



Dipartimento di Scienze Politiche

Cattedra: European Union Law

Titolo
The Legal Nature of the European Union: a Federal Approach

Relatore

Prof. Roberto Matrianni

Candidato

Giulio Bonechi

Matr. 071082

Anno accademico
2014/2015

Index

Introduction.....	pag.3
1. The Federalist’s ideology.....	pag.4
1.1 The Birth of Federalism.....	pag.4
1.2 Federalism in the United States.....	pag.8
1.3 The Federalist No. 39.....	pag.11
2. The European Constitution.....	pag.14
2.1 Historical Background.....	pag.14
2.2 The European’s Constitution main features.....	pag.18
2.3 Constitutional’s implications.....	pag.21
3. The European Union under a federal view.....	pag.24
3.1 The Foundational dimension.....	pag.25
3.2 The Institutional dimension.....	pag.27
3.3 The Functional dimension.....	pag.29
4. The Legal Nature of the European Union.....	pag.31
4.1 The Maastricht Decision.....	pag.32
4.2 The “Sui Generis” classification.....	pag.35
4.3 The European Union as a Federation of States.....	pag.37
Conclusion.....	pag.40
Bibliography.....	pag.41
Riassunto in lingua Italiana.....	pag.46

Introduction

The aim of this dissertation is to classify and analyse the legal nature of the European Union under a federal approach.

The history of the Union is complex and full of political struggles. For decades European scholars and not have debated regarding the legal nature of the European Union. The two main theories that have predominated the debate are the “sui generis” theory and the “international law” theory. Both theories, even if they differ in their contents, are based on the old European constitutional concept of the indivisibility of sovereignty. According to the European constitutional tradition sovereignty is one and indivisible.

This out-dated ideology had obscured the real nature of the Union excluding any other analytical approach.

In order to understand and analyses the legal origins of the Union I have used the analytical tools gave us by James Madison in his Federalist No. 39. The American Constitutional tradition saw in the European Union a compound structure that collocates the Union in between a national and international sphere.

The European constitutional tradition, based on the idea of absolute sovereignty, could conceive a Union of States just as a Federal State or as an international organization. This reductionism censored the very idea of a Federation of States

The European Union cannot be conceived within the logic of indivisible sovereignty. After analysing its nature under different analytical perspectives, I will explain why the Union can better be understand as a “Federation of States”.

The Federalist's ideology

1.1 The birth of Federalism

The ideology of federalism, as we understand it, was born during the time of the 18th century American and French revolutions. Essentially it was form in contraposition to the doctrine of the absolute sovereignty of the State ascribable to Bodin and Hobbes. As the famous Italian jurist Norberto Bobbio has analysed, the process of the construction of the Federal State seems to be symmetrically inverse to that one of the construction of a national State based on absolute sovereignty. The Federal State arises from the limitations of the internal national sovereignty, resolvable by a decentralisation of the power, and the external ones, which could be avoided through the creation of a supranational political community¹.

Until the Second World War, the federalism have not yet assumed the physiognomy of an ideology in the sense of a system able to globally oriented the political behaviours. It has rather been considered as a technique able to organize the power ascribable to single forms of States.

The founder of the Federal State's theory has been commonly accepted to be Alexander Hamilton, one of the three authors of the Federalist Papers. According to Hamilton, only a federal government can protect and guaranteed to its citizens the necessary security for the preservation of peace. As he stated in the Federalist No. 3, only a "cordial Union, under an efficient national government, affords...the best security that can be devised against hostilities from abroad"². Hamilton claimed that only the federal Constitution, which creates two different levels of government, a federal one and a unitary one, both of them owning autonomous competences, could guaranteed the sufficient liberties for the citizens. Thus the unification of more States within the same government did not only guarantees security from possible internal or external threats, but also secure freedom for its citizens.

Hamilton thought that the 1787's federal Constitution was the only instrument able to satisfy the institutional needs of the newly born American State, but he did not thought that his principle could be taken out of its geographical context.

¹ "Norberto Bobbio 'Il federalismo nel dibattito politico e culturale della Resistenza, in L'idea della unificazione europea dalla Prima alla Seconda Guerra Mondiale'" *Fondazione Einaudi, 1975*

² "Alexander Hamilton 'The Federalis No. 3'"

Actually, the idea of a federation of States, especially that one of a federal Europe, was mainly considered as an utopia. In the 18/19th century Europe the concept of a national unitary State was absolutely prevalent at the point to be the central feature of the European constitutional tradition. The sovereignty is one and indivisible.

The idea of a European Union was at the time just a moral idea pursued by few intellectuals, rather than a concrete political platform able to create a political movement. Within those intellectuals it is worth to mention Viktor Hugo and his famous speech at the International Peace Conference held in Paris in 1849. He addressed the following speech to the representative of the States sitting at the conference: “A day will come when you France, you Russia, you Italy, you England, you Germany, you all, nations of the continent, without losing your distinct qualities and your glorious individuality, will be merged closely within a superior unit and you will form the European brotherhood...A day will come when we shall see those two immense groups, the United States of America and the United States of Europe”³.

The few authors who have made the European Union as the central point of their political projects showed, most of the time, insufficient comprehension of the institutional exigencies of a federation. This is the case of Saint-Simon and Thierry who have published in 1814 a booklet called “On the Reorganization of European Society”. The project “suggests that England should have a two-thirds majority in an Anglo-French parliament”⁴, which clearly did not capture the essence of federalism.

Few years later, in 1834, Giuseppe Mazzini made an attempt to the unification of the European population with the creation of the “Young Europe”, yet without success.

However, even if in the 19th century just few intellectuals endorsed the idea of a European Union or a possible European federation, it is clear that a European sentiment was slowly increasing in the Continent.

After the Great War and the devastations that it brought, a young Austrian called Richard Nikolaus von Coudenhove-Kalergi founded the Paneuropean Union, becoming in this way a pioneer of the European integration. His manifesto, “Pan-Europa”, published in 1923, can be considered as the first popular political movement for a united federal Europe. Kalergi advocated that there would be an imminent threat

³ “Viktor Hugo, Speech delivered at the ‘International Peace Conference’” *24 August 1849*

⁴ “Thomas P. Boje, Bart van Steenbergen, Sylvia Walby ‘European Societies: Fusion or Fission?’, pp.20” *Routledge, 1999*

by Russia and thus against that danger the only solution would be the formation of a European Union. Moreover there was an economic threat since the disunited economy of Europe could not be competitive in comparison to the closed economy of the United States. “Against this danger there is only one salvation: merger of the European continent to a duty association, abolition of tariffs between European States and the creation of a pan-European economic area”⁵. Even if Kalergi had not succeeded in his project due to the re-born of national movements, especially the national-socialist party, and the following outbreak of the Second World War, he contributed in a concrete way at the European integration process.

Another major leap was taken by the Noble peace prize Aristide Briande. He advocated for a sort of federal Europe during his speech to the Assembly of the League of Nations held in Geneva in 1929. He stated that within the “peoples who are geographically grouped as the peoples of Europe, there must be some sort of federal link; these peoples shall have the opportunity at any time to contact, discuss their interests, take joint resolutions”⁶.

However, it is only in 1941, with the “Ventotene Manifesto”, written by Altiero Spinelli and Ernesto Rossi, which arouse a concrete ideology of European federalism. For the first time, with the “Ventotene Manifesto”, the European Federation becomes a concrete political goal, which its realization could be soon reach through an organize political fight. According to Spinelli and Rossi, the old European system of States, based on the balance of power, has fallen with the affirmation of Germany as an aggressive power. The result has been the arise of the two World Wars, expression of the inability of the European States to coexist without entering into conflict. Since the States are in continuous tension they are forced to organize themselves exclusively in function of military exigencies. Thus, on one hand the States have to centralize their power through authoritarian policies, and on the other hand, they are force to direct their economic resources into military expenditures, at the expense of the citizens. The Second World War, according to Spinelli and Rossi, has activated a revolutionary crisis that would lead to the final solution of the problem: the overcoming of the national States⁷. Thus according to the authors the crisis of the

⁵ “Richard Nikolaus von Coudenhove-Kalergi ‘The Pan European Manifesto’” 1923

⁶ “Proceedings of the Tenth Ordinary Session of the Assembly, Sixth Plenary Session, pp.51-52”
Thursday 5 September 1929,

⁷ “Flavio Terranova ‘Il Federalismo di Mario Albertini’” *Facoltà di Scienze Politiche dell’Università di Pavia, 2003*

nation-state model would make concrete the political goal of the creation of a European Federation, and this was not only possible but also necessary.

However, contrary to the provisions of the Ventotene Manifesto, the end of the Second World War did not lead to the creation of the European Federation, but contrary lead to the restoration of the nation-States.

Nonetheless, this had not stopped the European integration process. In 1946, Winston Churchill delivered a speech at the University of Zurich calling for the creation of a “European family in a regional structure...the United States of Europe, and the first practical step will be to form a Council of Europe”⁸.

The United States of Europe had never been created, however from the beginning of the 50's. and especially with the ratification of the Treaty of Rome, 1957, the European integration process has finally started. The history of the European integration, and following that one of the European Union, is full of political struggles and controversy. The Treaty of Lisbon, 2009, is the last of the most important treaties of the European Union. However, even after sixty years of political fights, reforms, and treaties, the configuration of the European Union is still on debate. Before analyzing the Union under a federal approach, let's look more into detailed at the American federal tradition.

⁸ “Winston Churchill, Speech delivered at the University of Zurich” *19 September, 1946*

1.2 Federalism in the United States

The federal tradition in the United States has emerged in 1787 with the adoption of the American Constitution. The 1776 “Articles of Confederation”, drafted after the seven years war, created a “first union of states”⁹ and established a national government. However, the document presented some difficulties, especially in terms of administration, and thus it was opted to hold a new Convention. The main issue was to “render the Constitution of the Federal Government adequate to the exigencies of the union”¹⁰, practically to create a “more perfect union”.

During the “Annapolis Convention” (the “Meetings of Commissioners to Remedy Defects of the Federal Government”¹¹, Sep. 11-14, 1786) it was called for a constitutional convention in order to debate amendments to the “Article of Confederation”.

The Constitutional convention was held in Philadelphia, on May 14, 1787. Fifty-five delegates representing the thirteen newly independent States attended the meetings of the Convention at the Independence Hall for almost sixteen weeks. The main debate centred on how the central power should be allocated: those in favour of a strong central government were the federalists, whereas the opponents who retained that the States should maintain their sovereignty were the anti-federalists. The States were proponents of a view or another in base of their experience of republican government since 1776: “those where representative government had been at least a qualified success were the more jealous of their independence. Conversely, states where independence had not been so successful...tended to federalism”¹².

The draft of the Constitution was for this reason hard to realize, the contrasts were strong and compromises were difficult to find. The result was a mix of the key principles derived from the British tradition and the State constitutions. Central attention was given to the main guarantor principles of democracies such as the separation of powers, the independence of the judiciary and to the establishment of representative institutions that are accountable to the people.

⁹ “Lawrence Goldman ‘The Federalist Papers, pp-xii’” *Oxford World’s Classics, 2008*

¹⁰ “Robert Middlekauff ‘The Glorious Cause: The American Revolution 1763-1789’” *Oxford History of the United States, vol. ii, 1982*

¹¹ “Winton U. Solberg ‘The Constitutional Convention and the Formation of the Union, pp.55’” *Board of Trustees of the University of Illinois, II ed., 1990*

¹² “Lawrence Goldman ‘The Federalist Papers, pp-xviii’” *Oxford World’s Classics, 2008*

After almost four months of debate, fifty-two out of the fifty-five delegates signed the final text of the Constitution: all excepts from “two Virginians – Edmund Randolph and George Mason – and a Massachusetts man – Elbridge Gerry”¹³ who refused to sign it. Once the text was signed, the delegates decided that before to be passed, the Constitution has to be approved by popularly elected ratification conventions. The fifteenth Mr Randolph’s resolution presented in the “Virginia Plan” states that the final text of the Constitution has “to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon”¹⁴.

The Philadelphia Convention determined in the art. VII of the Constitution that “the ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the Same”¹⁵. On 28th September 1787 the Congress decided to send the final text to the States for their considerations.

From this moment the debate between anti-federalists and federalists became stronger and determined the result of the ratification conventions.

Anti-federalists’ main ideas were published into various journals among which the most famous were the series of “Brutus”, “Cato”, “Centinel”, and the “Federal Farmer” letters. They believe that a centralisation of power could only led to a monopolisation of it, which possibly could led to a form of tyranny. For this reason they started a campaign against the Constitution with the main aim of not losing their national sovereignty. Moreover, they thought that a centralized government can not resolved the various local problems and thus a republican government is only possible in small territories. As James Winthrop of Massachusetts wrote in the “Agrippa letter”: “The idea of an uncompounded republic, on an average one thousand miles in length, and eight hundred in breadth...is in itself an absurdity, and contrary to the whole experience of mankind”¹⁶.

¹³ “Joy Hakim ‘From Colonies to Country: 1735 – 1791, pp. 182’” *Oxford University Press, III ed., 2003*

¹⁴ “Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, Resolution no. 15” *May 29, 1787*

¹⁵ “The United States Constitution, art VII”

¹⁶ “James Winthrop ‘The Agrippa Letters’” quoted in “Lawrence Goldman ‘The Federalist Papers, pp-xiii’” *Oxford World’s Classics, 2008*

On the other hand, the main ideas of the federalists were regrouped into a single booklet called “The Federalist Papers” written by Alexander Hamilton, James Madison, and John Jay. The main aim of the Federalist was to defend and support the Constitution in all of its aspects and functions. The first essay, written by Hamilton, set out the agenda: all together the papers were intended to show how weak was the Confederacy and thus why the Union was the best alternative. Madison’s Federalist No. 37 explains how the Philadelphia Convention tried to combine “the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form”¹⁷, highlighting the main aim of the Constitution and the Federalist itself: “to strike a balance between freedom, authority and order”¹⁸.

After a strong debate in the State of New York the federalists won. Nine States had signed the Constitution, respectively: Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia and New York.

The Federalist Papers had a great influence in the vote in the State of New York, however the reasons for why they have become so important are for their contents.

In order to proceed with the analysis of the legal nature of the European Union it is useful to look upon the Federalist No. 39 by Madison. The theoretical tools of this paper will be the bases in order to understand and analyse the European Union under a federal approach.

¹⁷ “James Madison ‘The Federalist No. 37’”

¹⁸ “Lawrence Goldman ‘The Federalist Papers, pp-xxxix’ *Oxford World’s Classics, 2008*”

1.3 The Federalist No. 39

The Federalist No. 39, written by James Madison, is the Federalist Paper that best shows and analyses the dual character of the 1787 Federal Constitution. In fact, according to Madison, the American Constitution had created a Union that stands in between a national and international structure. The United States is thus based on a government “of a mixed character...neither a national nor a federal Constitution, but a composition of both”¹⁹.

In order to explain the national and international/federal character of the 1787 Constitution, Madison divided its analyses into three parts. The first part deals with the origins and the nature of the Constitution; Madison tries “to ascertain the real character of the government in question”. The second part deals with the composition and the structure of the institutions, especially the House of Representatives and the Senate. And finally, the last part investigates the powers of the federal government, trying to define them as national or international in character. In order to simplify the analyses we can call the three dimensions of study as the foundational, the institutional, and the functional.²⁰

In the first part, Madison demonstrates that the act that established the 1787 Constitution is a federal act, and thus the Constitution as to be understand as international in character. Each State in signing the Constitution operates as an independent sovereign body that could be bound only by its voluntary will. The ratification, in fact, has to be pursued by “the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong”²¹. However, the legal nature established by the Federal Constitution differs from that one of an international organization. Whereas in the latter form are the State legislatures that are charged to ratify the document, as it happens with most of the international treaties, the 1787 Constitution had to be ratified by the State people. The new legal order settled is international in character but strictly differs from that one of an international organization.

In the institutional dimension Madison analyses the structure of the Constitution focusing on the two branches of the Union’s legislature: the House of Representatives

¹⁹ “James Madison ‘The Federalist No. 39’”

²⁰ “Robert Schütze ‘European Constitutional Law’” *Cambridge University Press, 2012*

²¹ “Lawrence Goldman ‘The Federalist Papers, pp-190’” *Oxford World’s Classics, 2008*

and the Senate. The former body “derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State”²². Thus the House of Representative represents the national branch of the government and not the federal one. The Senate, on the other hand, derives its powers from the States as equal subjects, which are represented on an equal basis as in the pre-existing Congress. For this reason Madison views the Senate as an international organ based on an international nature. According to the author then the new government presents “at least as many federal as national features”²³.

Having analysed the dual character of the government, Madison demonstrates in the foundational dimension that also the powers that the new government exercises manifest a dual feature. If we examine those powers in relations to their scope they certainly cannot be considered national. Their effects can be extended only to a limited number of objects, leaving in this way residual powers to the single States. In this way the States maintains their part of sovereignty that allows them to operate in all the other competences as they prefer. However, the nature of the powers of the central government is national in character and operates directly on the individual citizens. “The operation of the government on the people in their individual capacities, in its ordinary and most essential proceedings, will, on the whole, designate it...a national government”²⁴.

The 1787 Constitution then is neither fully national nor international, but a mixed of both. The central government stayed in this way on a sort of “federal middle ground”²⁵. In its foundational dimension it is international instead of national; in the structure of the legislature bodies it is partly national and partly international; in the nature of its powers it is national whereas in the extent of them it is international.

The innovation of the American Constitution has been thus the introduction and the combination of two systems that are opposed one another. This could have been reachable only through the division of the sovereignty. Each State in signing the Constitution agreed in ceasing part of its sovereignty, which does not mean losing all the sovereignty. Both the central government and the single States have their autonomy and exercise their powers in conformity with their competences. According

²² “James Madison ‘The Federalist No. 39’”

²³ “Lawrence Goldman ‘The Federalist Papers, pp-190’” *Oxford World’s Classics*, 2008

²⁴ “James Madison ‘The Federalist No. 39’”

²⁵ “Robert Schütze ‘European Constitutional Law’” *Cambridge University Press*, 2012

to Alexis de Tocqueville, the main aim of the American Constitution “was to divide the sovereign authority into two parts”: “in the one they place the control of all the general interests of the Union, in the other the control of the special interests of its component States”²⁶.

It was this double character, this mixed of two different systems, possible only through the division of the sovereignty, which became to be identified with the federal principle. “Federalism implied dual government, dual sovereignty, and also dual citizenship”²⁷.

²⁶ “Alexis de Tocqueville ‘Democracy in America’” *Penguin Putnam Inc., 2004*

²⁷ “Robert Schütze ‘European Constitutional Law, pp.53’” *Cambridge University Press, 2012*

The European Constitution

2.1 Historical Background

As soon as in 1951 the Treaty precursor of the European Union has been drafted, the “European Coal and Steel Community”, the history of the Union has been characterized by political struggles in order to support a better integration and cooperation between Member States and overcome the excess and complexity of the European treaties.

However, the multitude and complexity of the legislations had made the decisional process and the institutional operations hard to realize, usually with uncertain consequences full of misunderstandings.

In 1957 European leaders such as Jean Monnet, Gaetano Martino and Paul-Henri Spaak met in Rome in order to sign the so-called “Treaty of Rome”. The main feature of the Treaty has been the creation of two additional communities: The European Economic Community and the European Atomic Energy Community²⁸.

The three Communities, ECSC, Euratom, EEC, lived in relative independence until the 1967 with the enter into force of the “Merger Treaty” that formally combined their executive bodies creating in this way a single commission.²⁹

“A major organizational leap was taken with the 1992 Maastricht Treaty that integrated the three Communities into the European Union”³⁰. The Treaty established a Union based on a “supranational” character in which “every national of a Member State shall be a citizen of the Union”³¹. Moreover, it created two intergovernmental pillars: the “Common Foreign and Security Policy” (CFSP) and the “Cooperation in Justice and Home Affairs”; and it established the European Economic and Monetary Union.

With the entered into force of the Maastricht Treaty, it was added at the “Treaty on the Functioning of the European Union” (TFEU, Treaty of Rome) the “Treaty on European Union” (TEU).

²⁸ “Robert Schütze ‘An introduction to European Law’” *Cambridge University Press, 2012*

²⁹ “Brussels Treaty (European History 1965-93)” *Britannica Online Encyclopedia*

³⁰ “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000’” *Routledge, 2000*

³¹ “Consolidated version of the Treaty on European Union - Art. 9”

For a decade, among the various European theorists and officials, has developed the idea that a document more concise and consolidated, which would include all the Treaties of the European Union, would offer a clearer and more transparent solution. The idea was to create better opportunities in order to improve the coordination of the European policies and to ensure a better understating for the European citizens of the functions of the Union, which was usually seen as a detached and misunderstood organization.

Inspired by the “Philadelphia Convention”, which was the federal convention that led to the creation of the United States federal Constitution, it was held a meeting of the European Council in Laeken, Belgium, in which it was declared a body called “Convention on the Future of Europe”³². The agenda was to establish the creation of a stronger Europe, more competitive and unite, through the possibility of drafting a real European Constitution.

The European Convention counted 102 members; it was presided by the former President of France Valéry Giscard d’Estaing and the formers Italian and Belgium prime ministers, respectively Giuliano Amato and Jean-Luc Dehaene, as vice-Presidents.

“The Convention has been created to decide how the EU is going to deal with the problems and challenges it is currently facing...the EU is not democratic enough and lacks transparency”³³. Actually the adoption of a Constitution covers much more complex issues both ideologically and practical which I will analyse later.

It is enough for now reporting D’Estaing’s speech at the opening session of the convention in order to highlight how the adoption of a European Constitution can not be compared to a normal European Treaty: “We are a Convention, we are not an Intergovernmental Conference [...] If it succeeds [...] it will light up the future of Europe”³⁴.

The European Constitution was drafted in 2003, approximately two years later than the Convention. The officials charged with the duty of drafting the Constitution elaborated a text of approximately two hundreds and fifty pages, highlighting the structure the procedures and competences of the Union. The text of the Treaty,

³² “The European Council: 50 years of summit meetings” *General Secretariat of the Council of the European Union, 17 December, 2010*

³³ “Lars Hoffman ‘The Convention on the Future of Europe, pp.1’” *New York School of Law, 2002*

³⁴ “Valéry Giscard D’Estaing, Speech delivered at the opening session of the ‘Convention on the Future of Europe’” *2 October, 2002*”

approved in Brussels on June 2004, was signed in Rome on the 29th October 2004. The ratify process from the twenty-five Member States took place through a parliamentary ratification, like in Italy, or through a popular referendum.

Regarding the latter form of ratification, the citizens of Spain (20th February 2005) and Luxemburg (10th July 2005) had answered favorably at the referendum, whereas the citizens of France (29th May 2005) and Oland (1st June 2005) had not.

The following table shows how the process of ratification occurred through the Member States:

State of the process	Number of the Member States	Ratification through Referendum
Process of ratification completed	15 Austria Belgium Bulgaria Cyprus Estonia Greece Hungary Italy Latvia Lithuania Luxembourg Malta Romania Slovenia Spain	2 Luxembourg Spain
Parliamentary ratification completed	3 Finland Germany Slovakia	0
Not ratified	2 France Netherlands	2 France Netherlands

The results of the referendums in France and in Netherlands put an end at the ratification process leaving the iter uncompleted in the remaining seven Member States (Chez Republic, United Kingdom, Ireland, Poland, Portugal and Sweden).

The only think remained was to held a new ICG with the purpose of predispose a new Treaty that, renouncing the most problematic aspect of the Constitutional Treaty, would be able to obtain the approval of the executives of the Member States and later of the national parliaments or the electors in case of a referendum.³⁵

Before trying to understand why it was decided to abandon the idea of adopting an European Constitution let's analyze its main features.

³⁵ “Luigi Daniele ‘Diritto dell’Unione Europea” *Giuffrè Editore, 2008*

2.2 The European's Constitution main Features

The European Constitution is presented as a normal Treaty of the European Union. Its higher innovation resides in the technique of revision. Differently from the former experiences of reform where the revision was realized through the introduction of modifications to the original Treaties established: the introduction of the Constitution foresaw the formal abrogation of the all precedent Treaties. "In particular the Treaty establishing the European Community and the Treaty on European Union"³⁶ would have been replaced by it (Art. IV-437 Constitution Treaty).

The text is divided into four parts. The first one covers the general norms regarding the competences, the institutions, the acts, and the membership, but even the provisions relating to citizenship, democratic life and finances (art. 1-60). The second part (art 61-114) "incorporated the Charter of Fundamental Rights, which had been solemnly proclaimed at Nice, into the Treaty"³⁷. The third part (art. 115-436) constitutes a collage of the dispositions of the Treaty Establishing the European Community and the Treaty on European Union that have not found a collocation in the first part³⁸. And finally the fourth part (art. 437-448) consists of general and final norms along with procedures for revising and adopting the Treaty. In total, the Constitutional Treaty counts 448 articles, 36 protocols, 2 annexes and 50 declarations.

Most of the contents of the Constitution are covered in the subsequent Treaty of Lisbon, thus here I limit to list just some of the main features.

First of all it is worth to remember that the main contents of the Constitution were taken from the previous Treaties it was designed to replace, respectively the TFEU and the TEU, plus the Charter of Fundamental Rights.

Within the news that the Constitution would have introduced there was the overcoming of the three pillars' structure (with "the transfer of the JHA pillar to the

³⁶ "Gian Antonio Benacchio, Barbara Pasa 'A Common Law for Europe, pp. 12'" *Central European University Press, 2005*

³⁷ "Neil Nugent 'The Governments and Politics of the European Union, pp. 72'" *Palgrave Macmillan, 7th ed., 2010*

³⁸ "Luigi Daniele 'Diritto dell'Unione Europea" *Giuffrè editore, III ed., 2010*

TEU, though the CFSP pillar continued to be located in the TEU”³⁹) and the creation of a unique organization that would include all the former European Communities and the European Union.

The Treaty would abolish the rotation’s presidency of the Council of the European Union establishing a fixed President elected by a qualified majority by the Council itself, with a mandate of two years and a half, renewable once.

It intended to give to the European Union greater coherence and identity. This was seen in “the assignment of legal personality to the EU, the creation of a semi-permanent President of the European Council”⁴⁰ and the combination of the Council and Commission of foreign policy into a single Union Minister for Foreign Affairs.

His/her main tasks would consist in the conduct of the Union’s foreign policy, he/she would have been the vice-president of the Commission, presides the Council of foreign affairs, and would have been elected through qualified majority by the European Council in accordance with the President of the Commission.

The Constitution formally states the areas in which the Union has exclusive competence, those of concurrent competence with the Member States and those in which it has just competence for sustain actions.

Regarding matters of defense, the “Petersberg tasks” would have been enlarged to include the fight against terrorism. “The new definition of tasks includes joint disarmament operations, military assistance, deployment of combat forces as well as post-conflict stabilization”⁴¹.

One of the most democratic points of the Constitution is that the citizens of the Union, in a number of at least one million, could invite formally the Commission to legislate over a theme that they consider relevant. This instrument would have run in parallel with the ex art 194 TEC (now art 227 TFEU), which states that: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which

³⁹ “Neil Nugent ‘The Governments and Politics of the European Union, pp. 73’” *Palgrave Macmillan, 7th ed., 2010*

⁴⁰ “Neil Nugent ‘The Governments and Politics of the European Union, pp. 73’” *Palgrave Macmillan, 7th ed., 2010*

⁴¹ “Philipp Dann, Michal Rynkowski ‘The Unity of the European Constitution, pp 273’” *Springer, 2006*

comes within the Union's fields of activity and which affects him, her or it directly”⁴². On the other hand, the national Parliaments would acquire the power to verify the correct application by the communitarians Institutions of the principle of subsidiarity. Finally, the unanimity decisions, which most of the times blocked the decisional process of the Union, would be left just for matters regarding the CFSP and fiscal policies.

Since the ratification process ended up with a negative result, it was found an alternative solution for the celebration of the 50th anniversary of the Treaty of Rome with the “Berlin Declaration” (25th Mars 2007). In that occasion the Heads of States and Governments of the Member States declared to be unite in the objective of giving at the European Union a new common base within the European parliamentary election of 2009⁴³.

The idea was to draft a simplified Treaty, lacking of any constitutional connotation, which had to be approved exclusively through a parliamentary way. Practically it consisted in the incorporation of the Constitutional Treaty’s innovation into the text of the TEU and TEC.

In short time it was approved the new Treaty that modifies the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on the 13th December 2007, later known as the Treaty of Lisbon.

The more recent Treaties have thus implemented the principal innovations that the European Constitution would have brought. Hence it would seem that the problem of adopting a European Constitution has been resolved since its principal contents are effectively put into force. Effectively, if we examine this situation under a practical point of view, we can maybe say that thanks to the Treaty of Lisbon the problem has been more or less resolved.

However, the idea of adopting a Constitution covers a much more broader ideological aspect. Even if the innovations of the Constitutional Treaty have been integrated in the Treaty of Lisbon, the “light up for the future of Europe” hoped by D’Estaing has not happened.

⁴² “Consolidated version of the Treaty on the Function of the European Union – art 227”

⁴³ “Luigi Daniele ‘Diritto dell’Unione Europea” *Giuffrè editore, III ed., 2010*

2.3 Constitutional's implications

One of the main reasons that have brought to the failure of the constitutional project is ascribable to the fear of some Member States to be subjected to excessive compression of their national sovereignty. In fact, there were not the innovations of the Constitutional treaty that scared some of the Member States as much as the term Constitution in itself.

The significance of the European Constitution lay not solely on its provisions, decision-making processes and regulations. "It also had potentially great symbolic significance with its use of the word Constitution"⁴⁴.

Constitutions in general, with the exclusion of countries such as the U.K. or New Zealand, form the legal basis of States. "Supranational institutions, by contrast, have their legal basis in international treaties"⁴⁵. However, facing with the complex legal nature of the European Union, this classification seems to be not applicable.

The debate, especially before the "Convention on the Future of Europe", largely has focused on the role of the international treaties that have created and formed the European Union. Can they be referred as the European Union's Constitution? Or their bases are not enough solid and thus solely a more concise document can form a real Constitution?

The first view has usually prevailed in the European legal debate. A clear example is the "Case 294/83 *Les Verts* (1986) ECR", which has seen the ecologist party *Les Verts v. European Parliament*. The European Court of Justice stated that the European Community "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty"⁴⁶. A more recent case that confirms the former view of the European Court of Justice is the "*Opinion 1/91 [1991] ECR 6984 No. 21*" regarding the "draft agreement between the Community, on the one hand, and the countries of the

⁴⁴ "Neil Nugent 'The Governments and Politics of the European Union, pp. 73'" *Palgrave Macmillan*, 7th ed., 2010

⁴⁵ "Dieter Grimm 'Does Europe Need a Constitution?'" *European Law Journal*, Vol.1, No. 3, November 1995, pp. 282-302

⁴⁶ "Patrick Birkinshaw, Costas Kombos 'The UK Approach to the Emergence of European Constitutionalism Repositioning the Debate: Departure from Constitutional Ontology and the Introduction of the Typological Discussion'" *Report to the XVIIth International Congress of Comparative Law*, July 2006

European Free Trade Association, on the other, relating to the creation of the European Economic Area”⁴⁷. The Court states that the EEC “though concluded in the form of an international agreement, is nonetheless the constitutional document of a legal community”⁴⁸. The European Economic Community Treaty is “in a sense the constitution of this Community” had already been stated by the German Constitutional Court in 1967”⁴⁹.

On the other hand, the idea that the European Union needs a real Constitutional document has mostly pervades the political debate, especially endorsed by those proponents of a European Federation. The European Parliament has made constitutional initiatives before the “Convention on the Future of Europe”. An example is the “Draft Constitution for the European Union of 9 September 1993 presented by the European Parliament’s Institutional Committee”⁵⁰

Both sides thus, even if with different arguments, agreed on the idea that the European Union should have a Constitution, recognized through the existing Treaties or through an ad hoc document. The problem then is to be found in the word Constitution and thus in all of its implications.

Following the European understanding of a Constitution it would be impossible to think about it as disconnected by the State. In other words, the adoption of a Constitution runs in parallel with the concept of sovereignty. If we adopt a European Constitution then it would follow a cease or loss of sovereignty by the Member States. European constitutional tradition thus become a “victim of the nineteenth century’s obsession with sovereign States”⁵¹ that cannot accept or even think about a dual or divided sovereignty.

Taking into consideration a Union of States, such as the European Union, if the sovereignty lies solely within the States then the Union takes the form of an international organization; on the other hand if the sovereignty lies within the Union, then it takes the form of a Federal State. This simple classification however cannot apply to the European Union model and moreover, since the sovereignty is indivisible, it excludes any other form of State.

⁴⁷ “Case 294/83, *Les Verts v. European Parliament*, (1986) ECR 01339”

⁴⁸ “Opinion 1/91 [1991] ECR 6984 No. 21”

⁴⁹ “Dieter Grimm ‘Does Europe Need a Constitution?’” *European Law Journal*, Vol.1, No. 3, November 1995, pp. 282-302

⁵⁰ “Dieter Grimm ‘Does Europe Need a Constitution?’” *European Law Journal*, Vol.1, No. 3, November 1995, pp. 282-302

⁵¹ “Robert Schütze ‘European Constitutional Law, pp. 53’” *Cambridge University Press*, 2012

If we follow the logic of the European constitutional tradition, then the European Union could be classified as an international organization or a Federal State. Since it is clear that the Union does not fall in any of the two classifications, it has been opted for a “sui generis” theory classifying it as a kind of “federal middle ground”⁵², codifying in this way its “supranational” character.

However, this “national reduction of the federal principle”⁵³ fails to understand the real nature of the Union, which is that one of a “Federation of States”.

Later I will examine and explain why the “sui generis” theory does not fit with the European Union model whereas a Federation of States does.

Regarding the European Constitution, it is now clear why the debate for its adoption has been so complex and hard. In the eyes of the Member States, and thus on the European constitutional tradition, the adoption of a European Constitution would mean losing sovereignty.

The term Constitution is thus interpreted as an element of break in the European integration process since it is evocative of the supra-national character of the Union, which is assimilable to the Federal State model⁵⁴.

⁵² “Robert Schütze ‘European Constitutional Law, pp. 66’” *Cambridge University Press, 2012*

⁵³ “Robert Schütze ‘European Constitutional Law, pp. 54’” *Cambridge University Press, 2012*

⁵⁴ “Chiari Cavallari ‘Compendio di Diritto dell’Unione Europea’” *Nel diritto editore, III ed., 2014*

The European Union under a federal view

Traditionally, the European's scholars have rejected the idea of a Federal Union in the way understood by the American constitutional tradition. The central point of the debate is the idea of a Union with a double character, which presents both national and international features. Again, it is the concept of sovereignty that returns to be fundamental in the analysis of the legal nature of the European Union. The European constitutional tradition sees the sovereignty as indivisible.⁵⁵ This is manifested in the idea that is not possible to split the sovereignty between the States and a central government. A Union of States is seen or as an international organization or as a Federal State. In the former case, sovereignty is retained by the single States: thus they maintain their autonomy and can exit from the organization whenever they want. In the Federal State, on the other hand, sovereignty lies exclusively within the central Union. In this way, the European constitutional tradition denies any other legal form, since the sovereignty cannot be divided. "This national reduction of the federal principle censored the very idea of a Federation of States"⁵⁶.

An international organization has its basis on international treaties and it is seen as a "Confederation of States". The Union in this way does not have autonomous powers, but are the various Member States that confer them to it. The Federal State, on the other hand, is usually formed by an ad hoc Constitution, and the Member States unanimously decide to confer all their powers and their sovereignty to the central government.

However, if we analyse the legal nature of the European Union using the three analytical dimensions used by Madison in the Federalist No.39 we can see that the Union cannot be classified neither as an international organization nor as a federal State. In fact, if we highlight the European Union under the foundational, institutional and functional dimension then the Union seems to combine both national and international elements. It stands in a sort of "federal middle ground".

⁵⁵ "Jean Bodin, Julian H. Franklin 'On Sovereignty'" *Cambridge University Press, 1992*

⁵⁶ "Robert Schütze 'European Constitutional Law, pp.54'" *Cambridge University Press, 2012*

3.1 The Foundational dimension

In the first analyses of the Federalist No. 39 Madison studied the origins and character of the American Constitution. After having analysed its core elements, he argued that the 1787 Constitution is an international document.

The tools used by Madison in his study of the foundational dimension of the American Constitution can be used to understand the foundation character of the European Union, since its foundation treaty did not differ too much in character from the 1787 Constitution.

The European Union was understood and conceived mainly as an international organization⁵⁷. In fact it was not a Constitution, but an international treaty that formed it. Whereas the American Constitution had to be signed “by the people..composing the distinct and independent States”⁵⁸, the European treaties are ratified by the various national legislatures. They are legislative treaties, not constitutional, and thus they are international in character. But it is worth to remind the even if the 1787 Constitution is obviously a constitutional treaty, it is still international in character.

Moreover, since the European Constitutional project had failed, the European treaties are increasingly acquiring constitutionally validity⁵⁹. They are evolving into a “Treaty-Constitution”. In the famous case “*Costa v. Enel*, 1964 ECR 585”⁶⁰, the European Court of Justice insisted on the fact that the European legal order has its normative autonomy. In “*Commission v. Luxembourg and Belgium*, 1963 ECR 625”, the European Court highlighted the autonomy of European law: “a Member State could not invoke the breach of European law by another Member State to justify a derogation from its own obligations under the Treaties”⁶¹. Furthermore, the European Court of Justice insisted in “*Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* 1970 ECR 1125” that European law has validity over the national law of the various Member States, and even over their constitutional law⁶².

⁵⁷ “Flavio Terranova ‘Il Federalismo di Mario Albertini’” *Facoltà di Scienze Politiche dell’Università di Pavia*, 2003

⁵⁸ “James Madison ‘The Federalist No. 39’”

⁵⁹ On this point: see Ch. 2.3

⁶⁰ “Case 6/64, *Costa v. ENEL*, [1964] ECR 585”

⁶¹ “Cf. Case 90-91/63, *Commission v Luxembourg and Belgium*, [1963] ECR 625”

⁶² “Cf. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getre und Futtermittel*, [1970] ECR 1125

An important difference between the American Constitution and the various European Treaties is that the former has been ratified by the American people, whereas the latter by the various legislature of the Member States. However this “international” character should not preclude any federal status since the 1787 Constitution is still an international act or even the “1949 German Constitution has been ratified by the State legislatures”⁶³.

The European legal nature thus is seen as an international organization but at the same time its founding treaties have acquired Constitutional validity. This ambivalence and contradiction is the characteristic of the European federal nature.

Many Member States still debate on the validity and supremacy of European law over national or constitutional laws, but at the same time acts according to them. “The suspension of the supremacy question in the European Union is the very proof of the political co-existence of two political bodies and thus evidence of Europe’s living federalism”⁶⁴. The double character fundamental in any federal system is also seen in the European Union citizenship. Article 9 of the Treaty on European Union states that “every national of a Member State shall be a citizen of the Union”⁶⁵. Thus every European citizen has double citizenship: a European one and another one according to its own nation. “Citizenship of the Union shall be additional to and not replace national citizenship”⁶⁶.

To conclude the analyses of the foundational dimension of the European Union, if we use the tools gave us by Madison we can affirm that the treaty founding the Union are international in character, but at the same time can be considered as Constitutional treaties.

“The EU Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Union based on a rule of law”⁶⁷. The treaties have assumed national validity nonetheless they are international in nature.

⁶³ “Philipp Michael Hett Bell ‘Twentieth Century Europe’” *Hodder Arnold, 2006*

⁶⁴ “Robert Schütze ‘European Constitutional Law, pp.61’” *Cambridge University Press, 2012*

⁶⁵ “Article 9 TEU”

⁶⁶ “Article 20.1 TFEU”

⁶⁷ “Opinion 1/91 (EFTA), [1991] ECR I-6079

3.2 The Institutional dimension

In the institutional dimension Madison showed how the international and national characters are allocated in the American newly institutional structure. The 1787 Constitution established a national organ, the House of Representatives, and an international one, the Senate.

The European Union's principal legislative and executive organs are the European Parliament and the Council. Using the analytical tools adopted by Madison in his analysis, we can infer the legal character of the European Union's institutional dimension. How the national and international elements are allocated within the European Union's law making organs?

The European Parliament is directly elected by the European citizens since 1979 and the Member States are represented in a degressive proportionality. Even if its scope has not yet evolved into the real national branch of the Union, its nature is clearly national. The European Parliament thus directly represents the European citizens in a proportionally way in base of the number of citizens in each Member State. "Citizens are directly represented at Union level in the European Parliament"⁶⁸. It would be wrong then claiming that the European Parliament represents the single and different national individuals who composed the Union, instead it represents the European people. Moreover, the Parliament's national character is represented in its majority voting system: "save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the vote cast"⁶⁹.

The Council, on the other hand, "consists of a representative of each Member State at ministerial level, who may commit the government of the Member States in question and cast its vote"⁷⁰. It is evident thus that the Council represents the international organ of the European Union. Each minister in taking part of the Council's session represents its nation, and since the vote are to be taken unanimity, the principle of national sovereignty is respected. However, not all the decisions have to be taken by unanimity but sometimes it is sufficient a qualified majority⁷¹. When this happens the weighted of the votes by the Member States depends on the size of their population. Thus, even if the Council represents the international organ, the

⁶⁸ "Article 10.2 TEU"

⁶⁹ "Article 23.1 TFEU"

⁷⁰ "Article 16.2 TEU"

⁷¹ "Luigi Daniele 'Diritto dell'Unione Europea' *Giuffrè Editore, 2008*

principle of national sovereignty is not always respected, and the Union in some areas can overcome the Member States. “The Council...will not represent the Member States the Member States – a notion that implies their equality – but it represents the national peoples”⁷². In conclusion then, the decision-making procedure within the Council is not entirely international but it comprehends also national characters. This feature redirects the analysis to the idea of the “federal middle ground”, a component that is present in the 1787 Constitution.

The federal middle ground is also evident in the legislative procedures of the European Union. When the Council operates by unanimity the procedure is clearly international in character, the national sovereign principle is safeguarded by the veto power. However, when the Council deals with ordinary procedures it acts by qualified majority backed up by the European Parliament. In this way the legislation procedure acts in a sort of “bicameralism”: “legislation comes into being through majority voting in the two houses of the legislature and only after the approval by both of them. One house represents the people in their capacity as citizens of the Union, the other house represents the component entities of the federation, the Member States, and – through them – the people in their capacity as citizens of the Member States”⁷³.

The European Union then shows the double character that was present in the 1787’s Constitution. The Parliament is the national branch and it represents the European citizens. The Council, on the other hand, even if comprehends both national and international features, it represents the international component representing the Member States in their sovereign capacity.

⁷² “Robert Schütze ‘European Constitutional Law, pp.63’” *Cambridge University Press, 2012*

⁷³ “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000’”
Routledge, 2000

3.3 The Functional dimension

In the Federalist No. 39 Madison showed that not only the governmental institutions but also the powers that they exercise manifest both international and national characteristics. In fact those powers are national in nature but international in their extent⁷⁴.

In this last analytical dimension it is worth to focus on the nature and scope of the powers enjoyed by the European Union in order to show how the federal middle ground is de facto the foundation in which the legal nature of the Union is built.

The extents of the Union's powers are certainly not national, since they are enumerated powers. The most of the important decision taken by the Council required unanimity, conferring in this way veto power to the Member States, and thus maintaining the principle of national sovereignty⁷⁵.

Regarding the nature of the Union's powers, the European Union has at his disposal two applications that act directly on the European citizens. The first instruments are the regulations: "a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States"⁷⁶. And the other ones are the decisions: "a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them"⁷⁷. In this way, since the application of this two instruments have direct applicability into the internal domestic sphere of the Union, they can be considered as the Union's national instruments. A legislative one, the regulations, and an executive one, the decisions.

Moreover, the article 288 of the Treaty on the Functioning of the European Union confers an international instrument to the Union: the directives. "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"⁷⁸. This means that in order to be effective, a directive have to be incorporated by the Member States, and thus it is clear its international character. However the European Court of Justice have partly transformed the nature of the

⁷⁴ On this point, see: Ch. 1.3

⁷⁵ "Robert Schütze 'An introduction to European Law'" *Cambridge University Press, 2012*

⁷⁶ "Article 288.2 TFEU"

⁷⁷ "Article 288.4 TFEU"

⁷⁸ "Article 288.3 TFEU"

directives “by injecting national elements”, in this way they have become “a form of incomplete legislation and thus symbolically represent Europe’s federal middle ground”⁷⁹.

In conclusion, we have seen that not only the 1787’s Constitution but also the Treaties that have established the European Union have conferred to it a double character typical of a federation. In its foundational dimension the Union is certainly international, but as with the German Constitution or the 1787’s Constitution this does not preclude a federal status. “The European Union is based on a constitutional treaty that stands on federal middle ground”. As regarding the institutional dimension, the two main bodies, the European Parliament and the Council, present both national and international elements. Finally, even if the scope of its power are enumerated, their nature thanks to the regulations and the decisions are predominantly national.

The analytical dimensions structured by Madison have made possible to understand and study the legal nature of the European Union, which is based on a structure of a mixed character neither completely national nor international, “but a composition of both”⁸⁰

⁷⁹ “Robert Schütze ‘European Constitutional Law’” *Cambridge University Press, 2012*

⁸⁰ “James Madison ‘The Federalist No. 39’”

The Legal Nature of the European Union

What is the legal nature of the European Union? If we examine the Union under the American constitutional tradition we can say that it stands in kind of federal middle ground. The foundational, institutional and functional dimensions permit to classify the European Union as a Federal Union. In fact, it presents both national and international elements organized in a compound structure.

However, European constitutionalism denied any dual or mixed legal structure and thus reduced the federal principle into national logics⁸¹. It can exist just a Federal State where the powers are all concentrated within a central government; there is no space for a federation of States. On the other hand, if the Union cannot be classified as a Federal State, and certainly it is not, the European tradition sees as the logical alternative that one of an international organization.

This radicalized thinking is related to the indivisibility of sovereignty. “The absolute idea of sovereignty operates as a prism that ignores all relative nuances within a mixed or dual legal structure”⁸². If the States decide to form a Union of States but retained completely their sovereignty, then it follows that the Union is an international organization that works under the principles of international law. On the contrary, if the States decide to form a Union of States and they cede their sovereignty to the central government, then the Union would be a Federal State, and the central government would enjoy full powers.

In this chapter I will examine the legal nature of the European Union under the European constitutional tradition. The most prevalent views are the “international law theory”, which arose and acquired importance after the “Maastricht Decision” of the German Constitutional Court, and the so-called “sui generis theory”, which attached at the Union the special legal status of “supranationalism”⁸³.

⁸¹ “Flavio Terranova ‘Il Federalismo di Mario Albertini’” *Facoltà di Scienze Politiche dell’Università di Pavia, 2003*

⁸² “Dieter Grimm ‘Does Europe Need a Constitution?’” *European Law Journal, Vol.1, No. 3, 2 November 1995, pp. 282-302*

⁸³ “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000’” *Routledge, 2000*

Finally I will explain why both of those views fail to recognize the real legal nature of the European Union. Since they insist that the Union is full international or national they deny its double character.

4.1 The Maastricht Decision

When the Maastricht Treaty was ratified, the European integration process made a major leap within the collective understanding of European society. It immediately arouses a legal debate that lead to the review of the nature of the Union through constitutional reviews of the Member States. That one that has become the most important is certainly the “Maastricht Decision” made by the German Constitutional Court. Central to the debate was again the question of sovereignty.

When the German Parliament approved the Treaty of Maastricht it amended the Constitution to legalize Germany's membership in the European Union⁸⁴. It also inserted the European Monetary Union⁸⁵. The only way to oppose this decision was through recourse to the *Bundesverfassungsgericht* (the German Constitutional Court). “Four German members of the European Parliament, belonging to the political party *Die GrUnen* (The Green Party), and Manfred Brunner, a former high ranking official of the European Commission”⁸⁶, claimed before the German Constitutional Court that the above-mentioned amendments were unconstitutional.

The central contestation was that the European social structure would set constraints upon the “constitutional structure of the European Union”. Since there have never been nothing equivalent to national peoples, there would be legal limitations to the process of European integration. Basically, the German Constitutional Court stated and derived the national limits to European integration⁸⁷.

What the German Court claimed was that the aim at the base of the creations of the European Union was a “Union of States as an ever closer union of the peoples of Europe and not a State based on the people of one European nation”⁸⁸. Actually the statement of the Court was clearly an affirmation of the non-federal character of the

⁸⁴ “Article 23 Basic Law for the Federal Republic of Germany (Grundgesetz, GG)”

⁸⁵ “Article 88 Basic Law for the Federal Republic of Germany (Grundgesetz, GG)”

⁸⁶ “Joachim Wieland ‘Germany in the European Union –The Maastricht Decision of the Bundesverfassungsgericht’” *Kaleidoscope Issue Vol. 4, No.1, 1993*

⁸⁷ “James J. Sheehan ‘The Future of the European State: Some Historical Reflections on the German Case’” *Twenty-First Annual Lecture of the GHI, November 15, 2007*

⁸⁸ “Robert Schütze ‘European Constitutional Law, pp.70’” *Cambridge University Press, 2012*

Union. The Court continued saying that “In any event the establishment of a United States of Europe, in a way comparable to that in which the United States of America became a State, is not at present intended”⁸⁹.

The famous conclusion of the *Bundesverfassungsgericht* was that within the European Union are the national peoples, and not the European citizens, who are the primary sources of democratic legitimation. Thus, it automatically follows that are the Member States that confer and decide the degree of power of the Union. Any European legal measure has to pass and to be in conformity with the various national’s constitutional orders. If a law emanated by the Union “goes beyond the national scope, it could have no effects in the national legal order”⁹⁰. Finally, if any dispute arises regarding the validity or not of the European law, then the case has to be brought before the national Supreme Court in question.

The German Constitutional Court saw the European Union as an international structure. The Member States are those that have signed the International Treaties and thus those that retained final decision. The sovereignty lies exclusively upon them. Each of the Member States has maintained “the quality as sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 2.1 of the United Nations Charter”⁹¹.

According to the “Maastricht Decision” European law has to be treat as international law. There are no European people, and the international treaty has to be considered as such, international, and thus the legal nature of the European Union preclude any possible constitution and constitutionalism.⁹²

Since the sovereignty is indivisible, and lies exclusively within the Member States, there cannot be any double citizenship, as it happens within Federal Unions. But we have seen that this statement is wrong, as it is stated in article 9 of the Treaty on European Union: “every national of a Member State shall be a citizen of the Union”⁹³.

Regarding the possibility of an European Constitution, it is clear that the constitutional project has failed. However, the European Treaties have acquired a

⁸⁹ “James D. Dinnage, Jean-Luc Laffineur ‘The Constitutional Law of the European Union’” *Lexisnexis*, 2012

⁹⁰ “Robert Schütze ‘From Dual to Cooperative Federalism: The Changing Structure of European Law, pp.63’” *Oxford University Press*, 2009

⁹¹ “James D. Dinnage, Jean-Luc Laffineur ‘The Constitutional Law of the European Union’” *Lexisnexis*, 2012

⁹² “Robert Schütze ‘European Constitutional Law’” *Cambridge University Press*, 2012

⁹³ “Article 9 TEU”

Constitutional status. “The EU Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Union based on a rule of law”⁹⁴. The treaties have assumed national validity even though they are international in nature.

Nonetheless, the claiming that the European Union has no constitutionalism is, in my opinion, not completely wrong. Unfortunately, “the condition of Europe is not, as is often implied, that of constitutionalism without a constitution, but of a constitution without constitutionalism”⁹⁵. Whereas in the United States or other federal realities such as Canada or Germany, there has been in the constitutional process a direct recognition by the sovereign people, in the European Union this has not happened. “Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional *demos*”⁹⁶. Even the International Treaties that have acquired constitutional validity have always been approved by the various national legislatures, not by the citizens.

All those implications are the results of the central idea that the sovereignty is indivisible. Since the sovereignty is one, also citizenship must be one and it logically follows that within one State it is only possible a national constitution. Those limitations have obscured the real legal nature of the European Union. Taking for granted that sovereignty can be just one and indivisible, it has been denied any possible federal solutions obscuring in this way the dual character that is present within the European Union.

⁹⁴ “Opinion 1/91 (EFTA), [1991] ECR I-6079

⁹⁵ “Joseph Halevi Horowitz Weiler ‘Does Europe Need a Constitution?’” *European Law Journal*, Vol.1, No. 3, November 1995, pp. 219-258

⁹⁶ “Joseph Halevi Horowitz Weiler ‘Federalism and Constitutionalism: Europe’s Sonderweg’” *Oxford University Press*, 2001

4.2 The “Sui generis” classification

It has been widely accepted between the various European scholars that the European Union is a “sui generis” Union⁹⁷. Since the identification of the real legal nature of the European Union has always been a problem, and it could not be re-directed to previous Union experiences, it has been opted for a “sui generis” classification.

As we have seen in the previous chapters, the European constitutional tradition saw a Union of States as a Federal State or as an international organization. This classification depends mainly on where sovereignty lies. If the sovereignty lies within the central Federal government then the Union is a Federal State, whereas if the sovereignty is retained by the various Member States then the Union is an international organization. The double character of the Union is not even taken into consideration. According to the European constitutional tradition sovereignty is indivisible. Thus, since the European Union is certainly not a Federal State and it can neither be considered as a typical international organization, European theorists have opted for a third option, the “sui generis” classification, coining in this way the word “supranationalism”⁹⁸.

With the “sui generis” approach the European Union has thus been classified as a supranational organization. That is something that stays in between a Federal State and an international organization, which at the same time is not a Federation of States. The term is evocative of its “uniqueness”, something that cannot be compared to anything else. Moreover, it is in conformity with the European constitutional tradition since it still denies any federal perspective and does not classify the Union as a Federation of States.

However, the “sui generis” approach presents a series of limitations and shortcomings. “The term has neither analytic value of its own nor does it add in analysis: the characterization of the Communities as supranational and of their law as ‘supranational law’ still says nothing about the nature of that law in relation either to

⁹⁷ “William Phelan ‘What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime’” *International Studies Review* Volume 14, Issue 3, pages 367–385, September 2012

⁹⁸ “Neil Nugent ‘The Governments and Politics of the European Union’” *Palgrave Macmillan*, 7th ed., 2010

national legal systems or to international law”⁹⁹. In fact, the “sui generis” theory not only fails to analyse the Union but it actually asserts that no analysis is possible. “It lacks explanatory value for it is based on a conceptual tautology”¹⁰⁰. Moreover, this classification is based without any historical foundation. “All previously existing Unions of States lay between international and national law”¹⁰¹. We have seen this in the analytical analysis made by James Madison in the Federalist no. 39 of the 1787’s American Constitution. What the “sui generis” claims to be so special and unique is nothing more than an “introverted and unhistorical theory based on the idea of undivided sovereignty”¹⁰².

The “sui generis” theory celebrate the “uniqueness” of the Union while claiming at the same time features that are common to other Union realities. It practically asserts federal principles without being aware of them.

⁹⁹ “P. Hay ‘Federalism and Supranational Organizations. Patterns for new Legal Structures’” *The American Journal Of Comparative Law*, Vol. 15, No. 3, (1966-1967), pp. 583-585

¹⁰⁰ “Robert Schütze ‘European Constitutional Law, pp.67’” *Cambridge University Press, 2012*

¹⁰¹ “Robert Schütze ‘From Dual to Cooperative Federalism: The Changing Structure of European Law, pp.59’” *Oxford University Press, 2009*

¹⁰² “Robert Schütze ‘European Constitutional Law, pp.68’” *Cambridge University Press, 2012*

4.3 The European Union as a “Federation of States”

In classifying the European Union, we have seen that the European constitutional tradition has opted for the “sui generis” theory or the “international law” theory. However, it is clear that both theories fail to recognize the real character of the European Union. Both theories are based on the traditional idea that sovereignty is indivisible¹⁰³.

On the other hand, the American constitutional theory sees in the European Union the double character that collocates the Union within a sort of “federal middle ground”.

In the precedent analysis of the “sui generis” theory and the “international law” theory, it resulted clear that they both fail to recognize the real character of the Union. Moreover, and in particular with the “sui generis”, they assert federal principles without recognize or accepting that the European Union presents as much as federal components as national ones. Taking for granted that the sovereignty is indivisible then it is clear that the European constitutional tradition fails to recognize any real federal component. The concept of federation is reduced into national logistics, and thus if we talk about a federation within the European constitutional sphere, a federal Union is understand just as a Federal State. “This national reduction of the federal principle censored the very idea of a Federation of States”¹⁰⁴.

Whenever the “sui generis” approach is attacked, Constitutional positions usually switch in favour of the “international law” theory. Since European Union can be a Federal State or an international organization, and since it is clear that is not the former, by implication it must be the latter. But again, the “international law” approach shows incongruences and shortcomings. Differently from how international doctrine should operate, within the European union, the “Member States cannot modify their obligations inter se through the conclusion of subsequent international treaties”¹⁰⁵. “Unlike international doctrine predicts, the Member States are not allowed a free hand in how to execute their obligations”¹⁰⁶. The “sui generis” thesis and the “international law” theory have in this way give a wrong account of the legal

¹⁰³ “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000, pp.28’”
Routledge, 2000

¹⁰⁴ “Robert Schütze ‘European Constitutional Law, pp.54’” *Cambridge University Press, 2012*

¹⁰⁵ “P. Hay ‘Federalism and Supranational Organizations. Patterns for new Legal Structures’” *The American Journal Of Comparative Law, Vol. 15, No. 3, (1966-1967), pp. 583-585*

¹⁰⁶ “Robert Schütze ‘European Constitutional Law, pp.78’” *Cambridge University Press, 2012*

nature of the European Union deleting any possible federal approach.

However, a federal claim has slowly emerged within the European constitutional debate. Initially it was said that the Union was the “classic case of federalism without federation”¹⁰⁷. It presented federal characteristics, whereas at the same time it could not be considered as a federation. This has been the consequence of the radicalized concept of the European constitutional tradition that has conceived the federal principle represented just as a Federal State. “The Treaties stop short of the establishment of a federation. They do not transfer to a federal sphere the general powers usually associated with a federal state”¹⁰⁸.

The double character of the Union is de facto a reality, and analysed under the Madison’s foundational, institutional and functional dimensions the Union’s compound characteristic is clearly evident. European constitutionalism has to accept the real character of the Union, and the only way to do this is to abandon the concept of the indivisible sovereignty. It has to accept that “the law of integration rests on a premise quite unknown to so-called ‘classical’ international law: that is the divisibility of sovereignty”¹⁰⁹. The European Union is actually based on a divided sovereignty that is evident in the presence of both international and national elements, but it has to accept that. As Joschka Fischer said during his speech at the Humboldt University in Berlin on May 2000 on “the ultimate objective of European integration”: “The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state. Precisely this is the idea underlying the concept of ‘subsidiarity’, a subject that is currently being discussed by everyone and understood by virtually no one”¹¹⁰. And the Member States have de facto lost, or better say cede, part of their sovereignty to the Union.

European Union enjoys “real powers stemming from a limitation of sovereignty or a transfer of powers from the State to the Union” and it logically follows that “the Member States have limited their sovereign rights, albeit within limited fields”¹¹¹.

Abandoning the out dated concept of indivisible sovereignty is the only way in order to understand the real legal nature of the European Union. The Union is

¹⁰⁷ “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000, pp.28’”
Routledge, 2000

¹⁰⁸ “Robert Schütze ‘From Dual to Cooperative Federalism: The Changing Structure of European Law, pp.72’”
Oxford University Press, 2009

¹⁰⁹ “Robert Schütze ‘European Constitutional Law, pp.78-79’”
Cambridge University Press, 2012

¹¹⁰ “Joschka Fischer, Speech delivered at the Humboldt University in Berlin”
12 May, 2000

¹¹¹ “Case 6/64, *Costa v. ENEL*, [1964] ECR 585”

certainly not a Federal State and neither an international organization¹¹².

The “sui generis” and the “international law” theories had failed to capture the real nature of the Union. The European Union, indeed, is based on a compound structure. It presents both national and international components that are possible thanks to its double sovereignty, which collocates it within a “federal middle ground” sphere.

If we want to understand the real legal nature of the European Union we thus have to understand it as a “Federation of States”.

¹¹² “Michael Burgess ‘Federalism and European Union: the Building of Europe, 1950-2000, pp.28’”
Routledge, 2000

Conclusion

Having analysed the European Union under different analytical perspectives I have arrived at the conclusion that its legal nature is that one of a “Federation of States”.

Even though the European constitutional project failed due to the negative referendum of France and Netherlands, the European Treaties have acquired “constitutional validity”.

The European Union presents a double character collocating itself in a sort of “federal middle ground”. The analytical dimensions structured by Madison have made possible to understand and study the legal nature of the European Union, which is based on a structure of a mixed character...neither completely national nor international “but a composition of both”¹¹³.

The idea that sovereignty should lie exclusively within the nation States is still strong within the European Member States. However, this understanding of the principle of sovereignty is a big limitation for the future of the European Union.

“The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state”¹¹⁴.

¹¹³ “James Madison ‘The Federalist No. 39’”

¹¹⁴ “Joschka Fischer, Speech delivered at the Humboldt University in Berlin” *12 May, 2000*

Bibliography

Books

- "Philipp Michael Hett Bell 'Twentieth Century Europe'" *Hodder Arnold, 2006*

- "Gian Antonio Benacchio, Barbara Pasa 'A Common Law for Europe, pp. 12'" *Central European University Press, 2005*

- "Norberto Bobbio 'Il federalismo nel dibattito politico e culturale della Resistenza, in L'idea della unificazione europea dalla Prima alla Seconda Guerra Mondiale'" *Fondazione Einaudi, 1975*

- "Jean Bodin, Julian H. Franklin 'On Sovereignty'" *Cambridge University Press, 1992*

- "Thomas P. Boje, Bart van Steenbergen, Sylvia Walby 'European Societies: Fusion or Fission?', pp.20'" *Routledge, 1999*

- "Michael Burgess 'Federalism and European Union: the Building of Europe, 1950-2000'" *Routledge, 2000*

- "Chiari Cavallari 'Compendio di Diritto dell'Unione Europea'" *Nel diritto editore, III ed., 2014*

- "Luigi Daniele 'Diritto dell'Unione Europea'" *Giuffrè Editore, 2008*

- "Philipp Dann, Michal Rynkowski 'The Unity of the European Constitution'" *Springer, 2006*

- "James D. Dinnage, Jean-Luc Laffineur 'The Constitutional Law of the European Union'" *Lexisnexis, 2012*

- “Lawrence Goldman ‘The Federalist Papers’” *Oxford World’s Classics, 2008*

- “Joy Hakim ‘From Colonies to Country: 1735 – 1791’” *Oxford University Press, III ed., 2003*

- “Alexander Hamilton ‘The Federalis No. 3’”

- “Lars Hoffman ‘The Convention on the Future of Europe, pp.1’” *New York School of Law, 2002*

- “James Madison ‘The Federalist No. 37’”

- “Robert Middlekauff ‘The Glorious Cause: The American Revolution 1763-1789’” *Oxford History of the United States, vol. ii, 1982*

- “Neil Nugent ‘The Governments and Politics of the European Union’” *Palgrave Macmillan, 7th ed., 2010*

- “Robert Schütze ‘An introduction to European Law’” *Cambridge University Press, 2012*

- “Robert Schütze ‘European Constitutional Law’” *Cambridge University Press, 2012*

- “Robert Schütze ‘From Dual to Cooperative Federalism: The Changing Structure of European Law’” *Oxford University Press, 2009*

- “Winton U. Solberg ‘The Constitutional Convention and the Formation of the Union’” *Board of Trustees of the University of Illinois, II ed., 1990*

- “Flavio Terranova ‘Il Federalismo di Mario Albertini’” *Facoltà di Scienze Politiche dell’Università di Pavia, 2003*

- “Alexis de Tocqueville ‘Democracy in America’” *Penguin Putnam Inc., 2004*

- “Joseph Halevi Horowitz Weiler ‘Federalism and Constitutionalism: Europe’s Sonderweg’” *Oxford University Press, 2001*

Journal Articles

- “Dieter Grimm ‘Does Europe Need a Constitution?’” *European Law Journal, Vol.1, No. 3, November 1995, pp. 282-302*
- “Joseph Halevi Horowitz Weiler ‘Does Europe Need a Constitution?’” *European Law Journal, Vol.1, No. 3, November 1995, pp. 219-258*
- “P. Hay ‘Federalism and Supranational Organizations. Patterns for new Legal Structures’” *The American Journal Of Comparative Law, Vol. 15, No. 3, (1966-1967), pp. 583-585*
- “Richard Nikolaus von Coudenhove-Kalergi ‘The Pan European Manifesto’” 1923
- “William Phelan ‘What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime’” *International Studies Review Volume 14, Issue 3, pages 367–385, September 2012*
- “James J. Sheehan ‘The Future of the European State: Some Historical Reflections on the German Case’” *Twenty-First Annual Lecture of the GHI, November 15, 2007*
- “Joachim Wieland ‘Germany in the European Union –The Maastricht Decision of the Bundesverfassungsgericht’” *Kaleidoscope, Issue Vol. 4, No.1, 1993*

Reports

- “Patrick Birkinshaw, Costas Kombos ‘The UK Approach to the Emergence of European Constitutionalism Repositioning the Debate: Departure from Constitutional Ontology and the Introduction of the Typological Discussion’” *Report to the XVIIth International Congress of Comparative Law, July 2006*
- “Winston Churchill, Speech delivered at the University of Zurich” *19 September, 1946*
- “Valéry Giscard D’Estaing, Speech delivered at the opening session of the ‘Convention on the Future of Europe’” *2 October, 2002*
- “The European Council: 50 years of summit meetings” *General Secretariat of the Council of the European Union, 17 December, 2010*
- “Joschka Fischer, Speech delivered at the Humboldt University in Berlin” *12 May, 2000*
- “Viktor Hugo, Speech delivered at the ‘International Peace Conference’” *24 August 1849*
- “Proceedings of the Tenth Ordinary Session of the Assembly, Sixth Plenary Session” *Thursday 5 September 1929,*
- “Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, Resolution no. 15” *May 29, 1787*

Case Law

- “Cf. Case 90-91/63, *Commission v Luxembourg and Belgium*, [1963] ECR 625”
- “Cf. Case 6/64, *Costa v. ENEL*, [1964] ECR 585”
- “Cf. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getre und Futtermittel*, [1970] ECR 1125”
- “Cf. Case 294/83, *Les Verts v. European Parliament*, (1986) ECR 01339”
- “Opinion 1/91 (EFTA), [1991] ECR I-6079”
- “Opinion 1/91 [1991] ECR 6984 No. 21”

Treaties and Documents

- “Basic Law for the Federal Republic of Germany”
- “Treaty of Lisbon”
- “Treaty on European Union”
- “Treaty on the Functioning of the European Union”
- “United States Constitution”

La Natura Legale dell'Unione Europea: un approccio federale

L'elaborato "The Legal Nature of the European Union: a federal approach" ha come obiettivo principale quello di analizzare e classificare la natura legale dell'Unione Europea.

La tesi portata avanti è quella della classificazione dell'Unione Europea come "Federazione di Stati".

Sono partito da un'introduzione generale riguardante la storia del federalismo inteso come ideologia.

L'ideologia federalista nasce nel diciottesimo secolo in contrapposizione alla dottrina di sovranità assoluta dello Stato riconducibile ad Hobbes e Bodin. Come il famoso giurista Norberto Bobbio ha analizzato, il processo di costruzione dello Stato Federale sembra essere simmetricamente opposto alla costruzione dello Stato nazionale basato sull'idea di sovranità assoluta.

Alexander Hamilton, uno dei tre autori de "Il Federalista", è ritenuto il fondatore della teoria dello Stato Federale. Secondo Hamilton solo uno Stato Federale può proteggere e garantire ai propri cittadini la sicurezza necessaria e la garanzia di pace. Hamilton era convinto che la Costituzione Americana del 1787 fosse l'unico strumento capace di soddisfare i bisogni istituzionali del neo nato Stato Americano, ma non credeva che i suoi principi potessero avere valenza al di fuori del proprio contesto geografico.

In Europa l'ideologia federalista ha seguito una diversa strada. Durante il diciottesimo e il diciannovesimo secolo prevaleva il concetto di Stato unitario. La tradizione costituzionale Europea si basava sul concetto di sovranità indivisibile. L'idea che i vari Stati europei potessero unirsi formando un'Unione di Stati era più che altro un'idea morale perseguita da pochi intellettuali più che un vero progetto politico.

Nel 1941, Altiero Spinelli ed Ernesto Rossi scrivono il "Manifesto di Ventotene". Per la prima volta, la Federazione Europea si configura come un obiettivo politico concreto, la cui realizzazione può essere immediatamente perseguita con una lotta

politica organizzata. Secondo i due autori, la Seconda Guerra mondiale aveva aperto una crisi rivoluzionaria che avrebbe portato al superamento degli Stati nazionali.

Tuttavia, contrariamente alle previsioni di Spinelli e Rossi, la fine della Seconda Guerra Mondiale non portò alla creazione del Federalismo Europeo.

Qualcosa però mutò nell'ordine politico e sociale Europeo. Un sentimento di unione ha fatto sì che alcuni Stati a partire dagli anni cinquanta iniziassero un processo di integrazione e cooperazione che ha portato alla creazione dell'odierna Unione Europea.

Sin dalla nascita, nel 1951, della “Comunità europea del carbone e dell'acciaio”, Trattato precursore dell'Unione europea, la storia dell'Unione è stata caratterizzata da lotte e battaglie politiche per favorire una maggiore integrazione e cooperazione tra gli Stati membri e superare l'eccesso e la complessità dei trattati europei.

Tuttavia, la moltitudine e la complessità di queste legislazioni ha reso il processo decisionale e le operazioni istituzionali molto difficili da realizzarsi, spesso con conseguente incerte e ricche di malintesi. Con il maturare del tempo si era diffusa, fra i vari funzionari e teorici europei, l'idea che un documento più conciso e consolidato, che comprendesse tutti i Trattati attuali dell'Unione europea, potesse offrire una soluzione più chiara e trasparente, creando maggiori opportunità per migliorare il coordinamento delle politiche europee e garantire una maggiore comprensione ai cittadini europei delle politiche e del funzionamento dell'Unione, più volte vista come un'organizzazione distaccata e spesso poco compresa.

Nel 2001, i leader europei si incontrarono a Laeken, in Belgio, nel corso della “Convenzione sul futuro dell'Europa”. L'ordine del giorno era quello di stabilire l'agenda per la creazione di un'Europa più forte, più competitiva e più unita. In quella sede fu concordato in via officiosa la possibilità di redigere una Costituzione europea.

La Costituzione europea fu redatta nel 2003, all'incirca dopo 2 anni dalla Convenzione. I funzionari incaricati di redigere la Costituzione, elaborarono un testo lungo oltre 250 pagine, evidenziando la struttura, le procedure e le competenze dell'Unione. Il testo del Trattato, approvato a Bruxelles nel giugno 2004, venne poi firmato a Roma il 29 ottobre 2004.

La Convenzione, che vedeva come presidente Valéry Giscard d'Estaing e come vicepresidenti Jean-Luc Dehaene e l'italiano Giuliano Amato, era convinta che la creazione di una Costituzione europea avrebbe migliorato l'efficacia delle istituzioni e

che quindi il testo sarebbe stato accolto con entusiasmo dai vari Stati membri.

Il processo di ratifica da parte degli allora 25 paesi dell'Unione avvenne per via parlamentare, come successe in Italia, o tramite referendum popolari. In quest'ultimo caso risposero favorevolmente alle urne i cittadini di Spagna (20 febbraio 2005) e Lussemburgo (10 luglio 2005), mentre i cittadini di Francia (29 maggio 2005) e Paesi Bassi (1 giugno 2005) votarono in maggioranza no.

I risultati dei referendum in Francia e nei Paesi Bassi congelarono completamente il processo di ratificazione lasciando l'iter incompleto nei rimanenti 7 paesi dell'Unione (Repubblica Ceca, Regno Unito, Irlanda, Polonia, Portogallo, Svezia). L'Unione europea decise, allora, di post-porre il progetto di una Costituzione europea ad una data da definire.

All'incirca due anni dopo i referendum negativi di Francia e Paesi Bassi, si arrivò ad una soluzione con la "Dichiarazione di Berlino" del 25 marzo 2007, in occasione del 50° anniversario della firma del TCE. I Capi di Stato e di Governo degli Stati membri dichiararono di essere "uniti nell'obiettivo di dare all'Unione europea entro le elezioni del parlamento europeo del 2009 una base comune rinnovata". Redigere un nuovo Trattato semplificato privo di connotati costituzionali e da approvare solo per via parlamentare. Si trattò di incorporare nel testo del TUE e TCE le innovazioni contenute nel Trattato Costituzionale. Si giunse, così, in tempi molto rapidi all'approvazione del nuovo "Trattato che modifica il Trattato sull'Unione europea e il Trattato che istituisce la Comunità europea, firmato a Lisbona il 13 dicembre 2007 (Trattato di Lisbona)"¹¹⁵.

Le principali innovazioni che avrebbe introdotto la Costituzione Europea sono state comunque integrate tramite il Trattato di Lisbona. Tuttavia, l'adozione di un trattato Costituzionale implica a livello ideologico un tema più complesso, specialmente se si vuole definire la natura legale dell'Unione Europea.

Una delle principali ragioni che ha portato al fallimento del progetto costituzionale è riconducibile al timore da parte di alcuni Stati di subire eccessive compressioni alla

¹¹⁵ Daniele L. "Diritto dell'Unione Europea" III ed. *Giuffrè editore* pp. 34

propria sovranità nazionale. Il termine stesso “Costituzione” viene in questo modo “interpretato come elemento di rottura nel percorso d’integrazione europea in quanto evocativa del carattere superstatuale dell’Unione, assimilabile al modello di Stato federale”¹¹⁶

Prima di intraprendere il discorso federale a livello europeo mi sono soffermato nell’analizzare “Il Federalista” ed in particolar modo il No. 39, scritto da James Madison. Nel “Federalista No. 39” l’autore afferma che la Costituzione americana del 1787 creò un’Unione di Stati “che stava nel mezzo fra una struttura internazionale e nazionale”¹¹⁷.

Al fine di chiarire questo concetto e, rifiutandosi di analizzarlo dalla prospettiva metafisica del concetto di sovranità, Madison decise di dividere l’oggetto di studio in tre dimensioni analitiche: di base, istituzionale e funzionale. Nella prima parte, Madison descrive la Costituzione del 1787 come un atto internazionale e che quindi doveva essere ratificato dai cittadini, intesi non come individui componenti di un’intera nazione, ma come componenti di distinti ed indipendenti Stati ai quali loro appartengono. Ogni Stato nel ratificare la Costituzione è da considerarsi come stato sovrano, indipendente dagli altri, e quindi vincolato esclusivamente dalla propria volontà. Ed è per questo motivo che la Costituzione è da considerarsi come atto internazionale. Tuttavia, il nuovo ordine legale che ne deriva è diverso da quello di un’organizzazione internazionale, in quanto la Costituzione non viene ratificata dalla legislatura dei vari Stati ma dall’autorità delegata ai vari Stati dai cittadini stessi.

Nella dimensione istituzionale, Madison analizza la legislatura della nuova Unione costituita da una “Camera dei rappresentanti”, eletta da tutti i cittadini americani come singoli individui e che, quindi, rappresenta la branca nazionale del governo centrale e dal Senato, che rappresenta i vari Stati come “società politiche e coeguali”¹¹⁸ (l’eguale numero di rappresentanti di ogni Stato è un riconoscimento costituzionale della porzione di sovranità rimasta ai singoli Stati). Attraverso questa suddivisione la struttura del governo centrale presenta, dunque, tante caratteristiche internazionali quante nazionali.

¹¹⁶ Cavallari C. “Compendio di Diritto dell’Unione Europea” III ed. *Nel diritto editore* pp. 21

¹¹⁷ Schütze R. “European Constitutional Law” *Cambridge University Press 2012*

¹¹⁸ Hamilton A., Madison J., Jay J. “The Federalist” T. Ball ed. *Cambridge University Press 2003*

Infine, la dimensione funzionale, svela l'aspirazione della Costituzione del 1787, ovvero quella di dividere in due l'autorità sovrana. "Da una parte il controllo degli interessi generali dell'Unione e dall'altra il controllo degli interessi speciali dei singoli Stati"¹¹⁹, dove i poteri dell'Unione hanno un effetto diretto, ne segue che il governo dell'Unione può agire direttamente sugli individui.

Ogni Stato quindi cede parte della propria sovranità, ma non la cede completamente. In questo modo lo stato federale viene caratterizzato da un doppio governo, una doppia sovranità ed una doppia cittadinanza.

La tradizione costituzionale europea, vittima dell'ossessione del XIX° secolo sul concetto di Stato/nazione, rifiuta l'idea di una divisa o doppia sovranità. La sovranità è indivisibile. Un'Unione di Stati può essere formata dagli Stati membri che mantengono la propria assoluta sovranità, formando in questo modo un'organizzazione internazionale. Oppure la sovranità può essere attribuita esclusivamente all'Unione, dove quest'ultima diventa quindi uno Stato Federale.

Nella tradizione costituzionale europea dunque, il federalismo è pensato e strutturato in termini di Stato sovrano, per federazione si intende uno Stato federale, non una Federazione di Stati. L'indivisibilità della sovranità è un fattore primario nella tradizione costituzionale europea.

Questa idea d'indiscussa sovranità risulta in una polarizzazione concettuale espressa nella distinzione di un Unione di Stati intesa come "Confederazione di Stati" e quindi ricalcante il modello di un'organizzazione internazionale, oppure come "Stato federale"; ogni altra terza possibilità veniva ~~perché~~ ~~perché~~ una confederazione di Stati non può essere intesa in altra forma se non in quella di organizzazione internazionale? La risposta del tradizionale pensiero federale europeo risiede nel diritto internazionale: un'Unione di Stati si forma in base a trattati internazionali. Siccome è un trattato internazionale a formare l'Unione, gli Stati mantengono la propria sovranità e, di conseguenza, il diritto di annullare il seguente trattato. "La Confederazione è una creatura del diritto internazionale. Però il diritto internazionale non conosce [tradizionalmente] altro soggetto legale al di fuori dello Stato. La Confederazione quindi non è uno Stato e conseguentemente non costituisce un soggetto del diritto internazionale". La Confederazione si traduce quindi in un'

¹¹⁹ Schütze R. "European Constitutional Law" *Cambridge University Press* 2012

esclusiva relazione fra Stati sovrani.

L'Unione Europea è stata dunque descritta nel tempo come un ibrido, posta in mezzo ad una realtà internazionale e nazionale. Non viene considerata né come una Confederazione di Stati, né come Stato federale. Combina, invece, simultaneamente caratteristiche di entrambi i modelli e forma quindi un "mixtum compositum"¹²⁰.

La tradizione costituzionale europea, storicamente basata sull'indivisibilità della sovranità, cercando di classificare l'Unione Europea, si trovò, dunque, di fronte ad un'entità completamente nuova. In mancanza degli strumenti teorici adeguati per classificare l'Unione, i teorici europei la definirono "sovranaazionale" proclamando in tal modo il carattere "sui generis" dell'Unione.

La questione di un'Europa "sui generis" continua tuttora ad essere scontro di ideologie ed è condivisa solo in parte dagli esponenti del mondo intellettuale. Quando questa viene screditata, viene riproposta la soluzione offerta dal diritto internazionale e quindi l'Unione Europea viene nuovamente classificata come Confederazione di Stati.

Tuttavia, entrambe le teorie falliscono nel cercare di classificare e definire la natura legale dell'Unione. Basandosi sul concetto di sovranità assoluta, non riescono ad identificare il doppio carattere dell'Unione Europea che di fatto la colloca in una sorta di "federal middle ground".

Se guardiamo l'Europa e la studiamo dalla prospettiva analitica di James Madison, quindi di base, istituzionale e funzionale, ci accorgiamo che essa rispecchia forti connotazioni federali.

Come gli Stati Uniti d'America, anche l'Unione europea era stata concepita a livello "internazionale". La differenza risiede nel fatto che la Costituzione del 1787 non fu ratificata dalle legislature nazionali come nel caso dell'Unione europea (ma anche la Costituzione della Germania fu ratificata dalla legislatura e non per questo non è considerata una federazione). Inoltre è difficile negare che i Trattati europei non siano stati elevati a rango costituzionale.

L'Articolo 9 del TUE afferma che "è cittadino dell'Unione chiunque abbia la

¹²⁰ Constantinesco LJ, "Das Recht der Europäischen Gemeinschaften" (Nomos, 1977), 322 (traduzione Schütze R.)

cittadinanza di uno Stato membro”¹²¹, chiarendo dunque che ogni europeo ha doppia cittadinanza, caratteristica fondamentale di una Federazione di Stati.

A livello istituzionale, se analizziamo la branca legislativa, vediamo che il Parlamento europeo rappresenta la parte “nazionale” dell’Unione, essendo i parlamentari europei rappresentanti diretti dei cittadini europei. Mentre il Consiglio dell’Unione europea, in termini di composizione, rappresenta la parte “internazionale” con un rappresentante per ogni Stato membro (inoltre grazie al Trattato di Lisbona verrà abolito il “weighted voto” affievolendo la disparità in termini di sovranità nelle votazioni a maggioranza qualificata).

A livello funzionale l’Unione europea è basata su “trattati costituzionali” che gli conferiscono una configurazione quasi federale. Analizzando il governo dell’Unione, la procedura legislativa dominante costituisce una bilancia federale fra elementi “internazionali” e “nazionali”. E mentre i poteri esecutivi dell’Unione sono limitati, la loro natura è prevalentemente “nazionale”.

Nonostante il progetto Costituzionale Europeo portato avanti agli inizi del nuovo millennio sia fallito, gli attuali Trattati Europei hanno acquisito valenza costituzionale.

L’Unione Europea presenta un doppio carattere che la colloca in una sorta di “federal middle ground”. Questo è evidente se studiamo l’Unione attraverso le dimensioni analitiche forniteci da James Madison nel Federalista No. 39.

Dopo aver analizzato l’Unione Europa attraverso differenti prospettive analitiche, sono arrivato alla conclusione che la sua natura legale è quella di una “Federazione di Stati”.

¹²¹ “Art. 9 TEU”