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The European Union as a Form of 'Functional Federalism'

by

Giuseppe Martinico*

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Abstract

In this contribution, I shall explore the concept of 'functional federalism' as developed by Peter Hay in his book *Federalism and Supranational Organizations: Patterns for New Legal Structures*, a seminal work that should be rediscovered by scholars interested in EU law.

Keywords

Federalism, Supranationalism, Integration, Court of Justice, European Communities, European Union

1. Rediscovering What Should Be Considered a Classic

The experiment of the Conference on the Future of Europe[I] seemed to have reawakened the never-dormant federal ambition of the European Union (EU), although, for the time being, there has been no concrete follow up to its forty-nine proposals. The debate on the federal or non-federal nature of the Union is enormous and I make no claim to map here such an interdisciplinary and multidisciplinary discussion (among others, Burgess 1991; Elazar 1998; Hueglin 2000; Castaldi 2007). More modestly, I shall explore the concept of 'functional federalism' as developed by Peter Hay in his book *Federalism and Supranational Organizations: Patterns for New Legal Structures*, a work that represents the first legal analysis of the relationship between supranationalism and federalism.

'Functional federalism' is a formula that could be perceived as an oxymoron. In the past, scholars have defined Monnet's method by relying on the formula of functional federalism to differentiate it from Spinelli's federalism (Mitrany 1950; Chiti-Batelli 1950; Mitrany 1965). Hay gave this concept a legal dimension, and his reflection represents an important starting point for lawyers interested in the EU.

Federalism and Supranational Organizations is a work that could be defined as a classic, but for mysterious reasons, it is almost never cited in the most important essays on this subject (Weiler 1991) or in recent, very interesting contributions on EU federalism (Zglinski 2023; Gentile 2023).

Of course, some important books recognise the importance of this volume or at least cite it (Schütze 2009). Historians have grasped the importance of Hay's thought but have often seen it as secondary in comparison to another giant of European and comparative law, Eric Stein (Boerger 2014: 872). Of course, no one denies the influence Stein had on Hay, but it is possible to point out some autonomous profiles of the latter's thought. By writing this short contribution, I would like to explain why Hay's works on supranational federalism should be considered mandatory reading, in particular, this important volume, which is approaching the sixtieth anniversary of its publication.

Federalism and Supranational Organizations has a simple structure comprised of three parts that, in turn, develop into eight chapters. Chapter one is the introduction and precedes the beginning of the first part of the book. It focuses on framing the legal problems of the concept of integration, which is defined in the very first lines of the book as 'the

amalgamation of two or more units or of some of their functions. It is a nontechnical, descriptive – often political – concept which emphasizes the process of integration as well as a particular condition or level of integratedness' (Hay 1966: 1). Chapter two opens the first part of the volume (like the book, entitled *Federalism and Supranational Organizations*) and deals with an analysis and critique of the (at that time) current classifications of the European Communities. In this chapter, Hay defines supranationalism as a 'political quality, rather than a power or a right. It does not depend on express stipulation, but follows from powers and functions actually accorded' (Hay 1966: 30). Chapter three develops the concept of functional federalism, and Hay comes to terms with the ambiguous distinction between federation and confederation in comparative studies. Hay does not fail to refer to national law to develop the key concepts of his reasoning, and he defined the European Communities as 'limited federations to the extent of their sovereign powers' (Hay 1966: 89). However, federations are not the only manifestations of federalism, as he immediately clarifies on the same page, which is why 'the task is therefore to identify evidence of federalism, regardless of the institutional form' (Hay 1966: 89-90).

Chapter four is devoted to the jurisdiction of the Court of Justice (ECJ) and insists on the federal potential of Article (at that time) 177 of the EEC Treaty governing the preliminary ruling mechanism. These considerations on the relationship between national courts and the Court of Luxembourg pave the way for the fifth chapter, which is devoted to the relationship between Community and national law. On these pages, *Van Gend en Loos*[II] and *Costa Enel*[III] are analysed in detail and the principle of primacy ('supremacy', as he called it, relying on the federal analogy) is seen by Hay as a confirmation of the 'assumption of a transfer of sovereign powers to the Community' (Hay 1966: 181). Part two is entitled 'Accommodating Supranationalism and National Constitutional Law' and opens with Chapter six. This chapter confirms the importance of comparative law in Hay's research because it focuses on US constitutional law, which is seen as an important laboratory of federal techniques and concepts. As the author immediately makes clear, 'the United States is not at present a member of any "supranational" international organization…An analysis of U.S. law will be particularly useful because its own federal character also permits considerations of the relation of an internally federal state and its constituents to the new regional federal structure' (Hay 1966: 205). Chapter seven proposes an in-depth view of a case study, that of German co-constitutional law in its relation to EU law. This is not a coincidence. Germany has a

federal system (even though the new Basic Law had only recently come into force when the book was written) and the author, also for biographical reasons (Boerger 2014: 872), was very familiar with the German legal system. These pages also point out possible difficulties in the coordination between legal systems that would later emerge in the 1970s. Part three is entitled 'Conclusions and Outlook' and comprises Chapter eight devoted to 'Significance and Problems of Supranational Organizations'. It revolves around two questions. The first question has to do with the consequences of the emergence of a supranational organisation in a context still dominated by the dichotomy of national law versus international law. The second question is in retrospect perhaps even more interesting: 'What is its effect on the preservation of democratic values as developed by national constituent states and of the manner in which these values are secured, for instance, by constitutionalism?' (Hay 1966: 299). In these pages, the author truly anticipates some of the burning issues that characterise the current phase of the integration process, including potential tensions with national constitutionalism, challenges related to the democratisation of Communities and challenges related to the emergence of a supranational rule of law.

Having recalled the structure of the volume, in the following pages I will focus on the contribution of these reflections to European legal studies.

2. Peter Hay's Contribution to Comparative Supranational Studies

As has already been seen, Hay wrote in the sixties of certain 'federalizing features' (Hay 1968) of Community law and contributed to the spread of a comparative language, which would then be used by other scholars interested in the legal implications of the integration process. A very good example is given by the *Integration through Law* multivolume project, edited by Cappelletti, Seccombe and Weiler (Cappelletti, Weiler, Seccombe 1986), an initiative that gathered many American and European authors in order to compare American and European federalism and to study the Community integration process through the federal lens. In the words of Cappelletti, Seccombe and Weiler, the *Integration Through Law* scholarship was 'characterised as a highly pluralistic research endeavour… the product of the efforts of close to forty contributors from many countries in three continents, with almost every contribution being, in its turn, the joint product of a team' (Cappelletti, Weiler, Seccombe 1986: 5).

Building upon these premises, the authors explored the connection between federalism and integration, seen as 'twin concepts' (Cappelletti, Weiler, Seccombe 1986: 15). Their philosophy was inspired by the comparative approach understood as a third way; that is, different from both legal positivism and natural law. In their view, comparison serves as a laboratory that allows the test of theoretical hypotheses that need to be verified. Weiler himself (Weiler 1991; and Weiler, 2001, among others) used the conceptual and terminological apparatus of federalism in his works while stressing that the EU is not a federation. On another occasion, Weiler wrote that 'the Community is not destined to become another America or indeed a federal state. But I am convinced that the relevance of the federal experience to Europe (and the European experience to any novel thinking about federalism in the United States and other federations) will become increasingly recognized' (Weiler 1984: 1161).

In studying the relationship between federalism and integration, Hay again became a forerunner. In his mind, supranationalism had to do with federalism because both concepts are based on a transfer of power from the state to a higher entity. In presenting this idea, Hay endorsed a dynamic notion of federalism without paying too much attention to the institutional form, distinguishing in this way, 'the federal elements from the international elements':

> "Federal" is therefore used in an adjectival sense: it attaches to a particular function exercised by the organization and is used to denote, as to that function, a hierarchical relationship between the Communities and their members. (Hay 1966: 90)

By relying on 'functional federalism' to describe the activity of the Court of Justice and the relationship between national and supranational law, Hay used an approach that resembles that adopted by Carl J. Friedrich. According to Friedrich, studying federalism means more than only studying federal states/federations, and his understanding of the federalising process overcomes the distinction between 'federal state' (*Bundestaat*) and 'confederation' (*Staatenbund*), as Friedrich explicitly argued in his works:

> The American concept, at this point, may be called the discovery of the "federal state", because that was the term which the Germans and others attached to it when they contrasted it to a

> confederation of states. Actually, no such dichotomy was ever faced by the master builders of the American system (Friedrich 1968: 18).

Friedrich also argued that 'federalism should not be considered as a static pattern, as a fixed and precise term of division of powers between central and component authorities. Instead, federalism should be seen as the process of federalizing a political community' (Friedrich 1962: 514). This came as no surprise since Friedrich was part of the same intellectual atmosphere shared by other scholars at that time, including many other commentators of Community integration based in the US. Friedrich himself was familiar with Hay's work because he also wrote a review of his volume, which was later published in the *American Journal of International Law* in 1967 (Friedrich 1967).

The book review was mostly descriptive and short, but it showed appreciation for the work, defining it as a 'very interesting and well documented study' (Friedric 1967: 636). Of course, there were also important differences between these two authors that were primarily related to the concept of sovereignty. As we have seen, Hay does not renounce the notion of sovereignty in his analysis, whereas for Friedrich, 'no sovereign can exist in a federal system; autonomy and sovereignty exclude each other in such a political order' (Friedrich 1968: 8). Based on this premise, in his works Friedrich heavily criticised the classical vision of federalism, which is rooted in a very static approach.

Returning to Hay, other evidence of the impact of the comparative language he used can also be found in the debate concerning the effects of the Charter of Fundamental Rights of the European Union. Some authors in writing of the possible centralisation effect caused by the Charter evoked the concept of incorporation as experienced in the US after the entry into force of the Fourteenth Amendment (Eeckhout 2002).

Another terminological and conceptual borrowing refers to the 'implied powers doctrine', which was intended by American scholars to mean the expansion of federal power and the progressive centralisation of federal power[IV] even in areas not expressly mentioned by the US Constitution but necessary to achieve the federal objectives (also in light of the 'necessary and proper' clause[V]). Scholars have deployed the same concept formula to describe the ECJ activity despite the differences existing between the European and American contexts (Weiler 1991: 2415).

Hay has been one of the first legal scholars to spread the word about the importance of a comparative approach in the study of the European integration process. In his *Federalism and Supranational Organizations*, he wrote that 'one of the important reasons for the success of European integration is the organizational form which it adopted for the three "European Communities". Described as "supranational" ... these organizations possess both independence from and power over their constituent states to a degree suggesting the emergence of a federal hierarchy' (Hay 1966: 4).

Even earlier, in 1963, in an article published in the *American Journal of Comparative Law*, Hay referred to an 'imperfect' federalism, stating that imperfect federalism that 'derives from the limited economic federalism of the organization need not change the characterization, especially since the developing case law may correct imperfection' (Hay 1963: 24).

Perhaps the most important contribution by Hay concerns his work on the very concept of 'supranationalism' from a legal point of view. 'Supranational' was the word used in the first version of the European Coal and Steel Community (ECSC) Treaty; for example, it is possible to find reference to supranationalism in Article 9 of the ECSC Treaty, which is understood as independence from national governments:

> The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfillment of their duties, they shall neither solicit nor accept instructions from any government or from any organization. They will abstain from all conduct incompatible with the supranational character of their functions.
> Each member State agrees to respect this supranational character and to make no effort to influence the members of the High Authority in the execution of their duties.

Another key provision was represented by Article 13 of the ECSC Treaty, which provided for majority rule for the activity of the High Authority.[VI] These two provisions were taken into account by Hay, and the shift from unanimity to majority and the independence from national governments were reflected in two of the six requirements he identified in defining the legal concept of supranationalism:

> 1) "Independence of the organization and of its institutions from the member states';
> 2) '…the ability of an organization to bind its member states by majority or weighted majority vote';

> 3)'…the direct effect of law emanating from the organization on natural and legal persons in the member states, i.e., a binding effect without implementation by national legislative organs';
> 4)'…supranationalism, at least in its present European form, involves a transfer of sovereign powers from the member states to the organization';
> 5) '…supranationalism depends on the extent of functions, powers, and jurisdiction attributed to the organization';
> 6)'Finally, supranationalism has been defined in terms of the institutions with which the European Communities have been equipped. This suggestion does not draw support from the existence of a Council and a Commission because all international organizations which are more than mere treaty arrangements, alliances, or associations, must necessarily have policy-making or administrative organs or both (Hay 1966: 31-33).

Of course, Hay was influenced by other scholars, and he was Eric Stein's research assistant in 1958 (Boerger 2014: 872). Stein was probably the pioneer of the comparative approach in European Studies, as he wrote an important article in 1955 on the case law of the ECJ entitled 'The European Coal and Steel Community: The Beginning of Its Judicial Process', which was published in the *Columbia Law Review* (Stein 1955). Stein was much more than a lawyer; he was a true European intellectual. He organised two important conferences on the relationship between international organisations and Member States in Bellagio[VII] and then launched a comparative project on the US and the EU. He established a transnational network of scholars and officials, as shown by his important friendship with Michel Gaudet from the Legal Service of the ECSC High Authority.[VIII]

As Weiler put 'he has used this distance to maintain a constant overall synthetic view of the Community' (Weiler 1984: 1161). His essays about Europe and America in a comparative perspective have been collected in the book *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*. The first part of this work contains the article *Lawyers, Judges and the Making of a Transnational Constitution,* which became a classic of European Studies (Stein 1981: 1).

Hay and Stein cooperated a lot, indeed they edited together *Cases and Materials on the Law and Institutions of the Atlantic Community*, a two-volume textbook which 'constituted the first attempt to present to American students the new European developments, and to showcase interactions between regional and universal institutions' (Boerger 2014).

Together, these scholars played a crucial intellectual role because their resort to the federal categories, which were borrowed from American constitutional law,[IX] was essential to describe the process of emancipation of Community law from the logic of international law. To catch such a transformation from public international law into something resembling a federal entity (still partial in *Van Gend en Loos*, in which the reference to international law is still present), they also introduced the constitutional jargon in European Studies, as confirmed by the very well-known incipit that opens the most famous article by Eric Stein in which federalisation and constitutionalisation are seen as two sides of the same coin:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe (Stein 1981: 1).

These words will influence generations of scholars and, at the same time, confirm the court-centred approach that has characterised EU law studies for many years.

3. What is left of Hay's functional federalism?

Many things have changed with the passage of almost sixty years since the publication of *Federalism and Supranational Organisations*, but the amazing aspect is that it is truly a mine of insights for all scholars interested in EU law. I will try to emphasise the relevance of these considerations by looking at some aspects that seem to me still relevant today, touching on the issues of direct effect and primacy, convergence in terms of values and the relationship between supranationalism and intergovernmentalism.

The pillars of supranationalism are still present and have been strengthened: the scope of the majority principle has been extended in the EU lawmaking process, the Commission has strengthened its independence over the years and has recently even attempted – with the Treaties unchanged – to change its nature. I am referring to the notorious debate on the *Spitzenkandidat*, which has not yet produced the desired results but is brought up again and again in the European elections. At the same time, the European Union has never renounced its intergovernmental component, which has experienced a new youth with the emergence

of different crises (such as financial and political). For instance, the financial crisis has opened a season of evident decline for European mega-constitutional politics. The need to deal with contingent emergencies has led to the end of grand designs for reform (with the exception, perhaps, of Macron's vision[X]) and the emergence of a managerial approach aimed at responding in a timely manner to urgent issues.

It has also produced a policy of austerity that has led to much criticism and the casting of further blame on the European Union, and which has made evident the limits of an – unfortunately still weak – interstate solidarity that exploded in the migration crisis. The financial crisis also confirmed the existence of a different British political agenda, and the nation did not agree to sign the Fiscal Compact. As is well known, this difference of views (among other things) later led to Brexit.

In addition, it fostered the emergence of sovereigntist populisms (De Spiegeleire, Skinner, Sweijs 2017) that have ended up challenging the values of the Union as set out in Article 2 TEU (Spieker 2023).

Finally, the financial crisis marked a revival of intergovernmental dynamics and, according to some, a constitutional mutation of the Union (Dawson, de Witte 2013).

The constitutional ambitions of the EU suffered a severe blow with the economic crisis, leading many scholars to argue for a radical change in the structure of the European order.

In particular, the new economic governance that emerged in those years with the use of a combination of acts formally under EU law and agreements under public international law triggered a very interesting debate on the fate of supranationalism. The contents of all these measures have been extensively analysed by scholars,[XI] but the aim of this contribution does not include an in-depth exploration of this debate.

Within the new European economic governance, the asymmetric dimension of the EU has been amplified by the nature of the instruments employed since some of the introduced measures have been adopted out of the EU law framework, namely via the conclusion of international agreements. This factor has permitted the creation of a set of rules shared by a group of the EU Member States in the form of a public international law treaty.

As Bruno de Witte has pointed out, this 'turn to international treaties' (de Witte 2013) is not new; since even in other cases, this path has been followed.[XII]

The first reaction to this trend may be to interpret it as a return to intergovernmentalism and as a loss in terms of supranationalism. But as Fabbrini pointed out, the use of

differentiated agreements among members of a union is known even in federal experiences.[XIII] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was the solution chosen to challenge the crisis after the evaluation of a list of alternatives, first of all, the revision of the EU Treaties, that is, the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU). Another option considered was the use of the enhanced cooperation as regulated under the EU Treaties.[XIV] This path was suggested by some leading scholars as the way to overcome many of the EU's difficulties (Piris 2011). As mentioned, this was not the first time in which the international law instruments have been employed to face a supranational issue, even in the field of the European economic governance.[XV] However, scholars do not see a common strategy behind this trend; rather, this path was chosen because of the flexibility[XVI] that it can offer:

> Basically, in the case of the EFSF and of the ESM, EU law did not offer any suitable instruments because of the insufficiency of the EU's financial resources, a problem that can be remedied only in the long run, but not in the immediate context of the unfolding euro crisis. As for the Fiscal Compact, one could say that the states accidentally stumbled into the conclusion of a separate international agreement, for a mix of reasons including the rigidity of the TFEU amendment process, the belief (especially on the German side) in the symbolic power of a treaty, and also – admittedly – the wish to avoid going through the cumbersome and lengthy procedures of EU legislation (de Witte 2013).

The debate is far from over, and the pandemic crisis and the crisis linked to Russian aggression against Ukraine have given rise to new developments and even prompted talk of a Hamiltonian moment for the European Union. Regardless of the nature of the Next Generation EU as a Hamiltonian moment or not, it has certainly offered important arguments to confirm that it is far from being a technocratic depoliticising instrument and, thus, that the EU is actually capable of fuelling and enhancing important political conflicts even at the supranational level. This has been confirmed by empirical research looking at the negotiations behind the Next Generation EU (de La Porte, Dagnis Jensen 2021), but evidence of this can also be seen in the recent disagreements between the Parliament and the Commission with reference to the choices regarding the externalisation of the migration crisis and the problematic migrant deal with Tunisia (Sorgi 2023) or with reference to the

choices made by the Commission concerning the Rule of Law crisis (Hanke Vela, Chiappa 2024). This is also to a certain extent good news because it means that politics is alive at the supranational level and the hope is that the EU can complete its democratisation process in this sense. Having reasoned about the relationship between supranationalism and intergovernmentalism, I can turn my gaze to two other pillars of the concept of supranationalism developed by Hay, namely direct effect and the primacy of Union law. The nature of EU law primacy has changed over the years, and the idea of primacy devised in *Costa Enel* is different from the absolute version of it endorsed by the ECJ in *Internationale Handelsgesellschaft,*[XVII] which famously triggered a reaction at the national level, thereby contributing to the explosion of the first constitutional conflicts (understood as conflicts between EU law primacy and constitutional supremacy) in the seventies. The challenges posed by national constitutional court judgments, such as the *Frontini*[XVIII] *and the Solange cases,*[XIX] *have certainly contributed to changing the original understanding of primacy. Today, primacy* faces great challenges that range from the Rule of Law (ROL) crisis to the identity politics of illiberal populists in Hungary and elsewhere to the entry into force of the Lisbon Treaty with the new version of Article 4, which expressly stipulates the EU's duty to respect the 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' (Article 4.2 TEU). As Faraguna has argued, this provision has been used more by national constitutional courts than by the Court of Justice of the EU (Faraguna 2021), and this has in some cases created abusive interpretation of this clause (Scholtes 2023).

How should primacy be adapted in this context? Should we call for a return to an absolute concept of primacy to deal with these phenomena? Should the Court of Justice give up national identity and Article 4.2 TEU? I do not think so, as I have tried to argue elsewhere (Martinico 2021). National identity is not a bad thing per se, especially if used appropriately. In fact, avoiding the use of Article 4.2 risks leaving grounds for illiberal populists who would monopolise the identity argument, as has already happened, for instance, in some decisions of the Hungarian Constitutional Court.[XX] In some cases, these courts have used 4.2 TEU as if it were decontextualised from sincere cooperation under Article 4.3 to justify the violation of values and fundamental rights principles under Articles 2 and 6 TEU.[XXI] This is not acceptable, but avoiding the reference to national identity or claiming to interpret it without taking into account what national constitutional courts have said (at least when they duly

refer to preliminary references using Article 267 TFEU) would be a boomerang that could end up with a loss of the cooperation of national constitutional courts, especially of those courts that have acted in good faith, respecting sincere cooperation as requested by Article 4.3 TEU.

Direct effect has also changed its nature over the years, as Robin-Oliver argued (Robin-Oliver 2014): at first, it was a feature of those norms capable of passing the *Van Gend en Loos* test, but later, it became something different, especially in cases in which directives were at stake. In these cases involving directives, the norms have been systematically denied horizontal direct effect regardless of their characteristics. This 'no horizontal direct effect rule' has created inconsistencies in the case law of the CJEU and issues in the protection of fundamental rights (Gennusa 2023). The CJEU has tried to deal with this by devising what AG Bot called 'palliatives' in his Opinion in the *Kücükdeveci* case.[XXII] This is not enough, and sometimes these palliatives produce shortcomings. It is sufficient to recall the *Mangold* case[XXIII] and the tension created at the national level by this doctrine,[XXIV] not to mention the uncertainty concerning the case law in which the horizontal direct effect is based on the combination of directives and the provisions of the Charter of Fundamental Rights.[XXV]

If the EU already has federal characteristics, then beyond the question of its new institutional and political form, as Hay argued almost sixty years ago, these features need to be readjusted in light of the progressive importance acquired by fundamental rights and other challenges encountered by the EU. In this respect, while some of the statements made in that book may inevitably bear the weight of years, the final lines of Hay's book are of rare foresight:

> European integration has provided a remarkable legal structure. It is useful both as a model for new ways of multistate cooperation an association and as a highly sophisticated application of federal relational concepts to an institutional framework for regional association. But especially in the case of regional association (as distinguished from functional supranational cooperation), what goals provide the "will to integrate"; what is the common political, philosophical, and ethical heritage (homogeneity) which creates common value goals; and what minimum guarantees constitute the "rule of law" which is indispensable, even when balanced against the larger regional interests? All of these questions are beyond purely legal analysis; they require comparative and interdisciplinary evaluation of the common fond of law. All are vital: if the

> trend of necessity is toward multistate cooperation, national issues of "due process" must find their reflection in a multistate "rule of law" (Hay 1966: 307-308).

The references made to a 'multistate rule of law', many years before the delivery of *Les Verts* of the Court of Justice (which stated that 'the European Economic Community is a community based on the rule of law'[XXVI]), to the need for structural compatibility (in terms of homogeneity of values) between the EU and its Member States are issues at the heart of the current political agenda, as confirmed by the important novelty represented by the approval of Regulation 2020/2092 (the so-called Conditionality Regulation)[XXVII] that allows the EU to take measures to protect the budget in case of rule-of-law violations at a national level that threaten EU financial interests. Do these developments go in the direction of a progressive federalisation of the Union? Conditionality, often described as a Trojan horse by which the EU threatens sovereign choices, actually belongs to the history of federal systems (Baraggia 2023). Far from being an instrument to be incensed by or to condemn a priori, conditionality is an instrument of constitutional law that can and must be rationalised, which includes consideration of past mistakes made by the EU and its Member States. The attempt to link 'money to values' (Baraggia, Bonelli 2022), as has been written, is part of a necessary strategy to overcome the dangerous democratic retrogression in some EU Member States.

The approval of measures in Hungary and elsewhere that attack the independence of the judiciary, centralise the power of the executives in office, restrict the freedom of the press and close universities represents a threat to the EU values enshrined in Article 2 TEU. Article 7 TEU provides for the possibility of sanctions in accordance with a complicated procedure in cases of serious and persistent breaches of the Article 2 TEU foundational values. And although Article 7 TEU has proven ineffective so far, the CJEU has managed to remedy this by adapting the infringement procedure to comply with cases of violations of values. The entry into force of the Conditionality Regulation and the recent case law of the CJEU in this respect[XXVIII] represent the maximum effort made by the EU to act as an antidote against illiberal populism. The debate on how to guarantee the values of Article 2 confirms another of Hay's insights, this time concerning the role of homogeneity clauses in classical federal systems, starting with the experience of the Republican Guarantee Clause in the United States.[XXIX] Far from being exhausted, the doctrinal debate on the federal nature of the Union is fuelled by the innovations introduced to address crises in the integration process.

For all these reasons, if the concept of federalism today has ceased to be an 'f-word' (Puder 2003: 1583) in European studies, we owe it to the work of scholars like Peter Hay, who at the dawn of the European integration process and writing from across the ocean, inaugurated a new strand of studies without being afraid to use the language and tools of comparative analysis.

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* Giuseppe Martinico is a Full Professor of Comparative Public Law at the Scuola Sant'Anna, Pisa. Email: giuseppe.martinico@santannapisa.it

I https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en. On the conference, see Blokker 2022.

II ECJ, 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos, ECLI:EU:C:1963:1.

III ECJ, Case 6-64, Flaminio Costa v. E.N.E.L., ECLI:EU:C:1964:66.

IV See Section 8, Article I of the US Constitution.

V 'The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof' (Article I, Section 8, Clause 18).

VI Article 13 ECSC Treaty: 'The High Authority shall act by vote of a majority of its membership. Its quorum shall be fixed by its rules of procedure. However, this quorum must be greater than one half of its membership'.

VII A series of conferences organised in Italy between 1965 and 1967.

VIII See the work by Boerger (Boerger 2014: 866) on the relationship between Gaudet and Stein.

IX 'We must stop measuring the EC in terms of incipient federation. American lawyers and political scientists are quite compulsive about this. I plead guilty with everyone. . . . The federal perspective automatically leads to wrong questions about the Court of Justice. Most Europeans do not know what we are talking about when we speak of the federalizing function of the Court. I entirely agree that the Court of Justice is not the most important organ in the integration process and that its role in Community policy-making has been limited. Letter from Eric Stein to Stuart Scheingold (8 March 1962)' (Boerger 2014: 882).

X See the launch of the Conference on the Future of Europe, https://futureu.europa.eu/

XI See, for instance, the contributions included in de Witte, Héritier, Trechsel 2013.

XII 'And yet, what happened then, and what happened later when the ESM Treaty and the Fiscal Compact were concluded by groups of Member States, seems less shocking when seen within a broader evolutionary perspective of European law. In fact, there are numerous earlier examples of international treaties concluded between groups of member states of the EU. They have concluded, ever since the 1950's, agreements in areas such as tax law, environmental protection, defence, culture and education. The most prominent example of an inter se agreement (that is: an agreement between some but not all the EU member states) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly designed as interim arrangements in preparation of a final regime at the level of the European Community, rather than as a rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 member states; and for the Prüm Convention later on. In the course of the evolution of European integration, the importance of international agreements between the EU member states has declined' (de Witte 2013).

XIII 'As the comparative analysis makes clear, also the US Constitution is endowed with an instrument – the "compact clause" – which allows states to pursue flexible and differentiated action within the American Union. Yet, the comparison reveals that this instrument is not subject to a specific finality and has consequently been utilized in the US for a wide variety of purposes having to do generally with interstate adjustments. In the EU context, instead, it emerges that the function of the enhanced cooperation is essentially circumscribed to ensuring multispeed integration in the EU. The identification of a clear pro-integrationist ratio in the structure of the enhanced cooperation mechanism, however, has important implications, both for the kind of cooperation that can be launched by the states and for the role of the EU institutions in policing the constraints

that surround its use' (Fabbrini 2012).

[XIV] This is not an exhaustive list; authors like Beukers, for instance, identified a more complex scenario (Beukers 2013).

[XV] For instance, the Treaty Establishing the European Stability Mechanism was signed by the Member States of the Eurozone to create the European Stability Mechanism (ESM). http://europa.eu/rapid/press-release_DOC-12-3_en.htm

[XVI] 'Separate international agreements, which do not involve an amendment of the TEU and TFEU, can define alternative requirements for their entry into force. Not only can such agreements be concluded between less than all the EU states, but they can also provide for their entry into force even if not all the signatories are able to ratify. The Fiscal Compact offers a spectacular example of this flexibility in that it provided that the treaty would enter into force if ratified by merely 12 of the 25 signatory states, provided that those 12 are all part of the euro area. The fact that the authors of the Fiscal Compact moved decidedly away from the condition of universal ratification for its entry into force has created a 'ratification game' which is very different from that applying to amendment of the European treaties, where the rule of unanimous ratification gives a strong veto position to each individual country' (de Witte 2013).

[XVII] ECJ, Case 11-70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

[XVIII] Italian Constitutional Court, *Frontini v Ministero delle Finanze*, 183/73 [1974] 2 CMLR 372 ().

[XIX] *Solange I-Beschluß*, BVerfGE 37, 271; 2 BvL 52/71; *Solange II, Re Wuensche Handelsgesellschaft*, BVerfG, 22 October 1986, [1987] 3 CMLR 225265.

[XX] Hungarian Constitutional Court, Decision 22/2016, https://hunconcourt.hu/dontes/decision-22-2016-on-joint-excercise-of-competences-with-the-eu/

[XXI] Hungarian Constitutional Court, Decision 22/2016, https://hunconcourt.hu/dontes/decision-22-2016-on-joint-excercise-of-competences-with-the-eu/, par. 62-66.

[XXII] 'The Court compensated for that firm refusal to accept a horizontal direct effect of directives by pointing to alternative solutions capable of giving satisfaction to an individual who considers himself wronged by the fact that a directive has not been transposed or has been transposed incorrectly.

The first palliative for the lack of horizontal direct effect of directives is the obligation on national courts to interpret national law, as far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. (18) The principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.

In Pfeiffer and Others , the Court set out the procedure to be followed by the national courts in regard to a dispute between private parties, thereby reducing a little bit further the boundary between the right to rely on an interpretation in conformity with Community law and the right to rely on a directive in order to have national law which is not in conformity with Community law disapplied. The Court stated that if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law, or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

It is agreed, however, that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem.

The second palliative for the lack of horizontal direct effect of directives may be brought into play precisely in cases where the result required by a directive cannot be achieved by interpretation. Community law requires the Member States to make good damage caused to individuals through failure to transpose the directive, provided that three conditions are fulfilled. First, the purpose of the directive in question must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State's obligation and the damage suffered.

Finally, the third palliative consists in disconnecting the horizontal direct effect of directives from the right to plead them to exclude contrary national law in proceedings between private parties. That solution holds that, although directives cannot be substituted for a lack of national law or defective national law in order to impose obligations directly on private individuals, they can at least be relied on to exclude national law contrary to the directive, and only national law cleansed of the provisions contrary to the directive is applied by the national

court in resolving a dispute between private parties.
That disconnection of the 'substitution' direct effect of directives from the right to plead them in exclusion has, however, never been accepted by the Court in a general and explicit way. At the moment, therefore, the scope of this third palliative remains very limited.
In sum, the current line of case-law concerning the effect of directives in proceedings between private parties is as follows. The Court continues to oppose recognition of a horizontal direct effect of directives and seems to consider that the two principal palliatives represented by the obligation to interpret national legislation in conformity with Community law and the liability of the Member States for infringements of Community law are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States'. Opinion of Mr Advocate General Bot delivered on 7 July 2009. *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2009:429, par. 58-65.
[xxiii] ECJ, Case C-144/04, Mangold, ECLI:EU:C:2005:709.
[xxiv] For instance, the decision of the Danish Supreme Court, *Dansk Industri (DI) acting for Ajos A/S v. The estate left by A*, case no. 15/2014.
[xxv] ECJ, Case C-30/19, *Diskrimineringsombudsmannen Contro Braathens Regional Aviation AB*.
[xxvi] ECJ, Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, ECLI:EU:C:1986:166, par. 23.
[xxvii] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. https://eur-lex.europa.eu/eli/reg/2020/2092/oj
[xxviii] ECJ, Case C-156/21, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council.*
[xxviii] Article IV , section IV US Constitution: 'The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence'.

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