



Identity Politics and Constitutional Disagreement: The Rise of the “New” Populisms and Nationalisms in the Fragmented European Landscape

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1. Introduction

In the Federalist n. 1 Hamilton poses an essential question: «whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force». The endurance of liberal democracies is indeed consistently questioned by several forces and events and, among them, one of the most debated – especially in the last decade – is the rebirth of populisms and nationalisms. This paper joins this debate following the identitarian perspective.

One of the main features of liberal constitutionalism is the attempt to find a solution to a paradoxical issue: to build a legal system that allows for peaceful coexistence among all citizens by maintaining, at the same time, the freedom to choose different ways of pursuing happiness. Taking this as a starting point, the main goal of constitutionalism is to safeguard political disagreement through constitutional agreement. In other words, Constitutions «attempt to promote a major goal of a heterogeneous society: to make it possible to obtain agreement where

agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible»¹.

Historically, this attempt was built upon national identity, which constitutes the sociological structure of the nation-state. Indeed, identity has always been a need that belongs to everybody, both as individuals and as members of a community. But, in our times, the quest for identity has been modified and intensified by a new understanding of individual identity or, according to Trilling, the ideal of “authenticity”. Globalization, the migration emergency, growing pluralism, and, in general, the advent of postmodernity is triggering the fight for public recognition and fostering the rise of the so-called identity politics.

The rise of identity politics poses a present challenge to modern liberal democracies. Constitutional theories such as multiculturalism or supranationalism are no longer capable of resolving the conflicts we are experiencing within our pluralistic societies. Whenever requests for the recognition of identity do not meet with spaces and tools whereby to make their voice heard, they may leave room for the rise of new populisms and, especially, new nationalistic populisms.

The present paper aims to address those issues by taking a twofold approach. First, it explores the rise and the fall of nationalism within postmodernity, investigating this relationship from a theoretical perspective. Second, it takes an analytical approach, focusing on the European Union. The EU was built as a governance without government and has turned into a multilevel constitutionalism that jeopardizes the “constitutional” agreement that binds the European communities and the European states to one another. Against this growing disagreement, one solution that has been raised is to break down the underlying agreement. In conclusion, we will try to answer the following questions: how can European constitutionalism, in particular, and, more broadly, constitutionalism in general face the above-mentioned challenges? How can constitutionalism help manage this disagreement? How can identity be used to unify and not to divide?

2. The rise and fall of national identity

In a very famous book published in 1983, Benedict Anderson argued that, «nationality, or, as one might prefer to put in view of that word’s multiple significations, nation-ness, as well as nationalism, are cultural artefacts of a particular kind»². In particular, Anderson criticized the existing methodological approach to the terms “nation” and “nationalism”, which, for many decades, had been studied as two intertwined, but separate, concepts. Under that approach, while “nationalism” was used to refer to a political ideology born at the late 18th Century the nation itself was a very ancient social phenomenon rooted on the romantic trinity *Ein Volk, ein Land, eine Sprache*. Nation preexisted the state, and represented «a primordial natural community» based on common customs, traditions, and language that needed to be “brought

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¹ C.R. SUSTEIN, *Legal Reasoning and Political Conflict*, New York, 2018, p. 8.

² B. ANDERSON, *Imagined Communities*, London-New York, 1983, p. 48.

back to life” by nationalism movements (a concept expressed well by the Italian term “Risorgimento”, or rebirth). Embracing this perspective, the idea of “nation” was described as «a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up», while nationalism would be a political movement involving «(1) the attitude that the members of a nation have when they care about their identity as members of nation and (2) the actions that the members of a nation take in seeking to achieve (or sustain) some form of political sovereignty»³. The bridge between the two terms was established by the political idea of national identity.

Anderson’s book attacked this approach, arguing that nations are not primordial natural communities based on common roots, language, traditions, but cultural artefacts: according to Anderson, nation «is an imagined political community - and imagined as both inherently limited and sovereign»⁴. It is *imagined* because «its members will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion». And it is imagined as *limited* and *sovereign* «because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely ordained, hierarchical dynastic realm»⁵. In short, Anderson’s theory directly questioned the Romantic trinity “one people, one land, one language”, arguing that all these elements were imagined, and that the very idea of nation was, consequently, rooted in artificial artefacts invented for a political purpose.

Anderson’s approach was well received among academics. In 1983, Hobsbawm-Ranger’s book (*The invention of Traditions*) and Gellner’s book (*Nations and Nationalism*) echoed Anderson’s point of view, and pointed to the fragility of cultural traditions and national identities as cornerstones of nations. In so doing, they criticized the metaphysical essentialism of the “nation” and unveiled the unreasonableness of political nationalisms. They described nationalisms as pathologies of modern developmental history, oriented toward ideal (or ideological) purposes «or – like many others “isms” (capitalism, socialism, terrorism, etc.) – focused not on the necessary ideas but on the activities that stem from them»⁶.

The good fortune of these theories was linked to the rise of economic globalization and the end of the cold war. The collapse of the Berlin wall and the end of the division of the world into two distinct, opposing geo-political and geo-ideological blocks directly clashed with the ideology of nationalisms, while the development of free markets around the globe fueled the flourishing of new relationships between different nations and cultures. From a constitutional point of view, globalization directly impacted state sovereignty⁷: global forces undermined the ability of governments to control their own economics and societies, favoring the development of international and supranational law and institutions, which eroded the very idea of nation and/or national identity.

The (apparent) twilight of the nations was welcomed by many political thinkers. Fukuyama celebrated the victory of liberal democracy as «the end point of mankind’s

³ N. MISCEVIC, *Nationalism*, in E.N. ZALTA (ed.) *The Stanford Encyclopedia of Philosophy*, 2020, <https://plato.stanford.edu/archives/fall2020/entries/nationalism/>.

⁴ B. ANDERSON, *Imagined Communities*, cit., p. 49.

⁵ B. ANDERSON, *Imagined Communities*, cit., p. 50.

⁶ L.W. BARRINGTON, “Nation” and “Nationalism”: *The Misuse of Key Concepts*, in *Political Science and Politics*, 1997, p. 713.

⁷ A. MORRONE, *Sovranità*, in *Rivista AIC*, 2017, p. 1 ss.

ideological evolution», arguing that «[it] replaces the irrational desire to be recognized as greater than others with a rational desire to be recognized as equal. A world made up of liberal democracies, then, should have much less incentive for war, since all nations would reciprocally recognize one another's legitimacy»⁸. Beck explored cosmopolitanism as a «methodological concept which helps to overcome methodological nationalism and to build a frame of reference to analyze the new social conflicts, dynamics and structures of Second Modernity»⁹. In particular, he confronted the political ideology of nationalism, arguing that, while «the national perspective is a monologic imagination, which excludes the otherness of the other (...), the cosmopolitan perspective is an alternative imagination, an imagination of alternative ways of life and rationalities, which include the otherness of the other»¹⁰.

To be clear, cosmopolitanism is an ancient political idea, which originated in ancient Greece and survived the age in philosophical literature. As Immanuel Kant argued 200 years ago, cosmopolitanism means being a citizen of two worlds – “cosmos” and “polis”. Voltaire outlined a similar concept, pointing out that «the philosopher is neither French, nor English nor Florentine: he belongs to all countries»¹¹. On the other side of the ocean, Benjamin Franklin's motto “Where liberty is, there is my country” echoed this theory, and established the bedrock of the United States as “a Nation of immigrants” and “the land of the free”. These examples, along with many others, explain why, even in ancient times, cosmopolitanism's theories worked against those of egoistic nationalism, and cheered the birth of a league of unified nations.

From the historical perspective, this ancient utopian idea influenced the entire second half of the 20th Century- But only with the explosion of globalization did the dream seem finally to have become real. This explains why cosmopolitanism re-emerged as a useful political method for overcoming nationalism and national identities. Political thinkers like Beck and Appiah have argued that the theory of territorial identity is fatally flawed, because it imprisons people's identities in a single, delimited space (the nation), while globalization prompts the flourishing of multiple identities and the development of many, transnational ways of life¹².

3. Public recognition in the postmodern age: from national identity to identity politics

Cosmopolitanism, supranationalism, and globalism rapidly became cornerstones of the postmodern age. They marked the passage from “solid” to “liquid” times, and the end of traditional structures and institutions¹³. Many scholars have argued that, in the postmodern age, nation-states are increasingly becoming relics of antiquity, and that, «the very idea of independent sovereign nations is thrown into question»¹⁴.

In light of these developments, the ancient link between the identity of citizens and the nation-state seemed to be over, and the traditional concept of national or state sovereignty began

⁸ F. FUKUYAMA, *The End of History and the Last Man*, New York, 1992, p. XI and XX.

⁹ U. BECK, *The Cosmopolitan Society and its Enemies, Theory, Culture & Society*, London, Thousand Oaks and New Delhi, 2002, p. 18.

¹⁰ U. BECK, *The Cosmopolitan Society and its Enemies, Theory, Culture & Society, cit.*, p. 19.

¹¹ See VOLTAIRE, voice *Patrie* in C. MERVAUD (ed.) *Dictionnaire philosophique*, Oxford, 1994.

¹² K.A. APPIAH, *Cosmopolitanism: Ethics in a World of Strangers*, London-New York, 2007.

¹³ Z. BAUMAN, *Liquid Times: Living in the Age of Uncertainty*, Cambridge, 2007.

¹⁴ K.J. GERGEN, *The Saturated Self*, New York, 1991, p. 254.

to look like a relic of the past, destined to merge with supranational institutions. But this transformation comes at a price: by eroding the concept of nation, postmodernity has weakened the traditional place where, for many centuries, people found public recognition of their identities. It is probably true that, as Anderson pointed out, nation-ness was just an imagined artefact. But, on the other hand, it is an artefact that produced institutional and/or sociological ground where the people's disagreements could take their place in a common and peaceful composition.

In the past, one apt way of expressing this form of public recognition was the word "loyalty". Despite all their differences, the people of one nation could find their place in the state-community through their loyalty to it. From this perspective, the very idea of nation-ness helped to forge political, but also psychological, consensus into a collective identity, in the same way that the victory of our national team at the World Cup brings us together to celebrate in the streets. Postmodernism has eroded this psychological consensus; as Billing observes: «national identity no longer enjoys its preeminence as psychological identity that claims the ultimate loyalty of the individual» because «it must compete with other identities on a free market of identities»¹⁵. To draw out the soccer metaphor, this process is similar to a soccer fan who chooses to support a particular player, rather than the team for which he plays, and celebrates his victory because of his particular skills.

Postmodernity has shaped the rise of identity politics as «a wide range of political activity founded in the shared experiences lived by the members of certain social groups (...) reclaiming ways of understanding their distinctiveness (...) with the goal of greater self-determination»¹⁶. In particular, there are two main features of identity politics in the postmodern age.

First, the globalization process produced a psychological fragmentation of the collective recognition of identities. As Charles Taylor has argued, «in the earlier age recognition never arose as a problem» because «general recognition was built into the socially derived identity by virtue of the very fact that it was based on social categories that everyone took for granted». Nowadays, the recognition of people's identities is more closely related to the individual perception of it, and «personal, original identity doesn't enjoy this recognition *a priori*» but «it has to win it through exchange, and the attempt can fail»¹⁷. Moreover, the postmodern concept of identity is characterized by an emphasis on its inner voice and capacity for *authenticity* - that is, its ability to determine a way of being that is somehow true to oneself.

Second, cosmopolitanism has sought to identify a new foundation for the globalized political order, rooted in liberal constitutionalism¹⁸, and particularly in the principles of the equality, liberty, and dignity of human beings. In so doing, postmodernism transplanted a *thick* normative and universal theory of human rights into a *thin* political and sociological context. As Graber has pointed out, «cosmopolitan identities based on commitment to universal human rights that underlie much contemporary constitutionalism are too thin for most citizens»¹⁹.

¹⁵ M. BILLING, *Banal Nationalism (Theory, Culture and Society)*, London, 1997, p. 133.

¹⁶ C. HEYES, *Identity Politics*, in E.N. ZALTA (ed.) *The Stanford Encyclopedia of Philosophy*, 2020, <https://plato.stanford.edu/archives/fall2020/entries/identity-politics>.

¹⁷ C. TAYLOR, *The Politics of Recognition*, in A. GUTMANN (ed.) *Multiculturalism: Examining the Politics of Recognition*, Princeton, 1994, p. 35.

¹⁸ See *ex multis* P. RIDOLA, *Il costituzionalismo e lo stato costituzionale*, in *Nomos*, 2018, p. 1 ss.

¹⁹ M. GRABER, *Constitutional Democracy in Crisis? The Right-Wing Populist Surge*, in *VerfBlog*, 2018/8/26, <https://verfassungsblog.de/constitutional-democracy-in-crisis-the-right-wing-populist-surge/>.

The attempt to bring together the struggle for recognition of authenticity with the universal claim of liberty and equality could be synthesized in the following postmodern motto: “be yourself, and reclaim your identity in the public space, marking your difference from others”. But this claim dramatically changes the very idea of equality as inclusion into a broader political context, with paradoxical effects for postmodern constitutionalism: after having originated to enforce the equality between people, human rights theory is used by identity politics today to heighten civil and political disagreement.

One example can be helpful to fully understand this process. During the 1960’s the American Civil Rights movement utilized human rights doctrine to promote equality and social justice for African-American people. The chief goal of the movement was a quest for inclusion, demanding that civil society treat marginalized, black people with the same respect with which it treated the dominant, white groups, and fighting for social change. This demand for inclusion is summarized well by Dr. Martin Luther King, Jr.’s famous speech at the Lincoln Memorial, in which he described a dream «deeply rooted in the American dream», and claimed that «one day this nation will rise up and live out the true meaning of its creed: “We hold these truths to be self-evident, that all men are created equal”»²⁰. Few years later, political movements such as the Black Panther or the Nation of Islam echoed MLK’s words from a slightly different angle. Differently from Dr. King, these groups argued that «the black people had their own traditions and consciousness» and they «need to take pride in themselves for what they were»²¹, marking the differences between them and the white mainstream society.

Today, the Black Lives Matter movement (BLM) campaigns against police violence and brutality against black people. It mirrors Dr. King’s battle for justice and equality, and considers him to be an important source of inspiration. But sometimes it also embraces an identitarian approach to the problem, arguing that, since black people share an inner authenticity that needs to be protected, they need to claim who they are and not heed what the broader society wants them to be. This is a point of deep divergence between the two political struggles: while Martin Luther King was fighting for the *inclusion* of black people in American society, Black Panthers and sometimes even BLM stress the *identitarian difference* of its members, demanding respect for them as different from the mainstream society. This different approach explains why some activists are asking to remove, among others, Thomas Jefferson’s statue from Hofstra University because «his values aided in the construction of institutionalized racism and justified the subjugation of black people in the United States»²², while Martin Luther King’s speech quoted the words written in the Declaration of Independence by Thomas Jefferson himself in order to enforce equality and liberty throughout the nation.

In short, these different approaches aim to accomplish the same human rights’ goal of justice and equality for the African-American population, but they produce quite different outcomes. As one commentator has explained, «what makes identity politics a significant departure from earlier, pre-identitarian forms of the politics of recognition is its demand for recognition on the basis of the very grounds on which recognition has previously been denied

²⁰ M.L. KING, *I have a dream*, delivered 28 August 1963, at the Lincoln Memorial, Washington D.C.

²¹ F. FUKUYAMA, *Identity. The demands of dignity and the politics of resentment*, New York, 2018, p. 108.

²² See *Thomas Jefferson statue must go, some Hofstra University students say*, https://www.foxnews.com/us/students-urge-hofstra-university-to-remove-thomas-jefferson-statue-over-racism?fbclid=IwAR1OrJawWdltG6QaN_LPkz2BWP_r__EvpQpsTir5ysQX3JJIT0oXCj0DmQYY.

(...). The demand is not for inclusion within the fold of “universal humankind” on the basis of shared human attributes; nor is it for respect “in spite of” one’s differences. Rather, what is demanded is respect for oneself *as different*»²³.

4. Juristocracy, human rights, and the rise of new populism

The rise of identity politics in the postmodern global world directly challenges the deep core of liberal constitutionalism and the constitutional agreement that comes from it. Promoting the difference of particular groups from mainstream society in the name of equality and liberty, identity politics impacts the constitutional enforcement of human rights doctrine.

As is well known, the adoption of rigid constitutions, which envisage a catalog of fundamental human rights protected against parliamentary majorities, resulted in a new way of understanding and applying the law. It produced a shift of power from representative institutions to domestic and supranational judiciaries, fueling the phenomenon of juristocracy. As Hirschl pointed out, «there is now hardly any moral, political, or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one»²⁴. This global trend toward the expansion of the judicial domain is arguably one of the most significant developments of our times, affecting the legal framework of our constitutional path and prompting the rise of new constitutionalism.

The claims of identity politics took advantage of juristocracy and new constitutionalism by choosing the judiciary (and particularly the constitutional and supranational courts) as the public forum where to accomplish its goals. In so doing, it transferred legitimate demands for public recognition from the democratic process to constitutional adjudication, fueling the “litigation boom” in our society and increasing the gap between representatives and the people they represent.

The alliance between identity politics and juristocracy has produced two relevant outcomes. First, it has changed the very language of human rights doctrine, stressing the *psychological* and *emotional* effects of constitutional disagreement. By asking for public recognition of differences, identity politics are shifting Court’s legal arguments away from concrete injuries to applicant’s rights and toward the personal perception of wounded identity. In the famous case *Lautsi v. Italy*, for instance, the Second Section of the European Court of Human Rights (ECHR) argued that displaying the crucifix in Italian classrooms was unlawful because it «may be emotionally disturbing for pupils of other religions or those who profess no religion»²⁵. Despite the fact that this ruling was overruled by the Grand Chamber a few years later, it shows how deeply the identity politics narrative penetrates into the legal arguments of judges.

Second, it transferred to judges «some of the most pertinent and polemical political controversies a democratic polity can contemplate»²⁶. This process brings judges into the

²³ S. KRUKS, *Retrieving Experience: Subjectivity and Recognition in Feminist Politics*, Ithaca, New York, 2001, p. 85.

²⁴ R. HIRSCHL, *The Political Origins of the New Constitutionalism*, in *Indiana Journal of Global Legal Studies*, 2004, p. 71.

²⁵ *Lautsi v. Italy*, ECHR 3 nov. 2009, no. 30814/06, para. 55.

²⁶ R. HIRSCHL, *The Political Origins of the New Constitutionalism*, cit., p. 72.

political arena, transforming them from guardians of the constitution into major political actors (or elites). According to Hirschl, «the trend toward new constitutionalism is hardly driven by politicians' genuine commitment to democracy, social justice, or universal rights. Rather, it is best understood as the product of a strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders»²⁷. Especially when the Courts foster changes in social consciousness throughout the enforcement of new rights, they nurture the political clash between “new” and “old” constitutionalism. In short, constitutional judges are increasingly becoming political actors in the constitutional arena because they are asked to fill the gap between political disagreement over certain new rights and the evolution of social consciousness that supports them.

Therefore, the intertwined relationship between juristocracy and identity politics has changed the actors and the lexicon of public recognition struggles. It has empowered non-elected judges with the task of solving identity politics claims, and translated cultural, ideological, and political issues into arguments that are based on precedent and laws²⁸. But it also weakened the representative bodies and the deliberative process that, for many centuries, channeled the political disagreement of our society into democratic and procedural rules. Consequently, «traditional institutions of representative democracy as well as mechanisms of political participation are pushed into the background in order to make space for (...) unelected forms of power monitoring which are nevertheless said to be representative of the people in whose name they operate»²⁹.

This process gave rise to the anti-elitist and rhetorical narrative of the populist movements that have spread around the world. By increasing the gap between the people and the ultimate decision-makers, juristocracy gave new nationalist parties the perfect enemy to fight, fanning the flames of an anti-globalist and anti-institutional agenda. This explains why the right-wing movements in Poland and Hungary have established illiberal amendments limiting their high courts' powers (and undermining their judicial independence)³⁰.

In conclusion, cosmopolitanism, supranationalism, and new constitutionalism have generated a double shift. First, they replaced «the tendency towards centralization that accompanied the state formation process, in which attempts were made to eliminate differences in order to create a unified integrating culture for the nation» with a shift toward «decentralization and the acknowledgement of local, regional and subcultural differences»³¹. Fragmenting the idea of nation as the place of public recognition of common identities, the globalization fostered the birth of new nationalisms within the nations: as Billing pointed out, «the very differences and attachments which the state sought to erase in its modernist quest for uniformity are now being revived» and «some of these newly revived identities are constructed

²⁷ R. HIRSCHL, *Toward Juristocracy*, Cambridge-London, 2004, p. 222.

²⁸ A. PIN, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, in *German Law Journal*, 2019, p. 225 ss.

²⁹ J. BAROŠ, P. DUFEK, D. KOSAŘ, *Separation of Powers in Democratic Theory: Understanding Populism and Rise of the Unelected. The Case of Central Europe*, in http://www.agenda.unict.it/allegati/seminario_convegno/1379.pdf, 2018.

³⁰ See *ex multis* S. BARTOLE, *I casi di Ungheria e Polonia. L'organizzazione del potere giudiziario tra Consiglio d'Europa e Unione europea*, in *Quaderni Costituzionali*, 2018, p. 295 ss.

³¹ M. FEATHERSTONE, *Consumer Culture and Postmodernism*, London, 1991, p. 142.

in the image of nationhood»³². Separatist movements in Quebec and in the Balkans or, more recently, in Scotland and Catalonia imagined new, smaller homelands within their national territories, based on their particular cultural identities, and in opposition to the Constitutional path of their states. This phenomenon is directly connected with the identity politics narrative: just as BLM activists are stressing their ethnic differences from white American society, Catalonia's movement is claiming independence from Spain because of its cultural differences.

Second, in prompting the universal doctrine of human rights, new constitutionalism transferred the resolution of critical political questions from the political sphere to the judiciary system and «flattened questions of meaning, identity, and purpose into questions of equality and fairness». It, therefore, fed «the anger and resentment that animate the populist revolt» and lacked «the moral and rhetorical and sympathetic resources to understand the cultural estrangement, even humiliation, that many working class and middle class voters feel»³³.

All the phenomena described above fell on fertile ground in the European Union. According to Guibernau, the deep dissatisfaction that is growing among European citizens stems from the gap between elites and the masses that is a current and historical feature of Europe. The European union did not come to be because of an emotional identity that was capable of bringing together the several identities of the Member States. The European Union aimed toward a noble cause, but, methodologically, it fully embraced the task of cosmopolitanism, to create a thick framework on a thin consensus: «National identity and European identity are fundamentally different» because «the sense of belonging and attachment that defines the former tends to be replaced by an instrumentalist, rational or functionalist approach regarding membership of the latter»³⁴. The construction of a new, supranational legal system where multiple identities could live together peacefully has paradoxically led to the rise of new nationalisms.

5. Back to the future? The struggle for a pan-European identity

Many scholars argue that the rise of new populisms and nationalisms stems from a set of factors that are sometimes considered independently and sometimes considered to be tightly interconnected: on the one hand, increasing economic inequality and income insecurity, and, on the other hand, so-called cultural backlash³⁵. Within the European landscape that interests us here, these factors are undoubtedly playing a pivotal role in the growing support for populist parties and movements. The complex interaction between economic causes and cultural factors

³² M. BILLING, *Banal Nationalism*, cit., p. 135.

³³ M. SANDEL, *Populism, Trump, and the future of democracy*, in <https://www.opendemocracy.net/en/populism-trump-and-future-of-democracy/>, 2018.

³⁴ M. GUIBERNAU, *The birth of a United Europe: on why the EU has generated a "non-emotional" identity*, in *Nation and Nationalism*, 2011, p. 302 ss.

³⁵ R.F. INGLEHART, P. NORRIS, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, in *Harvard Kennedy School Faculty Research Working Paper Series*, 2016. The Authors argue that if the rise of populisms is the translation of a silent counterrevolution against "cosmopolitan values (that) emphasize the value of open national borders, shared multicultural values, diversity of people within an inclusive society", the economic explanation for the resurgence of populisms is strictly intertwined with the mushrooming of economic inequality, the rising of economic insecurity and the neoliberal austerity policies. On the economic explanation of the rise of the current populism see also B. MOFFITT, *The Global Rise of Populism. Performance, Political Style, and Representation*, Stanford, 2016.

underlying the surge of new populisms and nationalisms strains another crucial engine of European nationalistic populism, that is the identitarian factor³⁶, capable of inflaming identity politics to the extent that Müller argues that, «populism is always a form of identity politics (though not all versions of identity politics are necessarily populist)»³⁷. If this holds true for several of the contemporary forms of populism cropping up around the world, it is especially true in the European context, where the issue of identity/identities has had – and continues to have – a thorny bearing on the European integration process.

In the following paragraphs, embracing the identitarian perspective, we will try to highlight the trajectory of the European integration process, a supranational reality created to limit the nationalistic degeneration of the 20th century. A supranational project that, as it struggled with the effort to build unity between European peoples, tried to generate unity between individuals, only to run into the challenge of the return of nationalism. This situation perhaps offers a clue as to the weakness of this process in fixing a fragmented and complex “identity disorder”.

The inception of the European Union was inspired by a clearly stated ideal, at that time, and still today, defined by many scholars as utopianism: to imagine a supranational political structure capable of building the conditions in which nations could coexistence peacefully, counteracting the degeneration of the concept of national identity that has contributed to the surge of virulent and chauvinistic nationalisms, cropped up at the time of the Second World War³⁸. In brief, the goal was to pursue a *de facto* solidarity, only feasible within a community³⁹, preventing conflicts and disagreements among nations, starting with «the elimination of the age-old opposition of France and Germany» (Schuman declaration, 1950). This spirit transpires both from the Ventotene Manifesto, whose title underlines the two main goals of the European project “Towards a Free and United Europe”, and from the words of Jean Monnet: «There will be no peace in Europe if the States rebuild themselves on the basis of national sovereignty, with its implications on prestige politics and economic protection»⁴⁰.

Thus, the European project was not intrinsically conceived in opposition to the nations; the attempt was instead to look for a path where «all that is noble and humane within these national forces» could be present, «while co-coordinating them to build a supranational civilisation which can give them balance, absorb them, and harmonise them in one irresistible drive towards progress»⁴¹. It was an attempt embodied in the “European way” to manage unity and diversity, according to which the identity of others must not be perceived as a constraint, but as a pillar for building «a political community among those who are different»⁴².

But the launch of this European integration process took place within the context of the so called “second modernity”. This term was coined by the German sociologist Ulrich Beck to

³⁶ A. NOURY, G. ROLAND, *Identity Politics and Populism in Europe*, in *Annual Review of Political Science*, 2020, p. 421 ss.; C. MUDDE, C.R. KALTWASSER, *Populism: A Very Short Introduction*, Oxford, 2017.

³⁷ J.W. MÜLLER, *What is Populism?*, Philadelphia, 2016, p. 3.

³⁸ H. ARENDT, *Imperialism, Nationalism, Chauvinism*, in *The Review of Politics*, 1945, p. 441 ss.

³⁹ J. FLYNN, *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach*, New York-London, 2014, p. 185.

⁴⁰ J. MONNET, *Mémoires*, Paris, 1978, p. 21.

⁴¹ A. DE GASPERI, 10 December 1951, in Council of Europe, *Voices of Europe. A Selection of Speeches Delivered Before the Parliamentary Assembly of the Council of Europe*, Council of Europe Publishing, p. 35.

⁴² D. INNERARITY, *Democracy in Europe: A Political Philosophy of the EU*, Cham-Switzerland, 2018, p. 116; see also J.H.H. WEILER, *The Constitution of Europe*, Cambridge, 1999, p. 341.

describe the period starting from the end of the Second World War, characterized by “denazionalization”: a period when globalization and cosmopolitanism prompted the erosion of national identities⁴³. In this perspective, globalization and cosmopolitanism brought to the surface a significant defect of the European project. Despite the keen attention that legal scholars have paid to this issue and the vast numbers of related institutional documents, the EU has not carried out a sufficiently deep reflection on its own identity, and on the nexus between its supranational entity and the national identities. This defect could be seen through the lens of the European functionalist (and neo-functionalist) approach. According to this theory, European integration and the creation of a real political community that stems from it, was led by a utilitarian perspective, so-called outcome legitimacy, based on policy effectiveness⁴⁴. This slowly transformed the goal of the European integration process from a political project to an economic one⁴⁵. A clear example of this shift is the concept of European citizenship itself, which does not bestow a full-blown European citizenship status because it could be rather considered, as asserted by Cartabia, as a mere privileged treatment of EU citizens-foreigners within the Member States⁴⁶. European citizenship guarantees indeed individual freedoms that open up to the (economically-oriented) free movement of citizens throughout the European territory, but does not root their belonging to any broader concept of “nation” as an imagined community.

The functionalist approach was successful in creating the European Economic Community and in assuring a long-lasting period of peace and prosperity⁴⁷ even if, at the same time, it neglected to take seriously the problem of European identity, and it pushed aside the quest for a European *demos* within a plurality and heterogeneity of *demoi*. As a consequence, tensions arose between EU institutions and the Member States, which inflamed the political discord within the European space. There are several examples of this tension, especially since the entry into force of the Maastricht Treaty in 1992. It is worth remembering, among the others, the Danish people’s vote of no confidence against the Treaty and the “national compromise” which provided the *opt-outs* of Denmark with assurances on four areas of cooperation. The Denmark position, blindly labelled as the “false consciousness” of the Danish people⁴⁸, was justified by the fear that their own national identity would be jeopardized.

⁴³ U. BECK, *Risk Society: Towards a New Modernity*, London, 1992.

⁴⁴ See J.P. OLSEN, *Maybe it is time to rediscover bureaucracy?*, in *Journal of Public Administration Research and Theory*, 2005, p. 1 ss. and J.W. MÜLLER, *Contesting Democracy. Political Ideas in Twentieth-Century Europe*, London, 2011.

⁴⁵ See G. FERRAIUOLO, *Nazionalismo banale e livelli di governo dell'emergenza*, in S. STAIANO (ed.), *Nel ventennio anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19*, Napoli, 2020, p. 113 ss.

⁴⁶ M. CARTABIA, *Cittadinanza europea*, in *Enciclopedia Giuridica*, vol. IV, 1995, p. 1.

⁴⁷ See B. CARAVITA, *Quanta Europa c'è in Europa?*, Torino, 2015.

⁴⁸ J.H.H. WEILER, *The Crumbling of European Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, New York, 2018, p. 630.

6. The paradoxical effect of European supranational constitutionalism

In order to reduce this tension, the EU has tried to soften the persistent political disagreement between national and European institutions and the “democratic disconnect”⁴⁹ through a “semi-permanent revision process”⁵⁰. The treaties that followed the Maastricht Treaty introduced the proceduralization of the subsidiarity principle for purposes of enforcing its application, rephrased the national identity clause, tried to democratize both European institutions and policies, and aimed to enhance the role of national Parliaments.

All these institutional steps can be seen as the thought structure of the EU striving to imagine a new constitutional process, the apex of which was the draft Treaty establishing a Constitution for Europe. As von Bogdandy has stated, «Europe’s constitutional treaty would credibly establish a paramount normativity, which is indispensable to a credible entry in our dictionary of European identity»⁵¹. But the expectation of adding a “European identity” entry to the European dictionary was shut down by an opposing portion of the “European *demos*” itself. Here it is relevant to recall the soundless warning the French Conseil constitutionnel issued to European institutions about the incompatibility between European constitutional principles and the French constitutional tradition⁵². Its warning was accompanied by a procedural surplus required for the ratification of the European convention: both the successful outcome of the referendum and the following constitutional amendment process were necessary steps required to ratify the convention. But, in a now-famous move, the French electorate, with nearly record high voter turnout, rejected the European constitution and triggered an earthquake that shook not only national politics but supranational politics as well.

After the failed effort to reconcile the European *demos* under a European constitution, a veer towards human rights – one of the premises of constitutionalism according to Article 16 of the 1789 Declaration – has begun to take place. This veer has been accelerated and facilitated by the case law of the European Court of Justice. Since the ’60s European Judges developed a remarkable awareness in protecting not only economic liberties but also fundamental rights which were included among the general principles of EU law⁵³, giving rise to an unwritten bill of rights⁵⁴. This awareness then was able to meet and interweave with the drafting of the Charter of Fundamental Rights, which, following the entry into force of the Lisbon Treaty, has become

⁴⁹ P.L. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010, p. 234; see also N. LUPO, *Parlamento europeo e parlamenti nazionali nella Costituzione “composita” nell’UE: le diverse letture possibili*, in *Rivista AIC*, 2014.

⁵⁰ B. DE WITTE, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. BEAUMONT ET. AL. (eds.), *Convergence and Divergence in European Public Law*, Oxford, 2002, p. 137 ss.

⁵¹ A. VON BOGDANDY, *The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe*, in *International Journal of Constitutional Law*, 2005, p. 295 ss.

⁵² Conseil constitutionnel decision 19 November 2004, 2004–505 DC. See, *ex multis*, G. CARCASSONNE, *Conseil Constitutionnel on the European Constitutional Treaty*, in *European Constitutional Law Review*, 2005, p. 293 ss.; X. Magnon, *Le traité établissant une Constitution pour l’Europe devant le Conseil constitutionnel (à propos de la décision n° 2004-505 DC du 19 novembre 2004)*, in *Revue française de droit constitutionnel*, 2005, p. 330 ss.; M. CARTABIA, *La natura del Trattato costituzionale europeo e la sua ratifica*, in *Il Politico*, 2004, p. 567 ss.

⁵³ Especially since the “Stauder-decision” (CJEU, Judgment of 12 November 1969, C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, ECLI:EU:C:1969:57). See *ex multis* C. PINELLI, *I diritti fondamentali in Europa fra politica e giurisprudenza*, in *Politica del diritto*, 2008, p. 45 ss.

⁵⁴ R. SCHÜTZ, *European Constitutional Law*, Cambridge, 2012.

a legally binding source of EU law concurring in enhancing the role of human rights in the processes of constitutionalization of the European Union.

In order to establish a European *demos* and restore a constitutional agreement, the EU tried to achieve its goals by fostering “integration through rights”⁵⁵ on the logic that, as Appiah has put it, political unity «depends on being able to agree about practices while disagreeing about their justifications»⁵⁶. Rights have been increasingly considered a sort of common language and the vector of political unity under a European *koine*, on the premise that the theory of human rights «enables us to set out the rights that people should enjoy in a context of diversity independently of the doctrines that make up that diversity»⁵⁷. The EU translated its search for identity into the human rights narrative, and has pushed for the harmonization of this narrative among Member States.

But this way of implementing human rights has had significant consequences. First of all, human rights language has a two-fold side effect: a universalizing and an individualizing one. These double effects can come into sharp conflict with each other, especially when the prioritization of interests does not take place within a political and representative dialogue.

Secondly, the human rights language speaks with the words of European courts. Therefore, the Charter of European Rights, in particular, empowered them as the main actors of legal globalization⁵⁸ and the fuel of European progress⁵⁹. Translating human rights into positive norms, justiciable and enforceable by European judges, has allowed the judges to fill the gaps left by the European governance which stands accused of being technocratic, elitist and politically incapable of solving the growing problems that demand resolution (among them, the economic crisis and the flow of migrants). Within this backdrop, judges have seized the opportunities offered by their role as fundamental rights’ guardians. In keeping with this, they have, on the one hand, clarified the European Court of Justice’s role, affirmed the principle of primacy, and defined the relationships between the Union and the Member States, and, on the other hand, they have focused on the well-being and rights of small groups and individuals, emphasizing principles such as the principle of non-discrimination and, as a consequence, complying with identity politics.

The convergence of these two effects meant that the essential human rights language, introduced in the European arena with universalizing and unifying intent, has begun to be used as a tool for claiming particular identities, whose recognition is increasingly demanded by individuals, or small groups of individuals, in front of the European courts. And through their judgments, these courts have compelled Member States to assimilate legal standards into their domestic constitutional systems⁶⁰. Through this intense judicial activism, European judges – sometimes properly and sometimes improperly – compelled Member States to assimilate into

⁵⁵ M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER, *Integration through Law: Europe and American Federal Experience*, Berlin, 1986.

⁵⁶ K.A. APPIAH, *Cosmopolitanism: Ethics in a World of Strangers*, cit., p. 70.

⁵⁷ P. JONES, *Human Rights and Diverse Cultures: Continuity or Discontinuity?*, in S. CANEY, P. JONES (eds.), *Human Rights and Global Diversity*, London, 2001, p. 173 ss.

⁵⁸ M. CARTABIA, *Separation of Powers and Judicial Independence: Current Challenges*, in <https://www.cortecostituzionale.it>, 2018.

⁵⁹ A. PIN, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, cit.

⁶⁰ R. HIRSCHL, *The Political Origins of the New Constitutionalism*, in *Indiana Journal of Global Legal Studies*, 2004, p. 71 ss. and L. ALEXANDER, *Brexit and the Future of Liberal Democracy*, in *Cardozo Law Review*, 2018, p. 845 ss.

their domestic constitutional systems legal standards able to affect national constitutional traditions and identities. These legal standards are indeed not always welcomed within Member States, in particular when the national identity clause is demoted in favour of the invoked right.

Nonetheless, the increasingly significant role played by European courts has modified politics within Member States and in Europe⁶¹, partly because the European courts' rulings impose substantive constraints on decision-makers as they have started to behave as authentic constitutional courts. Moreover, the courts' reasoning has progressively been adopted by the other European institutions and their already weak decision-making processes, concurring in the development of a «politics based on the addition of particular interests», which seems to take the shape of a “non-politics”⁶².

Aided by the fact that European citizens are troubling by mushrooming challenges, this trend boosts a sense of distrust that hampers solidarity⁶³, fires up disagreement, and fails to engender, in European citizens, a sense of loyalty to their institutions. The original goal of the European project seems to be fading from view. But, this feeling of separation strengthens the need for belonging and the need for a recognition of a place of belonging that is radically and inherently pertinent to each human being⁶⁴. This explains the resurgence of both the terms nation and nationalism, which globalism had appeared to have surpassed because, as Billing pointed out, «nationalism, far from being an intermittent mood in established nations, is the endemic condition (...) having a national identity (...) involves being situated physically, legally, socially, as well as emotionally: typically, it means being situated within a homeland, which itself is situated within the world of nations»⁶⁵.

7. The Hungarian affair: a nationalistic rehash within the identity politics' narrative

In the present day, we are witnessing a drive towards the re-nationalization of the European landscape. Resurgent nationalism and identity politics penetrating cultural policy-making are widespread phenomena in several European countries⁶⁶. Reacting to European weaknesses, new populist movements in Italy, Poland, Hungary and many other countries lean on demagogic narratives as the way to restore the place that historically allowed people to create and share strong identities,⁶⁷. These populist parties have different political agendas, but they share a critical approach to the European integration process, which they accuse of being driven by elites against the pure people. This is the reason why, as Mudde has argued, particularly within the current European context, the populist surge can be regarded as «an illiberal democratic response to decades of undemocratic liberal policies»⁶⁸.

⁶¹ L. CONANT, *Courts*, in C. HAY, A. MENON (eds.), *European Politics*, Oxford, 2017, p. 256 ss.

⁶² C. DELSOL, *La démocratie asphyxiée*, in *Valeurs actuelles*, 2008, p. 22; A. DE BENOIST, *The Current Crisis of Democracy*, in *Telos*, 2011, p. 7 ss.

⁶³ D. INNERARITY, *Democracy in Europe: A Political Philosophy of the EU*, cit., p. 98.

⁶⁴ C. TAYLOR, *Cross-purpose: The Liberal Communitarian Debate*, in N.L. ROSENBLUM (ed.), *Liberalism and the moral life*, Cambridge-London, 1989, p. 164 ss.

⁶⁵ M. BILLING, *Banal Nationalism*, cit.

⁶⁶ P. DUELUND, *The Impact of the New Nationalism and Identity Politics on Cultural Policy-making in Europe and Beyond*, in *CultureWatchEurope*, 2011, available at <https://rm.coe.int/16806a34c8>.

⁶⁷ J. TECHAU, *Nationalism destroys Europe – or does it?*, in <http://carnegieeurope.eu>, 2016.

⁶⁸ C. MUDDE, *Europe's Populist Surge: A Long Time in the Making*, in *Foreign Affairs*, 2016, p. 30.

Of the many examples offered by the European landscape, Hungary provides a particularly good illustration of this dynamic and offers a privileged vantage point. In what would seem to confirm Mudde's definition, Victor Orban explicitly referred to Hungary as an illiberal state or a non-liberal state in a 2014 speech outlining the features of his constitutional reform⁶⁹. In the same speech, Orban grounded his political and constitutional project directly upon a «specific, national, particular approach»⁷⁰. In sum, «Viktor Orban in Hungary was the first central European ruler to realize that nationalist sentiment could provide a base for an enduring connection between politicians and a mass public»⁷¹.

This kind of approach relies on a human need for national identity and is also fostered by the widespread diffusion of identity politics in Europe. Moving from this need, Orban exploits the people's resentment, which finds its voice in the form of the same identity politics' narrative and language, a «tell-tale possessive language»⁷² that reflects the struggle for recognition reclaimed in the public space by marking the differences from others⁷³. Against these «others», and in an attempt to prevent the jeopardization of the national identity, the Government and the Parliament have begun enacting various laws that are hardly necessary or proportionate to the aims to be achieved⁷⁴.

At this point, we can ask ourselves who the others are. Three examples may help in understanding otherness in Orban politics; three examples that correspond, through an obvious simplification, to three different narratives: the political narrative, the cultural/religious narrative, and the anti-elitist narrative. All three elements are used to imagine the new constitutional identity of Hungary. On the side of political identity, otherness refers to the communism and the left-wing parties of Hungarian history. Remarking on the removal of the anti-soviet hero Nagy's statue, whose memory Orban had celebrated with an impassionate speech during the celebration for the reburial of Nagy in 1989, Orban stated that he was one of the worst communists. Ironically, by enforcing a political identity against the communist hero, Orban produced the classic paradoxical effect so entrenched in identity politics. By removing Nagy's statue because of his political affiliation, Orban is weakening the history of Hungarian independence and eroding the national identity itself. Second, in order to restore a common ground useful for prompting national identity, Orban seeks to rediscover Hungarian Christian culture. Using religious tradition as identity politics⁷⁵, Orban often styles himself as the savior

⁶⁹ See the Viktor Orbán's speech at the XXV Bálványos Free Summer University and Youth Camp, Băile Tușnad, 26th July 2014 available at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnadtusnadfurdo-of-26-july-2014/10592>.

⁷⁰ Unlike what happened in Poland where informal tools of transformation were used to breach constitutional provision, «the Hungarian way was more formal, based on constitutional measures such as adoption and amendments of the constitution that have been abusive. (...) In effect, the Hungarian system is based on an illiberal constitution – 2011 Fundamental Law – whereas the Polish system is based on the delegitimization of the still-binding 1997 Constitution». See T. DRINÓCZI, A. BIEŃ-KACAŁA, *Illiberal Constitutionalism: The Case of Hungary and Poland*, in *German Law Journal*, 2019, p. 1140 ss.

⁷¹ C. CROUCH, *Post-Democracy and Populism*, in *The Political Quarterly*, 2019, p. 128.

⁷² M. CANOVAN, *Patriotism is not enough*, in *British Journal of Political Science*, 2000, p. 419.

⁷³ M. TUSHNET, *Comparing Right-Wing and Left-Wing Populism*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, New York, 2018, p. 639 ss.

⁷⁴ R. UITZ, *The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe*, in *VerfBlog*, 2017/4/05, available at <https://verfassungsblog.de>.

⁷⁵ A. BOZÓKI, Z. ÁDÁM, *State and Faith: Right-wing Populism and Nationalized Religion in Hungary*, in *East European Journal of Society and Politics*, 2016, p. 98 ss.

of both the Hungarian and European Christian roots questioned by the Islamic way of life. Religious tradition is explicitly rooted in the Preamble of the Hungarian Constitution (2011), which proudly celebrates King Saint Stephen as the builder of the Hungarian State as «a part of Christian Europe one thousand years ago». It also recognizes «the role of Christianity in preserving nationhood» and carries the promise «to preserve the intellectual and spiritual unity of (the) nation»⁷⁶. The last otherness is that of the “the corrupt elite”⁷⁷, considered to undermine democratic self-government. This elite encompasses non-elected agencies or institutions, academic scholars, and non-elected decision-makers such as judges, particularly constitutional judges, who are accused of having participated in the establishment of a democracy widely perceived as empty and elitist, capable of undermining the democratic exercise of the people’s political sovereignty.

The construction of the new constitutional identity that flows through these three narratives has had an impact on the constitutional ground, prompting several reforms. A few examples are sufficient. In order to protect the constitutional identity, the Parliament has passed several statutes, tiles in a wider anti-migration policy that has been validated thanks to a “misuse of constitutional identity”⁷⁸. Furthermore, the process has aimed to impose a new (illiberal) constitutional order, breaking with the previous one laboriously put in place⁷⁹, and has gone so far as to amend the recently-enacted 2011 Constitution for the seventh time in 2018. After an unsuccessful referendum and an equally vain attempt to amend the Constitution in 2016, in 2018 the duty of the state to «protect the constitutional self-identity of Hungary and its Christian culture» was introduced.

As asserted by Scheppele, «a constitutional frenzy» ushered in the election of the Fidesz government⁸⁰. Since 2010 Orban has put in place many constitutional changes, which have resulted in a constitutional capture: the separation of powers has been dismantled step by step, and some of the fundamental rights have been broken. One of the most dangerous set of amendments concern the Constitutional Court, whose independence and powers have been compromised. Fidesz initiated a de-judicialization process of lawmaking, probably due to the empowerment of constitutional judges pushed by juristocracy. It is worth noting that the election system of the constitutional judges was reformed, as well as the selection of the Court’s President who is now elected by the Parliament. Even more serious, the Fourth Amendment nullified all the case law of the Constitutional Court prior to the entry into force of the new Constitution, destroying the rule of law. Arguably driven by the intention of limiting the power of constitutional judges, Fidesz is sowing the seed of a «très insidieux “campanilisme constitutionnel”»⁸¹ which endangers the rule of law in Hungary.

⁷⁶ R. BRUBAKER, *Between nationalism and civilizationism: the European populist moment in comparative perspective*, in *Ethnic and Racial Studies*, 2017, p. 1191 ss.

⁷⁷ C. MUDDE, *The Populist Zeitgeist, in Government and Opposition*, 2004, p. 541 ss.; P.A. TAGUIEFF, *Political Science Confronts Populism: From a Conceptual Mirage to a Real Problem*, in *Telos*, 1995, p. 9 ss.

⁷⁸ G. HALMAI, *National(ist) constitutional identity?: Hungary’s road to abuse constitutional pluralism*, EUI Working Papers, 2017.

⁷⁹ D. LANDAU, *Abusive Constitutionalism*, in *U.C. Davis Law Review*, 2013, p. 189.

⁸⁰ K.L. SCHEPPELE, *Testimony, U.S. Commission on Security and Cooperation in Europe. Hearing on “The Trajectory of Democracy – Why Hungary Matters”*, in <https://lapa.princeton.edu>, 2013.

⁸¹ G. GRASSO, *Démocratie (libérale) contre démocratie non libérale: le cas des partis politiques européens et du respect des valeurs sur lesquelles se fonde l’Union européenne*, in *Constitutions*, 2018, p. 488.

Recently, the Hungarian Parliament (where Fidesz-KDNP alliance controls two-third of the seats) further stoked fears that Hungary is moving toward authoritarian rule inconsistent with the principle of separation of powers when it passed the so called “Enabling Act” in March 2020. The act grants Orbán uncontrolled and unlimited powers in order to ensure all necessary, extraordinary measures for preventing the consequences of the COVID-19 pandemic. In plenty of constitutional systems some political decisions made to address concerns associated with the COVID-19 outbreak and its effects have unquestionably strained constitutional provisions, and not only those involving fundamental rights and liberties but even those ensuring the separation of powers. Although some of these political decisions have prompted criticisms, especially where Constitutions do not envisage emergency measures in times of exceptional circumstances, in most constitutional systems they cannot be considered (or at least perceived as) a trend capable of affecting their democracy index because they appear to be attempts to tackle an unexpected and temporary, traumatic event. But in Hungary Orbán has, in a sense, taken advantage of this crisis, not letting it go waste⁸², and using it to pursue a project that has deeper and older roots. This umpteenth threat to the Hungarian rule of law prompted the EU to take its first timid stance, through statements issued by the Presidents of the European Commission and of the European parliament, and a letter written by some leaders of the EPP member parties to Donald Tusk, calling for the expulsion of Fidesz from EPP, and the resulting letter from Tusk to the EPP staff. If the party’s positioning of Fidesz in the European political context has hitherto suggested that Orbán strived for restoring Hungary’s sovereignty without exiting the European integration process, after two years of escalating tension among the parties of Europe’s center-right political alliance⁸³, this tension has reached its peak. Just a few weeks ago, the EPP majority voted in favor of a decision to change the procedural rules of the parliamentary group to allow for the suspension of a member party from their ranks. This vote prompted Fidesz to quit the EPP Group and pushed it to look for new allies in the European Parliament.

Another more recent effort to counteract the backsliding of rule of law in Hungary could be represented by the new rule of law mechanism included in the “Regulation on a general regime of conditionality for the protection of the Union budget” adopted in December 2020. This policy instrument aims at protecting the financial interests of the Union in accordance with the general principles embedded in the Treaties, in particular the values set out in article 2 TEU, and provides protection against «breaches of the principles of the rule of law in the Member States»⁸⁴.

If, on the one hand, the Regulation and «the swift introduction of conditionality seems to be Europe’s last chance to change the course of Hungarian and Polish events»⁸⁵, on the other hand, this mechanism – a compromise solution needed to overcome the Hungarian and Polish

⁸² K.L. SCHEPPELE, *Orbán’s Emergency*, in *VerfBlog* 2020/3/29, available at <https://verfassungsblog.de/orbans-emergency/>.

⁸³ In March 2019 Fidesz has been suspended from membership of the EPP alliance. Nonetheless, the suspension has had a negligible impact on the positions of Fidesz’s members in the European parliamentary group.

⁸⁴ Differently from the original proposal (2018), the Regulation adopted on December 2020 offers more detailed definition of the rule of law principles and gives examples of breaches.

⁸⁵ A. BARAGGIA, *The New Regulation on the Rule of Law Conditionality: a Controversial Tool with Some Potential*, in *IACL-AIDC Blog*, 2020/12/22, available at <https://blog-iacl-aidc.org/2020-posts/2020/12/22/the-new-regulation-on-the-rule-of-law-conditionality-a-controversial-tool-with-some-potential>.

veto – has been severely criticized as a non-victory for the rule of law in Europe and as yet another blunt weapon in the European institutions’ arsenal⁸⁶.

Notwithstanding these attempts to recompose the clash between the European institutions and the Hungarian legal system, it seems that the constitutional order pushed by Orban needs to fuel this disagreement, by reversing the Holmesian statement according to which «Constitution is made for people of fundamentally differing views»⁸⁷. After resolutely pushing Hungary as an illiberal democracy, Orban then demands that Hungarian uniqueness be recognized by the European liberal democratic regime, exacerbating the clash with European institutions. Orban’s new thick order (based on the struggle for national identity) directly clashes with the thin, human rights-based, liberal democracy envisaged by EU. Orban is using identity nationalism within the language of identity politics to create a new political order which does not make the European liberal order as «a central element of state organization»⁸⁸. While the strengthening and protection of national identity was indicated in 2004 as one of the major reasons why Hungary should take part in the European project, nowadays it may also turn out to be what could compromise the constitutional agreement that ties the EU and Hungary pursuant to Article 7 TEU⁸⁹.

8. Concluding remarks

The intertwined relationship between cosmopolitanism and supranationalism in the global postmodern age has changed the sociological and political/constitutional framework of our societies. From a sociological perspective, by eroding the concept of nation, postmodernity has devitalized the traditional place where, for many centuries, people found public recognition of themselves and, as a consequence, this process has prompted the rise of identity politics within the global market of individual identities, enflaming political disagreement. Many scholars have recently criticized identity politics: Lilla has argued that liberalism needs to push back the identitarian fight in order to rediscover the true meaning of the term “we”⁹⁰. And Appiah has directly attacked the concept of identity, defining it as «the lie that binds us»⁹¹. Identities are perceived as social constructs⁹², which compel us to think about ourselves as components of a monolithic community opposed to other communities, whereas

⁸⁶ K.L. SCHEPPELE, L. PECH, S. PLATON, *Compromising the Rule of Law while Compromising on the Rule of Law*, in *VerfBlog*, 2020/12/13, available at <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law>.

⁸⁷ *Lochner v. New York*, 98 U.S. 45, 75-6 (O.W. Holmes dissent).

⁸⁸ Viktor Orbán’s speech at the XXV Bálványos Free Summer University and Youth Camp, Băile Tușnad, 26th July 2014.

⁸⁹ *Ex multis* see B. NASCIBENE, *Lo Stato di diritto e la violazione grave degli obblighi posti dal Trattato UE*, in *Eurojus*, 2017.

⁹⁰ M. LILLA, *The Once and Future Liberal. After Identity Politics*, New York, 2017.

⁹¹ K.A. APPIAH, *The Lie that Bind Us. Rethinking Identity*, New York, 2018.

⁹² J.D. FEARON, *What Is Identity (As We Now Use the Word)?*, California, Stanford University, 1999, available at <https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>. The Author describes the modern concept of identity as not given by nature but socially constructed insofar it is «a set of persons marked by a label and distinguished by rules deciding membership and (alleged) characteristic features or attributes» (p. 2).

cosmopolitanism should have made it clear that individuals possess multiple coexisting identities⁹³.

Both scholars have depicted the rise of identity politics as one of the main causes of the current crisis of liberal democracies. But whilst the misuse of identity as an instrument to make claims, as well as a tool of social fragmentation, puts liberal democracies under strain, the concept of identity still endures as a key component of our societies, because the «modern democratic state demands a “people” with a strong collective identity» and «requires a high degree of common commitment, a sense of common identification»⁹⁴. In other words, the concept of identity/identities is strongly related to the struggle for public recognition and, as Taylor has pointed out, «due recognition is not just a courtesy we owe people. It is a “vital human need”»⁹⁵. To consider identity as a human need is crucial for our societies: «people will never stop thinking about themselves and their societies in identity terms. But people’s identities are neither fixed nor necessarily given by birth. Identity can be used to divide, but it can also be used to unify. That, in the end, will be the remedy for the populist politics of the present»⁹⁶.

Therefore, on political/sociological grounds, the tough responsibility we need to embrace is finding a new theoretical framework that helps to settle the identity disagreement. A closer look at Anderson’s definition of nation as an imagined community could be helpful: several authors misunderstand this definition, using the term “imagined” as synonym of the term “fictitious”. In hindsight, Anderson’s theory emphasizes that the terms nation or nation-ness cannot be described as mere ideology because they are unique cultural constructs, capable of answering a stratified set of human and social needs. Of course, this does not mean that we need to look at the past with nostalgia and celebrate the virtues of the nation-ness. Using Anderson’s narrative, instead, the challenge that the present and the future have in store for us is to imagine a new political community⁹⁷, where the sense of identity can take roots. History teaches us that, if we fail to accomplish this task, nationalism could emerge from the ashes in a new, but no less scary form. The European integration process could be seen through this lens. Created to counteract Second World War nationalisms, the European process tried to establish a supranational community capable of restoring peace and prosperity among Europe by providing people with a unifying identity.

From a political/constitutional perspective, the chief effort to build a pan-European identity is represented by the drafting of a European Constitution intended to create a European *demos*, which moves from a common origin but looks at a community of destiny and values to which all the manifold European citizens belong⁹⁸. The search for a balance between national identities and the unity among Member States is a distinguishing feature of the European integration process⁹⁹. Since the Maastricht Treaty, the national identity clause has been included

⁹³ See K.A. APPIAH, *The Lie that Bind Us. Rethinking Identity*, cit.

⁹⁴ C. TAYLOR, *The Meaning of Secularism*, in *The Hedgehog Review*, 2010, p. 30.

⁹⁵ C. TAYLOR, *The Politics of Recognition*, cit., p. 26.

⁹⁶ F. FUKUYAMA, *Against identity politics*, in <https://www.foreignaffairs.com>, 2018.

⁹⁷ See A. CANTARO, *L’allargamento dello spazio giuridico ed economico: osservazioni preliminari*, in *Studi Urbinati*, 2005, p. 461.

⁹⁸ See A. VON BOGDANDY, *The European Constitution and European identity: text and subtext of the Treaty establishing a Constitution for Europe*, in *International Journal of Constitutional Law*, 2005, p. 295 ss.

⁹⁹ See *ex multis* P. BILANCIA, F.G. PIZZETTI, *Aspetti e problemi del costituzionalismo multilivello*, Milano, 2004.

in the European constitutional framework in order to alleviate some Member States' fears, particularly those concerning a loss of national identity and of sovereignty because of the supranational integration process¹⁰⁰. Since then, the national identity clause, which should have become a constitutional limit on the expansion of European competences, has followed the path of European integration: first it was linked to the subsidiarity mechanism in the Amsterdam Treaty; then, in 2001, it was introduced in the Preamble of the European Charter of Fundamental Rights; finally, it was reformulated by Article 4(2) of the Lisbon Treaty as inherent in the Member States' fundamental political and constitutional structure. In sum, the European challenge was to shift the need for a common identity away from psychological and sociological grounds and onto normative ones¹⁰¹. But «this need not lead us to abandon the idea that national identities can be multiple and encapsulate cultural identities as well» because «the very structures of many political and constitutional arrangements are fundamentally an expression of cultural phenomena»¹⁰².

After the failure of the constitutional Convention and in the face of the precarious balance achieved between national identity and European unity, European institutions have leaned heavily on the universalizing language of human rights in order to fill the lack of European identity with a common language. It is not our intent here to question the pivotal task played by human rights enforcement, which must not be abandoned because it is one of the headstones of the unity among the different European national identities. Nevertheless, on methodological grounds, this choice risks entrusting judges with the task of solving critical political questions. It could also transform the dialogic quest for an identity into the dialectic language of equality and fairness, inflaming political disagreements within the fragmented European landscape. Moving the claims for identity recognition before courts has urged judges to embrace a dialectic approach aimed at reaching a solution which prevails over the other possible solutions. This happens even if a globalized society, where multiple identities coexist, would instead require a dialogic approach following which different solutions can find their own place, and where differences can even remain unsolved¹⁰³.

This multilevel system of fundamental rights protection has achieved some undeniable gains (such as the harmonization of Member States' laws in light of fundamental rights). At the same time, however, it has perhaps overshadowed the constitutional issue concerning the relationship among European powers. By empowering non-elected judges and weakening the democratic decision-making process, it leaves «the place of power too empty»¹⁰⁴. As Luciani has said, a trend towards the fragmentation and dilution of responsibilities or decisionmaking

¹⁰⁰ We can remember here the famous Margaret Thatcher speech at National Press Club (the path to power), 26 June 1995 available at: <https://www.margaretthatcher.org/document/108344>. Among the several scholars see M. CLAES, *National Identity: Trump Card Or Up For Negotiation?*, in A. SAIZ ARNAIZ, C.A. LLIVINA (eds.), *National constitutional identity and European integration*, Cambridge, 2013, p. 109 ss.

¹⁰¹ According to P. FARAGUNA, *Constitutional Identity in the EU—A Shield or a Sword?*, in *German Law Journal*, 2017, p. 1620, «the Treaty of Lisbon gave a remarkable contribution for the enrichment of the legal – and more precisely, constitutional – meaning of the identity clause, by weakening sociological and historical reference of the clause».

¹⁰² L. BESSELINK, *National and constitutional identity before and after Lisbon*, in www.utrechtlawreview.org, 2010, p. 44

¹⁰³ C. MCCRUDDEN, *Quando i giudici parlano di Dio*, Bologna, 2019, p. 195.

¹⁰⁴ L. CORRIAS, *The empty place of European power: contested democracy and the technocratic threat*, in *European Journal of Public Law*, 2017, p. 482 ss.

makes it more difficult to precisely attribute of responsibility and to exercise control powers. It eases both the relocation of decision-making powers in favor of politically irresponsible actors (technical authorities and the Courts), and the postponement of political responsibilities¹⁰⁵.

From this perspective, «constitutional lawyers need to recapture the power (...), subordinating it to the law, and underline the complex relationship between power, law and rights, as well as revealing the modest democratic performance of decision-making processes within multilevel constitutional systems. They need to shy away from the risks of an *irenical* constitutionalism that merely celebrates the human rights triumphs achieved thanks the role played by courts, and to come back to a *polemic* constitutionalism confronting power»¹⁰⁶. In other words, we need to rediscover the very ancient wisdom of the “old” constitutionalism, born to protect people’s liberties through the vertical and horizontal division of powers¹⁰⁷.

Restoring the separation of powers is obviously quite important in Hungary, where Orbán’s reforms are diminishing judicial independence and undermining the basic rule of law. But the EU itself also seems to suffer from the lack of a stable separation of powers. As Giuliano Amato ironically commented during the European Convention, «Montesquieu never went to Brussels». The recognition of the pivotal role played by the separation of powers «did not affect the way the political process operated and how it aggregated the different interests at stake»¹⁰⁸.

Since Amato made this statement, many things have changed. For many decades, because of its functionalist approach, Europe was described as a governance without government. Now, however, it seems that «the functionalist era is over»¹⁰⁹. The Lisbon Treaty itself tried to make the EU more democratic, establishing a clearer division of powers between the EU institutions and the Member States, and building a new institutional set-up, but the ongoing process of reforming European institutions is doomed to continue. Despite all the endeavors, the European Treaty fails to establish clear boundaries between the Parliament, the Council and the Commission, and the EU constitutional framework seems to be based «on the principle of the balance between powers rather than on the principle of separation of powers»¹¹⁰.

Within this backdrop, Europe is still struggling to fill the gap between the European institutions and its own people. As stated in 2017 by the Resolution of the European Parliament on possible evolutions of and adjustments to the current institutional set-up of the European Union, «it is now time for a profound reflection on how to address the shortcomings of the governance of the European Union by undertaking a comprehensive, in-depth review of the Lisbon Treaty»¹¹¹. Reforming European governance is vital to face the current and future

¹⁰⁵ M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, in *Rivista AIC*, 2006.

¹⁰⁶ M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, cit.

¹⁰⁷ G. BOGNETTI, *Dividing powers*, Torino, 2016, p. 60.

¹⁰⁸ M.P. MADURO, *How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union*, in J.H.H. WEILER ET AL. (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, 2004; P. PONZANO, *Les institutions de l’Union*, in G. AMATO H. BRIBOSIA, B. DE WITTE (eds.), *Genèse et destinée de la Constitution européenne*, Bruxelles, 2007, p. 441.

¹⁰⁹ See B. CARAVITA, *Il dibattito sul futuro dell’Europa: quali politiche e quale governance per l’Unione dopo le elezioni europee del 2019 e dopo Brexit*, in *Federalismi.it*, 2019, p. 4.

¹¹⁰ See G. DE VERGOTTINI, *Forma di governo dell’Unione europea*, in *Enciclopedia Treccani-XXI Secolo*, 2009, available at https://www.treccani.it/enciclopedia/forma-di-governo-dell-unione-europea_%28XXI-Secolo%29/.

¹¹¹ See *European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union* (2014/2248(INI)) https://www.europarl.europa.eu/doceo/document/TA-8-2017-0048_EN.pdf, para. 1.

challenges that, «cannot be handled by single Member States, but only by a joint response from the European Union»¹¹². But this joint response also requires a political system capable of settling the potential disagreements among Member States and restoring a proper balance between unity and diversity.

¹¹² *Ivi*, Para. C.