PART I

THE CONSTRUCT OF THE EUROPEAN UNION

CHAPTER 1

THE PATH TO EUROPEAN INTEGRATION

SUMMARY: I. The conceptual and cultural foundations of the European integration project. – II. The foundational values and the aim of integrating peoples. – III. The complexity of the system and the erosion of national sovereignty. – IV. The role of the Court of Justice in deconstructing the concept of national sovereignty. – V. Fragmentation of state sovereignty and supranationalism. – VI. Metamorphosis of the concept of sovereignty into the process of European integration. – VII. The fading of national sovereignty in normative pluralism.

I. The conceptual and cultural foundations of the European integration project

1. Despite its undoubtedly interstate origin, the institutional system of the European Union has gradually moved away from the legal categories of international law. While retaining some characteristics of interstate cooperation, the institutional system of the Union has assumed forms previously unknown in international relations. The Union is not, however, a federal state understood as an institutional model, deduced from Hamilton's essays, based on a central (federal) government endowed with sufficient powers to guarantee political and economic unity among the various federated entities. It is difficult to argue that the Union, as a new entity, has assumed the constituent power of a federal state, let alone a super-state. If the Union were a federal system, one would have to admit that the member states have become extinct as independent entities, and that national supreme

courts are nothing more than regional jurisdictions of a superior, unitary legal order. The experience of the last decades shows a different legal reality. Indeed, the Union has not claimed to exercise the essential prerogatives of a constitutional state (namely, the control over its territory, independence, effective government), even if its authority is widely acknowledged *de iure* in the member states (Part VI).

The Union is a peculiar construct, an *in fieri* project characterized by many specificities. Above all, it is an **unfinished project**: it could become a federal state (as Luigi Einaudi and Egidio Tosato imagined) or, at the opposite end, be dissolved due to unresolved economic, social, migratory and health crises, which in its recent history have often not been faced with foresight.

To explain the **uniqueness of the European institutional system**, it is worth beginning with the vision pursued by the founders of the former European Communities. Indeed, they saw this European construction as a path to **integrating states** and their **peoples**. The preamble to the Treaties is still inspired by this crucial objective: here, member states intend to '*continue the process of creating an ever closer union among the peoples of Europe*'. The founders particularly intended to share a peaceful future '*based on common values*', as stated in the preamble to the Charter of Fundamental Rights.

The process of European integration was and is grounded on mutual respect for national identities, but also on the idea that different nations and peoples of Europe pursue a common destiny based on a shared 'European identity' (as acknowledged in the Document on The European Identity adopted by the Nine Foreign Ministers on 14 December 1973, in Copenhagen). The Court of Justice in a Kantian logic has used the powers conferred upon it in the original Treaties to enhance the role of individuals, economic operators, citizens, as well as states, at the centre of the European system in a dynamic and unitary vision (*infra* § 4). As a result of the idea of harmonizing a plurality of national societies, a new legal experience has emerged, bound to put an end to the devastating vicissitudes and tragic events of the first half of the twentieth century. The Union has succeeded, always in a Kantian spirit, because of its basis on respect for the rule of law and the values that unite European society.

Indeed, in 2012 the Norwegian Noble Committee decided to award the Nobel Peace Prize to the Union, recognizing that:

'*The Union and its forerunners have for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in*

Europe ... The stabilizing part played by the EU has helped to transform most of Europe from a continent of war to a continent of peace'.

This is an important acknowledgement that the project of European integration has at least achieved its original objective, having ensured peace for decades in a part of the European continent. It is not superfluous to remind the new generations of this achievement.

2. The European integration process began to take shape with the Declaration made by the French Minister of Foreign Affairs Schuman on May 9, 1950, proposing to place the Franco-German production of coal and steel under a common and supranational authority: '*L'Europe ne se fera pas en un jour ni dans une construction d'ensemble: elle se fera par des réalisations concrètes créant d'abord une solidarité de fait*'.

The project was based on a functionalist and elitist vision of European integration, as Jean Monnet has previously suggested: **functionalist**, because integration in the production of coal and steel was to be an initial stage meant to lead to further **economic integration** and, eventually, to the **political unification** of Europe, putting an end to conflicts and wars; **elitist**, because it was conceived by an intellectual elite, without any real involvement of peoples. Progressive integration was intended to initiate, in fact, a sort of infinite chain reaction, destined to weld social ties and to make it impossible to leave without producing enormous damage. The strength of the Euro – as German Chancellor Helmut Schmidt would later say – is that '*nobody can leave it without damaging his own country and his own economy in a severe way*'.

As a matter of course, this process can be criticized for the fact that such an important objective was at times pursued without the involvement of peoples concerned. Economic, social and health emergencies have highlighted other weaknesses. Suffice it to mention the asymmetrical and contradictory nature of the economic and monetary legal framework built by the Maastricht Treaty, and the sudden and likely excessive enlargement of the Union at the beginning of the new century.

However, the possibility that crises would arise was taken into account at the outset: '*Europe will be forged in crises*', wrote Jean Monnet in 1976, '*and will be the sum of the solutions adopted for those crises*'.

Indeed, the project of European integration was born out of crisis: it began in the 1950s as a response to the two world wars, taking shape with the **Treaty establishing the European Coal and Steel Community** (the ECSC, 1951), soon followed by the **Treaties of Rome** (1957), which created the European Economic Community and Euratom in the nuclear energy

sector. The subsequent revisions of the Treaties, particularly those from the **Single European Act** (1986) up to the **Treaty of Lisbon** (2009), consolidated the functionalist approach, increasing Union competences and strengthening its institutional mechanisms. It should not be forgotten, however, that the advancement of the European project has always been intertwined with delays (e.g. the late entry into force of the **Maastricht Treaty**) and failures, such the '**constitutional**' **Treaty**, signed in 2004, that never entered into force.

3. The European integration paradigm was not born in the 1950s with the founding Treaties of the European Communities. Rather, according to an interesting historiographic analysis, it has a clear **Enlightenment imprint**, dating back to the Renaissance. In the eighteenth-century, European cosmopolitan society became self-aware: indeed, the *idea of Europe* can be traced back to the writings of Montesquieu, Machiavelli, Voltaire. It came about as an idea of **cultural and moral unity**, one that makes Europe an entity different from other continents. An idea of **political unity** also emerged, a common European thought based on principles of public law, on ideals of freedom, on a joint vision unknown in other parts of the world (Chabod). Some of these ideals are still reflected in the European legal system if we consider the '*spiritual and moral heritage*' of the Union recognized in the preamble of the Charter of Fundamental Rights. The history of the nineteenth and early twentieth centuries shows, however, that this idea of a unified Europe was weak in comparison to that of national sovereignty, which asserted itself forcefully in the second half of the eighteenth century along with the concepts of nation-state and absolute national power.

In that period, **national sovereignty stood as an antithesis to the idea of European integration**, and it translated into a claim of supreme control, of **absolute and exclusive independence**. It was an all-encompassing claim that the state was subject to no external restrictions, implying that the unitary decision-making authority of the national government and its community ordered as a state are the ultimate foundation of its sovereignty. Thus, the national authority exercises a power that is essentially inaccessible and impermeable to external influences when it comes to imposing the law on the people and its territory (Bodin).

The dangers inherent in this political and conceptual construction have been noted by de Jouvenel, who held that unified power is dangerous *per se*. He argued that this unitary power should be divided and distributed among multiple subjects, who would make a less risky use of it. He recalled how a conception of non-exclusive sovereignty instead prevailed in the late empire,

one in which different forms of power were shared and limited by divine or natural law and by individual rights.

4. After the Second World War, European ideals found a more favourable *humus* in a different political and social context. For the founding fathers of the European Union (Schuman, Monnet, De Gasperi), Europe had passed the point of no return: as Jorge Semprún said, Europe was born in Buchenwald. The European construct is not just a currency, nor just a market, but it is the expression of the Christian roots and common values that were definitively consolidated in the aftermath of those tragic events. The lessons learned from history are thus the premises of an ongoing project to ensure that the atrocities and horrors of the past are not repeated. Europeans must show that they are capable of building, *rectius* completing (if one remembers the Enlightenment) the common project of Europe, should the social and political will arise.

However, on the one hand, modern political thought and constitutionalism **break down sovereignty internally** in order to neutralize any anti-democratic drifts. Modern democracies have sometimes vested sovereignty in the legislature, as in the United Kingdom. Here, the authority and sovereignty of Parliament, in accordance with 'common law constitutionalism', is limited by common law provisions and principles, the identification and implementation of which is under the responsibility of the judiciary. In other systems, sovereignty belongs to the people (France and Italy, for example) who hold it within a framework of constitutional guarantees that delimit the separate powers of the State, which establishes a supreme judicial control to ensure the unity and coherence of the national legal order.

On the other hand, the process of European integration aims to partially break down national sovereignty, gradually converging it into a supranational context. Political thought has transformed **the idealism of the eighteenth century into a more concrete**, **functionalist vision of the European plan**. This consists in relinquishing a series of national powers in order to exercise them jointly within the framework of a unified supranational authority, firstly in economic and then in political matters. The **deconstruction** of state sovereignty by the European integration process can be fully assessed within this new historical and political context. The transfer of powers to a supranational entity is legally grounded in the so-called *European clauses* set forth in national constitutions. For example, **Article 11 of the Constitution of Italy** sets out that the Italian Republic permits, on equal footing with other states, the limitations of sovereignty necessary for an external order that

ensures peace and justice among nations, and it promotes and encourages international organizations devoted to this purpose (Part VI, Ch 3). The consequent loss of sovereignty is perhaps less surprising when one considers that national sovereignty is nothing more than a historically and temporarily delimited model of political authority (Delsol).

5. It is within the functionalist framework that the **structural specificities of the Union**, constantly highlighted in the decisions of the European Court of Justice, can be explained. After all, the Union does not appear at first glance to differ greatly from other international organizations in its constitutive legal basis (the Treaties), its legal personality, its endowment with certain competences through attribution by the states, and its division into organs and bodies called upon to exercise these competences.

Admittedly, the Union is not a state as the Court of Justice acknowledges (Opinion 2/13 of 18 December 2014, para. 156). However, it is far more than a mere international organization. The process of European integration rests on a ***corpus iuris* that is unique** compared to other forms of cooperation between states. Its uniqueness lies in the fact that the **functionalist strategy** has given rise to a much more evolved and complex legal construction that has both caused (for the time being, at least) an **impressive erosion of national sovereignties**, and progressively placed the individual at the centre of a **legal order that is autonomous from both national and the international systems**, as the Court of Justice has often held.

European Union law is a normative order that is largely composed, monitored, and administered through 'institutions', including legislatures, courts, authorities, and agencies, with their origins both in the European Union and member states. Subject to rule of law constraints, the Union is an entity-under-law in a sense that is in essence equivalent to the French, Italian or German terms '*état de droit*', '*stato di diritto*', '*Rechtsstaat*'. Within these limits, it is largely acknowledged that Union bodies are empowered with public functions, that is, legislative, adjudicative, and to a limited extent even executive and law-enforcement ones. In this composite legal order, the Union's capacity to affect the situation of national authorities and private persons is widely recognized even by national supreme courts. Therefore, it is plausible to affirm that the Union's legal order is 'institutionalised', for its participants refer to Union law and reciprocally agree to conform their conduct to it. Within the conceptual framework of legal institutionalism (Hauriou, Romano, MacCormick, and more recently La Torre), the European Union legal system is, in my understanding, an autonomous legal order, *in*

primis a real and permanent institutional and normative fact, grounded on effectiveness (*ubi societas, ibi ius* and vice versa). This (supranational) institutional construct does not pre-exist *per se* (and this distinguishes it from traditional institutionalism). Rather, it has been created by international instruments. Tellingly, its transformation into a path for integrating states and their peoples has been subsequently accepted by national authorities and their supreme courts, including through acquiescence (Parts V and VI).

The Union is an organized structure of rules that possesses its own sources of law (Part IV), law-making institutions (Part III), as well as a judiciary (system) able to guarantee the principle of legality, uniform interpretation, and uniform application of law (Part V). Law enforcement mechanisms also apply to breaches of Union rules. It is a legal order endowed with autonomy that acts to preserve its structural specificities in its international relations as well (Opinions 1/09 of 8 March 2011, and 2/13). Nonetheless, as noted, the European Union does not possess the features of statehood, nor is it a mere international organization.

The Union is a separate legal order that is integrated into national legal systems, while possessing a considerable degree of centralization of powers and functions. It is doubtful, however, whether this process is irreversible. The Treaties that lie at the origin of the Union construction could be amended, or even terminated through other international instruments. However, until such time, the Union remains a unique entity.

The structural specificities of the Union can be summarized in **three macro-components**: the founding values of the integration of peoples and states, the complexity of its institutional system and the deconstruction of the concept of national sovereignty by the Court of Justice.

II. The foundational values and the aim of integrating peoples

6. Like any other legal order (Cotta, MacCormick, La Torre), Union law is linked to legal values. The Union is founded *inter alia* on the **Charter of Fundamental Rights** and on legal **values common to the member states** (Articles 2 and 3 TEU). Respect for human dignity, freedom, democratic principles (Articles 9-12 TEU) and the principle of transparency aim to strengthen the democratic foundation of its institutional system (Article 15 TFEU).

The meaning of the respect for European values set forth in Article 2 TEU is a multifaceted topic, which involves the enlargement policy and external relations. One facet is linked to member states' activities

within their respective domestic jurisdictions. Member states are neither *legibus soluti*, nor above the need to respect common values in all their actions, including those unrelated to the implementation of Union law. This 'Union of common values' is a key feature of the integration process. The Union construct can only function if all its members behave in accordance with these values. Moreover, for some member states, participation in the Union is constitutionally possible only if the other members comply with the principles of democracy and rule of law and effectively guarantee a sufficient level of protection of individual rights that is comparable to that provided for in their domestic Constitutions (arguing from Article 11 of the Italian Constitution and 23 (1) of the German *Grundgesetz*).

Accordingly, respect for common values is not confined to the sphere of moral behaviour or mere politics, otherwise Articles 7 TEU and 269 TFEU would be deprived of any *effet utile*. Instead, they set out a procedural tool that complements the substantive provision provided in Article 2 TEU, ensuring a centralized control over states' behaviour, should they infringe the system of common values. Although this mechanism has several flaws, recent institutional practice counters any suggestion that Article 7 TEU is outdated (Part V, Ch 1).

The legislative function of the Union is exercised by two organs both acting with democratic legitimacy: the **European Parliament**, representing the citizens of the Union, and the **Council**, composed of representatives of national Governments, who are held accountable by their respective Parliaments in accordance with the constitutional systems of each member state. The **Commission** benefits from the democratic legitimacy of the European Parliament, which elects its President and Commissioners. Moreover, it became a less bureaucratic and more political body following the 2014 elections: in that case, the candidate of the party obtaining a (relative) majority of the votes of European citizens was elected President.

These are the three institutions that lead the Union's legislative process. While it may be true that these forms of representation have not resolved the issue of the so-called deficit of democratic legitimacy, sometimes emphasized by socio-political analyses, it is also true that there has been significant progress in this regard.

7. The Union confers on its citizens a ***status civitatis*** that carries with it certain subjective public rights, such as the right to vote within the Union and to enjoy diplomatic protection when they are outside its borders. This

European identity is still nascent and could also lead, over time, to the affirmation of a European civic identity, and there with a European civic *demos*: a new status linked to the recognition of fundamental rights, no longer dependent on belonging to a nation-state (Poiares Maduro). So far, this perspective has not taken place.

However, it cannot be excluded that a **new concept of 'belonging'** will emerge – one with **supranational** features, which could serve as a foundation for assimilating the complex social structure of the Union. Even within a framework that is still based on the survival of national systems, there is a trend towards the affirmation of **the supranational legal order as an instrument for integrating** the (still heterogeneous) European peoples **within a logic of social cohesion**. It may be possible to draw analogies between this process and other historical events related to the birth of states out of the unification of diverse social groups. The recognition of the existence of a community of values based principally in Article 2 TEU and the Charter of Fundamental Rights could eventually prove to be the **founding social compact** of a new, distinct community identity, built upon and deriving from national identity.

8. The emphasis placed on common roots, on social justice, that is, on a set of legal values binding on the Union as an entity distinct from its member states, confirms that the **integration process** is no longer seen as functionally aimed at creating a **single market**, but also as a process permeated by **social**, **cultural**, **humanistic**, **and normative values**. Its aim is **precisely to give rise to a community based on these shared values**.

The Union has pursued this political goal and its aspiration to integrate the peoples of Europe within a supranational legal framework through **gradual changes to the Treaties**. Indeed, the preamble to the TEU considers the Treaties as one '*stage in the process of European integration*': these instruments pursue the long-term objectives of promoting the '*economic and social progress of ... peoples*' and '*creating an ever closer union among the peoples of Europe*' with a view to the further steps '*to be taken in order to advance European integration*'. As a result, the European integration scheme is conceived as a **work in progress**, a goal to be realized step by step. This course of action could lead to a unitary political system but when this will occur, or what shape it will take, has yet to be determined. The primary law and its subsequent revisions are the stages of a long path towards the integration of the European peoples, a path characterized by objectives to be achieved progressively over the long-term.

III. The complexity of the system and the erosion of national sovereignty

9. The Union possesses a composite and multiform institutional system that has competences (classified as exclusive, shared, and complementary) and procedures **resembling the articulation of a national system**, rather than the simplified structure of an international organization. The Union is further endowed with a normative legal order characterized by the principle of legality, the primacy of law, the rule of law and a strong separation of powers between the legislative, judicial, monetary (and financial) and, to a limited extent, executive functions. These principles have been borrowed from modern constitutionalism.

It is undisputable that there has been an interference in national governmental powers due to the **attribution of competences** to this supranational legal system, along with the renunciation of the corresponding prerogatives by the member states (Part II). The devolution of national powers to the Union represents, in effect, the *prius* of the loss of national sovereignty. However, to understand the essence of this phenomenon, it is worth considering the **Union's decision-making mechanisms** (Part IV, Chs 5 and 6). This erosion derives in an immediate and tangible way, as will be seen throughout this volume, from the daily exercise of its competences, rather than from the division between matters devolved to the Union pursuant to the Treaties and those remaining in the hands of the member states.

IV. The role of the Court of Justice in deconstructing the concept of national sovereignty

10. One further **element that has proven to be crucial in de-structuring national sovereignties** has been the institution of a judiciary organized on a hierarchical basis, with the Court of Justice at its apex, called upon to guarantee the unity of interpretation and application of common rules (Part V).

The specific features of the Union have been captured and enhanced, well beyond the letter of the Treaties, by the jurisprudence of the Court of Justice, which has played a remarkable role in defining the autonomous identity of this supranational system. Such **judicial activism** has been defined by a set of doctrines aimed at **constitutionalizing** the system. Looking at the Court's longstanding case law, we find that its integrationist approach has been based on a set of rules, some unwritten, that constitute the unitary foundation of the system, even if they are not constitutional

in a formal sense. It is the Court that has envisaged the existence of a **new supranational legal system**, **autonomous and distinct** from the international and national legal orders, the result of a **process that it claims to be irreversible**. This perspective inevitably creates frictions with the sovereignty of the member states, as the Union, according to the Court's approach, expresses a legal order that is not (or is no longer) subordinate to those of the states.

11. By exploiting the hesitations of political institutions and, to a certain extent, the acquiescence of member states, the Court of Justice has assumed a driving role in the process of European integration since the 1960s by:

(a) Recognizing that **elements of formal hierarchy exist among the sources of law of the Union** (Part IV, Ch 1).

(b) Enhancing the **ability of supranational law to directly affect the legal sphere of individuals** without requiring further implementing acts. Since *Costa v Enel* (1964), this has been achieved by the **principle of primacy** by interpretation – i.e. the Union rule, whether of primary or secondary law, prevails over conflicting domestic law. This principle views the relationship between the supranational system and that of the member states in a **monistic logic comprising the primacy of the former over the latter** (Part VI).

(c) Affirming, at the level of normative values, that certain founding rules, including fundamental rights, **cannot be derogated**, consequently placing them at the apex of the Union's legal order in a way that was unknown in the original Treaties (Part IV).

(d) Upholding the view that Union law is subject to the control of a **predetermined system of common judicial guarantees**, governed by courts of both the Union and member states, which are an integral part of this new legal order. In this system, national judges can avail themselves of a judicial tool, unprecedented in the panorama of the law of international organizations: the **preliminary rulings proceeding**. This **judicial system** must be completed by remedies provided by the member states, necessary to ensure effective judicial protection in the absence of direct remedies before the Union's courts (Article 19 TEU) (Part V).

(e) Claiming that member states have renounced their sovereign powers, albeit in limited areas (Part II). Besides affirming the sovereign nature of the powers devolved to the Union's institutions, the Court added **the irrevocability of the powers conferred**, and in *Simmenthal* the **primacy of Union law over conflicting domestic legislation**. This would even prevent the valid formation of new national legislative acts incompatible with that body of law.