

Rethinking Sovereignty: The Role of European Society in the Federal Architecture of the European Union^{*}

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* List of abbreviations: BVerfGE – Bundesverfassungsgericht (German Federal Constitutional Court); CFREU – Charter of Fundamental Rights of the European Union; CJEU – Court of Justice of the European Union; ECJ – European Court of Justice; ECHR – European Convention on Human Rights; ECLI – European Case Law Identifier; ECR – European Court Reports; EU – European Union; OACPS – Organisation of African, Caribbean and Pacific States; OJ – Official Journal of the European Union; TEU – Treaty on European Union; TFEU – Treaty on the Functioning of the European Union

1. Introduction

In October 2022, in a speech delivered in Bruges at the College of Europe, the then High Representative of the Union for Foreign Affairs and Security Policy, Josep Borrell, employed elevated language to depict the European Union as a garden whose most prized fruits are “political freedom, economic prosperity, and social cohesion.”¹ He further stated that where the garden ends, the jungle begins.² Predictably, this speech sparked widespread criticism of Borrell’s choice of language, with accusations of “racism”³ and “neocolonialism.”⁴

It falls outside the scope of this study to engage in an axiological analysis of these statements. Instead, building on this citation, it seems appropriate to begin this contribution by developing brief reflections on how the Union presents itself to the rest of the world, focusing exclusively on the dimension of values, principles, and fundamental rights. This approach allows for an exploration of the EU’s external projection as a normative power, emphasizing its commitment to a distinct set of foundational elements that shape its identity and interactions on the global stage. To summarize as concisely as possible, despite the criticisms levelled against Borrell’s speech, it has the merit of faithfully reflecting the exceptionalism⁵ with which the EU views itself and aspires, often unsuccessfully,⁶ to be perceived by the rest of the world.

The Union sees itself as a legal order that challenges the traditional dogmatics of international law,⁷ asserting that it has successfully fragmented from the international legal order to become a system that is autonomous and self-sufficient, albeit not hermetically sealed.⁸ Furthermore, it is a system characterized by an internal dynamic process of continuous systematization, expansion, and strengthening of fundamental rights protections.⁹ Yet, in its external action,

1 European Union External Action Service (2022).

2 *Ibidem*.

3 BISHARA (2022).

4 STEVIS-GRIDNEFF (2022).

5 DE WITTE (2008), pp. 39-54.

6 ODERMATT (2021), pp. 18-20.

7 DE BAERE (2008), p. 1.

8 ODERMATT (2021), pp. 15-18. International norms encounter the limit of compatibility with fundamental rights as interpreted within the EU legal order, as clarified in the landmark judgment in Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities [2008] ECR I-6351, para. 285.

9 DAWSON (2017), pp. 1-2.

the Union presents itself with a clear and well-defined set of values, principles, and rights¹⁰ that it is bound to “uphold and promote” according to Art 3(5) TEU.

This framework does not, however, perfectly mirror a system of values and principles that, in its internal dimension, cannot entirely disregard the constitutional traditions of the Member States,¹¹ its interactions with the conventional system of Human Rights protection¹² or the internal challenges it faces.¹³ This system of values, principles, and rules constitutes the defining element of the European society referred to in Article 2 TEU.

At the same time, shifting to a different level of analysis, the Union’s legal order is characterized by federal forms and rules, adhering here to an empirical and anti-formalist interpretation of federal theory. The final component of this ideal triad, alongside society and the federal structure, is, inevitably, sovereignty.

In summary, the objective of this research, conducted through a conceptual methodology, is to rethink sovereignty within the European federal system by emphasizing the conceptual category of European society as outlined in Article 2 TEU. The study of the European legal order and its integration process through the lenses of federal theory is not a novel endeavor.¹⁴ However, while the doctrinal focus on European society is more recent, it is no less significant, as highlighted in the research of Von Bogdandy¹⁵ and Azoulai.¹⁶

Similarly, the European people and popular sovereignty in the EU context have been extensively explored.¹⁷ This contribution, therefore, does not aim to address new themes but rather seeks to investigate a novel intersection between widely studied categories. Specifically, the goal is to examine whether and how the notion of European society can be employed to rethink sovereignty within the federal context of the European Union.

By conceptually positioning European society within the federal framework in which it exists, the research asks: what can these two notions – European

10 Consider, for example, the negotiation and content of the Samoa Agreement, which involved the EU on one side and the Organisation of African, Caribbean and Pacific States (OACPS) on the other, as described by CARBONE (2024), pp. 1314-1331.

11 Suffice it to consider, in this regard, the *Solange* and *Controlimiti* doctrines developed by the German and Italian Constitutional Courts, respectively; Article 4.2 TEU, which explicitly refers to “national identities”; or, moreover, Article 6.3 TEU, which stipulates that “the constitutional traditions common to the Member States shall constitute general principles of the Union’s law”.

12 The literature on this subject is vast; for present purposes, it suffices to refer, among many, to HALBERSTAM (2015), pp. 105-146.

13 KELEMEN & BLAUBERGER (2017), pp. 317-320.

14 Among all, the work most deserving of mention for its completeness and the accuracy of its analysis of the European federal process is SCHÜTZE (2009).

15 VON BOGDANDY (2024).

16 AZOULAI (2022), pp. 203-214.

17 BEETZ (2024), pp. 508-524; LINDEN-RETEK (2023).

society and federalism – reveal to one another about the understanding of sovereignty?

The first chapter, *Society, People, and Sovereignty: Definitions and Interactions within the Federal Dynamics of the EU*, establishes the theoretical foundation by defining and analysing these three essential categories and their interrelations. It examines how sovereignty is distributed and shared within the EU's federal framework, how the “people”, understood as a subset of society, interacts with the broader societal construct, and how the concept of European society reshapes traditional sovereignty through a critique of institutionalist theories. This chapter demonstrates how these conceptual categories dynamically interact within the Union's federal matrix, laying the groundwork for subsequent analysis.

The second chapter, *The Role of European Society in the Federal Process of the European Union*, focuses on how European society functions within the federal architecture of the Union. It illustrates how the values and principles enshrined in Article 2 TEU are operationalized through the federal process, emphasizing the multi-level and cooperative nature of EU governance. This chapter examines how European society not only benefits from but actively shapes the Union's federal dynamics, particularly through mechanisms such as the implementation of EU law and the interaction between the Court of Justice of the European Union and national courts. It argues that these processes reveal the Union's federalism as not merely structural but as a living system capable of fostering a cohesive European identity aligned with its foundational values.

The concluding chapter synthesizes these insights, advocating for a redefinition of sovereignty within the EU's federal framework. It posits that European society, as articulated in Article 2 TEU, serves as both the foundation and the goal of the Union's governance model. This chapter contends that the EU's federalism is not just a mechanism for managing diversity but a transformative force that integrates governance and societal values. By rethinking sovereignty in this light, the Union offers a model that is at once innovative, cohesive, and deeply rooted in pluralism, presenting a challenge and an opportunity for the future of federal theory and practice.

2. Society, People, and Sovereignty: Definitions and Interactions within the Federal Dynamics of the EU

This section examines three fundamental concepts – people, society, and sovereignty – and their interrelations within the unique federal dynamics of the European Union. The definitional analysis and exploration of these interconnections

provide the essential framework for rationalizing interdisciplinary complexity while laying the groundwork for the thesis that will be further developed in the following sections.

A necessary methodological clarification: this section emphasizes the relationships between these concepts rather than their definitions. Therefore, definitions are treated concisely to focus on their interplay, which is critical for advancing the thesis.

Starting with the concept of “people,”¹⁸ the classical definition refers to a group endowed with citizenship rights by the legal order, characterized by historical, cultural, and linguistic homogeneity. However, defining “people” in the context of European federalism is far more complex. The notion of “people” originates from the model of a “single-status community,”¹⁹ fundamentally at odds with the pluralism within unity that underpins federalism. Moreover, while European citizenship exists, the absence of a homogeneous European demos – culturally, historically, and linguistically – has given rise to the no-demos theory,²⁰ which denies the existence of a unified European people and critiques transnational constitutionalism.

Additionally, European citizenship is not autonomous, but inherently dependent on national citizenship. The German Federal Constitutional Court’s rulings in the *Maastricht Urteil*²¹ and *Lissabon Urteil*²² link the concept of demos to “pre-legal conditions including language, history, and culture.”²³ While authoritative, this theory has faced significant criticism, with alternatives like Habermas’ *pouvoir constituant mixte*, which emphasizes the duality of citizenship at the European and Member State levels,²⁴ offering competing perspectives.

The question persists: what constitutes the European people? Rather than endorsing one doctrine, it is more productive to highlight the limitations of existing theories. These approaches often oscillate between narrow formalism (focusing solely on citizenship) and substantive definitions (e. g., German jurisprudence), which, though influential, remain arbitrary. This analysis leads to the initial proposition of this research: the concept of “people” is a recessive category within the framework of European federalism.

18 LOUGHLIN (2014), pp. 218-237, conducts a valuable analysis focusing on the dichotomy between “people-as-one” and “the people-as-the-governed”, while presenting the principal theories on the people as the bearer of constituent power.

19 NOOTENS (2015), p. 58.

20 MAC AMHLAIGH (2022), pp. 156-160.

21 German Federal Constitutional Court, *Maastricht Urteil* (BVerfGE 89, 155, 1993)

22 German Federal Constitutional Court, *Lissabon Urteil* (BVerfGE 123, 267, 2009).

23 *Ibidem*, pp. 165-67.

24 HABERMAS (2012), pp. 28-37.

Defining European society, by contrast, defies exclusivity. It has been described as “a community of liberal values,”²⁵ “the social whole constituted by the EU Treaty,”²⁶ and, per Article 2 TEU, a system grounded in an open catalogue of values, principles, and rights. These complementary definitions capture the multifaceted nature of this holistic, fluid, and increasingly significant construct within the European legal order.²⁷

Finally, sovereignty must be connected to the concept of people, as sovereignty is exercised by and originates from the people who hold “normative political authority.”²⁸ This research does not aim to dismantle the dogma of popular sovereignty, but to theorize that the concept of a value-based society, as per Article 2 TEU, represents an evolution of popular sovereignty within European federalism rather than its replacement.²⁹

With these foundational concepts in place, the analysis now turns to their interrelations.

2.1. People and Sovereignty

Numerous reconstructions of popular sovereignty within the EU legal order have been proposed, ranging from the *no demos theory* to Habermas’ *pouvoir constituant mixte*, as well as intermediate approaches such as Beetz’s concept of “shared popular sovereignty.”³⁰ However, it is Schütze who most explicitly analyses sovereignty in the EU, intricately linking it to its federal nature. By emphasizing the “ambivalence”³¹ of the Treaties, Schütze recognizes that “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.”³²

Moreover, Schütze challenges the dogmatic category of the indivisibility of sovereignty,³³ theorizing a “federation of states” in which sovereignty is distributed

25 AZOULAI (2022), p. 209.

26 VON BOGDANDY (2024), p. 3.

27 *Ibidem*, pp. 32-36.

28 BEETZ (2017), pp. 469-470.

29 VON BOGDANDY (2024), pp. 162-164.

30 BEETZ (2024), pp. 511-513.

31 SCHÜTZE (2009), p. 50.

32 *Ibidem*.

33 *Ibidem*, pp. 63-68.

and shared.³⁴ In doing so, he effectively undermines the absoluteness of another dogma, that of popular sovereignty understood in traditional terms.

While Schütze's thesis is both compelling and worthy of acceptance, this research aims to push the boundaries further by broadening the framework within which sovereignty is conceptualized. Specifically, it proposes that sovereignty be reconceived as part of a more expansive category that integrates and transcends the federal dimension: European society.

But what, then, is the European *people*? It is necessary here to distinguish between the formal-institutional dimension and the substantial-cultural dimension. Regarding the former, it can be argued that a European *people* exists and exercises its sovereignty through the European legislature,³⁵ which, as in the most classical forms of federalism, is composed of a *Chamber of the People* (the European Parliament) and a *Chamber of the States* (the Council). Despite the shortcomings that limit the role of the European legislature – and in particular, the Parliament³⁶ – as an adequate representative of the European *people*, the underlying logical framework can still hold.³⁷

However, if we step away for a moment from the stronghold of synchronic formalism, the cracks become more apparent. On a factual level, the essential elements of a *people* are absent: a common language, a homogeneous culture, and, above all, a “sense of collective agency”³⁸ which leads to the rise of a “community of ignorance.”³⁹ Are we dealing with a singular European *people* or *peoples*? A sovereign *people* or sovereign *peoples*? These are all reasonable questions – but are they useful? Perhaps it is time, even in the interest of the *people* itself, to avoid reducing it to a mere fetish that opens the door to populism, understood as “the theory that sovereignty always resides inalienably in the *populus*, the whole people, even after the institution of a government.”⁴⁰

To relativize the concept of the European *people*, it must be placed in relation to European society.

34 *Ibidem*, p. 73.

35 *Ibidem*, pp. 52-58.

36 *Ibidem*, pp. 53-55.

37 Moreover, in LACEY (2016), p. 65, the dual constituency of Member States and citizenship (represented in and by the Parliament) marks the dividing line between a confederation and a federation.

38 BEETZ (2024), p. 512.

39 LACEY (2016), pp. 70-71.

40 TIERNEY (1982), pp. 56-60.

2.2. People and Society

This section explores the intricate relationship between people and society, specifically within the framework of the European Union. Whenever these terms are used, they are understood in the context of the EU. It is essential to resist the temptation to reduce people to a mere subset of society, as these two categories only overlap partially and each retains its distinct dogmatic autonomy.

To advance this research, it is necessary to examine the intersection between people and society, highlighting their interplay while respecting their distinctiveness. The notion of people, even when understood as a federal people, suffers from conceptual limitations within the EU system. These limitations often lead to either distortions or theoretical dead-ends.⁴¹ However, this critique does not align with the no-demos theory; instead, it resonates with Christoph Möllers' broader conception of people,⁴² which disconnects the democratic ideal of self-determination from traits like shared ethnicity or national identity.⁴³

The question arises: why continue to insist on the term "people" which brings significant systemic and ontological challenges? The TEU itself offers a clue: it consistently refers to peoples in the plural, never a singular people. This reinforces the coherence of the holistic conception of European society, as articulated by Mosler⁴⁴ and Von Bogdandy.⁴⁵ Article 2 TEU explicitly mentions "society", further underscoring this perspective.⁴⁶ As the meaning of this provision will be explored further, we now turn to the relationship between people and society, particularly in light of the EU's federal dynamics.

On the conceptualizations of people, much has already been discussed. But what, then, is European society? Comparing the perspectives of Von Bogdandy and Azoulai provides useful insights. Von Bogdandy, inspired by a Hegelian understanding of the State,⁴⁷ describes society as encompassing "all public institutions, with their staff, procedures, instruments, and practices, but also all citizens with all their social relationships."⁴⁸ This structural and relational interpretation emphasizes the dense networks that integrate institutional and individual dynamics, including the federal dimension.

41 MAC AMHLAIGH (2022), pp. 158-160.

42 MÖLLERS (2011), pp. 247-266.

43 MÜLLER (2017), p. 1264.

44 MOSLER (1966), p. 168, quoted in VON BOGDANDY (2024), pp. 30-32.

45 VON BOGDANDY (2024), pp. 32-36.

46 *Ibidem*, p. 11.

47 *Ibidem*, p. 3.

48 *Ibidem*.

Azoulai, while describing society as a “structured whole,”⁴⁹ stresses its dynamic and aspirational nature. For him, European society is “something to be constructed and organized rather than a given,”⁵⁰ a goal to strive toward rather than an established reality. With striking brevity, he asserts, “It is not real.”⁵¹ While both theories share a holistic premise, Von Bogdandy emphasizes the institutional and relational components, whereas Azoulai treats European society as a future-oriented project.

From a federal perspective, Azoulai argues that conceptualizing the EU as a federal constitutional structure is restrictive compared to framing it as a European society.⁵² Von Bogdandy, by contrast, keeps these dimensions distinct. Building on Von Bogdandy’s work, this research posits that people, society, and the Union’s federal architecture intersect in a tripartite relationship. My thesis is that the people is simultaneously an actor, a component, and a structure within the holistic matrix of European society.⁵³

According to Article 2 TEU, society subsumes and absorbs the people. While the people retain ontological autonomy, they lose their central role as the foundation of the Union’s sovereign prerogatives. The Union, as a whole, is sovereign – or at least co-sovereign – most notably due to its *Kompetenz-Kompetenz*.⁵⁴ But what people are we referring to? It is the collective of citizens who confront those exercising sovereign power delegated by the people, whether at the State level or through fragmented sovereignty, both upwards and downwards.⁵⁵

This framework, however, does not fully capture intermediary realities, such as transnational corporations, interest groups, interinstitutional dynamics, or even future generations. These entities, alongside the “social whole” of European society, coalesce around the values and principles of Article 2 TEU, which form the core of its identity.

The boundaries of society, particularly the divide between insiders and outsiders, raise profound and unresolved questions, especially concerning the status of third-country nationals within European society.⁵⁶ While this issue may seem peripheral, it is far from marginal conceptually or practically. A formalistic identification of society with the people, understood merely as the sum of

49 AZOULAI (2022), p. 205.

50 *Ibidem*, p. 206.

51 *Ibidem*.

52 *Ibidem*, p. 205.

53 ELAZAR (1998), pp. 28-33, employs the effective metaphor of a matrix to describe the federal system in general terms.

54 SCHÜTZE (2009), pp. 151-156.

55 FINCK (2017), pp. 1119-1134.

56 VON BOGDANDY (2024), pp. 96-99; AZOULAI (2022), pp. 211-213; ALEKSEEV (2023), pp. 213-214.

citizens, conflates these categories. This prioritization of the people over society risks undermining the promise and potential of a broader European society,⁵⁷ as envisioned in Article 2 TEU.

2.3. Society and Sovereignty

We now turn to the final interrelation, which is also the most complex and least examined. This represents the last and necessary step in the theoretical-conceptual foundation that precedes the exposition of my theory in the subsequent section of this contribution.

Sovereignty, in the supranational federal context of the European Union, definitively dismantles the Schmittian dogma of sovereignty as an exclusive prerogative of the State⁵⁸ and opens the door to the concept of “shared popular sovereignty.”⁵⁹ As Nootens observes,⁶⁰ the concept of sovereignty in reference to the nation-state lacks any causal link to the democratic nature of an order. Yet, despite its commendable irenicism, the theory of “shared popular sovereignty” appears, in my view, capable of capturing only certain dynamics of sovereignty distribution among the multiple levels of governance in the Union, Member States, and local autonomies. Assigning sovereignty exclusively to the European peoples,⁶¹ while correct, is reductive if it does not also account for the phenomenon of sovereignty transfers from Member States to the Union’s institutions.

One could engage in an erudite debate about the ownership of these portions of sovereignty – whether they remain with the Member States or should be considered fully transferred to the Union. While this is a topic of great scientific interest, it lies beyond the scope of this research and, in any case, the phenomenon seems irreversible at this point. Adding to this complexity is the category of constitutional-like rulings from the CJEU,⁶² which have effectively conferred sovereign prerogatives on Union institutions over time beyond the literal tenure of the Treaties. Sovereignty is further fragmented, delegated, or shared even within the legal orders of Member States, many of which are not immune to some form of decentralization.

57 VON BOGDANDY (2024), p. 9.

58 *Ibidem*, p. 42.

59 BEETZ (2024), pp. 511-513.

60 NOOTENS (2015), pp. 68-70.

61 BEETZ (2024), p. 511.

62 To cite just a few landmark cases in this regard: *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1 (Case 26/62); *Costa v. ENEL* [1964] ECR 585 (Case 6/64); *Commission v. Council (ERTA)* [1971] ECR 263 (Case 22/70).

What may appear as chaos and fragmentation instead transforms into unity within pluralism,⁶³ as well as the concrete implementation of the subsidiarity principle. Applying the doctrine of European society to the dynamics of sovereignty within the federal architecture requires rejecting partial and partisan theories that aim to centralize sovereign prerogatives either entirely upward (toward the Union) or downward (toward Member States).

My theory, while obviously standing against populism and anachronistic conceptualizations of the nation-state, also cautions against an exaggerated or accelerated European federal integration that would detach Union institutions from the Union's other components,⁶⁴ turning it into a Platonic republic of philosophers.⁶⁵

In media stat res, but it is in European society – and even more so in the values enshrined in Article 2 TEU – that the lifeblood flows, binding the parts of the whole together and, above all, establishing a limit on the exercise of sovereign power.⁶⁶

It now becomes necessary to close the circle from a logical and conceptual perspective. The most tempting path would be to simply embrace the theory of post-sovereignty, which views the EU as “a system of interdependent entities, in which there is no ultimate comprehensive authority – no sovereign, state or otherwise, in the modern sense.”⁶⁷

This doctrine, it must be acknowledged, has undeniably influenced the ECJ in its relentless judicial weaving of the EU's constitutional fabric.⁶⁸ However, in my view, it resolves the complexity of sovereignty by negation, leading not to error, but to an artificial solution. Capturing and describing the phenomenology of sovereignty in the EU context seems nearly impossible without resorting to the categories of federal theory.

In this sense, it is crucial to walk a path that stretches from Elazar to Schütze. The profound insight of the American scholar lies in his assertion that “[t]he model

63 FINCK (2017), pp. 1131-1133.

64 VON BOGDANDY (2024), pp. 32-36.

65 JÖRKE & SONNICKSEN (2020), pp. 217-234.

66 For the sake of completeness, it is essential to highlight the triad that links Article 2 TEU with Articles 4(2) and 7 of the same Treaty. These latter two articles are, in a way, parallel and delineate the ultimate limits to the exercise of sovereign prerogatives by both the Union and its Member States.

Article 4(2) TEU establishes that the Union “shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” Meanwhile, Article 7 TEU addresses situations where “a clear risk of a serious breach by a Member State of the values referred to in Article 2” arises. In such cases, it allows for the initiation of a procedure that could lead to the suspension of the offending Member State's rights, commonly referred to as the “nuclear option” due to its severe and far-reaching consequences.

67 CANIHAC (2023), p. 100.

68 *Ibidem*, pp. 103-104.

for federalism is the matrix, a network of arenas within arenas.”⁶⁹ While initially referring to the American federal experience, this concept is easily abstracted to general terms.

Elazar was the first to dismantle the pyramid, the traditional iconography of federal dynamics, which places the centre at the apex and the periphery at the base. He replaces the pyramid model with a matrix model, where there are no longer centres and peripheries but instead “multiple centres, bound together within a network of distributed powers, with lines of communication and decision-making that force them to interact.”⁷⁰

It is almost surprising that in his work, *The Emergence of European Society through Public Law*, Von Bogdandy never cites Elazar nor employs the metaphor of the matrix, which could have evocatively described his holistic conception of European society.⁷¹

Schütze, on the other hand, builds on Elazar’s teachings and identifies signs of a gradual evolution (*gemeinweg*) of the EU’s dual federalism toward a cooperative model.⁷² The implications of this latter theory for sovereignty are of paramount importance. Schütze concludes that intra-order sovereignty spheres are no longer atomically divided but rather interwoven.⁷³ It is precisely this interweaving that must be scrutinized to understand the phenomenology of sovereignty in the European Union.

This interplay of cooperation and confrontation also becomes the locus of the Union’s federal architecture, within which the European society – understood as outlined thus far – finds its place. The task of situating European society within the channels of the Union’s federal process constitutes the core of my theory and the primary objective of this research, which will be developed in the subsequent chapter.

3. The Role of European Society in the Federal Process of the European Union

The thesis I aim to present at this stage of the research can be effectively summarized using an anatomical metaphor, if I may. The multi-level federal architecture of the European Union – particularly the intricate interweaving of

69 ELAZAR (1984), p. 3.

70 AGRANOFF (2001), p. 37.

71 This omission, though legitimate and coherent, stems from the merely tangential relationship of Von Bogdandy’s research to the federal domain.

72 SCHÜTZE (2009), pp. 345-352.

73 *Ibidem*, pp. 350-52.

competences and sovereign powers referenced in the previous chapter – represents the vascular system through which the European society, as defined in Article 2 TEU, flows, analogous to blood in this metaphor.

An additional element to consider is the values and principles enumerated in the same Article 2, which, in this analogy, function as white blood cells. These defend the “organism”, understood as the organic ensemble of federal models and processes on the one hand, and the European society situated within them on the other, from pathogens. These pathogens are the antidemocratic or “illiberal”⁷⁴ threats that originate either internally or externally and undermine the foundational principles and values of the Union as enshrined in Article 2 TEU.

Thus, following the logic of this medical metaphor, both physiology and pathology will be considered. Regarding the former, the focus will be on the phenomenology of European society and how it conforms to the Union’s federal characteristics, particularly in relation to the role of Courts and Institutions. However, it is recognized that these two categories represent only a small fraction of the European society in its entirety.

As for the pathological aspect, attention will turn to the “antibodies” in action, with a particular focus on the *Regime of Conditionality for the Protection of the Union Budget*,⁷⁵ which serves as a critical mechanism for safeguarding the Union against threats to its fundamental principles and values.

3.1. The physiology

The sui generis federal architecture of the European Union undoubtedly provides the spatial dimension within which European society is situated. However, it is crucial to ask whether the federal element is merely an accessory feature or a necessary and constitutive component of this society. While the values enumerated in Article 2 TEU are compatible with and observable in various non-federal legal systems, the role of federalism in the EU context goes far beyond a mere accessory.

It would be excessive to view the EU’s federal structure as indispensable in a strict sense for the existence of European society. However, it would be equally mistaken to overlook the deep interdependence between the two. Rather, I believe that the federal architecture strengthens the values of Article 2, promoting their realization through a shared interpretation and allowing their appropriate

74 This refers to the oxymoronic expression “illiberal democracy”, coined in the now-famous speech by ORBAN (2014).

75 Regulation (EU) 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 [2020] OJ L433 I/1.

articulation within the matrix. In its procedural dimension, federalism is not merely a means but inevitably also an end to be pursued through a combination of self-governance and participation in governance.⁷⁶ Among the various goals that a federation may pursue, one seems to unite every federal system that is fully realized in both form and substance: freedom.⁷⁷ Federal liberty is founded on voluntary agreement, and it has been rightly observed that it competes with natural freedom, which is unconstrained by the conventions of civilization.⁷⁸

It seems that two principles, which directly stem from the EU's federal nature and its legal order, are functional to the protection of the values of Article 2: loyal cooperation and subsidiarity. Loyal cooperation acts as the adhesive that unites the diverse and plural centres of sovereignty within the Union, ensuring that sovereignty is "shared"⁷⁹ and that the aim of exercising sovereign prerogatives is the realization of the societal model outlined in Article 2. Subsidiarity, on the other hand, plays the critical role of identifying the proper location within the matrix for a specific fragment of sovereign competence and determining which component of European society is "better placed"⁸⁰ to defend and promote values and rights.

Let us now consider two concrete examples of the physiology of European society within the EU's federal framework: implementation and delegation of EU law⁸¹ and the dialogue between the CJEU and the constitutional courts of Member States.⁸²

The phenomenon of implementation and delegation of EU law is deeply connected to the Union's federal architecture, reflecting its multi-level and cooperative governance framework. This process involves Union institutions, such as the Commission and the Council, alongside Member States and Union Agencies, whose roles have grown increasingly indispensable. These mechanisms, rooted in executive federalism,⁸³ demonstrate the Union's ability to balance centralized oversight with decentralized implementation, ensuring that governance operates

76 ELAZAR (1998), p. 70.

77 *Ibidem*, pp. 76-82.

78 ELAZAR (1982), p. 4.

79 BEETZ (2024), pp. 513-515.

80 ARAI-TAKAHASHI (2013), pp. 97-102, highlights, with reference to the ECHR, the two facets of subsidiarity: the cultural and the structural/institutional.

81 On this subject, see LENAERTS, VAN NUFFEL & CORTHAUT, (2021), pp. 565-586.

82 On the subject, noteworthy contributions include LENAERTS (2018), which offers a more optimistic perspective, and TRIDIMAS (2015), which sheds light on the points of tension in the dialectic between the CJEU and the courts of Member States.

83 LANCEIRO (2018), pp. 91-98, highlights the similarities, in this regard, between the EU system and the German federal model.

across multiple levels while respecting the autonomy and diversity of actors within the federal matrix.

At its heart, the implementation of EU law exemplifies the federal principle of shared governance. Responsibilities are distributed across various levels, fostering collaboration between institutions, Member States, and Agencies. This distribution aligns with the federal ideal of balancing unity and diversity, allowing the Union to maintain cohesion while respecting pluralism. Agencies, by providing specialized expertise and bridging functional gaps, enrich the polycentric nature of the federal matrix and enhance their capacity to address complex challenges.⁸⁴ However, the increasing reliance on Agencies also raises questions about democratic accountability and transparency, as their growing influence often operates outside the direct scope of primary law and parliamentary oversight, highlighting potential risks to the Union's democratic fabric.⁸⁵

Despite these challenges, the implementation framework aligns with the objectives of the Treaties and reinforces the values of democracy, the rule of law, and human rights enshrined in Article 2 TEU.⁸⁶ By operationalizing subsidiarity, the framework ensures that decisions are made at the most appropriate level of governance, reflecting the Union's commitment to effective and value-driven implementation.⁸⁷ This multi-level and collaborative system not only support the realization of Article 2 values but also underscores how the Union's federal matrix serves as both a mechanism for governance and a means of upholding the principles that define European society.

A brief reflection on the relationship and dialogue between the Court of Justice of the European Union and the superior courts of the Member States is warranted. Without retracing the numerous milestones of this ongoing journey, it suffices to focus on the federal implications and the emergence of European society.

The first point to clarify is the dual role of national judges as judges of the Union,⁸⁸ ensuring the effectiveness of EU law's primacy. In this sense, the CJEU

84 Two particularly noteworthy contributions on this phenomenon, specifically on comitology, are WINDHOFF-HERTIER (2013), which highlights the balance of powers between the Council and the Commission, and FERNÁNDEZ PASARIN *et al.* (2021), pp. 311-330, which focuses on the deliberative dynamics of comitology.

85 GALLINELLA & CHRISTIANSEN (2024), pp. 812-826.

86 Of particular importance is the role of the Fundamental Rights Agency, which, despite its limited attributions, positions itself as a spearhead in the promotion and protection of the values enshrined in Article 2 TEU. On this topic, see GRIMHEDEN & TOGGENBURG, (2016), pp. 1093-1104; THIEL (2014), pp. 435-451; VON BOGDANDY & VON BERNSTORFF (2009), pp. 1035-1068.

87 The Court of Justice, while legitimizing the phenomenon of "agentification" in Case C-270/12 United Kingdom v. European Parliament and Council ("Short-Selling") ECLI:EU:C:2014:18 para. 53, clarified in the same judgment that the acts of agencies are "amenable to judicial review."

88 MAYORAL *et al.* (2014), pp. 1120-1141, provide an analysis of this aspect from a perspective that could be described as sociological.

acts as the federal court entrusted with the nomophylactic function, but EU law truly lives within the matrix through the jurisprudence of all EU judges.⁸⁹

Secondly, it is essential to consider the conflicts that have arisen between the CJEU and constitutional courts, such as those reflected in the Italian doctrine of *controlimiti*⁹⁰ or the German *Solange* cases. These conflicts have been addressed through dialogue and synthesis rather than coercion,⁹¹ even though the door remains open to potential future tensions. This should not be a cause for alarm but rather a dynamic to be preserved as a valuable reflection of federal dialectics.

Indeed, a lively debate over the interpretation and scope of fundamental rights can contribute to their enhanced protection, provided the dialogue is not pretextual,⁹² judicial independence is granted⁹³ and the conversation does not cease. In such a framework, debate – and, if necessary, confrontation – becomes a functional tool for realizing the European society envisioned in Article 2 TEU.⁹⁴

3.2. The pathology

We now turn to the pathology, that is, the obstacles to the realization of a European society informed by the principles of Article 2 TEU. As previously mentioned, these obstacles and threats are manifold. On the external front, it suffices to consider attempts at destabilization through disinformation campaigns conducted in the interests of third countries. Such actions have prompted the General Court of the EU to endorse significant restrictions on freedom of expression and information to protect “the integrity of democratic debate within European society.”⁹⁵

Matters become significantly more complex when the source of the threat is internal. In cases where these threats emanate from a Member State – or more precisely, from the government of a Member State – the Union faces the

89 An example of this trend is the use of the CFREU as a parameter of constitutional review by some national courts, as effectively illustrated in RAUCHEGGER (2020), pp. 258-278.

90 This doctrine is clearly expressed, among others, in the Order no 24 of 2017 of the Italian Constitutional Court.

91 ARROYO JIMÉNEZ (2018), pp. 57-72, adopts the compelling concept of “constitutional empathy”.

92 For example, by making abusive use of the provision on the national identity of Member States under Article 4(2) TEU.

93 MAYORAL & WIND (2022), pp. 1433-1453.

94 VON BOGDANDY (2024), pp. 192-194.

95 Case T-125/22 RT France v. Council ECLI:EU:T:2022:483, para. 193.

challenge of addressing such violations while navigating the constraints of its federal architecture. The Union has at its disposal a range of tools, varying in effectiveness, to address these internal challenges. These tools must strike a balance between respecting the sovereignty of Member States and upholding the shared values enshrined in Article 2 TEU, a task that tests the resilience and adaptability of the Union's federal system.

It must first be acknowledged that the Union has mechanisms more geared toward collaboration, such as the national rule of law dialogues,⁹⁶ whose effectiveness remains highly debated. Here, however, we will focus on the less conciliatory tools available to the Union to safeguard the foundational values of European society: the so-called nuclear option under Article 7 TEU, infringement procedures under Article 258 TFEU and the conditionality regime tied to respect for the rule of law established in secondary legislation.

The nuclear option, while symbolically powerful, is a drastic measure undermined in practice by the strategic use of mutual vetoes,⁹⁷ rendering it largely a residual mechanism. In contrast, the other two tools are regularly employed and reveal how budgetary issues, deeply embedded in the EU's federal dynamics, serve as an effective means of protecting the European society founded on principles and values.

The cooperative federalism of the EU has thus developed instruments which, despite their limitations and the need for further refinement, address these challenges. This highlights the recognition that without a federal system grounded in the values of Article 2 TEU, the European society envisioned in the same article will remain a mere aspirational ideal. The critical insight has been the linkage between budgetary management and the respect for values, paving the way for what might be described as *ethical federalism* characterized by a transactional feature.⁹⁸ This approach integrates financial discipline with the promotion and protection of foundational principles, demonstrating the Union's capacity to adapt its federal framework to meet the demands of its evolving society.

Thus, is the federal character of the Union a driving force for the realization of the values enshrined in Article 2 TEU? The answer appears to be affirmative. On this basis, it is plausible to consider the federal architecture not as a mere historical accident but as a structural element of European society. The Union's federalism is both form and structure, while simultaneously shaping the holistic idea of society that it encompasses.

96 BARATTA (2016), pp. 357-372.

97 SCHMALENBACH (2020), pp. 428-430.

98 THINUS (2024).

This federalism, depending on the context, can be cooperative or executive, asymmetric⁹⁹ and, as discussed, ethical and grounded in values. It is a federalism that demonstrates resilience and adaptability to the complexity of European society, maintaining the values of Article 2 TEU as its compass.

4. Conclusion

The European Union's federalism, integrated with the concept of European society, transcends traditional federal theory, creating a governance model uniquely suited to the challenges and aspirations of a pluralistic and interconnected polity. This innovative federalism does not merely adapt existing structures; it redefines them, combining the ideals of unity and diversity with the operational demands of multi-level governance. It positions the EU as a transformative force,¹⁰⁰ not bound by historical precedents but actively shaping a new paradigm for federal governance.

The Union's federalism operates across multiple dimensions. It is cooperative, ensuring collaboration between supranational institutions, Member States, and local governance. It is executive, facilitating the implementation of Union law through an intricate network of shared competences. It is asymmetric, allowing for tailored solutions that respect the diverse legal, cultural, and political realities of its Member States. Crucially, it is also ethical, rooted in the foundational values of democracy, the rule of law, and fundamental rights as enshrined in Article 2 TEU. These dimensions interact dynamically, reinforcing each other and adapting to the evolving needs of European society.

By embedding the concept of society within its federal architecture, the EU dismantles traditional notions of sovereignty as a zero-sum game. Instead, it offers a model of shared and distributed sovereignty, where power is exercised collaboratively across multiple levels of governance. This framework acknowledges the interdependence of its actors and ensures that sovereignty is not confined to a singular locus but is instead a shared responsibility. This innovative approach not only addresses the Union's internal challenges but also strengthens its ability to uphold and promote its core values in the face of external pressures.

The integration of societal values within the EU's federalism has profound implications. It demonstrates that governance can be both principled and

99 The most significant example is represented by enhanced cooperation, now detailed in the Treaty on European Union (Article 20) and the Treaty on the Functioning of the European Union (Articles 326-334).

100 VON BOGDANDY (2024), *passim*.

pragmatic, aligning operational efficiency with the normative ideals of European identity. The Union's ability to link governance mechanisms, such as budgetary policies and legal enforcement, to the promotion and protection of societal values exemplifies this alignment. Instruments like the conditionality regime and infringement procedures reveal how the EU leverages its federal structure to address threats to its foundational principles, ensuring that the vision of European society remains not just aspirational but achievable.

In this reimagined federal framework, European society emerges as both the foundation and the goal of the Union's governance. The values of Article 2 TEU serve as a compass, guiding the Union's evolution and ensuring that its federal architecture remains responsive, inclusive and resilient. This model does not merely function within the parameters of traditional federalism; it breaks those boundaries, establishing a new, integrated approach that harmonizes governance with values and pluralism with unity. The EU's federal architecture is not simply a mechanism of governance but the lifeblood of the European project. By intertwining governance and societal values, the Union has not only redefined the principles of federalism but also charted a course for a cohesive and resilient European society. This vision, grounded in the values of Article 2 TEU, exemplifies how the EU continues to lead as a transformative and innovative force in governance.

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