FARAGUNA, 2016).

The identity argument therefore becomes the synthesis of the essential characteristics of national legal systems in the interpretation by the Court of Justice, which summarises the tension between the tendency of the legal system to open itself to supranational law and the tendency towards closure in order to preserve the priorities of the internal system with respect to the provisions of primary European sources (RUGGERI, 2019; DI FEDERICO, 2019). In this interpretative view, the overall dimension that seems to emerge in the multi-level dialogue as seen in the affirmation of the protection of the identity clause referred to in Article 4, paragraph 2 TEU (BESSELINK, 2010) cannot be reduced to an exclusively hierarchical perspective. Indeed, this dimension could be understood as axiological question, which is measured in the balance between national principles – as drafted by the respective constitutional Courts (BLAGOVJEVIC, 2017) – and the general principles of European law.

In this hybrid system, the use of the principle of subsidiarity and proportionality, and the obligation imposed by the Union to respect national identities are not sufficient to clarify the actual scope and exercise of competences. To achieve this objective and understand how the Union's powers are exercised, it is necessary to refer to the provisions of the Treaties specifically dedicated to the exclusive, shared and facilitative (GOVAERE, 2016). The paragraph 6 of Article 5 TEU specifies that the scope and methods of exercising each type of competence derive from sectoral provisions contained in the Treaties, which have a different degree of precision pursuant to the individual sectors. Identifying the exact scope of each individual EU competence is not easy, given that the ways in which the specific competences are defined within the Treaties vary and do not always allow their actual limits to be identified (KONSTADINIDES, 2018). The rigidity of principle of conferral has been mitigated by case law of the Court of Justice, which, when ruling on competences, has in principle favoured interpretations of the relevant rules capable of expanding the scope of these competences (GARBEN/GOVAERE, 2017).

Within the Treaties, the division of competences was effectively codified through a series of specific provisions (DASHWOOD, 2004). The Lisbon Treaty not only list the different types of competences, but it also made changes. Therefore, its reform, does not just re-use the previous

system based on practice and case law, but changes the existing discipline. These important changes require a detailed analysis of the categories into which the competences are placed.

4.1.2 The division of competences between the European Union and Member States

The competences of the European Union are divided into different categories (Article 2 TFEU) identified on the basis of the relationship existing between such competences and those of Member States, taking the consequences of a certain competence into account as deriving from the attribution to one category or the other.

Three types of competence coexist in the European supranational structure. The first contains the fields included amongst the exclusive competences of the Union (Article 3 TFEU). The concept of exclusive jurisdiction established in the past by the Court of Justice[29] implies that Member States can no longer legislate in the relative matters. This also applies in the event that exclusive competence has not yet been exercised by the EU (DE WITTE, 2017). Through the ordinary review procedure (Article 48, paragraph 2 and Article 5 TEU) the Member States can modify the Treaties to increase or reduce the competences attributed to the EU (DE WITTE, 2017).

The second type is shared competences between the EU and Member States (Article 4, paragraph 2 TFEU). In such case, the principle of pre-emption is invoked as a regulatory mechanism. The Member States can continue to legislate only until (and to the extent that) the EU has not done so (SCHUETZE, 2006). The effective exercise of shared competence by the Union progressively reduces that of national competence. Pre-emption is reversible since the act can be repealed. For these reasons, what matters is the effective exercise of competence by the Union, not only the conferral. If the Union subsequently governs the sector exhaustively over time, shared competence does not differ from exclusive competence. On the contrary, insignificant action of the Union does not prevent the regulatory intervention of Member States (ARENA, 2018). The exercise of the competences by the EU must also take place in compliance with the principle of subsidiarity.

The third type of competence encompasses the fields in which the Union is responsible for carrying out actions aimed at supporting, coordinating, or completing the action of Member States (Article 4, paragraphs 3 and 4, and Article 5 and 6 of the TFEU). In areas falling into this category, the European Union has a limited role in completing or merely coordinating the action of Member States. In such cases, the European institutions cannot harmonise the legislation of Member States. For these reasons, there can never be a total substitution of EU action for that of Member countries in the matters in question, let alone pre-emption (GARBEN, 2017).

In the framework of the division of competences, the EU's external action has some special features that do not allow it to fall within a single competitive area (CREMONA, 2017). Despite the formal unity acquired thanks to the Lisbon Treaty, it does not present itself as an EU policy. Indeed, it is identified with a complex and vast set of related activities that contribute to creating the international dimension of the EU. Common commercial policy and activities in the areas of development cooperation, humanitarian aid outside of the Union, and economic, financial, and technical cooperation with third countries are included in the current external

[29] See European Union Court of Justice of 31 March 1971, Kramer, C-6/76, EU:C:1976:114.

action of the EU. These various activities attributable to the external action of the EU must be carried out within the framework of general and common principles and objectives (Article 21, paragraph 3) of the TEU). The principles generally coincide with the founding values of the EU: democracy, rule of law, human rights, and respect for international law. The objectives include general purposes ranging from the affirmation of the values mentioned to the protection of the Union's security, independence, and integrity, the protection of international peace and security, the promotion of sustainable development, and the liberalisation of trade. In this way, Article 21 TEU reaffirms the provisions of Article 3, paragraph 5 TEU: in addition to safeguarding its values and interests for the protection of its citizens, in relations with the rest of the world, the Union contributes to peace, sustainable development of the earth, solidarity, mutual respect amongst populations, free trade, the eradication of poverty, the protection of human rights, and the strict observance and development of international law.

External action of the EU does not reflect a specific EU competence but makes use of all of the different types of competences that the Treaties grant to European institutions (CREMONA, 2017). For example, in the external dimension of trade policy, the EU has exclusive competence (Article 3, paragraph 1, letter e) TFEU). This policy is one of the main instruments of the Union's external action, of which it formed the initial nucleus of the first external relations of the European Economic Community. The content of the commercial policy is closely linked to the existence of the internal market and a customs union between Member States, of which it represents the external aspect (DIMOPOULOS, 2010; BARTELS, 2007). The Treaties attribute objectives to the commercial policy, that is of contributing to the shared interest to the harmonious development of world trade, the gradual lifting of restrictions on international trade, direct foreign investment, the reduction of customs and other barriers (Article 206 TFEU). The allocation of rules on the shared commercial policy in the part of the Treaty on the Functioning of the EU relating to the EU's external action means that the action of European institutions must be observant to the framework of principles and objectives that guide the external action itself (Article 205 TFEU). Primary EU law contains a broad notion of commercial policy (Article 207, paragraph 1 TFEU). It includes the modification of tariffs, the conclusion of tariff and commercial agreements relating to the exchange of goods and services, and the commercial aspects of intellectual property, direct foreign investment, the standardisation of liberalisation measures, export policy and commercial protection measures, including those to be adopted in the event of 'dumping' and subsidies. However, this list is not exhaustive. Case law of the Court of Justice has had the opportunity to broaden the terms of the definition of a commercial policy. The Lisbon Treaty brought new areas of trade policy to the exclusive competences of the EU, namely that of services and intellectual property (KRAJEWSKI, 2012). However, the EU's exclusive competence as regards commercial policy is not without limits (VILLALTA PUIG/AL-HADDAB, 2011). The Treaty provides that the exercise of competences as regards a common commercial policy does not affect the division of competences between the EU and Member States and does not entail harmonisation of the laws or regulations of Member States (Article 207, paragraph 6 TFEU). In other words, the Union cannot enter into international agreements in areas that cannot be harmonised internally (Articles 149; 153, paragraph 2, letter a); 165, paragraph 4; 166, paragraph 4; 167, paragraph 5; 168, paragraph 5, 173, paragraph 3, TFEU). It should be remembered that in relation to many of these areas, the Treaty confers express competence to the EU as regards negotiating and concluding agreements on the exchange of services (Article 207, paragraph 4 letter a) and b) TFEU).

Unlike the commercial policy, the EU exercises parallel competence in areas such as development cooperation, as national competences exist without interfering with supranational competences. In areas where the EU's external action consists of the implementation of internal policies at an international level, the competence of the institutions is simultaneous with that of Member States, with the consequence that there cannot be a simultaneous exercise of the same by the first or second. As far as the common foreign and security policy is concerned, the EU has neither exclusive competence nor simultaneous and parallel competence. The CFSP is subject to specific rules (Article 24, paragraph 1, point 2 TEU). This specific nature is due to the intergovernmental character of the institutional or procedural structure that presides over its operation: the dominant role of the Council, generalisation of unanimity rule, absolute marginality of the EP, and total lack of control by the Court of Justice. This leads to considering the Union's external action as a complex dimension dominated by the will of Member States. The different competences and varying methods of exercise that refer to the different sectors of external action may involve the need to delimit the respective areas of application for the purpose of framing a certain EU initiative in one or the other sector, or any coordination of such operating methods.

In light of these considerations, apart from the hypothesis of exclusive attribution, the existence of competence of the institutions does not undermine the corresponding competences of Member States. When institutions have availed themselves of their competence, Member States will be required to respect and apply the related secondary legislation. In principle, Member States will not be stripped of their competence. However, they will be free to act or legislate on that particular matter, provided that their conduct or measures taken are not contrary to the obligations imposed by EU law. This is certainly true when a Member States' competence – which is symmetrical to that of the Union – occurs without the two spheres of competence being intended (in principle) to interfere with each other on a formal basis. The Union's action is thus configured as parallel to that of Member States, since the two actions only have to become integrated on the basis of an obligation of coordination aimed at ensuring the mutual consistency of national policies and Union policy.

These legal bases specifically define both the belonging of each policy to a competence and the objectives of each policy, with greater precision with respect to certain federal systems (SCHUETZE, 2008; DE BURCA/DE WITTE, 2002). In the intentions of national negotiators, the idea that each policy was included in a specific competence allows, at least in theory, Member States to best control the work of European institutions (GARBEN, 2014). has been disavowed by the practice and actions needed to temper the economic crisis. Measures taken during the crisis entailed a remodelling of the framework of competences contained in the Lisbon Treaty. The European Union has gained expertise in areas where, according to the Treaties, Member States had to remain firmly in command (GARBEN/GOVAERE, 2017), while in others, the prevalence of the intergovernmental method slowed down the action of European institutions in the attempt to recover sovereignty by Member States within a supranational legal scope.

4.2. The economic crisis and new macroeconomic and fiscal governance

The following section studies the changes made by the economic crisis on the EU's macro-economic and fiscal governance. As regards the banking sector, state finances and aspects of the real economy, the economic crisis has had very negative effects on the institutions of the European Union and on the integration process (DEHOUSSE/BOUSSAGUET, 2014; OFFE, 2013). The

institutional process launched to deal with this crisis has been described as a 'post-democratic executive federalism'. It presents the 'substantial marginalisation of the European Parliament, the 'internationalisation' of European constraints and the delegation of decisions that have a strong margin of political discretion to non-democratically legitimated bodies (especially the Commission). This dynamic has been pursued through the bureaucratisation of political processes and the politicisation of 'technocratic institution' (HABERMAS, 2011). The predominantly intergovernmental management has strengthened an integration model based on competition between Member States rather than on redistributive social justice. Moreover, the logic of informal summits has prevailed, and the hegemony of strong governments has turned into pressure on weak governments, thus exacerbating the conflict between states (GUAZZAROTTI, 2017).

The founding values of the Community and those of the European Union today, such as peace, and prosperity, have been the pillars on which the integration between the various acceding countries was founded, in order to create a common space of freedom (VON BOGDANDY, 2010; WEILER, 2003). Given that Weiler had already repeatedly claimed that Europe has lost its profound soul after Maastricht, the messianic vision of the Schuman declaration and Jean Monnet's aspiration to 'unite men, not states' (WEILER, 2009), the political and democratic deficit that characterises the EU, which is aimed at seeking legitimacy in results only and mainly in the economic field, has worsened precisely because of the economic and financial failures of recent years (WEILER, 2011). The financial crisis and the search for adequate ways to deal with it have negatively interacted on the democratic levels of the European legal system (FABBRINI, 2012).

The crisis then highlighted the weakness of the economic and monetary union (EMU) model outlined in Maastricht. This asymmetrical model, which is based on the distinction between the monetary policy, which is the exclusive competence of the EU, and the economic and budgetary policy, which is entrusted to each Member State, has not prevented situations of deficit from having occurred in some States, which threatened the stability of the single currency (FABBRINI, 2013). For this reason, in significantly impacting the traditional canons of the integration process, 'European emergency law' has made the distinction between the two policies less clear, altering the mechanisms of production of law and the distinction of powers outlined by the treaties (CARUSO, 2018).

The introduction of new tools to coordinate the economic policies of Member States and a greater politicisation of the monetary policy, which is increasingly confused with the economic policy, was not followed by the strengthening of the democratic legitimacy of the EU (DONATI, 2013).

For these reasons, it is appropriate to highlight the tension that anti-crisis measures have produced both internally (on individual national decision-making procedures) and externally (on the institutional aspect of the Union). Internally, decision-making procedures have gradually been replaced by negotiation procedures, in which the substantial marginalisation of institutions responsible for representing general interests has taken place, such as national parliaments. The new governance of the Union failed to compensate for the erosion of the legislative power of national parliaments at a European level (FASONE, 2014; GRIMM, 2015). On the external side, the financial and public debt crisis affected not only the construction process of the EMU but also the institutional set-up of the EU, triggering several processes (CHITI, 2012):

the transition from the expected method of action from the treaties to a mainly intergovernmental method.

The Union's competences and the corresponding obligations of Member States are not identical for monetary and for economic policy. According to Treaty rules, the rigorous and stringent mechanisms envisaged for monetary policy correspond to a less invasive system as regards economic policy. These developments increased intergovernmental collaboration in the European Union.

Article 3 TFEU states that the EU has exclusive competence for the monetary policy of Member States that use the euro as their currency. On the contrary, Article 4 of the TFEU states that the EU has a shared competence with respect to economic policy (FABBRINI, 2018; WAIBEL, 2017). However, Member States must consider economic policy interventions as matters of common interest and implement them in such a way as to contribute to the achievement of the objectives of the Union, coordinate them within the Council and according to the indications of the competent bodies of the Union (Articles 2, paragraphs 3 and 5, paragraph 1 TFEU). In response to the sovereign debt crisis the approach to governance is based on the idea that the economic policy of Member States should be closely coordinated and controlled according to the principles and criteria listed in the Treaty (Articles 121 and 126 TFEU) (LEINO-SANDBERG/SAARENHEIMO, 2017). It emerges that the coordination of economic policies is carried out through broad guidelines. Indeed, the mechanism is very complex. These guidelines are the subject of a recommendation from the Commission to the Council, which prepared a draft and submitted it to the European Council. After having discussed it, the latter transmits its conclusions to the Council, which uses such conclusions to make a recommendation that defines those guidelines, and then informs the European Parliament. The introduction of the European Semester changes the situation and shifts coordination ex ante, modifying the provisions of Article121, paragraph 2 of the TFEU.

Although the EU's competences in economic and monetary policy have not been allocated equally, the Treaty has established a close link between the two sectors (SCHUETZE, 2008; ARNULL, CHALMERS, 2015).Pursuant to the conditions laid down in the Treaties, Article 119, paragraph 1 TFEU explicitly declares that the action of Member States and the Union includes the adoption of an economic policy that is based on the close coordination of the economic policies of Member States, the internal market, and on the definition of common objectives, conducted in accordance with the principle of an open market economy with free competition. This action includes a single currency – the euro, as well as the definition and conduct of a single monetary and exchange rate policy, which aim to support general economic policies in the Union in accordance with the principle of an open market economy and in free competition (Article 119, paragraph 2 TFEU). This must take place in compliance with the following guiding principles: stable prices, public finances, sound monetary conditions, sustainable balance of payments (Article 119, paragraph 3 TFEU).

Control over compliance with these guidelines is ensured by a special multilateral surveillance mechanism, which aims to ensure the close coordination of economic policies and the lasting convergence of the economic results of Member States (Article 121 paragraph 3 TFEU). In order to comply with the indications, Member States are and must remain solely responsible for their public finances and ensure their proper management. In the logic of Economic and Monetary Union, they must maintain the ability to finance themselves independently on the markets

based on sustainable public-spending policies and the credibility of their future commitments. The regulatory framework also entails important provisions on the prohibition of excessive government deficits, which allow European institutions to take binding action to protect the stability of the system – especially in the Eurozone. This regulation was further strengthened by measures taken during the economic crisis to face speculation on sovereign debt. Specifically, EU law provides that in the event that a Member State fails to comply with the tax rules and is in a situation of excessive public deficit, an articulated and complex procedure is triggered which involves the Commission in the supervisory phase, and the Council in proposing recommendations for recovery from the deficit.

However, referring generally to EU law, the strict rules for coordinating economic policies do not prevent the Council and Member States from deciding to initiate support measures appropriate to the economic situation of a Member State, in a spirit of solidarity. This occurs in the event of serious difficulties in the supply of certain products, for example in the energy sector, or in the event that a Member State in difficulty is seriously threatened by grave problems caused by natural disasters or exceptional circumstances beyond its control (Art 122, paragraphs 1 and 2 TFEU).

Monetary policy is not classically an exclusive competence (WAIBEL, 2017). It is only restricted to Member States that have adopted the euro as their current currency (Article 3, paragraph 1, letter c) TFEU). Specific rules are only provided for Member States belonging to the Euro system (Article 5, paragraph 1, point 2 TFEU). The Euro system is a hybrid. The Treaties created a governance of the monetary policy in which decisions are shared between national and European levels, within the European System of Central Banks, which coordinates the work of the European Central Bank with 19 national central banks. Although the Treaties do not contain a precise definition of the monetary policy, the objectives and scope of action reserved for the EU in this field are indicated in a number of provisions of the Treaty on the Functioning of the EU.

The main objective of the European System of Central Banks is to maintain price stability, while the second is to support the economic policies of the Member States (Article 127 TFEU). This aims to promote effective allocation of resources and respect the principles of price stability, public finances, sound monetary conditions, and a sustainable balance of payments (Article 119 TFEU). In order to achieve these objectives, the European Central Bank enjoys numerous competences, such as the setting of key interest rates and intermediate monetary targets as well as the supply of Euro system reserves, including the exclusive right to issue euro banknotes as legal tender (Article 128, paragraph 1 TFEU). Without prejudice to the competences of the European Central Bank, the measures for the use of the euro as a single currency are defined by the EU legislator after consulting the ECB itself (Article 133 TFEU).

The crisis demonstrated the powerlessness of the Economic and Monetary Union to stabilise the Eurozone. This mechanism could at best allow the avoidance of excessive public deficits with the described and very bland multilateral monitoring mechanism but does not allow positive action to be taken to impose proper tax governance on Member States. According to the treaties, the power of taxation falls within the competence of Member States, while the European Union only has limited competences for the proper functioning of the single market (Article 110 and 113 TFEU). The competence to introduce, remove, or adjust taxes remains in the hands of Member States. Member States are free to choose the tax regime they deem most

appropriate, provided they comply with EU law. The key priorities of the Union's tax policy are the elimination of tax obstacles to cross-border economic activity, the fight against harmful tax competition and tax evasion, and the promotion of greater cooperation between tax administrations in the ensuring controls and combatting fraud. Greater tax policy coordination would ensure that Member States' tax policies are supported by the EU's broader strategic objectives, as defined in the Europe 2020 strategy for smart, sustainable and inclusive growth, and in the Single Market Act (MARIOTTO, 2019).

In order to cope with the difficult economic situation, the search for an effective form of governance of the Economic and Monetary Union has intensified, which is capable of saving and strengthening the system (LASTRA/LOUIS, 2013). Despite this, the responses that the European Union provided as a whole to deal with the financial and public debt crisis of Member States not only affected the European 'economic constitution', understood as a set of rules on the functioning of the internal market and economic and monetary Union, but also the entire institutional structure of the Union, or rather, the general structure of public power established within the founding treaties. The anti-crisis measures can be broken down into different processes. (CHITI, 2012). The first process concerns the choice of the decision-making method, which alternates between the use of the Union method and the so-called intergovernmental method. To manage the economic-financial and public debt crisis, Member States opted for the use of purely intergovernmental instruments, marginalising the function of the Community method in the forms indicated by the Lisbon Treaty. Examples of using the intergovernmental method instead of the Community method include: the decision to make bilateral loans to Greece in May 2010; the establishment in May 2010 of both the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism – EFSM; from July 2011 to February 2012 and measures targeted toward the establishment of a fiscal 'stability union'. Many of the decisions that the Union has made to respond to the economic crisis have developed along the course of negotiations within the European Council, within Ecofin, at the level of the heads of state and government of EMU member countries, and within informal summits. These seats marginalised the role of institutions representing the general interests of the Union (European Commission and Parliament), significantly altering the institutional framework established by Lisbon. This choice has pushed the European Union towards the model of a typical international organisation, marginalising federal and federative approaches and institutions.

A second process involves the use of tools to contain and promptly respond to the current economic crisis. Over the past 10 years, the EU has adopted many anti-crises measures by resorting to solutions offered by the post-Lisbon framework. These include: the establishment of the new European supervisory authorities; the reform of the Stability and Growth Pact carried out by the so-called 'Six-Pack'; the reform of Article 136 TFEU, so as to provide for the establishment of a stability mechanism to be activated when it is indispensable to safeguard the stability of the eurozone as a whole.

Together with these internal instruments, the EU itself introduced other measures through international law and not Union law. For example, the aforementioned bilateral loans to Greece were negotiated by the Council through an international agreement called the Euro Plus Pact of March 2011. Through this agreement, the Member States of the European Union pledged to implement a series of political reforms which should have been improving their fiscal solidity and competitiveness. In this context, Member States have drafted the Stability Union

Agreement. This agreement aims to review EU tax law, with a series of decisions taken between 2011 and 2012 that mix instruments within the Treaties, such as the Six Pack Regulations and provisions external to the EU institutional framework, such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Treaty establishing the European Stability Mechanism.

This new European economic governance brings a structural imbalance between the Member States, thus fuelling the conflicts within it. The conditional nature of the aid and the lack of a central role of the European institutions has strengthened the position of the creditor countries at the expense of the countries most exposed to the economic crisis, with the effect of strengthening and not completing the sharing of risks in the field of law European area organically. A final process concerns the overlap between monetary and economic policy and the new role held by the European Central Bank (ECB). The measures adopted during the economic crisis not only produced an outsourcing of functions, but also a progressive process of centralisation for certain EU institutions, of which the ECB stands out for having gained new functions in the field of economic and banking supervision policies (COUR-THIMANN/WINKLER 2012).

In relation to the economic policy functions, with the announcement of a program (never implemented) of definitive monetary transactions (Outright Monetary Transactions, OMT 2012) and with the Public Sector Asset Purchase Program (PSPP, from 9 March 2015), the ECB took action aimed at the massive purchase of government bonds from countries in the Eurozone, with the aim of fighting deflation and helping Member States most affected by the economic crisis to get financed on international markets.

The process towards the establishment of a banking union, which brings new powers in relation to the ECB with it for the supervision of credit institutions, has also made the gap opened in Maastricht between monetary policy and economic policy less obvious (DE GRAUWE, 2013).

The institutional dynamics described above, and the measures adopted by the ECB to deal with the economic crisis were challenged before the EU Court of Justice. In the *Pringle*[30] case-law, the Court relied on the 'no bail-out' clause supported by the Treaty (Article 125 TFEU). According to the EU Court of Justice, the mechanism of financial assistance has the effect of undermining the incentive of Member State benefiting from such assistance to lead to a virtuous fiscal policy. Furthermore, in the Gauweiler case-law, the European Court of Justice stated that the securities purchase program falls within the powers of the European System of Central Banks (ESCB), respects the principle of proportionality, and is compatible with the prohibition of financial assistance by the ESCB to Member States.[31]

The processes triggered by the crisis questioned the European institutional framework. The Union opted for widespread use of the intergovernmental method at the expense of the Community method. This has given rise, through the use of instruments external to the Treaty, to an even more accentuated functional and institutional differentiation of EMU compared to the European Union. In so doing, the intergovernmental method has strengthened the federal

[30] See European Union Court of Justice Judgement of 27 November 2012, Pringle v. Ireland, C-370/12, EU:C:1964:66.

[31] See European Union Court of Justice Judgement of 16 June 2015, Peter Gauweiler e a. contro Deutscher Bundestag, C-62/14, EU:C:2015:400.

component of the Union without risk sharing and without reconstructing the loss of sovereignty of the Member States in the supranational context.

It is argued (BICKERTON, 2012) that the new institutional paradigm of the European system is represented by the Member State, characterised by internal reception of rules produced outside its national borders and to which states freely choose to submit themselves; by the bureaucratisation of government action; by criteria for legitimising political power based on efficiency and external appreciation by the governments of other Member States and the technocratic institutions of the Union. Formal transfer of sovereignty does not take place through the reform of the founding treaties. In the sectors covered by this inquiry, the erosion of sovereignty takes place through an autonomous choice of States on the basis of individual international agreements. A 'variable shape' that is directly related to the economic strength and political weight of the various contracting states (CALDARELLI, 2019). According to some commentators, this process marked a de-constitutionalisation of supranational law, and radically transformed the European integration process (CHITI/TEXEIRA, 2013; JOERGES, 2012).

Austerity policies aimed at containing public spending levels have caused the differentiation of the levels of guarantee of social rights in the various Member States (COSTAMAGNA, 2017). It has been argued that the value of social rights changed in this context. Social rights are now considered in a macroeconomic system dimension in a regulatory perspective that forces the Member States to change the meaning of social constitutional guarantees in order to achieve the requisite objectives of economic and financial balance. As such, the individual protection inherent in these rights is lost, while the aspect of macroeconomic rebalancing is encouraged (BILANCIA, 2016).

To conclude, we can affirm that the institutional innovations adopted by the EU have an experimental character and limit the discretionary space of the political choices of the Member States. Despite this, these measures reinforce the idea that the integration process is characterized by the intergovernmental method and will remain so for a long time to come. Economic and fiscal governance risks being distorted by the COVID-19 crisis. For instance, the European Commission has adopted a comprehensive economic response to the outbreak and applied the full flexibility of the EU fiscal rules. Moreover, the European Commission has revised its State Aid rules. Currently, many other interventions are under discussion, but a possible sharing of risks and change of debt remains far from being implemented.

4.3. The effect of the economic crisis and measures to contain it through decision-making: marginalisation of the European Parliament and national parliaments

The regulatory measures adopted from 2010 in response to the period of economic and financial crisis have changed the architecture of EU economic governance (FABBRINI, 2016; CRAIG, 2014) and, have more generally destabilised the European institutional balance (DAWSON/DE WITTE, 2013). The institutional experimentalism (BENVENUTI, 2015) of the emergency regulation phase affected the structure conceived by the Lisbon Treaty, and took away the power from representative institutions. Notwithstanding the provisions of Article 10.1 of the TEU, which states that 'The functioning of the Union is based on representative democracy', the European Parliament has neither been entrusted with tasks of the control nor management of crises. After an initial involvement of the EP in strengthening the Stability and Growth Pact procedures (the aforementioned 'six-pack' and 'two-pack'), the subsequent anti-crisis policies relied largely

on others European institutions (CHRISTIANSEN, 2015). Even when an involvement of the European Parliament was foreseen – as in the case of the interparliamentary conference on economic and financial governance as established by Article 13 of the Fiscal compact, its effective role was marginal and devoid of concrete operational tools (CHRISTIANSEN, 2015).

It could be argued that the European Parliament has always played a limited role in the institutional structure of Europe: in the beginning of the integration project, it mainly performed consultative and control functions vis-à-vis the European Commission. The representative European body has seen its functions increase over time, in part due to a reaction to the critique of the democratic deficit. It was only at the time of the Stability and Growth Pact that the European Parliament experienced greater marginalisation, while the name of the institution was not even mentioned in Regulations 1466/97 and 1467/97 (FASONE, 2012).

The new EU economic governance European has partially deteriorated larger sovereignties for the benefit of the latently understood executive decisions (HABERMAS, 2012), affecting the role not only of the European Parliament, but also of national parliaments (CHRISTIANSEN, 2015). Indeed, the measures to combat the crisis have been adopted with instruments of international law and through the intergovernmental method.

The use of the Community method was still prevalent until 2010, with the involvement of all EU government bodies, including the European Parliament, and voting systems aimed at ensuring the participation of even the economically smallest and least influential countries. The escalation of the crisis led to new dynamics in the integration process, moving the EU away from ordinary decision-making procedures (CHRISTIANSEN, 2015). The main players in the emergency action have become the European Council and the Eurogroup. Faced with the inadequacy of the macro-prudential supervisory systems in place (QUAGLIA/HOWARTH, 2015), they promoted interventions to strengthen the automatic monitoring of the level of deficit and debt of States, as well as that of national reform plans.

Removed from this decision-making, the European Parliament can be considered the most side-lined institution in the adoption of anti-crisis measures. Some authors argue that this is partly due to the different degree of participation of Member States in the decision-making process. (PINELLI, 2014). Giving a decision-making role to the European Parliament with regard to the management of the Euro would result in granting decision-making powers to representatives of countries that do not belong to the single currency system. The differentiated participation of its members or any change in the decision-making methods of the European Parliament would require a revision of the treaties (CHRISTIANSEN, 2015).

The increase in the role of the European Parliament in economic governance would not on its own compensate for the shortcomings that the intergovernmental method presents in terms of democracy and representation (CHRISTIANSEN, 2015). According to some authors, increasing the role of the European Parliament would not enhance democracy and representativeness of the decision-making processes, given that Member States would find themselves subject to decisions made by an external majority, in violation of their sovereignty. (GRIMM, 2017; CATELLANI/BERTOLOTTI, 2014)

The marginalisation experienced by the European Parliament in recent years is even more evident when compared to the expansion of the role of the Commission and, above all, of the European Central Bank.

The well-known emergency legislation is characterised by the conferral of additional functions to certain European bodies by international agreements. The legitimacy of the described transformation of institutional powers can be questioned from several perspectives. European institutions can act exclusively within the limits of the powers conferred on them (Article 5 TEU). additional competences conferred on EU institutions, outside of the European regulatory framework, would thus run against a grammatical interpretation of the Treaties. As the EU Court of Justice concluded in the *Pringle* case, the conferral of additional functions and powers to the Commission and ECB outside the institutional context of the EU is possible, provided that such does not 'alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[32]

It could be argued that this legislation created an unbalanced system in which the work of institutions in charge of economic governance is difficult to control by the European Parliament and national parliaments (TUORI, 2012).

The stability mechanisms operate parallel to the European framework. An example of this is the Treaty establishing the European Stability Mechanism (2012), which vested the Commission and the European Central Bank with various roles: from negotiating a memorandum of understanding with the country requesting financial assistance from the ESM, to coordination of the implementation of the rescue operation.

The Commission has exercised its oversight over Member States' compliance with the measures introduced, which often included heated political confrontations with national executive bodies (CRAIG, 2014). Moreover, the decision-making of the European Central Bank has affected several areas, including monetary policy issues and fiscal matters, and assessment operations of national reform plans and decisions relating to the purchase of state public debt securities. They are attributable to the line of measures that includes the Security Market Programme (2010), the Outright Monetary Transaction (2012) and Quantitative Easing (2015).

To preserve their national sovereignty as regards matters of taxation and their refusal of a central bank system on the basis of the 'American-type federalist' model, an economic governance model was created with particularly severe constraints on States (CRAIG, 2014). The ECB created something brand new, by not placing itself within a traditional system of government, but within an atypical union of states (PAPARELLA, 2016), constituting a central bank with a federal structure, without a federal state. This was critiqued by Amato saying that 'you cannot be the federal reserve without a federal state and, therefore, if we do not have a federal State, we cannot have a federal reserve') (AMATO, 2012).

The purpose of the ECB's intervention consists of measures aimed at pursuing price stability and market confidence. These are objectives partly set by the treaties and partly derived from anti-inflationary rules shared by central banks in the Eurozone (HODSON, 2015). However, the

[32] See European Union Court of Justice Judgement of 27 November 2012, Pringle v. Ireland, C-370/12, EU:C:1964:66, paragraph 150.

ECB is different from other federal models of central banks, such as the US Federal Reserve, which also involved in promoting employment and growth (GUAZZAROTTI, 2017).

In recent years, these recent institutional changes often forced the legal boundaries of treaties, without increasing the institutions' accountability to citizens (DAWSON/ENDERTEN/JOERGES, 2016). The emergency framework took place without the support of the society, and therefore, to a certain extent, illegally. (GRIMM, 2017). The role of national parliaments has changed significantly over the years. Before the direct election of the European Parliament, its members were designated within national parliaments, hence there was a certain degree of connection between state-based and European assemblies. After this link faded, policies to enhance the perspectives of national assemblies were adopted, starting from the Treaty of Maastricht. By adopting Declarations n. 13 and 14 annexed to the Treaty of Maastricht, European institutions started the process of progressive integration and involvement of national elective assemblies. However, these were provisions of non-prescriptive value, both as regards the source from which they were conveyed as well as their content. They were limited to encouraging the exchange of information on European issues between EU institutions and parliaments.

In 2006, the European Commission launched a procedure for involving national parliaments in EU activities, sending them consultation documents and any new legislative proposals. With the adoption of the Lisbon Treaty, this dialogue became a legal obligation of the Commission The relationship between national parliaments and the Union was formalised with Article 12 of the TEU and protocol no. 1 on the role of national parliaments in the European Union. National parliaments were thus granted supervisory functions on the principle of subsidiarity; participation in the area of freedom, security, and justice in evaluation mechanisms for the implementation of Union policies; participation in treaty revision procedures; rights to information on new applications for membership in the Union; cooperation functions with the European Parliament.

Impaired in terms of legislative functions, national parliaments entered the European system as control bodies (CARTABIA, 2007) in the context of the legislative procedure, such as the so-called early warning system. Additional differentiated procedures were then prepared by Member States to allow their parliaments to influence European policies both in the rising and decreasing stages.

However, the sum of these measures was not sufficient to compensate for the erosion of the legislative competences of national parliaments, especially following the constitutionalisation of treaties (GRIMM, 2015). The loss of legislative competence cannot be balanced by participation in, or control over, decisions made by other bodies (GRIMM, 2015). In addition, the sheer amount of information that the European Union sends to national parliaments often overwhelms their participation efforts. National parliaments are unable to process the approximately 500 communications received per year from the EU. The opinions of Bundestag that are communicated to Brussels do not even reach 5% of this information (GRIMM, 2015).

The general European trend towards de-parliamentarisation, which led parliaments to lose their central position and create a 'democratic deficit' European Union (INNERARITY, 2016) thus worsened during the economic and financial crisis. State assemblies mostly intervened by ratifying decisions already made by executive bodies. National parliaments have served as a

filter in the transfer of sovereign spaces (GRIMM, 2015), but usually with only two options: to fully approve or reject the work.

According to some authors, however, the redistribution of competences as regards economic governance was more detrimental to the powers of executive bodies than those of parliaments (FASONE/GRIGLIO, 2013). The process of transformation of competences created several problems relating to the decision-making and sovereign powers of the people. Anti-crisis policies also resulted in further restriction of the autonomy of national parliaments as regards welfare-state policies, and in some cases, a decrease in the protection of certain fundamental constitutional rights, particularly social and economic rights (GAMBINO/NOCITO, 2012). Furthermore, the executive bodies of many European states often cited international obligations to avoid having to internally justify their restrictive economic policies (INNERARITY, 2016). In the perception of European citizens, the result of the combination of these different factors was the full dispersion of decision-making competences. Moreover, without adequate legal and political accountability mechanisms (DAWSON, 2016), the supranational integration process has thus become an 'impersonal set of rules in which no one assumes competence' (PITRUZZELLA, 2012).

4.4. The area of freedom, security, and justice after the migration crisis and terrorist attacks

EU treaties create an area of freedom, security, and justice that includes policies such as the management of the Union's external borders, asylum, immigration, judicial cooperation in civil and criminal matters, police cooperation, and the fight against crime – which includes the fight against terrorism (Article 2, paragraph 3 TEU). The Union creates this area of freedom, security, and justice while respecting the fundamental rights, different legal systems, and legal traditions of Member States (Article 67 TFEU). In this context, European institutions guarantee, through coordination and cooperation measures between the police force and judicial authorities and other competent authorities, the free movement of persons and a high level of security, the mutual recognition of criminal judicial decisions, and a trend towards the harmonisation of criminal law. Terrorist attacks, the migration crisis, and the asylum seekers crisis have caused changes and intensified the tension between the Union and Member States over the last five years. Above all, Member States try to assert their sovereignty in the matters that make up the area of freedom, justice and security.

In the area of freedom, security, and justice, the fight against terrorism is carried out through a form of multi-level governance in which the Union is one of the agents. The Lisbon Treaty indicates terrorist crime is expressly like a serious act in primary EU law (Article 83 TFEU), the European legislator cannot impose changes in national anti-terrorism systems but for the joint adoption of binding legal instruments with Member States (BURES, 2011). In terms of governance, the Union can only use coordinating powers in combatting terrorism. The Lisbon Treaty gives European institutions more powers of coordination than ever before as regard cooperation in criminal justice and counterterrorism. As regards preventing and combatting terrorism, the Treaty establishes that by acting through regulations in the ordinary legislative procedure, the European Parliament and the Council defines a set of administrative measures on the movement of capital and payments, such as the freezing of capital, financial assets or economic proceeds belonging to, owned, or held by natural or legal persons, groups, or state entities dedicated to the conduct of terrorist operations (Article 75 TFEU).

It is possible to achieve a strong convergence of counter-terrorism policies within the EU by means of greater cooperation, but this convergence between national systems can derive from intergovernmental initiatives rather than exclusively from supranational bodies. In the EU, these mechanisms and factors serve to impose policies, create harmonisation through international law, and exchange information (KAUNERT, 2010). The role of the EU in coordinating the action of its Member States influences the development of counterterrorism towards a transnational approach that is particularly attentive to the protection of the rights of the people. This offers the Union the opportunity to generate a model that focuses on protection not only in its content and the nature of its anti-terrorism rules and policies, but also in processes through which actions are developed (DE LONDRAS, 2016).

The Union retains some significant tools in the fight against terrorism. Article 88 of the TFEU entrusts Europol with supporting and enhancing the action of the police and other law enforcement services of Member States, and mutual cooperation in the prevention and fight against terrorism (KAUNERT, 2010; DE MOOR/VERMEULEN, 2010). Article 222 of the TFEU provides for a solidarity clause, allowing the Union and Member States to take joint action if one of them suffers a terrorist attack. In this case, the Union is required to mobilise all of the means at its disposal, including military made available by Member States, in order to prevent the terrorist threat, protect democratic institutions and the civilian population from a potential terrorist attack, and assist a Member State on its territory at the request of its political authorities, in the event of an attack (NOVÁKY, 2017). Indeed, if a Member State suffers a terrorist attack, other Member States, at the request of its political authorities, must assist it by coordinating with the Council. The implementation methods of the solidarity clause by the Union are defined by a decision adopted by the Council and a joint proposal from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, after informing the European Parliament. If the decision has implications in the defence sector, a decision must be made unanimously by the European Council and the Council (HILPOD, 2015; FUCHS-DRAPIER, 2011).

The Union's contribution to fighting terrorism also expands into an external dimension. The Treaties also allow the Union to use civilian and military means for external missions to ensure peacekeeping, prevent conflict, and strengthen international security, in accordance with the principles of the United Nations Charter (PEROT, 2019). Article 43 of the TEU specifies that these missions can contribute to the fight against terrorism, including through the support to third-party countries to combat the phenomenon on their territory. The Council is tasked with defining the objectives, scope and general procedures for carrying out missions, while the High Representative of the Union for Foreign Affairs and Security Policy is entrusted with the task of coordinating their civil and military aspects, under the authority of the Council and in close and constant contact with the Political and Security Committee. Financing actions to prevent organised crime and terrorism can be done through the EU Internal Security Fund, established with Regulation no. 513/2014/EU.[33]

The debate on the fight against terrorism has returned to the focus of the European agenda after the attacks in Paris (January and November 2015) and Brussels (March 2016). The Union

[33] Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA.

and Member States found themselves weak when faced with a type of terrorism that has taken on a flexible and transnational structure (De Londras, 2019). Emergency measures were no longer sufficient: it was necessary to intensify the coordination of supranational and national judicial, intelligence, and police authorities. The events rendered it necessary to update the legislative framework adopted in the first decade of the 2000s. In that decade, European institutions began to use a few tools that were of fundamental importance in the investigation of terrorism, making them faster, leaner, and more profitable, as well as sources specifically aimed at the terrorist phenomenon.

One example of such legislation is Framework Decision 2002/475/JHA[34] against terrorism, which deals with one of the most complex aspects in the practice of judicial cooperation in criminal matters: potential conflicts of jurisdiction, asking Member States to cooperate with one another to concentrate investigations in a single system, or to carry them out in a coordinated manner if the former is not possible (O'Neill, 2007). This regulatory intervention was complemented by Framework Decision 2009/948/JHA[35] on the prevention and resolution of conflicts relating to the jurisdiction of criminal proceedings, including trials for international terrorist offences. Furthermore, one of the main forms of judicial cooperation in the field of counterterrorism is the exchange of information relating to preliminary investigations between the competent authorities of Member States. Coordination takes place through Decision 2005/671/JHA.[36] Through this measure, the authorities of Member States, Eurojust, and Europol can access any object, document, or evidence obtained in operations to counter transnational terrorist activities, unless such jeopardises the ongoing investigations of a national authority (Kaunert, 2010).

The succession of attacks after 2015 led to the adoption of the Directive 2016/681/EU[37] on the use of reservation code data (RCD) to prevent, ascertain, investigate, and initiate a legal action against terrorist offences. The purpose of this directive is to harmonise the collection of such data across the Union at a European level. Directive 2017/541/EU was subsequently adopted,[38] which fully replaces Framework Decision 2002/475/JHA by expanding and updating its content to face the new threats that terrorism currently presents, focusing on foreign terrorist fighters (De Londras, 2018).

Although Directive 2017/541/EU represents a step forward compared to the previous Framework Decision 2002/475/JHA – attributing legislative rank and full judicial protection on such a delicate matter before the Court of Justice – the contribution of new provisions to the development of an effective counter-terrorism strategy is less certain. This directive was not able to better and more clearly limit the envisaged offences, but it contributed to the

[34] Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3–7.
[35] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15.12.2009, p. 42–47.
[36] Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253, 29.9.2005, p. 22–24.
[37] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132–149.
[38] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

proliferation of offences related to terrorist activities, which entails both a retraction of the punishable threshold of certain behaviours and a significant expansion of those prohibited. In other words, terrorism also becomes an act which in and of itself is not terrorist, but merely intentionally facilitates its commission. This poses problem of legal certainty. From a procedural point of view, a prior impact assessment on fundamental rights is lacking. But for the reference to the obligation to respect fundamental rights and the legal principles contained in Article 6 of the TEU, nearly none of the observations presented during the implementation to solicit greater attention to the protection of rights were incorporated into the final text of Directive 2017/541/EU (CAIROLA, 2017).

The analysis shows that the EU system has equipped itself with tools to combat transnational terrorism both through regulatory measures aimed at facilitating judicial cooperation as well as with investigative tools specifically aimed at combating terrorism. However, the problems lie in the partial use of these rules of judicial cooperation by the authorities of Member States (DE LONDRAS, 2017). In an attempt to maintain their security sovereignty, Member States often resort to safeguard clauses that allow national authorities to pull an emergency brake on the full application of the European counter-terrorism framework. This leads to partial derogations from EU rules whenever they conflict with the protection of sensitive interests of individual Member States, such as national security or the confidentiality of intelligence sources. In the area of counterterrorism, where investigations in many Member States are conducted by the secret services rather than the judicial police, these safeguard clauses are frequently applied, rendering ineffective a large part of the judicial cooperation and investigation institutes provided by EU law (DE LONDRAS, 2018).

Immigration and asylum policies are an integral part of the area of freedom, security, and justice, within which the EU shares competence with the Member States. In this area, the Member States play a particularly important role by guiding legislative action and intervention through decisions made by the European Council (Article 68 TFEU).

On the basis of the general provisions relating to the area of freedom, security, and justice, the Union develops a common policy on asylum, immigration and control of external borders (Article 67, paragraph 2 TFEU). The use of the term 'common policy' is not neutral. It corresponds to the desire to pursue an in-depth integration process and organise a division of competences that is more favourable to the EU (PASCOUAU, 2010). The Treaty clearly expresses this desire by promoting the exercise of competence on behalf of the EU. However, the Member States do not seem ready to give up their competences in this area, in not preferring simple sharing with the EU.

Migration policies are based on the principle of solidarity between Member States and the principle of fairness towards third-country nationals. These two principles are valid for judicial protection and create binding legal effects (TRIDIMAS, 2017). Concrete measures can be taken with these two principles. The principle of equity has both an internal and external dimension, which refers to the sharing of competence between Member States (Article 80 TFEU) and towards third-country nationals (Article 67, paragraph 2, and Article 79, paragraph 1 TFEU).

Member States have agreed to immigration sovereignty restrictions on the entry and residence of third-country nationals. This competence is broad, and ranges from visa measures, border control, immigration, residence, deportation, and the granting of international protection

status. Specifically, the Union's competence in migration matters is autonomous, and its objectives can be distinguished from that relating to asylum seekers (Article 79 TFEU). The Union develops a common immigration policy aimed at ensuring the effective management of migration flows at all stages, the fair treatment of citizens from third countries residing legally in Member States and the prevention and enhanced contrast of the illegal immigration of human trafficking (Article 79, paragraph 1 TFEU). These objectives express the final aim of the Union's action, which consists in managing immigration on a European level and in integrating third-country nationals (ACOSTA ARCARAZO/GEDDES, 2013).

EU action can be distinguished at internal and external levels. Within the borders of the Union, migration can contribute to the economic growth of the European Union, taking the reception capacity, insertion into the labour market, housing needs, and health and school services of each Member State into account. Internally, European institutions have concurrent regulatory competence and competence for operational support and coordination (PIRIS, 2010). The intervention of the European institutions is based more on a power of action rather than regulatory production. Through soft law acts and the use of the open method of coordination, the EU has taken measures[39] in order to facilitate the integration of third-country nationals without this affecting the competence of Member States (HAILBRONNER, 2016).

Within the area of migration policy, the EU can adopt legislative acts in accordance with ordinary legislative procedure (Article 79, paragraph 2 TFEU) or by virtue of special legislation. EU competence in migration matters allows institutions to adopt minimum common rules by means of directives. Member States have an obligation to transpose them. They can legislate on matters not covered by directives and derogate from common rules within the limits allowed by the directives themselves. However, the Union's competence in the area of immigration is not a simultaneous competence in all of its aspects. The Treaties state that European institutions can adopt legislative measures aimed at encouraging and supporting the action of Member States in order to encourage the integration of third-country citizens, excluding any harmonisation of the laws of Member States (Article 79, paragraph 4, TFEU). This competence can be qualified as support, completion, and coordination of the actions of the state (PIRIS, 2010).

The Union's external actions took a comprehensive approach towards migration management. This includes cooperation with third party countries for the fight against illegal immigration and targets the development of the States involved (Article 79, paragraph 3 TFEU). The Union has the simultaneous competence to conclude agreements with third countries for the readmission of third-country nationals to their places of origin or provenance who do not meet or no longer meet the conditions of entry, presence, or stay in the territory of one of the Member States. Cooperation with third countries on migration issues is part of the association or cooperation agreements concluded by the EU and its Member States on cooperation policies for development of the neighbourhood policy (CARDWELL, 2013; BOSWELL, 2003).

[39] See Council Decision 2007/435 of 25 June 2007 establishing the European Fund for the integration of third-country nationals for the period of 2007-2013, under the general program 'Solidarity and management of migratory flows', OJ L 168 of 28 June 2007, and Council Decision 2004/573 of 29 April 2004 on the organisation of joint flights for the deportation of third-country nationals illegally present in the territory of two or more Member States, OJ L 261 of 6 August 2004.

There is an explicit reservation of state competences in this area. In addition to the aforementioned limit that the Union's competence in migration matters does not influence the competence of Member States regarding the integration of third-country nationals residing there legally. Indeed, the EU level cannot affect the definition of the entry volumes of third-country nationals for the purpose of looking for work (Article 79, paragraph 5 TFEU). In addition, the Treaties have a reservation regarding the maintenance of public order and the safeguarding of internal security (Article 72 TFEU); the exercise of the Union's competence must take into account the interests of Member States with regard to social security (Article 79, paragraph 2 TFEU).

Economic immigration is a topic that causes political confrontation in Member States, as it affects the objectives and competences of Member States in matters of employment and economic policy. Internally, the tension has recently intensified between the interest of the EU in integrating citizens from third party countries that reside legally and that of Member States that look at the migratory phenomenon from a standpoint of security, employment policy, and social policy. Member States have repeatedly expressed their reticence towards the development of the Union's competence and its impact on the admission policy for the purpose of carrying out work activities (SCIPIONI, 2018).

Asylum policies fall alongside issues of economic immigration. The European Union shares competence with Member States as regards asylum. The Treaties mention the objective of creating a common asylum, subsidiary, and temporary protection policy with the aim of offering appropriate status to any third-country national who needs international protection, and to ensure compliance with the principle of non-refoulement (HAILBRONNER, 2016; CHERUBINI, 2015; PIRIS, 2010). This policy must comply with the Geneva Convention of 28 July 1951, the protocol of 31 January 1967 on the status of refugees, and other relevant treaties (Article 78, paragraph 1 TFEU). Primary EU law provides for the minimum measures appropriate for the creation of a common system that involves the creation of standard procedures for obtaining and losing a standardised status in the field of asylum or subsidiary protection. Moreover, EU law proposes criteria and mechanisms for determining the Member State responsible for examining an asylum application; standards on reception conditions; partnership and cooperation with third party countries (ZAUN, 2017).

New items introduced by the Lisbon Treaty modified the asylum decision-making procedure by introducing the co-decision procedure for legislative purposes. The Court of Justice plays a central role. Referral for a preliminary ruling can now be made from any jurisdiction of a Member State, and no longer only by national jurisdictions that rule in the final instance as was done in the past. This allowed the Court of Justice to develop case law that was more consistent on asylum matters (SCIPIONI, 2017). Indeed, during the migration crisis, the case-law is characterized by ambivalence. Indeed, during the migration crisis, jurisprudence is characterized by ambivalence. On the one hand, the *NS*[40] case-law subjects the individuality of rights to the dogma of mutual recognition. On the other hand, the *CK*[41] case-law is a welcome

[40] See European Union Court of Justice Judgement of 21 December 2011, NS v. v Secretary of State for the Home Department, C-411/10, EU:C:2011:865.

[41] See European Union Court of Justice Judgement of 16 February 2017, PPU – C. K. and Others, C-578/16, EU:C:2017:127.

rebalancing of the principles of mutual recognition and respect for fundamental rights. In *CK*[42] case-law, the Court of Justice held that the transfer of asylum seeker to the Member State responsible to examine the application of the asylum seeker cannot take place where there is a real risk of her suffering inhuman or degrading treatment (TRIDIMAS, 2017).

At present, secondary EU legal framework on asylum and immigration is defined by regulation no. 604/2013/EU[43] (called Dublin III), international protection directives,[44] supplemented by Regulation no. 603/2017/EU (called Eurodac), the temporary directive on protection[45] and that of repatriation,[46] In addition, an asylum support office called the European Asylum Support Office (EASO)[47] was created. This legislative package represents all third-generation measures as regards the Dublin Convention.

In 2015, the crisis in migration and asylum seekers revealed the limits of the Union's work. The combination of low harmonisation, weak monitoring, poor solidarity and lack of strong institutions in the EU's migration policy became increasingly unsustainable during the crisis (SCIPIONI, 2017; THYM, 2016). The difficult economic situation made it clear that the absence of strong cooperation between the EU and Member States and the failure to apply the principle of solidarity between Member States in the area of freedom, security, and justice does not allow the management of incoming migratory flows, triggering unpredictable political reactions.

The crisis highlighted the lack of application of the principle of solidarity amongst Member States (Article 80 TFEU). Since the entry into force of the Lisbon Treaty, EU migration policy has been obliged to respect this principle of solidarity together with fair sharing of competence amongst Member States, including any financial burden (THYM/TSOURDI, 2017; TSOURDI, 2017). EU asylum actions should include appropriate measures to ensure that this principle is applied. On the contrary, European institutions and national governments have understood this principle only in terms of technical and financial assistance to Member States that receive a large number of asylum seekers and migratory flows (TRIDIMAS, 2017). The joint distribution of the large flows of asylum seekers arriving into one port of entry in a Member State was not

[42] See Ibidem, paragraph 93.

[43] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59.

[44] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–2.

[45] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12–23.

[46] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

[47] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29.5.2010, p. 11–28.

taken into account. Similarly, the promotion of mutual recognition and flexible management of transfers of beneficiaries of international protection have been excluded.

Driven by the emergency, the institutional actors involved used a new instrument for relocation, which only makes adjustments to the Dublin regulation, and huge resources have been donated in cooperation with third countries to try to stop the flow of migrants to the EU (MAIANI, 2017). On the legal basis of Article 78, paragraph 3 TFEU, the decisions provided for a temporary transfer mechanism for a total of 160,000 people. The new feature of these decisions is the definition of mandatory quotas on the basis of objective criteria on which the redistribution of applicants for international protection takes place amongst Member States (TRIDIMAS, 2017). Redistribution is based on concrete parameters to establish the number of people that each Member State can potentially accept in view of the population, number of requests submitted, the gross domestic product, and unemployment rate. Member States pushed back on mandatory relocation, leading to the unsatisfactory application of these practices (ZAUN, 2018).[48]

In this context, the Court of Justice recently intervened. It ruled that by refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary, and the Czech Republic have failed to fulfil their obligations under EU law.[49] Furthermore, the Court of Justice held that those Member States can rely neither on their responsibilities concerning the maintenance of law and order and the safeguarding of internal security, nor on the alleged malfunctioning of the relocation mechanism to avoid implementing that mechanism.

Essentially, the Court upheld the infringement actions brought by the Commission against these three Member States, aimed at having them declare that by failing to relocate the applicants for international protection, they failed to fulfil their obligations under Union law. According to the Court, these Member States have not fulfilled a relocation agreement on a mandatory basis of one hundred and twenty thousand applicants for international protection to the other EU Member States. While, the Court found that Poland and the Czech Republic did not comply with their obligations under a Council decision to relocate, voluntarily, forty thousand applicants for international protection who arrived in Greece and Italy.

As to the substance, Poland and Hungary maintained inter alia that they were entitled to misapply the relocation decisions by virtue of Article 72 TFEU. In that regard, the Court of Justice held that the Article 72 TFEU is a provision derogating from the general rules of EU law and it must be interpreted strictly. Thus, that article does not confer on Member States the power to depart from the provisions of EU law based on no more than reliance on the interests

[48] In May 2015, the European Commission presented a comprehensive European Agenda on Migration (Brussels, 13.5.2015 COM(2015) 240 final) intended to address immediate challenges and equip the EU with the tools to better manage migration in the medium and long term in the areas of irregular migration, borders, asylum and legal migration. The measures originally contained in the European Agenda on Migration and the subsequent initiatives which represent coherent development, are inspired by the so-called 'global approach to migration', which consists of a combination of tools which concern: actions within the internal dimension of migration policy; activities at the external borders of the EU, the strengthening of external action which has resulted in foreign policy initiatives towards the main third countries of origin or transit of migrants.

[49] See European Union Court of Justice Judgement of 2 April 2020, Commission v Poland, Hungary and the Czech Republic, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2019:917.

linked to the maintenance of law and order and the safeguarding of internal security, but requires them to prove that it is necessary to have recourse to that derogation in order to exercise their responsibilities on those matters.[50] Nevertheless, the Court pointed out that, to rely on the abovementioned grounds, those authorities had to rely, following a case-by-case investigation, on consistent, objective and specific evidence that provides grounds for suspecting that the applicant in question represents an actual or potential danger.[51]

On this ground, the Court of Justice held that the arrangements provided by those provisions precluded, in the relocation procedure, a Member State from peremptorily invoking Article 72 TFEU for the sole purposes of general prevention and without establishing any direct relationship with a particular case to justify suspending the implementation of or even ending to implement its obligations under the relocation decisions.[52]

Furthermore, in ruling on the Czech Republic's plea in defence from the malfunction of the relocation mechanism in question, the Court ruled that a Member State is not allowed to rely on its unilateral assessment of the alleged lack of effectiveness, or of the alleged malfunction of the relocation mechanism established by the same deeds, to escape any relocation obligation incumbent on it under these same acts. When a Member State unilaterally withdraws from its relocation obligations, it damages the objective of solidarity inherent in the relocation decisions as well as the mandatory nature of the acts that provide for such relocation.[53] Finally, recalling that relocation decisions for the Czech Republic have been mandatory since their adoption and during their period of application, the Court indicated that this Member State was required to comply with the relocation obligations imposed by the same decisions regardless of the provision of other types of aid to Greece and Italy.[54]

The crisis of migrants and asylum seekers has revealed the unsuitability of EU migration governance in facing the arrival of large flows of people. Critical issues that arose in the difficult economic situation cannot be resolved through the control of external borders or the use of economic resources for Member States that are the first port of entry. The creation of the area of freedom, security, and justice risks stopping, with borders becoming an obstacle to the free movement of people, even if the individual enjoys international protection. These structural deficiencies are also reflected in a negative way in the exercise of competences attributed to the EU, in which it has not developed its own vision independent from that of governments, which is inspired by the principle of solidarity between Member States (THYM/TSOURDI, 2017). The Union not only doesn't possess adequate competences to govern immigration in an appropriate manner, but the exercise of the competences attributed by the European institutions is limited by the constant use of the intergovernmental method, with repeated flaws in the procedural rules and prerogatives of the Union as derived from Treaties (SCIPIONI, 2017). A structural reform of supranational migration and asylum policies (THYM, 2017) aimed at mitigating the prevalence of the intergovernmental approach – which is looking to preserve the sovereignty of Member States in this sector.

[50] See Ibidem, paragraphs 143 and 144.
[51] See Ibidem, paragraph 160.
[52] See Ibidem, paragraph 160.
[53] See Ibidem, paragraphs 180 and 181.
[54] See Ibidem, paragraph 188.

This case-law is a step forward from the previous case law on mutual recognition and asylum seekers. Moreover, this case-law could represent a new way to build the solidarity between Member State in the immigration area.

The migration crisis and terrorist attacks have revealed the fragility of the Union to safeguard the correct function of its freedom, security, and justice, while Member States have reaffirmed their desire to continue to have competence as regards these matters. The future of this area passes through a new and exhaustive cooperation between the national and supranational level. This is necessary to overcome cyclical crises. For example, in the first quarter of 2020, the migration crisis came back into the limelight when Turkey decided to reopen the border with Greece to let refugees from Syria pass. This is yet another proof of the ineffectiveness of the international agreement signed between the EU and Turkey on March 18, 2018. Specifically, in a public statement, the EU and Turkey have agreed on a series of action points, including a resettlement plan under which for every Syrian returning to Turkey from the Greek islands, another Syrian will be resettled from Turkey to EU.[55] The agreement closed the trafficking of refugees who arrived in the EU from Turkey. Moreover, the EU-Turkey agreement has proved politically controversial and raises some issues from its compatibility with fundamental rights (TRIDIMAS, 2015). This is yet another example of the absence of solidarity and an effective strategy to solve the problems of the area of freedom, security, and justice.

4.5. The theoretical implication of the Brexit on the sovereignty in the EU

In a famous work at the dawn of the Maastricht era, Joseph Weiler suggested that the 'transformations' of Europe (WEILER, 1991) were being driven by mutual interaction of political players revolving around three poles: Exit, Voice and Loyalty. These concepts were borrowed from another well-known work (HIRSCHMAN, 1970) pointing to the interaction between market and non-market forces within any public or private organisation; Weiler uses them to describe the behaviour of the states depending on shifts in their strategic options. 'A stronger 'outlet' for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction' while 'the closure of Exit leads to demands for enhanced Voice'.[56]

Weiler claims that 'the 'harder' the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law's 'opposability' to them. When the international law is 'real', when it is 'hard' in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decision-making suddenly becomes important, indeed crucial'.[57]

Weiler distinguishes between radical and selective Exit, the latter consisting in each State seeking to adjust the application of Community law for itself. This option seemingly faded away with the 'constitutionalisation' of the Community during the Foundational Period, when the Community decision-making paths bolstered the sovereignty claim.[58] However, the gap between the political dimension, firmly in the hands of governments, and the legal dimension, piloted by the Court of Justice towards the ever closer integration, was functional to the goals

[55] See the EU-Turkey Statement of 18 March 2016, International Summit EU Press Release, 144/16 of 18 March 2016.
[56] J.H.H. WEILER (1991) 2411.
[57] *Ibid*., 2426.
[58] *Ibid*., 2424.

of the national ruling groups': to proceed with the sectoral *communitarisation* of the economy, maintaining control over political levers. Consequently, the combination of Exit and Voice made it possible for all States to grant Loyalty to the Community plan and to apply its law in view of the *télos* given in the Treaties: an ever-closer Union of peoples and states equally sovereign (WEILER, 1995).

Recently, the measures to overcome the crises have made the path of integration more difficult. They have especially marked growing, distressing inequality within and among the member states (KUKOVEC, 2014). Right now, scholars attempt a new reading of Weiler's transformations (KUKOVEC, 2014; WILKINSON, 2017). Exit, against the political/institutional backdrop of the Community, has been construed as a *Grenzbegriff*, a limit-concept, a measure of the need to leave the states room for Voice in the supranational choices made – according to Weiler, the 'heavier' the obligatory claims that issue from such choices the more room there is – rather than as a tangible option. Presented in legal theory as a tightrope between the 'constitutionalist' ambition of Community law and its originally internationalist origin (BARTOLONI, 2016), the radical Exit option has become plausible: not yet a premise for the effective construction of reciprocal Voice options, but an actually pursuable path – rather, used to legitimate an ever 'harder' *sovereign* claim from the Community (KELEMEN, 2016; BAQUERO CRUZ, 2018).

The distortion of the concept of Exit ended up shaking the rules of the Exit-Voice-Loyalty relationships outlined by Weiler to the very foundations. One could argue that the request for Loyalty that the Union addresses to the states in the 'emerging' context of a 'global' crisis doesn't imply any strengthening of Voice options. For example, the European Council's *Conclusions* in 2008 show that the decisions were agreed on in Washington, and that the Community institutions are expected to take the correlative measures without delay[59] The 'harder Loyalty, better Voice' rule, centred around the conception of Exit as *Grenzbegriff*, is left by the wayside.

Two consequences follow from such an earth-shaking change in the relationships between *Exit, Voice* and *Loyalty*. First of all, Exit turns incapable of yielding reflexive changes to the Europe system taken as a unit – that is, as Weiler puts it, to make it so that 'more sophisticated processes of self-correction' are sparked. Rather it acts as a stabilising factor, since it freezes the radicalised positions of the players on the field; that is, it works entirely against the system's self-correction, inasmuch as it secures the 'take it or leave it' alternative that whoever asserts themselves in Community decision-making imposes on whoever gives in. Secondly, this stabilisation is uneven, confirming inequality and going in the other direction as the promise of the Union of peoples and equally sovereign states. Greece – despite the elections *Syriza* won in 2015 and the triumph of the 'no' to the conditions the *Troika* set for the bail-out agreement in the July fifth referendum – Grexit was advanced *against* Greece, as a plan B to persuade the Tsipras government to stay Loyal although waiving all and any Voice options. Thus, an Exit has opposite meanings for Greece than it does for the United Kingdom – they are opposite states in terms of political impact and economic and social conditions, one is peripheral and the other one is central (KUKOVEC, 2014).

[59] See *Conclusions* of the Presidency of the Council of the European Union of December 11-12, 2008, point II, par. 5.

One can thus truly see the revolutionary value of Brexit: it is a permanent break in the many contractual plans within the Union, and at the same time, a sign of a perhaps irreversible, resolute alteration of the decision-making dynamics, in the spirit of pure radicalisation.

Brexit imposes a new take on Community decision-making processes and their ability to keep abreast of a common evolution whose direction it must take into account. Along these lines, an emergency pops out of Brexit: renegotiating the Union's sovereignty claim, before membership in the Union itself – and in the end its very existence – end up on the negotiating table.

This requires a development of a working theory that cannot be developed here beyond a 'tentative thesis'. Yet brief and roughly explained, such thesis wishes to draw a broad lesson from the imminent celebration of the radical Exit option.

1. The past decade's economic crisis clearly manifested an impoverishment of the Voice option within the member states as well as in the relationships between them. Subtle but inexorable, this impoverishment changed Exit's nature and fuelled today's waves of renegotiation of the Union's sovereignty claim.
2. The cause for this impoverishment is the gradual demise of rational discourse as a legitimating criterion for the exercise of power. Rational discourse progressively has subordinated to arguments of *other* origin, outside the *public use of reason* (HABERMAS, 1996) and therefore ultimately undiscussable, *non-retractable*. As a consequence, such arguments are opposed by likewise non-retractable arguments – or rather: by arguments that become non-retractable when the dialogue is made impossible by a 'hard' – although non-retractable – *Loyalty* claim coming from the Community. On a closer look, all these arguments do is restore selective Exit options by various means, benefiting the players for which the Voice options are suddenly running out.

This circumstance, which comes out in the political dynamics within national borders and beyond, *is not* a product of the states, but began supranationally. To simplify, its origins might be rooted in the Treaty of Lisbon. The Treaty of Lisbon was intended to strip the integration process of its constitutionalist guise without abandoning practically any of the novelties about to arrive with the Treaty-constitution. Considering the results of the referendum consultations in France, Holland, and later in Ireland, an authentic observance of the verdict 'of the people' could have pushed for a genuine collective reflection through 'authentic decision-making' tools (CHALMERS, 2003) capable of renewing the fabric. This did not happen. Rather, there was a tacit agreement to send an antithetic message, that is, that the constitutional narration championed over the last decades is nothing more than empty rhetoric. However, here was no Constitution to write for a unitary future, but a 'veil of the Maya' to lay out, both ornate cloak and discreet screen for state cabinets' freedom of action, which has since run amok towards foggy results (CURTIN, 2014).

The Lisbon Treaty replaced the supranational constitutionalist narration with an, ambiguous design that opens up to paths of a nation-based European constitutionalism, rather than a supranational one; examples are the enhancement of national parliaments, the importance given to constitutional identity, and the like. Nonetheless, the decision-making process has not been supplied with credible Voice options aimed at complying with the principles of subsidiarity and proportionality.

Therefore, it is not coincidental that the Treaty of Lisbon brings, among others, two innovations: the right to withdrawal, as set forth in Article 50 TEU, which ratifies the radical Exit's 'touchdown' (CLOSA, 2017) and Article 4, paragraph 2 TEU, which enhances 'the national identity, inherent in its fundamental structures, political and constitutional, of the individual states' (Millet, 2013). Shielded by the argument of identity, one can argue for the reactivation of Exit-Voice circuits capable of withstanding the ever 'harder' Loyalty claims. Such arguments answer the backward path of the relationship between them; indeed, Article 4, paragraph 2 TEU links the constitutional identity to observance of the sovereign equality of the states before the treaties, which has been long lost (KUKOVEC, 2014), contorting the connotations of Exit-Voice. In restoring the selective Exit option, these arguments allow the state Courts to shield their states from a direct impact of Community law; and they do so by leaving the application of Community law to purely internal mechanisms of domestic law, which comprise both Courts and political organs.

The Court of Justice confirmed that when a Member State has given the European Council notice that it wants to withdraw from the EU, like the United Kingdom did, that Member State is free to unilaterally revoke that notice (POWER, 2019). This option subsists as long as a withdrawal agreement between the EU and the member state involved has not entered into effect, or as long as the two-year deadline from the notification of intent to withdraw from the EU, extended if needed, is not up. Prior to communication to the European Council, according to the Court of Justice this decision must be decided through a democratic process following national constitutional regulations.[60]

The re-emergence of self-governing nationalistic views characterise the political backdrop even of states with a long democratic tradition. It thus appears that the reshaping of the relationship between Exit and Voice with respect to the Foundational Period of the Community has a direct effect on the fate of 'integration through law' and affects the 'dialogue among the Courts'. The Voice options' dwindling can be read between the lines of the tortuous legal arguments used in order to avoid politically renegotiating the respective sovereign claims. In the Union, the supremacy claim of Community law seems to increasingly break away from the legal theory of direct effect – that is, from the actual protection of an individual right – to end up affirming straightforward supremacy thanks to tools with an extremely tortuous application (SARMIENTO, 2017) and occasionally as a countertrend to the *acquis communautaire* (BAILLEUX, 2009; GALLO, 2018). The controversial legal validity of the Charter of Fundamental Rights of the European Union makes the weight of the arguments harboured therein virtually indecipherable, different from case to case, and laid down with unpersuasive reasoning (CRUZ VILLALON, 2017). The economic-monetary union represents the high point of hermeneutic teleologism that protects the independence of the ECB, master of the bounds of its own mandate. (HINAREJOS, 2019). Community law became a parameter for evaluating the choices made by the debtor states in areas of Member State as well as exclusive competence, however without this being able to take up the validity of the protocol which persuades or forces such choices (MARKAKIS/DERMINE, 2018). Moreover, the question remains open to what extent constitutionalism and the discourse of sovereignty actually contributes to the disintegration of the European Union (KUKOVEC, 2019). Lastly, it is said there is an urgency to bridge the pseudo-authoritarian gaps in the Hungarian and Polish governments which led the Court of Justice to endorse overgrowth of the concept of 'infringement' of Community law, sanctioning 'systemic violations' of the rule

[60] See European Union Court of Justice Judgement of 1 February 2019, Wightman e a., C-621/18, EU:C:2018:999.

of law pursuant to Article 258 TFEU according to a line of argument that seems rash even to those who back it (VON BOGDANDY, 2019). From the Italian viewpoint, as far as the states, the vexed paths of *Taricco* (LUCIANI, 2016; MASTROIANNI, 2017) and those lesser-known of *Mascolo* perhaps go without saying. Likewise, if we remain within a European perspective – we ought to cite the wide constitutional case law on the European arrest warrant, or the still little-known extremely severe *Ajos* case-law by the Danish Supreme Court. Lastly, from a sub-state standpoint, it is worth to mention the Spanish *Tribunal Constitucional*'s effort to define slippery concepts like supremacy and right to decide. In the case law that followed, the mirage of an *open* concept of sovereignty is reflected in the vain references that the Courts addressed to both the state and Catalan authorities towards the *political* solution of a blatantly *political* dispute.

The Legal theory of the constitutional federalism's sparks the reshaping of the relationships between Exit, Voice, and Loyalty. The Member States' solidarity and cross-border justice, perhaps even the idea that one day they could become a sole European people – grows through the process of reciprocal observance of legal interdependence. This should be achieved through processes of democratic legitimation. If the EU vainly and counterproductively forces against the issue with an excessively federalist integration outlook, it risks achieving the opposite: a destructive vicious cycle, rather than an integrative virtuous cycle (CORKIN, 2019).

Moving from the reinterpretation of the relationship between individualism and cosmopolitanism with a Kantian take that pushes human beings toward an unstable 'unsocial sociability' (REQUEJO COLL, 2015), these legal theories propose regulatory formulas of social harmony (MAIZ SUAREZ, 2006) which rephrase the models of federalism on a municipalist and consensual basis, according to subsidiarity and proportionality principles.

The key idea, that we may take as a conclusion, is that highly sensitive political conflicts should not be reduced to mere legal disputes. Therefore, a Loyalty claim should provide adequate tools for Voice, and selective Exit paths that are grounded on public use of reason. In such context, it would make sense to ask whether a radical Exit should be legally provided for (NORMAN, 2015); it would act again as a limit-concept under whose shadow the parts may work on mutually acceptable political compromises.

4.6. The policy of enlargement to the East and the conflict with the rule of law in the European Union

It is first useful to mention the profound considerations that J.H.H. Weiler made the fifth big enlargement: 'the Enlargement decision was the single most important constitutional decision taken in the last decade and arguably longer. For good or for bad, the change in number of Member States, in Europe's population size, in its geography and topography and its cultural and political mix are all on a scale of magnitude which will make the new Europe a very, very different polity *independently* of any constitutional structure adopted' (WEILER, 2003).

Unfolding at the same time as the approval and failure of the Treaty establishing a Constitution for Europe, the enlargement to the East showed specific characteristics that set it apart from previous, more limited enlargements, from the beginning of negotiations. The major wave of accessions of twelve States (ten countries from central-Eastern Europe and the islands of Malta and Cyprus) posed the fifteen existent EU members not just problems – more than ever before

– of adjustment for the institutions and decision-making processes in the EU, capacity for progress in economic and social integration in Europe to twenty seven, but also and above all the essential question of identity and the ends of the integration process. This seemed extremely clear upon the fifth enlargement to the East and in the prospect to enlarge the EU to the Western Balkans,[61] but it was unequivocally shown also when accession did not occur; Turkey is one such example which has become emblematic.[62] Indeed, it is certain that any decision (either positive or negative) on the enlargement is eminently political. The EU made a substantial constitutional decision, risking its own identity, uniting its destiny with that of countries that just left the Soviet orbit and from regimes far removed from the liberal-democratic tradition.

Already in 1980s, the accession of Greece, Spain and Portugal to the European Community was seen as a decisive factor in the establishment of democracy for those countries that had just come out of past dictatorial experiences. The enlargement to the East, too, was seen in that way, but nonetheless also as a potential risk for the Union. Indeed, precisely starting with that enlargement to the East, the enlargement process underwent stricter conditions and prolonged between EU bodies (Commission and Council) and candidate states in order to ascertain adjustment to the EU's values. One could argue that it is not appropriate to impose legal theories and values extraneous to the traditional identity of the states involved, which, asking to be received as members of the cited supranational institutions, agree to share their principles, the conditions that ensue and to undergo the related monitoring processes (BARTOLE, 2018).

The European Council in Copenhagen on June 21-22, 1993, the EU set clearer accession criteria. To be able to enter the Union, the candidate country – besides being able to meet the legal obligations deriving from such membership (legal criterion) and having a functional market

[61] Croatia had already entered the EU in 2013. In February 2018 the Commission published a new 'Strategy for the Western Balkans', COM (2018) 65 final, where it says that Montenegro and Serbia, as 'first in line', could enter the EU by 2025, however recognising that it is an 'extremely ambitious outlook'.

[62] Of all the states that expressed their desire to enter the European Union, Turkey is the one that boasts the longest history of dialogue with European institutions, with an association agreement signed as early as 1963 and an application for accession dating back to 1987. In 1989, the Commission expressed a negative opinion on opening negotiations as much for political reasons as for economic reasons. It was only with the European Council in Helsinki in December 1999 that Turkey was officially recognised as a candidate country. This date marked the beginning of a pre-accession strategy including financial assistance and other forms of cooperation aimed at stimulating and supporting the reform process.
In December 2004 the European Council decided to give way to the accession negotiations with Turkey. The official negotiations for accession were begun in 2005, but in November 2006 the commission registered their partial suspension due to the country's lack of progress in solving the conflict with Cyprus. The European Council consequently suspended negotiations on eight out of the 35 chapters opened. After an over three-year stalemate, in November 2013 a new chapter of negotiations was opened. Another one was opened more than two years later, in December 2015. On March 18, 2016, Turkey and the EU reasserted their commitment to implementing the common action plan to check the flux of illegal immigration to the EU and to relaunch the accession process. Consequently, in June 2016 an additional chapter was opened. In light of the drastic deterioration of the rule of law in Turkey, especially after the attempted coup in July 2016, we can say that currently Turkey's accession process is indeed at a standstill. Iceland's story is singular; it asked to enter the EU in July 2009, and negotiations were launched in June 2010. As a well-established democracy and member of the European Economic Area (EEA), Iceland made rapid progress in negotiations with the EU. However, the new government that was instated with the 2013 general elections halted the accession negotiations. In March 2015, the authorities asked the EU to not consider Iceland a candidate country anymore, although without officially withdrawing the country's accession application. Since then, the governments that came afterwards have maintained this approach.

economy capable of answering the competitive pressures and the dominant market forces (economic criterion) – must have reached an institutional stability that guarantees democracy, rule of law, human rights and the respect for and protection of minorities (political criterion). Tracing the steps of the Union's progressive enlargement, especially through the lens of the European Council's statements and the opinions drawn up by the Commission, what vividly emerges is the growing emphasis placed on the accession candidate states' satisfying the political conditions.

This can be explained by taking into account several factors, such as the difficult construction of the constitutional identity and the past experience of the candidate countries. As set forth in Article 49 TEU, an unavoidable condition for accession of a European state to the Union is following the founding principles (VON BOGDANDY, 2010) as set forth in Article 2 TEU, like human dignity, freedom, democracy, equality, rule of law and observing human rights, including rights of people who belong to minorities. Even the sanctioning procedure set forth in Article 7 as originally formulated by the Treaty of Amsterdam (Article F.1 TEU), was conceived precisely in view of enlargement to the East, as a tool to safeguard the axiological legacy on which the European Union is founded (KEISTER, 2013)

Before verifying other aspects of connection between the mechanisms as set forth in Articles 2, 7 and 49 TEU, we must take a look at some critical aspects of the enlargement policy and more recent developments in the procedure. First off, the accession criteria were found to be extremely vague, especially the political ones, which affected the monitoring process so much that it caused inevitable uncertainty. Secondly, in the concrete applicative experience gained during the fifth enlargement, the procedures turned out to be quite opaque and above all were distinguished by low participation. The lack of public debate – also stigmatised by Weiler (WEILER, 2003) – seemed much more contradictory if compared with the highly participative rationale that, as of the Laeken Declaration, came with the debate on the European Constitution that took place in the same time frame.

The uniform evaluation of complex and vague parameters, such as observance of democracy and rule of law, whose uniform treatment, besides originating antinomies among the specific applicative profiles, was deemed a choice the Commission made to simplify its voting activity. This entailed a risk of jeopardising the achievement of the goals set by the European Council in Copenhagen. (KOCHENOV, 2008).

This observation is worth a clarification: the check for satisfaction of the accession conditions was conducted based on tangible elements, that is, on the situation encountered in the candidate country at the beginning of monitoring and on the standard levels that it must reach. On the one hand, while this made it possible to tone down the vagueness of the reference criteria, on the other hand, it did not distort its eminently political nature, with the inevitable fluctuations that ensue.

At the same time, it is undeniable that the checks conducted during the fifth enlargement were carried out on the basis of a peculiar logic. Specifically, during such checks only situations that had to do with macroscopic and systematic violations of human rights, sometimes too benevolently, were excluded (CARTABIA, 2001). Furthermore, on a strictly institutional level, the

European Commission underestimated,[63] the difficulties linked to the partial rooting of the new constitutional principles in political life and in administrative and legal systems (CARTABIA, 2001).

It is precisely these modus operandi that provides more clues on the possible link between the politics of enlargement and some more recent cases of recently added states alleged (or ascertained) violation of the rule of law (VON BOGDANDY/IOANNIDIS, 2014).

As early as December 2006 the European Council dictated the new keywords for future expansions: consolidation, conditionality, and communication. Substantially, the new enlargement strategy would have to follow these principles: the consolidation of the commitments already taken up; the application of a just but stringent conditionality; more communication to involve citizens in the objectives and challenges of enlargement. At a time in history when major integration process crisis factors were already showing, after the enthusiasm from the conventional experiences, the EU declared it did not want to fail to meet the commitments it had taken up. Nevertheless, at the same time, it expressed the need to proceed cautiously with the decision on new enlargements, which would also have concerned the individual states, based on their specific progress, and no longer as a unit. Secondly, the Council asked for a stricter evaluation of the achievement of the conditioning parameters, which had to be done before the conclusion of the procedure. The importance of meeting the political criteria was pointed out, considering that the violation of one of the fundamental principles of the EU would have entailed suspension of negotiations, to which two other chapters were added, about Legal power and fundamental rights (no. 23) and Justice, freedom and safety (no. 24), meant to assume an essential role to observe the rule of law (FAKIOLAS/TZIFAKIS, 2008).

Right from when their entry was imminent, many of the States that entered with the fifth enlargement stood out for having hindered making common decisions, even particularly important ones (e.g., Ratification Treaty of Lisbon), often justifying with having to safeguard their supremacy (SADURSKI, 2012).[64] Nonetheless, above all over the past decade, some reforms approved in Hungary and Poland have sparked particular concern for the safeguard of European values as outlined in Article 2 TEU, to the point that, among other things (besides the infringement procedures and references for preliminary rulings at the Court of Justice), the mechanism 'of early alert' was resorted to as outlined in Article 7 TEU (SADURSKI, 2012). One must recall that in the original formulation of Article 7 TEU, introduced by the Treaty of Amsterdam, there was not any pre-alert mechanism aimed at affirming the existence of a clear 'risk' of violation of the values as outlined in Article 2 TEU. In that case, the Austrian Prime Minister was revealing himself as a threat to the values of the European Union and the democratic traditions of its Member States. In this sense, if the Austrian affair contributed to breaking the link of reciprocal and exclusive interdependence of the sanctioning procedures with the enlargement policy, whilst at the same time demonstrating the need to set up a prior

[63] As initially encountered in Slovakia in the Opinion of the Commission in 1997 [COM(97)2004].

[64] More recently, Hungary and Slovakia contested before the Court of Justice (joint cases C-643/15 and C-647/15, Slovakian Republic and Hungary c. Council of the European Union) the decision of the Council on mandatory reallocation of people requesting international asylum. In Hungary a popular referendum was called, held on October 2, 2016, which concerned the reallocation – but in reality, and more in general – the country's anti-immigration policy aimed at protecting the population and national interests. The Court of Justice rejected this petition, deeming the temporary mechanism of mandatory reallocation for those requesting asylum justified, since it really and proportionately would help Greece and Italy face the consequences of the 2015 migratory crisis.

alert mechanism, the respect for the values pursuant to Article 2 TEU, in addition to constituting an essential prerequisite for the accession of a State to the Union, continues to represent a condition of full participation therein by current Member States.

Another significant innovation introduced in the Nice Treaty is that of a possible jurisdictional review by the Court of Justice of the acts adopted pursuant to Article. 7 TEU, but only as regards the compliance with procedural requirements. Therefore, the Court of Justice is not competent to review the merits of the resolutions that they prove or the risk or existence of a serious violation of EU values, these essentially being political decisions and referred to the unquestionable appreciation of the Councils.

However, like in the case of the Austrian prime minister and in other circumstances where resorting to the sanctions mechanism as outlined in Article 7 TEU was foreseen, the applicative experience had demonstrated how the threats to the Union's values could also come from countries with stronger democratic traditions. In this sense, the Austrian episode helped break the relationship of reciprocal and exclusive interdependence of the sanctioning procedures with the enlargement policy, at the same time showing the need to set up an early alert mechanism.

Even so, looking at the more recent results of the monitoring of Western Balkan country candidates for accession, once again it becomes clear that the major issues arose in the those countries' keeping the rule of law, given the great amount of corruption, well-established criminal networks dedicated to illegal drug and weapon trade and human trafficking, instability of political institutions, gaps and inefficiencies in the government and the legal power, especially regarding judicial independence (FAKIOLAS/TZIFAKIS, 2008). It is still undeniable that the different evaluations influence the final decision for entry into the EU, including geopolitical evaluations, and these probably will have a significant weight even in this stage of a major crisis of the Union, given the need the Union feels to aid the stabilization of that difficult, but strategic geographic area.

The recent debate of Article 7 TEU about the Hungarian and Polish cases, brings us to make further considerations to this regard. The Hungarian situation aroused particular concern, especially following the 2010 elections and, particularly regarding the approval of a new Constitution, on which obviously the European and international institutions were unable to comment during the enlargement process, and a series of reforms regarding fundamental freedoms such as freedom of the press, the protection of religious minorities, the independence of the judiciary and the supervisory authorities. In Poland, there were many doubts about compatibility with the founding values of the EU, and in particular with the rule of law principle of the new rules on the composition and appointment of judges, sought by the Government led by the conservative party Prawo i Sprawiedliwość (PiS), the reform of the Constitutional Court and the means of applying its case-law.

The Commission and the Parliament therefore triggered the procedure under Article 7, paragraph 1 TEU,[65] whereby the Council, acting by a majority of the four fifths of its members

[65] In Poland, following the triggering of the instruments under the new EU framework for strengthening the State of Law, the Commission decided to initiate the procedure under art. 7, para. 1, TEU. A few months later the Parliament triggered the same procedure for Hungary (GUUE C 433, 23 December 2019, p. 66).

after approval by the European Parliament, can ascertain the existence of a clear risk of a serious violation by a Member State of the values referred to in Article 2 TEU.

Also concerning the early alert procedure there was talk about a 'European constitutional moment', by which the EU would, inwardly and outwardly, help define the insuperable boundaries of its identity (VON BOGDANDY ET AL, 2018, LENAERTS, 2020). To the uncertainty of the values outlined in Article 2 TEU, governing Article 7 TEU, the response was that the European Union is capable, over time and acting based on concrete prospects, of identifying its main distinctive characteristics (BARTOLE, 2018). To this concern, the frequent appeal to the work of its bodies of international organizations (KOCHENOV/PECH, 2015) for this purpose was also met favourably (BARTOLE, 2018), like the Venice Commission (European Commission of democracy through law), which thus came to fill a role that goes beyond the experience of the European Council – whose relationships with the union order continue to have vague characteristics – and the emphasis on reports or warnings from citizens.

As far as the procedure as outlined in Article 7, paragraph 1, TEU, given that finding clear risk of a serious violation of the EU's founding values, in any case, entails a broad scope of discretionary power; it is built with the intent to be conducive to prudence and caution, observing the principle of *audi alteram partem* and Parliament's opportunity for democratic rule. The communication of the Commission[66] in 2014 would identify three stages of dialogue with the state, preliminary to a potential launch of the procedure in Article 7 TEU. The first consists in an evaluation that can end with the adoption of an 'opinion on the rule of law', where the Commission makes its concerns known; the second is a 'recommendation on the rule of law' if there is objective proof of a systemic threat and the national authorities have not taken measures; the third in an inspection or follow-up activity on the action taken following the recommendation.

On the effectiveness of these procedures, in the cases concerning Poland and Hungary, the European Parliament recently adopted a resolution on January 16, 2020.[67] The European parliamentary institution reported deterioration of the situation in two countries after activation of Article 7 TEU, for this reason asking the council to make 'concrete recommendations to the Member States in question, also giving the deadlines for implementation of those recommendations to ensure observance of the common European values and safeguard mutual trust and credibility of the Union on the whole'. Moreover, the parliament asked the Commission to avail of all the tools it possesses to address the risk of serious violation of EU values, including accelerated infringement procedures and applications for interim measures before the Court of Justice. The European institution has also complained that the hearings carried out by the Council, following Article 7 TEU, are not organized in a regular, structured and open manner, without participation of the European Parliament, as needed as ever in the case of Hungary, for which it was precisely the EP that launched the procedure.

To conclude, it is important to analyse the sovereignty conflicts generated by the enlargement

[66] See COM(2014) 158 final, Communication of the Commission to the European Parliament and Council. A new framework of the EU to strengthen the rule of law.

[67] Resolution of the European Parliament on January 16, 2020, on the hearings underway in accordance with Article 7, paragraph 1, TEU, concerning Poland and Hungary (2020/2513(RSP).

to the East to understand how to mend the tensions underway on the values of the Union and European governance. On the one hand, the Eastern Member States represent most of the Member States that hinder the taking of common decisions on important matters such as immigration by reaffirming their sovereignty over matters that generate political consensus. On the other hand, the risk of obvious violations of the values expressed in Article 2 TEU pushes the European institutions to resort to sanctions and challenge the sovereignty of the Eastern States. The analysis of these issues is important for understanding how to resolve these sovereignty conflicts. Finally, one cannot fail to note how the situation of the rule of law in Hungary is even more worrying following the approval of the cardinal law, approved by the Hungarian Assembly pursuant to Article 53 of the Basic Law of 2011. This confers on the Executive led by Victor Orbán, 'full powers' thus substantially and indefinitely depriving the Parliament of any residual legislative or control power. Such further provision, was approved using the skilful pretext of the health emergency to get rid of the bonds of democracy and the obstacles that its rules pose to the centralization of powers and to the alteration of the constitutional system.

4.7. The different reactions of the Supreme Courts as an example of multiple sovereignty conflicts

The process of European integration that distinguished itself over the years for having achieved integration through law went through alternating phases of acceleration. It was a process that, although eminently political, experienced indisputable self-promotion by the Courts of Justice, and national Court. According to the closest observers, the European Union's Court of Justice had a central role, representing the real genuine 'engine' of the integration process (HORSLEY, 2013). The Court took up this role thanks to the relationship it developed with national Courts, defined by the very case law of the Court of Justice as Courts of the Community and the Union, and with the substantial acquiescence of the Supreme and national constitutional Courts. Over the course of the first decades of the integration process, the latter agreed on the evolution of the communities towards a new model of supranational organization, accepting the supremacy of European law although often with different emphasis and tones than those the Court of Justice used. For example, it is the case of the case-law on the principle of the primacy of EU Law.

All this was tolerated by the supreme and national constitutional Courts with no little tension and ongoing actions to redefine the boundaries. The process of redefinition of supremacy and its allocation ended up being a long and complex path of determining boundaries, between state claims and supranational pressure. This process saw the Courts in the role of main players in the re-elaboration of these new coordinates of sovereignty. Not only was the European legal institution the protagonist in this process, but the very national Courts, both common and constitutional, helped affirm the process of supranational integration and this, also when the constitutional identities of the Member States were reasserted and it was necessary to identify intervention mechanisms of the internal Courts to safeguard the hardcore of the constitutions of the Member States.

The progressive outlining of the dense sovereignty assignments brought about by the integration process with the consequent affirmation of the *primacy* of European law was not free from defects and national resistance. The gradual relativization of the centrality and supremacy of the national Courts has caused reactions and resistances which have gradually

manifested themselves and strengthened gradually over the past decades. These reactions have gone from simple, though threatening, assumptions to actual limits on the prevalence and effectiveness of legal obligations from the EU.

On this point, the clearest positions, in the course of the first steps of the integration process, were those of the German Constitutional Court and the Italian Constitutional Court. The German Constitutional Court (*Bundesverfassungericht*) passed down a series of judgments that identified a real genuine European path of the Court of Karlsruhe starting from the *Solange*[68] case-law. Specifically, the German Constitutional Court (BVerfG) recognized the supremacy of the legislation from the Communities, also accepting the chance that it decides for non-application of the national rules when incompatible.

However, this would have happened only and until (*Solange*) the right of European origin does not clash with fundamental rights as recognized by the fundamental law of the Federal Republic of Germany. This position has gotten more and more specific, growing stronger over the years, at least formally allowing the constitutional Court, to hypothetically keep the last word on application of European law in Germany and providing the chance to prepare a theory on sovereignty and its allocation in the scope of the integration process which remains. According to this interpretation, the Member States are the 'Masters of the Treaties', and control the process of sharing sovereignty in the EU.

Although with some differences, not to be overlooked, the approach of the Italian Constitutional Court echoed this set-up. It is precise to the Italian Court that we owe the preparation of the legal theory of counter-limits. Starting from the *Granital*[69] judgment, no. 170 in 1984, the Constitutional Court prepared an original approach concerning the relationship between internal order and supranational order, attempting to limit as far as possible the generalized recognition of the supremacy of European law over internal law. However, the constitutional judges of the Italian Republic have prepared a general limit to the assimilation of European law and supranational and international law. This limit, on the one hand, requires respect for human rights, as guaranteed by the Republican Constitution. On the other hand, it provides that if there is a violation of human rights, the full implementation of the law of supranational and international origin in the internal order is interrupted, precisely doubling as a counter-limit also to the primacy of EU law. This case-law also refers to the previous *Simmenthal*[70] case-law. Concretely, according to the legal theory prepared by Italian judges, the constitutional Court recognizes the prevalence of the European order in the specific topics under the treaties. However, on the condition that neither the fundamental principles nor the inviolable rights of man are ever violated and are guaranteed by the Constitution; in this case, being able to declare illegitimacy of the transposition regulations and performance of the treaties in the part where they allow issuance of regulations that conflict with said fundamental rights and principles in the internal order.

Asserted by the two main Constitutional Courts of the countries that pioneered the European continental integration process, these stances represented a model and an example that over

[68] See German Federal Constitutional Court, BVerfGE 37, 271, (Solange I) of 29 May 1974.
[69] See Italian Constitutional Court, judgement n. 232/1975 of 22 October 1975, IT:COST:1975:232.
[70] See European Union Court of Justice Judgement of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA, C-106/77, EU:C:1978:49.

the decades has been followed by many supreme Courts, up until finally being recognized by the Treaty of Lisbon, and above all, accepted by the very case law of the European Union Court of Justice. It is thus that the road was paved for protection of the hardcore of the national Constitutional identities within the European constitutional process. A process whose heart lies in the capacity of dialogue, argument and legal and cultural synthesis of the supreme and national constitutional Courts with the supreme legal institutions of the European constitutional space to be identified in the European Union Court of Justice, with specific reference to the EU order, and in the European Court of Human Rights, with reference to the broader context of the European Council.

The role of the Courts becomes central to the definition of the same constitutional value of the European integration process and the treaties.[71] The dialogue between national Courts and supranational Courts becomes the mechanism of reallocation of sovereignty with the Court of Justice which on the one hand prepares the principles of the supremacy of European law and provides the tools, for national Courts, too, needed to guarantee that supremacy as well as full effectiveness of European law. On the other hand, as already seen, the state Courts try to keep control over the process, that is, to guarantee a sort of intervention procedure where one perceives the risks of integration to the integrity of the internal constitutional fabric, as a guarantee of the national constitutional identity itself. Furthermore. the emergence of the protection of national constitutional identity is affirmed precisely in the wider process of reaffirming the role of national constitutions and internal constitutional courts. This is declined in the sense of a balance with respect for the progress of supranational integration and legal processes of globalization (LUSTIG/WEILER, 2018).

Such a development determines a dynamic process of redefinition of the sovereign competences and prerogatives between national states and the European Union, reviving the same role of the national Constitutional Courts. This came along with the reorganization of the intervention rationales and of the order of interpretative priority between the intervention of the national Courts and the jurisdiction of the Union. More and more often, internal constitutional Courts have tried to take back centrality in the control of legitimacy of internal regulations, also when prepared based on community obligations, especially for that which concerns observance of fundamental human rights. This has led to a reassessment of the legal theory of so-called double prejudicially according to which, as soon as interpretative issues or issues of legitimacy come into play that may involve the jurisdiction both of the Court of Justice and the national Constitutional Court, the internal Courts must leave room for the European Court's prior intervention only after the supranational Court's decision (CATALANO, 2019).

However, more and more often the national constitutional Courts (to this regard the French and Italian examples are paradigmatic) have foreseen the need for prior intervention of the national constitutional Court, relegating any EU Court of Justice intervention only to its outcome, that is, this even despite a well-established jurisprudential legal theory prepared by the Court of Justice that deems it essential that at any time the national Court's right to directly and immediately turn to – through the tool of preliminary ruling under the Article 267 TFEU – the Court of Justice is recognized.

[71] See European Union Court of Justice Judgement of 23 April 1986, Les Verts v Parliament, C-294/83, EU:C:1986:166.

This process of prioritizing the intervention of the national constitutional jurisdiction performs the purpose of guaranteeing greater effectiveness of the intervention of the internal constitutional Courts as far as the proper interpretation of the system's principles. This is also to make up for a progressive process of marginalization of constitutional and supreme jurisdictions, as a consequence of the opportunity granted the common Courts to directly turn to European justice.

The adoption of the Treaty of Lisbon rekindled the debate and tensions between the national orders and the supranational one. This led to new interventions of the constitutional Courts of the member states. Exactly, the German constitutional Court passed down an important case-law on the compatibility of the Treaty of Lisbon with the German fundamental law, defining progressive advancement of the European paths of the Karlsruhe Court. In the *Lissabon Urteil*[72] case-law, the Karlsruhe Courts underlined that besides the traditional check with the national standard of protection of fundamental rights (*Solange*), it was up to the constitutional Court to also check EU Treaties' compliance with the German constitutional identity (*Identitätskontrolle*), identifying the constitutional topics and assets that cannot be touched by EU competences, full supremacy of EU law not being able to be recognised in said topics without jeopardizing the German constitutional identity. The paragraph 252 of the case-law is crucial to this regard. It listed the sensitive topics are listed: the substantive criminal and Court decisions; the monopoly of power and therefore the police's choices within national boundaries and related to the use of military force on the outside; the fundamental decisions in the area of taxes on income and expenditure, also with reference to social policies; the main decisions regarding the social status and choices referring to living conditions as far as the options of social status; the culturally sensitive decisions in the area of family law, school system, education and relationships with different religious communities.

Such an approach has determined clear advancement of the conventional theory of counter-limits, bringing their function well beyond their original boundaries. The *Lissabon* judgement clearly doubled as a model for other national jurisdictions, trying to identify the boundaries of the sovereignty assignments and limiting EU law's room for expansion, thus guaranteeing the hard core of state sovereignty with respect to uncontrolled expansion processes of European competences, and therefore of reallocation of sovereignty on the supranational plane.

Based on the interpretation provided by the Court of Justice there is clearly an attempt to find a balance between the reasons for survival of the Euro and the needs represented by the German constitutional jurisdiction to protect its own constitutional identity. This led to the case-law on June 21, 2016, with which the BVerfG abstained from condemning the incompatibility of the *OMT*[73] plan with the German fundamental law. In this case, an interesting interpretative contamination takes place where the Court of Justice tries to interpret the OMT system in light of the caveats formulated by the German constitutional Court, while that same constitutional Court interpreted the law and the German fundamental law in light of the evaluations offered up by the EU Court of Justice as an interpretation.

As the crisis grew worse, the interventions of the constitutional Courts of the member states multiplied in order to settle potential conflicts between the orders that make up the multilevel

[72] See German Federal Constitutional Court, BVerfGE 123, 267, (Lisbon) of 30 June 2009.
[73] See German Federal Constitutional Court, 2 BvB 2728/13 (OMT II) of 21 June 2016.

system. In 2012, the Czech Constitutional Court applied the counter-limits deeming it would not be able to conform to a decision of the Luxembourg Court. In 2003, the Czech Constitutional Court had underscored that in the cases where Czech citizens had suffered a limitation of the legitimate retirement expectations due to the application of the treaty on the regulation of the effects of the breakup of the Federation of Czechoslovakia, they would have had the right to a compensation costing the Czech budget. The Court deemed it had to guarantee the constitutional principle of non-discrimination of Czech citizens to which no exceptions could be allowed. The Czech Supreme Administrative Court however did not agree with the constitutional Court's stance, deeming that in any event the supremacy of international law was to be guaranteed, which in the case in question was the solution that most protected the equilibrium of the state budget. The difficulties in reaching a synthesis between the two stances led to a preliminary ruling. Assigned the case, the Court of Justice found incompatibility with EU law in the compensative solution proposed by the national Constitutional Court's decision, substantially agreeing with the administrative judges' stance. The outcome of the preliminary ruling led to the national Constitutional Court expressing a very harsh opinion, which in *Slovak Pensions XVII* case-law,[74] declared the judgement of the EU Court *ultra vires* with a very harsh reason. To avoid further tension, the Czech government decided to compensate all the applicants.

During the crisis, the Portuguese constitutional Court also exercised a kind of counter-limits. In May 2011, the Portuguese Republic reached a complex agreement for the restructuring of public debt with the international financial institutions of Troika. The agreement included Portugal's obligation to introduce a series of heavy austerity measures with a major impact on social status. The Portuguese Constitutional Court deemed it necessary to declare many of the measures in the 2012 and 2013 budget laws unconstitutional. In this case, too, a conflict between European and international obligations arose, although the legal status of these obligations couldn't be immediately linked to European law obligations, as recognised by that very Court of Justice with the order dated March 7, 2013, in case C-128/12.[75] In declaring the unconstitutionality of the austerity measures, essentially the Portuguese constitutional Court leveraged the principles of equality and proportionality, attempting to pursue a suitable balance between the budget requirements and observance of international agreements and guaranteeing the necessary supremacy of fundamental constitutional principles. It's interesting how in declaring the unconstitutionality of certain measures adopted precisely on the basis of instructions from the European institutions, the Court reminded us how in the treaties the European Union itself guaranteed respecting the specific national constitutional characteristics that cannot be recognized as departing from the also important budget requirements.

Another example of clear conflict between a national supreme jurisdiction and the EU Court of Justice is also found in the well-known Danish case Ajos (Dansk Industri). On December 6, 2016, the Danish Supreme Court[76] decided to break away from the interpretative solution provided by the EU Court of Justice provided in the case-law passed down in case-law C-441/14[77] of April

[74] See Czech Constitutional Court, PI. US 5/12 of 31 January 2012 (Slovak Pensions XVII).
[75] See European Union Court of Justice Judgement of 27 November 2012, Sindicatos dos Bancários do Norte e /BPN v. Banco Português de Negócios S.A, C-128/12, EU:C:2013:149.
[76] See Danish Supreme Court, judgement of 6 December 2016, no.15/2014.
[77] See European Union Court of Justice Judgement of 19 April 2016, Dansk Industri (DI) contro Successione Karsten Eigil Rasmussen, C-414/14, EU:C:2016:278.

19, 2016. In brief, the episode concerned the supremacy of the prohibition of discrimination based on age, as prepared by the Luxembourg Court in the celebrated *Mangold*[78] case with respect to internal regulations and provisions. Consequently, the option to cease to apply national regulations due to a conflict with EU law (that is, in the case in question the accession treaty that transposes the European Union law into the Danish order). According to the Danish judges, the solution put forward by the Union Court could not be agreed with, not finding clear and explicit grounds in the treaties. Therefore, the Danish Court deemed it did not have to guarantee supremacy to a principle of the right deriving from case law, this, also following a national legal legacy always very focused on implementation of positive law and avoiding excessive jurisprudential liberties. In any event, also for the time it was passed down, the case-law represents a clear warning to the Union Court of Justice and a solid stance against overextension – exercised merely interpretatively – of the scope of application of European Union law. The Danish Court's judgements join other constitutional and national supreme Court judgements that were the proof of a renewed liveliness of the member state Courts in defending the bounds of national competences.

The so-called *Taricco*[79] saga provided an important testing ground for the relationships between EU jurisdiction and national constitutional jurisdiction, between integration claims and protection of national constitutional identity.

The case that concerned compatibility of the national rules in relation to the terms of prescription of financial crimes with the obligations deriving from EU treaties, and specifically from Article 325 TFEU as interpreted by the Court of Justice. In a 2015 decision which was challenged, the Luxembourg Court ended up deeming that EU law, and especially Article 325 TFEU imposed ceasing to apply the national substantive criminal regulations related to the rules for the prescription of crimes, this way making it possible to criminally sanction conduct that based on internal law had become no longer punishable due to the time that had passed.

This brought the intervention of the national constitutional Court. It showed how the prescription national rules interfered with the constitutional notion of legality of the penalties. The severe stance expressed by the Italian Constitutional Court, the complete reconstruction of the national system and constitutional relevance of the regulations that it was asked to cease to apply, brought the Court of Justice to basically review its decision. Indeed, it confirm the interpretation provided by the national constitutional Court in order to protect the constitutional identity of the Italian Republic, accepting that the interpretation proposed could not impose an interpretation of the internal regulatory framework on the national Courts that could compromise full implementation of constitutionally significant regulations and principles. This orientation of the Court of Justice was later confirmed in other judgements that recognise the constitutional principle of *nulla poena sine lege* and the limit to the supremacy of the obligations deriving from EU law when they might jeopardise the national constitutional identity.[80]

[78] See European Union Court of Justice Judgement of 22 November 2005, Mangold, C-144/04, EU:C:2005:709.
[79] See Italian Constitutional Court, judgement n. 115/2018 of 10 April 2018, IT:COST:2018:115.
[80] See European Union Court of Justice Judgement of 17 January 2019, Dzivev, C-310/16, EU:C:2019:1115.

A different outlook on the dynamics that involve the EU order and the national orders comes from the case law of the Polish Constitutional Court. In the decision on May 11, 2005, K 18/04,[81] on the accession treaty, the Court seems to have provided a complete picture of these dynamics. The fulcrum of the decision is the statement that the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland and that this principle, stated in Article 8, paragraph 1 of the Constitution, was not in any way impaired by Poland's accession to the European Union. The Polish Constitutional Court focused its reasoning on the fact that the internal order and that of the EU are independent, coexist and operate simultaneously. However, independence does not mean that the two orders do not interact, rather, it's precisely because this interaction exists that conflicts can arise between EU law and the national Constitution. If it may not be modulated through interpretative tools, such a conflict entails that the Nation as the sovereign, or a State authority organ authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union. Simultaneously, the Court indicated the limits to the principle (which it formulated) of interpretation of internal law in a manner sympathetic to European law identifying, in the rules of the Constitution protecting rights and civil liberties a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions. The cited decision does not affirm the absolute supremacy of the national Constitution over EU law. It has happened in the Polish Constitutional Court Judgement K 32/09. This case-law was confirmed in the decision on November 24, 2009, K 32/09[82] as soon as the constitutional Court of Warsaw adamantly referenced the legal theory of national constitutional identity and its supremacy, also in the presence of obligations deriving from EU law (KONCEWICZ, 2015).

Extremely recent is the dispute, still underway, between the European Court of Justice and the Spanish Supreme Court, with the constitutional Court that in some collateral decisions seemed to take the side of the supreme body of Spanish ordinary justice's stances. The dispute springs from the Court case of Oriol Junqueras, former Vice President of the *Generalitat Catalana*, arrested together with other institutional and political members after the events following the unilateral declaration of independence in November 2017, which in turn followed the referendum for independence in October 2017, held by the autonomous Spanish community. Junqueras was arrested together with other eminent political exponents and went through criminal proceedings with very serious charges of sedition and embezzlement of public funds. He stood for the political elections and for those to the 2019 European Parliament and both times he was elected.

After the election he was denied the chance to be able to attend the inaugural session of the European Parliament for which judicial remedy was proposed and question referred for a preliminary ruling to the EU Court of Justice. The Court of Justice, with the judgement on December 19, 2019, in C-502/19 case-law,[83] decided on immediate liberation of the political exponent, deeming it could apply the immunity reserved to members of the European Parliament (which in fact refers to the status of the parliament members in the countries of

[81] See Polish Constitutional Tribunal, K 18/04 of 11 May 2005 (EU Accession).
[82] See Polish Constitutional Tribunal, K 32/09 of 24 November 2010 (Lisbon).
[83] See European Union Court of Justice Judgement of 19 December 2019, Junqueras Vies, C-502/19, EU:C:2019:1115.

election). After that on January 9th, the Supreme Court deemed it could not allow liberation of the parliament member who in the meantime had been judged, in October 2019, to 13 years of imprisonment. Moreover, according to the Spanish Court Junqueras had never acquired the qualification of European Parliament member, thus confirming the decision of the Spanish Central electoral board (and disavowing the hard core of the decision of the Court of Justice). In view of this assertion, the European Parliament did not validate Junqueras' election, asking Spain to indicate the parliament members that would've had to take the place of the elected Catalan convicts, making way for another of their appeals to the Court of the European Union, whose decision is then susceptible to being appealed before the Court of Justice. Instead on January 28, 2020, the Court passing case-law on Junqueras' *recurso de amparo* – this time to be able to sit in the Spanish parliament – rejected it, confirming the supreme Court's decision.

The area of mutual recognition of judgments (the cornerstone of legal cooperation in civil and criminal proceedings) also recently yielded some interesting case-law by the national Constitutional Courts sanctioning interpretative conflicts between supranational and national level, sometimes solved guaranteeing supremacy of principles and rights protected by the state constitutions.

Two cases that have sparked significant scientific and legal debate are worth recalling, to explain other multiple sovereignty conflicts. They concern, for one, the Spanish Constitutional Court and secondly, the German Court and both are about episodes of legal cooperation in criminal law related to carrying out Court orders issued by Italian Courts at the outcome of proceedings in the absence of the accused, that is, according to the previously effective Italian Court regulations that allowed proceedings *in absentia*.

In the *Melloni*[84] case-law, the Court of Justice reaffirmed the supremacy of EU law. In the case in question, the framework decision on the European arrest warrant, was similar to the same Spanish constitutional provision on the accused's attendance of the criminal trial and the consequent prohibition of case-law *in absentia* in the Constitution of the Kingdom of Spain. The Court of Justice deemed that here EU law had supremacy, since the issue was entirely regulated by EU law and not applying European regulations would have brought about a problem of effectiveness of the system set up on the European level. The principle of supremacy of Union law would be shaken by the foundations if a state were given the chance to subordinate extradition to the observance of fundamental rights laid forth in a different way – even though more favourable to the individual involved – from the constitutions of the member states.

The other case refers to the judgement on December 15, 2015, with which the BVerfG[85] accepted the direct individual appeal of an American citizen, he, too, held in his absence many years earlier and who had later been reached by a European arrest warrant in Germany. He complained about the case-law issued at the outcome of a trial he did not even know about, therefore deeming that the execution of the EAW had harmed the German constitutional identity. The constitutional Court of Karlsruhe deemed that the Italian regulations were incompatible not just with the principle of personal liability in criminal law (principal central to defining the constitutional identity of the Federal Republic). Moreover, with the very principles underlying the framework decision for the EAW, it take responsibility for not allowing the

[84] See Spanish Supreme Court, no. 6922/2008 of 13 February 2014 (Melloni).
[85] See German Federal Constitutional Court, 2 BvB 2735/14 (European Arrest Warrant) of 15 December 2015.

execution of the arrest warrant although not bringing a preliminary ruling to the Court of Justice, deeming that the one offered was the only interpretation compatible with the national Constitutional identity.

Also in light of the constitutional episodes mentioned, it's clear that the very identity of the constitutional proceedings of the European Union are characterized by the diversity of the national constitutional contexts and how over the past decades the national Supreme and constitutional Courts have strengthened their function of controllers of the boundaries of competences to guarantee a constitutional pact between European and national dimension. The complex division of competences and functions between institutions of the Union and member states indeed makes the process fluid and subject to progressive adjustments or actions to define the boundaries (KLABBERS/PALOMBELLA, 2019).

It's clear that the definition of this complex system of division is up to the legal institutions and the intense dialogue between Court of Justice and national Courts. Also, part of this process is the recent tendency of national constitutional case law to deem the question of constitutional legitimacy of regulations with respect to preliminary ruling a top priority, especially when there are alleged violations of the order's fundamental rights and general principles.

The liveliest part of the dialogue between the Supreme and the national constitutional Courts and the European supreme legal institutions essentially developed on the theme of sovereignty and on identification of the ultimate decision-maker (KUMM, 1999). The last stage of this dialogue was characterized by the emergence of the theme of constitutional identity as limit and barrier to a progressive expansion of the competences attributed to the European Union. the introduction of the Charter of fundamental rights of the EU and a case law of European Courts, first and foremost of the Court of Justice, which using the legal theory of implicit powers and principles of effectiveness of EU law and subsidiarity has progressively eroded the sovereign dimension and competences of member states. This has made it even more vital for national Courts to defend their own scope of intervention as well as of interpretation of the national catalogues of rights in order to avoid an emptying, from the outside, of the value of national constitutional charters, not to mention a real genuine marginalization of constitutional justice. It was in this area where that process of emergence of an ever more frequent claiming of the role of national constitutional identity also came into play as a limit to expansion of the competences of EU law and its interpretations provided by the Court of Justice, until the setting up a prioritization on the intervention of the constitutional and national Supreme Courts in the area of control of constitutionality (French and Italian case). This brings about dynamic proceedings as far as the identification of the boundaries of sovereignty with a complex and involved system of control, without an ultimate decision-maker, also dear to the constitutional tradition of Member States.

To conclude, it is possible to affirm that the study of relations and conflicts between the European Constitutional Courts and the EU Court of Justice is relevant to understand, on the one hand, how the competences between the supranational and national level are declined, on the other, how the sovereignty is interpreted at jurisprudential level in the EU.

5. Conclusion

This section examined several crises faced by the EU and Member States in the last period of European project. These processes touched the concept of sovereignty differently. The marginalization of the European Parliament, the reluctance of the East Member States to protect the rule of law and Brexit are proof of how State sovereignty has returned forcefully to the centre of political and legal debate in Europe. While the financial crisis and the crisis of the area of freedom, security, and justice prove how the Member States try to preserve spheres of sovereignty to the detriment of possible common solutions. The striking example is economic and fiscal governance. After the 2008 financial crisis, economic and fiscal governance was created forged on austerity, which allowed the Member States to maintain their fiscal sovereignty. This governance also tries to resist the COVID-19 crisis. Although it is necessary to transfer competences to the EU level to give it a fiscal capacity to allow it to adequately address the symmetrical shock caused by the epidemic, the Member States continue to defend their fiscal sovereignty and oppose a sharing of risks. The context is constantly evolving, and it is not possible to make predictions, but the sovereignty in the European Union could change soon.

Part C: Entitlement to sovereignty in the EU

1. Introduction

The distribution of institutional competences is central to the study of the comprising states. Observing the way and the breadth with which the Constitutions assign functions and competences to the central body and to the peripheral ones is an absolutely necessary way of proceeding to comprehend the form of the state and its federal or regional nature. The importance of the institution still remains even in the cases of more recent federal organisations where the detachment that can be created between the form of the constitutional provisions and the substance of the institutional reality is generally sharper. Indeed, even in these cases, the distribution of the competences in any event remains a starting point for the analysis of sovereignty.

The analysis conducted in part B rather shows how right from the start many are the threads of theory, dogma or concrete power system, which, altogether, can help interpret one of the most complex social phenomena in modern times.

The analysis conducted up until now makes it possible to see how the European states have sovereignly created an international organisation that over time has freed itself from its original dimension. Also, sovereignly, the States have progressively transferred ever broader competences with an effect on the sovereignty of the member states to the Union. This was possible because, like what normally happened in the federal membership processes, the issue of sovereignty was placed in parentheses, it wasn't decided (SCHMITT, 1928). This idea was recently brought up again in a radical take on federalism according to which the concept of sovereignty should be set aside to be able to think about the Federation. In this reconstruction the federation is a political order without any sovereignty, which instead belongs to the member states (BEAUD, 2009).

2. Possible versions of sovereignty

This last part summarises the principal theoretical concepts about sovereignty that have emerged in recent years. Each position has more or less precise organisational effects that will not be developed in this report. They may double as a stimulus for a more elaborate and in-depth discussion by the other implementers of the RECONNECT project. The synthetic mapping proceeds first identifying the two extreme stances, which so to speak mark the ideal boundary, and then examine the intermediate notions.

2.1. Sovereignty of the EU

It is impossible to find positions that out-rightly indicate the holders of sovereignty in the EU and its bodies. Not even the Court of Justice to which we owe the main dogmatic tools for the construction of the union's order, has ever gone in that direction. However, it is possible to trace two theoretical threads that run-down different paths but arrive at the same destination.

An initial orientation holds that the claims of the member states and its respective Courts to the last word end up clashing with the structural principles of the union's legal system and with its nature of unitary order (VON BOGDANDY, 2000). Therefore, the idea that in the scope of the

EU there might be a (constitutional) pluralism where different powers and authorities (union and state) coexist with equal claims and have the last word is rejected (BAQUERO CRUZ, 2008 and 2016). In truth, as already seen, the very concept of supremacy, although not able to be juxtaposed with the idea of sovereignty, contains an allusion to the sovereignty of the EU. In particular, Walker and Late affirm that 'while supremacy is clearly not identical with sovereignty, the assertion of original authority and of priority over domestic law contained in the doctrine of supremacy appears to presuppose –and implicitly confirm- the EU's sovereign status' (WALKER/LATE, 2013).

A second and more decided interpretation of the Union phenomenon instead goes so far as to say that a European people, on which to lay an adequate representative system, must be the holder of sovereignty. The biggest difficulty that this orientation encounters is its anchoring to the principle of reality. Some authors deem that a European community already exists and that it identifies itself in common cultural and historical roots, even though it's not entirely aware of it (DELANTY, 1995). Other authors identify the signs of the European people in the sharing of democratic procedures and in some common values; simply put, the very existence of a European governance would prove the existence of a European people (FOLLESDAL/HIX, 2006).

A European people needs an adequate system of representation, made up of members elected directly by the people and equipped with all necessary powers to express European popular sovereignty. General representation would be up to this Parliament, while the member states would take on a secondary role, as in federal systems with parliaments of Member States.

2.2. Sovereignty of States

The State-centred view holds a stance exactly opposite to that just summarised and does so with different arguments.[86] The fundamental assumption is that a European people is impossible (so-called no '*demos thesis*'), the only political communities in the Union's decision-making process being the national ones.

In this field, which can be linked back to the philosophical/political thread of communitarianism, (BELLAMY/CASTIGLIONE, 1997), the more lucid theoretician is undoubtedly Grimm, a German constitutional judge at the time the just as famous *Maastrichtsurteil* was drawn up. For some time, he has said that the lack of a European people is the main shortcoming for legitimation of the Union. Through a reconstruction of European constitutionalism and therefore starting from the French Revolution (which founds public power in the consensus of the listeners and therefore in the people) the German jurist finds the impossibility of a European Constitution, because the treaties cannot be connected to a European people, but rather to individual Member States. In other words, the European treaties cannot be considered by the same standards as a European Constitution, because they connect back to the will of the Member States and not of a people of the Union (GRIMM, 1997).

Grimm brought it up again recently, intending to show that the constituent power, in light of the treaties, does not reside – unless perhaps minimally – in the citizens but rather in the states (GRIMM, 1997). This time the author has focused on the review procedures required by the

[86] Walker/Late, 2013: 11 also add, backing the statist perspective of the jurists, there are 'reasons of intellectual training, professional socialisation and associated normative commitment'.

Treaty of Lisbon. In the normal procedure the entire TEU and most of the TFEU can be changed, the changes are agreed by the heads of state and government of the states and then subjected to ratification. Therefore, the States are the masters of the treaties in this case. For the two simplified procedures, of a narrower applicative scope, the issue is only partially different. With the second procedure, the decision is passed by unanimity of the European Council, a body of the Union, while the Commission and Parliament are heard preventively. With the third – useful in changing the decision procedures within the Council and to foresee the circumstances where Parliament acts through co-decision – the decision is always made through unanimity of the European Council with the consensus of Parliament, however without prejudice to the veto right of any national parliament.

Summarising, the citizens are involved, in the capacity of citizens of the state they belong to (national citizens), in the first two procedures through ratification, which can be through a referendum (direct participation) or parliamentary (indirect participation); in the third procedure they participate through Parliament's veto power. In the capacity of European citizens, they are not at all involved in the first two procedures, since neither a European referendum nor a European Parliament vote is involved; in the third, they are involved through the European Parliament's veto power.

Therefore, the constituent power in the EU resides in the states, although in a different way. It entirely resides in the first procedure, the states having *Kompetenz-Kompetenz*. In the second procedure, the power is entrusted to an EU body, which however is made up of heads of state and government, and that decides only with unanimity; the states are still the Masters of the treaties. In the third procedure, European citizens have a limited power of participation over a limited number of issues that are not very important.

The implications of this position are fairly simple to sort out: while the national parliaments are the places that express popular sovereignty, the national cabinets must preserve veto power. The union institutions act as agents of the member states.

Grimm's position has the merit and the limits of radicality. Opposing this stance are those who, like Habermas in particular, believe that a European people exists (immediately hereafter). Moreover, the emphasis on power of review also must be framed in the debate raised by those who held that a mixed constituent power exists (PATBERG, 2017). Furthermore, the Court of Justice has already drawn the formal and material boundaries to member states' power of review. In *Defrenne*, the Court of Justice clarified that the treaties may be changed only through procedures set forth in what today is Article 48 TEU, with the consequence that we can no longer consider the power of review of the treaties entirely in the hands of the states. And at least on one occasion, the Court argued supra-constitutional material limits to the power of review (Opinion 1/91 (EEA Draft Agreement), (1991) ECR I-6079, par.72.). Therefore, also from this viewpoint, Grimm's thesis seems too one-sided.

2.3. Widespread and divided sovereignty

Habermas is known to have supported the notion of a popular sovereignty both on the union level and the state level (HABERMAS, 2012). What distinguishes this stance from the one under 2.1 is the idea that having a *demos* does not require a sovereign political system. The two peoples, national and European, would be on the same plane, united by the *traite d'union* of

the European citizen, which would have two different abilities and would act based on these two different titles (this is where the idea of a mixed constituent power comes from).

The legal grounds for this theory can be found in the interpretation that von Bogdandy gave of the democratic principle, built on two elements, on the one hand, the peoples of the Member States, and on the other, the citizens of the Union, with the consequence that the Union would rest on a 'dual structure of legitimacy. The totality of the Union's citizens and the peoples of the European Union as organised by their respective Member State constitutions (VON BOGDANDY, 2009).

Divided sovereignty is also discussed by those who try to read the EU phenomenon with the conceptual categories of federalism. The idea already so dear to Waits returns (see part A above), that of a federal *demos*, the result of a federal Constitution, that reaches its own political identity gradually, similar to the United States' experience. Thus, it follows not only dual sovereignty, but also dual democracy (of the Union and of the States), dual citizenship (SCHUETZE, 2017).

The equal position of the different peoples involved implies a bicameral representation system where neither of the two Houses prevails over the other, and where an important role can be played by regressive proportionality (HABERMAS, 2017).

3. Conclusion

States have progressively transferred competences to the EU. This transfer has been so significant both qualitatively and quantitatively that we may hardly speak of complete sovereignty of states. If it is true – as the supporters of state sovereignty hold – that the states still haven't disappeared and that they keep exercising governmental power, it is also true that they are still the masters of the treaties because they preserve the *Kompetenz-Kompetenz*.

An argument that states are masters of the treaties because they have *Kompetenz-Kompetenz*, like the German Federal Constitutional Court claims today, resembles a legal fiction. Firstly, a number of State entities, all equal, rather than a single entity as in the federal theory, possess this function. It therefore becomes misleading to say that Germany or France or England possess this function.

Secondly, it is the states all together that possess *Kompetenz-Kompetenz*, with the consequence that the exercise of this function is necessarily a collective exercise. Lastly, it is very difficult to establish what the essence of sovereignty is, what the objects that characterise it are and therefore it is in no way non-transferable. After the attribution of monetary sovereignty to the EU, it becomes hard to imagine drawing an ideal line. The Federal Constitutional Court tried to do it in the *Lissabonurteil* (BVerfGE 123, 267, 357, on which FARAGUNA, 2015). And nevertheless, an *actio finium regundorum* between Union and Member States also becomes objectively difficult.

The question of sovereignty in Europe is ridden with ambiguity. The European lens must not stop us from seeing that sovereignty, inside and outside of Europe, is still an attribute characteristic of statehood (however altered and even this limited by the phenomena given in Part A). The claim of sovereignty is brought forth precisely by the 'hegemonic' states in the

international panorama. Thus, in this global perspective, sovereignty cannot be considered as having been abolished. The possible presence of outside threats to the European context, and new forms of sovereignty – think of the so-called digital sovereignty (GUEHAM, 2017) – could even challenge the very existence of individual Member States. This could spark a push toward greater integration and federal-type solutions. Let's not forget that the scholars of federalism found in the demand for protection from 'external' threats, in particular, of the military kind, the main thrust toward federal solutions (RIKER, 2004; FRIEDRICH, 1963; DUHACEK, 1970). Thus, weak sovereignty could potentially create the thrust toward a new federal sovereignty.

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