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*Sébastien Gauderie*¹  0009-0008-0594-9908

Université de Paris-Nanterre, Nanterre, França

Unleashing Legal Polycentricity in Europe? Barnett, Hayek, and the Theory of European Union Law

Abstract: The questioning of the public and monopolistic production of European Union law is extremely little, if at all, addressed by European Union legal theory. The article proposes to divide the reasons for this absence into two classes. The first part of the article explores reasons endogenous to European Union law. The second part is devoted to reasons that are part of the evolutionary context of European Union law, stemming from facts of a historical, political, epistemological and societal nature. The article suggests to refer to the theory of constitutional polycentric order developed by the American legal theorist Randy Barnett, as well as Friedrich Hayek's theory of interstate federation proposed as early as 1939. Despite the apparent difficulties presented by the Union's contemporary organization, mechanisms specific to European Union law and European culture are capable of supporting the rehabilitation of polycentric conception of Union law and Hayekian interstate federation.

Keywords: Polycentricity, Interstate Federation, European Union, Randy Barnett, Friedrich Hayek.

¹ Public Law PhD Student (Paris Nanterre University, France). European Economic and Financial Criminal Law LLM (University of Luxembourg, Luxembourg). Public Law Maîtrise (Aix-en-Provence Institute of Political Studies, France). History BA and Law BA (Aix-Marseille University, France). E-mail: sebastien.gauderie@parisnanterre.fr

¿Desatar el policentrismo jurídico en Europa? Barnett, Hayek y la teoría del derecho de la Unión Europea

Resumen: El cuestionamiento de la producción pública y monopolística del derecho de la Unión Europea es muy poco o nada abordado por la teoría jurídica de la Unión Europea. El artículo propone dividir las razones de esta ausencia en dos clases. La primera parte del artículo explora las razones endógenas al derecho de la Unión Europea. La segunda parte está dedicada a las razones que forman parte del contexto evolutivo del derecho de la Unión Europea, derivadas de hechos de naturaleza histórica, política, epistemológica y social. El artículo sugiere remitirse a la teoría del orden constitucional policéntrico desarrollada por el teórico jurídico estadounidense Randy Barnett, así como a la teoría de la federación interestatal de Friedrich Hayek, propuesta ya en 1939. A pesar de las aparentes dificultades que presenta la organización contemporánea de la Unión, los mecanismos propios del derecho de la Unión y de la cultura europea son capaces de apoyar la rehabilitación de la concepción policéntrica del derecho de la Unión y de la federación interestatal hayekiana.

Palabras clave: Policentrismo, Federación interestatal, Unión Europea, Randy Barnett, Friedrich Hayek.

Desencadear a policentricidade jurídica na Europa? Barnett, Hayek, e a Teoria do Direito da União Europeia

Resumo: A questão de questionar a produção pública e monopolista do direito da União Europeia é extremamente pouca, se alguma, abordada pela teoria jurídica da UE. O artigo propõe dividir as razões desta ausência em duas classes. A primeira parte do artigo explora razões endógenas ao direito da União Europeia. A segunda parte é dedicada a razões que fazem parte do contexto evolutivo do direito da União Europeia, decorrentes de factos de natureza histórica, política, epistemológica e social. O artigo sugere referir-se à teoria da ordem policêntrica constitucional desenvolvida pelo teórico jurídico americano Randy Barnett, bem como a teoria de Friedrich Hayek da federação interestadual proposta já em 1939. Apesar das dificuldades aparentes apresentadas pela organização contemporânea da União, os mecanismos específicos do direito da UE e da cultura europeia são capazes de apoiar a reabilitação da concepção policêntrica do direito comunitário e da federação interestatal de Hayekian.

Palavras-chave: Policentricidade, Federação Interestatal, União Europeia, Randy Barnett, Friedrich Hayek.

INTRODUCTION

The application of polycentric theory to the EU has also been very limited. [...] While it is undoubtedly true that [this system] display polycentric features and/or have polycentric potential, this does not mean that they already function in a polycentric manner (Zeben, 2019, p. 46).

[The European Union is] constitutionally a Union between Member States, and arguably between their peoples (Jääskinen, 2005, p. 89).

[...] It seems that the individual is asking more and more of the state in terms of protection and security, while at the same time demanding ever greater autonomy of action and thought. The clash of these two contradictory demands makes it all the more necessary to establish an organizing standard that will enable competences to be better allocated on a case-by-case basis (Millon-Delsol, 1992, p. 198).

Within the European Union (EU), doctrinal controversies surrounding the questioning of monopolistic production of law by public structures are rarely, if at all, present in EU legal theory. Historically, through the single market and economic integration, the European Union has been associated with ordoliberalism of German origin (Bruno, 2022). However, despite its attachment to certain liberal ideas, the Union has never promoted of its own accord, from its fundamental texts to the jurisprudential activity of the Court of Justice of the European Union (CJEU), a polycentric conception of the production of law. At the risk of abandoning this particular form of economic liberalism, the EU is tempted by a structural and increasing recourse to public interventionism in the economic sphere (Heidebrecht, 2023).

In contemporary legal theory, the concept of “polycentric law” is a subject particularly emphasized by jurists who are close to classical liberalism and libertarianism (Long, 2022). Some American authors, such as Bruce L. Benson, have addressed this notion since the 1990s (Benson, 1990). But it really made a comeback thanks to an article – “Polycentric Law” – by Tom W. Bell. Bell, currently Professor of Law at Chapman University in California (USA), in which the author conceptually systematizes the notion and makes it adaptable to both theoretical and practical legal discourse (Bell, 1991). The reappropriation of the notion at constitutional level led to a key work by American legal theorist and libertarian Randy E. Barnett, *The Structure of Liberty*, published in 1998, although Barnett had already identified the notion of “non-monopolistic law” in 1986 (Barnett, 1986). In this work, the author intends to develop the notion of “polycentric constitutional order” and systematize it as part of a formal study of the foundations of legislation (Barnett, 1998).

What is the “polycentric conception of law”? A generic, consensus definition of polycentric law “refers to the overlapping and amalgamating of rules and jurisdictions, in contrast to the legislating of a monolithic legal code that denies cultural particularities [and] is not centrally planned” (Mendenhall, 2014, p. 67; Sheleff, 2013) where “different authorities in the different fields of regulation use different sources of law and in different orders” (Weis Bentzon, 1992, p. 30). Tom Bell proposes a definition of polycentric law – “The very definition of polycentric law implies that individuals choose the sort of law under which they prefer to live” – that would cover two levels of reading: a broad sense and a restricted sense. “In a broad sense, then, all legal issues in a polycentric legal order would boil down to the law of contracts. In a narrower sense, however, competing legal systems would offer substantively different means of resolving disputes over property, torts, business agreements, and so on. A wide variety of communities should therefore develop, sometimes overlapping and sometimes separate, each offering its own unique sets of laws” (Bell, 1991). However, in the conception of legislation as in the resolution of disputes, European Union law evolves precisely within the framework of public, governmental and monopolistic institutions, far from being reduced to contract law and competition between public and private legal systems in the legitimate interpretation of Union law. Indeed, in understanding a form of institutional distinction between private and public law from the point of view of their production, the former “would refer to legal regulation by ‘private’ or nonmonopolistic legal institutions” while the latter “would refer to monopolistically or ‘publicly’ provided legal regulation” (Barnett, 1986, p. 271). But contrary

to common sense, monopolistic public concentration of law has not always been the rule in Western Europe (Peden, 1977; Friedman, 1979; Casey, 2010; Ogilvie, 2014; Geloso & Leeson, 2020), nor in the world—as in Papua New Guinea among the Kapauku (Benson, 1990, pp. 15-21), the Ifuagos of Luzon in the northern part of the Philippine archipelago (Barton, 1919; Benson, 1989) or, among other examples, in North America amongst the Comanches and Yurok (Hoebel, 1954; Benson, 1989).

The article proposes to examine two groups of factors in the causal study of this public monopolistic concentration of law within the framework of the European Union. It does so by crossing, firstly, the interpretation of EU law with Barnett's "polycentric" theory of law and, secondly, by confronting the Union's current orientations with Friedrich Hayek's theory of "interstate federation," which the Economic Community of Coal and Steel, encouraged by Jacques Rueff, originally seemed to follow.

The first part of the article deals with reasons relating to Union law itself as a complex normative and para-normative whole, first within the Treaties, then within the opinions of the Advocates General, with a confrontation with Barnett's theory of the polycentric order. The second part is longer: it is based on a more contextual analysis of the appropriation and development of this conception, with a convergence of factors of an epistemological, historical or societal nature in a parallel to the Hayekian theory of interstate federation (Hayek, 1939).

Endogenous factors of public monopolistic concentration in EU law

European Union law is familiar with the notions of legal pluralism and polycentrism (or polycentricity) in the purely public sphere. In this sphere, however, the two notions are often confused. Indeed, while legal pluralism would more formally refer to the various sources of European Union law, such as sources of international law (whether public or private law), the case law of the European Court of Human Rights or the constitutional case law of the Union's Member States (Bobic, 2019) – the topical case being postcolonial jurisdictions (Rautenbach, 2010, p. 145; Alvarez, 2017) –, polycentricity would refer more to a dimension that comes closer to public policy through certain theories of governance (ESPON, 2005), legal regulation and dispute resolution (Zahle, 2005, pp. 233-253). However, it is clear that the two notions are juxtaposed or, at the very least, influence each other in a reciprocal and structural way.

Outside the strict field of European Union law, legal doctrine also sometimes confuses the notions of pluralism and polycentricity (Petersen & Zahle, 1995, p. 8), even though there is a major difference in perspective. Whereas the idea of legal pluralism was introduced through legal anthropology (Zahle, 2005, p. 234), the idea of polycentricity refers more restrictively to law as such: "Whereas the legal anthropologist and legal sociologist [sc. legal pluralists] may mostly tend to understand and describe the legal landscape from outside, legal polycentricity approaches legal science from within and tries to reach another understanding—and practice—of law to influence and interact with the landscape" (Petersen & Zahle, 1995, p. 8). In any case, the value of polycentricity within the analysis of political and social structures has long

been stressed (Ostrom et al., 1961; Aligica & Tarko, 2011), as well as in legal theory (Fuller, 1978; Hirvonen, 1998) and more broadly in fundamental epistemology (Polanyi, 1951/2002). Vincent Ostrom's clear statement of the rich exploitation of the concept of polycentricity can be highlighted: "Polycentric' connotes many centers of decision-making which are formally independent of each other. Whether they actually function independently, or instead constitute an interdependent system of relations, is an empirical question in particular cases. [...] They take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts" (Ostrom et al., 1961, p. 831). By formally taking up this distinction between the exogenous (or contextual) point of view of legal pluralism and the endogenous point of view of the use of polycentricity as an operative concept, would it nevertheless be possible to reconcile the traditional legal interpretation of the idea of polycentric law with that which proceeds from a reformulation in libertarian legal theory?

The notion of Randy Barnett's polycentric constitutional order

The article deliberately restricts the approach to the notion of "polycentric constitutional order" as used by Randy Barnett in *The Structure of Liberty* in the first part. What does he mean by this appropriation of the polycentric dimension and its projection onto a constitutional stratum? It is worth quoting the author's full explanation here.

In a polycentric constitutional order, as distinct from a monocentric one, multiple legal systems exercise the judicial function and multiple law-enforcement agencies exercise the executive function. These multiple decision makers operate within constitutional constraints that permit them to co-exist and adjust to each other. The phrase legal or constitutional order is used here when speaking of the entire legal structure, and the phrase legal or court system when speaking of one court or other dispute resolution system within the larger constitutional order. Just as the liberal conception of justice requires 'several properties' to handle the problems of knowledge and interest, a decentralized or polycentric constitutional order consisting of several legal systems and several law-enforcement agencies provides an institutional framework to address the problem of enforcement abuse. Although a polycentric constitutional order will initially appear to be a radical departure from our current arrangements, such an order will arise naturally if just two constitutional principles that depart from our current approach to law enforcement and adjudication are adopted—principles that are commonplace features of social arrangements outside the context of law enforcement and adjudication" (Barnett, 1998, p. 257).

To make his constitutional polycentric conception operational, Barnett backs it up with two fundamental principles (which he consequently describes as constitutional): the "non-confiscation principle" and the "competition principle" (Barnett, 1998, p. 257). On the one hand, "Law-enforcement and adjudicative agencies should not be able to confiscate their income by force, but should have to contract with the persons they serve"; on the other, "Law-enforcement and adjudicative agencies should not be able to put their competitors out of business by force" (Barnett, 1998, p. 258). As for the implications of these principles, Barnett details them in the following pages (Barnett, 1998, pp. 258-282) and endeavors to make his

theory more comprehensible through an account of a fictitious political society that would be based on it (Barnett, 1998, pp. 284-298). It is possible, however, to retain two prohibitions deduced from these principles, which form the cornerstones of Randy Barnett's reasoning. The first principle – nonconfiscation principle – is linked to the prohibition of imposition (in favor of contractualization) in the referral (or choice) of law-enforcement and adjudicative agencies by litigants (or consumers); the second principle – competition principle – refers to the prohibition of monopolization (in favor of competition) in the relations (or market) between law-enforcement and adjudicative agencies. Finally, Barnett centers his theory on the solution of three problems structuring the relations between the public and private spheres when a theory of justice is conceived. Indeed, it is, more broadly, the underlying problems of *knowledge*, *interest* and *power* that must underpin reflection on the constitutional organization of a normative whole, according to Randy Barnett:

This book is about the principles which provide the structure of liberty. These principles are clustered under the concepts of justice and the rule of law. Just as the structure of a building solves certain architectural and engineering problems to enable its occupants to pursue their respective purposes, certain principles of justice and the rule of law provide a structure that enables people to pursue happiness by handling the serious and pervasive social problems of knowledge, interest, and power. No society can exist unless it handles these problems to some degree, and the better these problems are handled, the better able are the people who comprise it to pursue happiness, peace, and prosperity (Barnett, 1998, p. 2).

Nothing seems further from Barnett's conception of a polycentric constitutional order than European Union law as it stands today. Certainly, "a polycentric constitutional order [would] initially appear to be a radical departure from our current arrangements" (Barnett, 1998, p. 257) in the contemporary architecture of this law. In order to examine this seemingly radical incompatibility in a partial but methodical way, three levels of interpretation (in internal sources) of Union law can usefully be invoked, from the most to the least fundamental: provisions of the fundamental treaties of the EU legal order – 1992's Treaty on European Union (TEU), 1957's Treaty on the Functioning of the European Union (TFEU) –, case law of the CJEU and opinions of the Advocates General.

On the provisions of the TEU and TFEU

The provisions of the Treaties of Maastricht (TEU) and Rome (TFEU) are clear on the fundamental jurisdictional and administrative organization of the European Union. Article 13 TEU, paragraph 1, names the EU institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. These appointed institutions enjoy, both *de jure* and *de facto*, a privilege of exclusivity over spontaneous free-market agencies by virtue of their legitimacy acquired via the fundamental treaties, while they are said to practice "loyal cooperation among themselves" (article 13 TEU, paragraph 3). Article 15(1) of the TFEU stipulates that the institutions of the Union must respect the principle of open-

ness to the greatest possible extent, and that the Member States of the Union and the other institutions of the EU, as well as “any natural or legal person,” may bring actions before the CJEU in the event of a breach of the Treaties (article 265 TFEU) by the institutions named in article 13 TEU, paragraph 1, and reserves the exclusivity of the final jurisdictional function to the Court of Justice in matters of European Union law (articles 263 to 280 TFEU), which is confirmed by Protocol number 3 on the Statute of the Court of Justice of the European Union of 2012. Finally, article 280 TFEU states that “The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299,” which specifies that acts “of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable. Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. [...] Enforcement may be suspended only by a decision of the Court.” In relation to the theory of polycentric constitutional order, two consequences of treaty provisions – upstream and downstream – can be regarded. Indeed, insofar as “The nonconfiscation principle tells us how we arrive at a polycentric regime, while the competition principle tells us how we stay there” (Barnett, 1998, p. 258), it is not even possible to establish a *prima facie* compatibility with Barnett’s first principle. In fact, the latter specifies that the nonconfiscation principle “is really just an application of the first aspect of the liberal principle of freedom of contract – freedom from contract” (Barnett, 1998, p. 258). However, the exclusive privilege granted to the Union’s appointed institutions by political arrangements completely rejects the idea of contractualization: there is no freedom of choice in the market for law enforcement and adjudication services within the scope of European Union law. Notwithstanding the idea that freedom of contract “helps to solve the knowledge problem by enabling (and forcing) everyone to take into account the personal and local knowledge that others possess” (Barnett, 1998, p. 259), such institutions find themselves confronted in their decision-making with a real problem of informational asymmetry, to the detriment of both the consumer and the litigant they claim to serve (Mises, 1944; Hayek, 1945; Polanyi, 1951/2002, 1958/1964; Stringham, 2006; Rothbard, 1962/2009; Dilorenzo, 2011).

In fact, this blind spot of the Union’s jurisdiction is well reflected in the adherence to a truncated vision of the notion of competition through the mention of “loyal cooperation.” In the assessment of the Austrian School of Economics (to which Barnett belongs: Vallentyne, 2000), the principle of competition brings together under the same notional umbrella mechanisms of rivalry and cooperation, and constitutes a prerequisite for the discovery by the agent (or entrepreneur) of information likely to satisfy his subjective preferences (Kirzner, 1997): “Competition is by its nature a dynamic process whose essential characteristics are assumed away by the assumptions underlying static analysis. [It is] essentially a process of the formation of opinion, [...] a process which involves a continuous change in the data and whose significance must therefore be completely missed by any theory which treats these data as constant” (Hayek, 1948/1958, pp. 94, 106). In other words, solving the problem of knowledge, from the perspective of a polycentric constitutional order, requires not a division of functions within an institutional monologue that needs to be consolidated, but a debate (which includes a dimension of rivalry). Without resolving the problem of failed competition,

it is clear that respect for the “principle of openness” of article 15 TFEU is unfounded in this respect: what use is it to litigants to have access to a supply of information which, because of the very restrictions which alienate them, is unable to form under adequate conditions? As for the confiscation of the final jurisdictional function for the exclusive benefit of the Court of Justice within the framework of European Union law, this is clearly detrimental to the spirit and function of Barnett’s two principles.

On the opinions of the Advocates General

If the incompatibility between Randy Barnett’s theory and the provisions of the Treaties can be accepted, what about the opinions of the Advocates General? Article 252 TFEU states that “It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.” Even if the legal value of such an opinion seems to be *per se* akin to soft law (Burrows & Greaves, 2007), it plays an important role in the Court’s decision-making (Clement-Wilz, 2012) in that “the duty of the Advocate General [is] to assist the General Court in the performance of its task” (article 49 of the Statute of the CJEU). In addition, the First Advocate General may intervene in specific cases considered to be of paramount interest for the European Union’s legal order, in particular when “there is a serious risk of the unity or consistency of Union law being affected” (article 62 of the Statute of the CJEU). Their (admittedly relative) freedom in assessing the EU legal order and their “supra-doctrinal” scope constitute an interesting bridge for incorporating new ideas on the fundamental conception of law within the European framework. However, the opinions of the Advocates General remain linked to the defense of institutional monocentricity: sub-national public authorities – which sometimes have jurisdictional powers in the Member States—and their jurisdictional and administrative scope are rarely addressed by EU law, which substitutes polycentric thinking with a closed bicentric attitude, between the European Union on the one hand and the Member States on the other (Finck, 2017, pp. 1-2). This closed dialogue excludes other agents of the law, which seems to be confirmed by the opinions of the Advocates General in this area, referring directly either to the European Union itself, or to the Member State concerned in the facts of the case. This applies, for example, to the devolution of the power to produce law: “Each Member State is free to allocate powers, including legislative powers, internally as it sees fit” (Paragraph 95, Opinion of Advocate General Trstenjak in Case C-428/07 *Horvath* 2009 EU:C:2009:47). The same is also true of the discretionary assessment of authorities concentrating jurisdictional and administrative functions (which are not called into question, even in the context of a fundamental uncertainty that refers to the problem of the extreme limitation of information formation in a non-competitive context, but on the contrary reinforced in their *de facto* powerlessness, which, from a purely epistemological point of view, is a striking incongruity (Polanyi, 1951/2002, p. 89): “The greater the scientific uncertainty, the greater the margin of appreciation of the authority” (Paragraph 103, Opinion of Advocate General Mischo in Case 192/01 *European Commission v. Kingdom of Denmark* EU:C:2002:760). Another

example is the enshrinement of the precautionary principle, which, despite the objections of the doctrine (Donati, 2021), is not only at the expense of the extension of the principle of innovation (Fuller, 2012, 2014), but despite the liveliness of the debate on the precautionary principle within international commercial law (Lowenfeld, 2002, pp. 327-328) and the public intention formulated by the European Commission itself to elevate innovation to the status of a principle (European Commission, 2022): “[The society] is characterized by unclear risks resulting from new technologies and, more broadly, from rapid scientific progress. In such a society, public authorities may wish to rely on a rule of action in situations of uncertain risks [and] the precautionary principle takes on such a rule” (Paragraph 31, Opinion of Advocate General Bobek in Case C-111/16 *Giorgio Fidenato and others* 2017 EU:C:2017:248).

From the point of view of both the treaties and the opinions of the Advocates General, EU law therefore seems impervious to “constitutional innovation.” Indeed, the latter can be defined as the conjunction of the processual definition of innovation and the scope of reflection on the organization of constitutional phenomena. In this processual perspective, innovation is understood as “the process of making changes, large and small, radical and incremental, to products, processes, and services that results in the introduction of something new for the organization that adds value to customers and contributes to the knowledge store of the organization” (O’Sullivan & Dooley, 2008, p. 5). The scope of the organization of constitutional phenomena, meanwhile, is limited by the internal architecture of the bicentric European Union-Member State relationship, which “has a profound impact on our constitutional imagination, that is to say the assumptions we take for granted when evaluating a certain legal phenomenon” (Finck, 2017, p. 2). The process of innovation within these “assumptions we take for granted” is, however, itself conditioned by factors exogenous to the strict confines of European Union law, factors that act much like, within scientific activity, Michael Polanyi’s “fiduciary presuppositions,” “that is the fact that our discovery and acceptance of scientific knowledge is a commitment to certain beliefs which we hold, but which others may refuse to share” (Polanyi, 1951/2002).

Contextual factors of public monopolistic concentration in EU law

In the context of Union law, and by cross-referencing the analysis with Randy Barnett’s theory, at least two factors—within the “fiduciary presuppositions” of this fundamental framework—seem to be able to be assimilated to this structural barrier to any constitutional innovation in this field, but at the same time offer avenues for resolution: 1. the profound continuity between ordoliberal thought and the European Union in the ulterior motive of the construction of the latter’s law, and the counter-light offered by Austrian theory; 2. the deliberately limited understanding of the principle of subsidiarity inherited from Christian doctrine, and the consubstantial undermining of the spontaneous coordinating capacity of legal agents, as well as the post-Westphalian vision that ultimately remains stato-centric, including in the federalist/nationalist configuration, and the cultural ascendancy of the nation-state model among supporters of both federalism and nationalism (here too, however, Austrian theory is of considerable help).

Ordoliberalism, Austrian theory and European architecture

Ordoliberalism is an economic theory that “supports a market order with a regulatory framework created by the state to ensure economic competition while protecting citizens from an excessive power concentration” (Reimers, 2020, p. 15). In the post-World War II era, there was a particular attraction to this school of thought, developed in Germany by the Freiburg School in the 1930s: the liberal thinkers of this theoretical school, whose most emblematic representative is Walter Eucken, considered that economic competition was a blessing that could only develop through a market embedded in a solid constitutional normative framework, the Freiburg School therefore being at the crossroads of economic and legal concerns: “This framework was necessary to protect the process of competition from distortion, to assure that the benefits of the market were equitably distributed throughout society and to minimize governmental intervention in the economy” (Gerber, 1994, p. 25). Precisely in the immediate context of European reconstruction from 1945 onwards under the aegis of the American Marshall Plan, the historical paradox affecting ordoliberal theory seemed terrible: in the very name of liberalism, state powers of economic intervention had to be considerably strengthened in the face of a “greatly troubled and highly concentrated economy” (Ito, 2011, p. 7). Whether it emerged from a hybridization with the authoritarianism of the 1920s and 1930s based on the thought of Carl Schmitt (Alves da Silva, 2021), or was an alternative to classical laissez-faire liberalism (Young, 2017), the point was clear: “Ordoliberalism would have no choice but to allow a state to intervene to liberalize the market” (Ito, 2011, p. 7). Apart from being a major misunderstanding in the eyes of the Austrian School of Economics, both economically and politically (Mises, 1940/1998a; Hayek, 1944/2006), this theory was to have a profound impact on the ulterior motives of the European Economic Community under construction, and then of the European Union, right up to the present day. Long kept under wraps, it reappeared in the light of day in the context of the Eurozone debt crisis from 2009-2010 onwards (Young, 2017, p. 31): it had not so much been forgotten on the surface by European bureaucrats as internalized by the structures of the European Union themselves.

But the adoption of ordoliberalism by the European Union, “especially in its incorporation as monetary union” and in its top “five European-level institutions that today govern the European free market while protecting it from democratic interference: the Parliament, the Council, the Commission, the European Court of Justice and the European Central Bank” (Streeck, 2015, p. 361), is the result of a specific context. There is absolutely nothing to prevent a paradigm shift from a theoretical point of view, other than a genuine awareness of the benefits of halting convergent processes of bureaucratization and centralization on a European scale. The Austrian School of Economics is particularly well placed to play a pivotal role in this theoretical transition. Born in an old Mitteleuropa in turmoil, the Austrian School was also particularly marked by the experience of World War II: the migration of its liberal thinkers to the Anglosphere, some of whom (Ludwig von Mises, Ludwig Lachmann) were Jewish, was a consequence. Unlike the ordoliberals, however, the Austrians learned very different lessons. For Mises, Hayek’s teacher, “the middle of the road leads to socialism,” according to the title of a lecture given on April 18, 1950 (Mises, 1950/2018); the victory of fascism precedes

the victory of communism, and in this struggle between totalitarianism and liberalism, “The ultimate outcome of the struggle will not be decided by arms, but by ideas” (Mises, 1927/2002, p. 51). The U.S. model, especially through its original libertarian inspiration in the American Revolution (Rothbard, 1979/2011, pp. 1127-1577), is praised in relation to the decadence of a Europe torn apart and doomed to fascist and communist demise. In this configuration, the post-war period did not help matters, given the popularity, in the heart of Western Europe, of socialist (e.g. United Kingdom) and communist (e.g. France, Italy) programs.

Moreover, in the history of law and economics, even before the Posnerian reappropriation in the 1970s, the Austrian School of Economics was the first school of thought to develop an economic analysis of law (Deffains & Ferey, 2010, p. 8). Indeed, following the marginal revolution in economics at the end of the nineteenth century, it subsequently developed its own economic analysis of law, and the founding work of Austrian public action theory is a book by Austrian economist Ludwig von Mises, *Bureaucracy* (Mises, 1944). In this work, Mises analyzes the bureaucratic phenomenon on the basis of a reinterpretation of Weber’s analysis of bureaucracy (Weber, 1952, pp. 196-198), an analysis in which Mises points out that a bureaucratic-type organization is distinguished through three functional characteristics: the violation of property rights, hierarchical dependencies and centralization, and the use of regulatory power in the systematic allocation of resources (Mises, 1944, pp. 3, 54, 41; Carnis, 2007, p. 103). The European bureaucratic phenomenon could undoubtedly be explored from this angle against the ordoliberal perspective that promotes a constitutional political economy in which a presupposition of bureaucratic trust in the constitutional architecture of an institution prevails, to the detriment of a radical political economy in which, conversely, a presupposition of mistrust towards bureaucrats invested with powers of normative architecture prevails (Kornhauser, 2011).

In addition, important figures such as Jacques Rueff and Friedrich Hayek embodied this same possibility of an “Austrian” Europe in the sense of the Austrian School of Economics, both practically and theoretically (Carret, 2022, p. 6). Rueff, a high-ranking French polytechnician civil servant, judge at the Court of Justice of the European Communities between 1958 and 1962 and Prime Minister (*Minister of State*) of Monaco between 1949 and 1950, is the perfect embodiment of the ideological bridge between the economic and legal ideas stemming from the Austrian School to which Barnett adheres, in the precise context of the European Union. He asserts that “it was price mechanism, and not the conscious plan, that should be asked to establish and maintain economic equilibrium” (Rueff, 1979, p. 33); or it is obvious that “for Rueff, once this force is stopped or stymied, this will inevitably lead to imbalances, inflation and upheavals, or in Hayek’s words, a road to serfdom” (Carret, 2022, p. 43). Hayek, in fact, is primarily concerned by the European project. In 1939, he prophetically published “The Economic Conditions of Interstate Federation,” which he incorporated into his 1948 *Individualism and Economic Order*. In the latter, he argued for a European construction that would lead to a radical reduction in public interventionism: indeed, for Hayek, there was no question of transferring powers refused at nation-state level to some supra-state bureaucracy; European integration should be an opportunity to restore the full

economic sovereignty of the individual (and not of a state or federation), even if Hayek, a classic “neo-liberal”², did not go so far as to conceive of a fragmented and dissipative structure of constituent power like Barnett, and in a way came closer to ordoliberal ideas in his rejection of the “laissez-faire” solution, unlike Mises, his elder, also a classic liberal, but a supporter of laissez-faire. As Hayek put it to Mises in 1933: “A difference between us exists [...], the position of the new liberalism is not the position of laissez-faire,” quoted by (Kolev, 2023), which corrESPONds to the assertion of Miksch, an ordoliberal disciple of Eucken, that “What separates us from the economic liberalism of the 19th century is that we have learned to distinguish between laissez-faire and competition, that we very definitely want to shape an ‘Ordnung’ and that we think in terms of economic constitutions” (Miksch, 1947, p. 220). Hayek concludes, moreover, that integration must be (even if he doesn’t put it this way) negative in order to respect the rights and freedoms of individuals (Hayek, 1948/1958, pp. 255-272) and must be part of a liberalism with an international dimension (Nientiedt, 2022). The two lessons (the need for political construction and the need for a considerable reduction in state interventionism) are formulated in this way by Goettfried Haberler, another Austrian exiled in the United States and a student of Mises: “The first [conclusion] will hardly be disputed. It is that economic unification is impossible without political unification. There is no chance whatsoever that sovereign states will ever agree and stay agreed on the major phases of economic policy. My second conclusion is this: Economic unification in the real sense as indicated above is politically impossible except (a) if it was imposed by force by a dictator, a Stalin or a Hitler, or (b) after a return, not to complete laissez faire (if that every existed), but to a condition of comparatively little state interference in economic matters as it existed before 1914” (Haberler, 1949, p. 434). Nevertheless, perhaps the strongest criticism ultimately comes from one of ordoliberalism’s founding fathers himself, Wilhelm Röpke, whose argument against the development of European integration is summed up as follows: “On the one hand, [European and Western citizens] may choose to go on the road to collectivism and serfdom, to quote the famous book of Hayek. On the other hand, they have the possibility of stopping the process and diverting its direction. That means to oppose collectivism and authoritarianism by restoring liberalism as a new humanism. [But] firstly, the functionalist method is destined to drive the Communities towards an oppressive European Superstate. Secondly, the institutional model of the customs union will divide Europe from the rest of the world” (Quirico, 2018, pp. 71-72). It has to be said that, more than half a century after the fundamentalization of ordoliberalism within European structures and for whom “The market could not be allowed, therefore, to function as an independent entity over which there was no control” (Gerber, 1994, p. 83), “today, the idea that the development of a bureaucracy of independent agencies was meant to drive efficiency in administering government is somewhat ironic, and much of the criticism levied against the European Union, its technocratic structure

² The term “neoliberalism” is understood to have emerged with the Walter Lippmann colloquium in Paris in 1938, which brought together Mises, Hayek, Raymond Aron and Jacques Rueff, and whose central theme was the redefinition of liberalism in the face of fascist and communist totalitarianisms.

and its lack of accountability is of the same nature as the reaction against the development of the administrative state in the United States” (Carret, 2022, p. 42).

Subsidiarity, spontaneous coordination and the post-Westphalian system

The gradual *de facto* abandonment of the principle of subsidiarity, which originated in medieval *christianitas*, can be seen as a consequence of this attachment to ordoliberal theses (Reimers, 2020, p. 41). Subsidiarity is a general principle of European Union law developed in Protocol No. 2 on the application of the principles of subsidiarity and proportionality. The consolidated version of the Treaty on the Functioning of the European Union specifies that “decisions are taken as closely as possible to the citizens of the Union,” although the 1997 reference to “the overall approach to the application of the subsidiarity principle [...] will continue to guide the action of the Union’s institutions as well as the development of the application of the principle of subsidiarity” has disappeared. The fact remains that, despite these fine words, the general provisions cited do not have the force of law in the text as such, and remain purely declarative since they are included in the introductory chapeau of the said Protocol; it was only in 1991 that the Court of Luxembourg recognized the justiciability of the principle of subsidiarity, without ever having “pronounced any censure because it had not been respected by the Commission” (Marchand-Tonel, 2012, p. 11; Bertrand, 2012, p. 329). In fact, the repeated and ongoing violation of the principle of subsidiarity by a centralizing bureaucratic entity (whose impunity in this respect is flagrant) and which has throughout encouraged the acceleration of a transfer of regalian competences from the Member States to the Commission and the institutions of the Union emanates from an “embedded” understanding of subsidiarity within several factors –including the federalism/nationalism dualism – in a post-Westphalian way of thinking and in an impoverished understanding of the term within its European conception. Not only the historicity of the concept of subsidiarity, but also its contextualization in the lineage of the Westphalian system, help us to grasp how this particular, and ultimately recent, understanding of subsidiarity constitutes a major obstacle to the hypothetical transition to a constitutional model of polycentric order in Europe.

The principle of subsidiarity is an old principle of political philosophy in the West, even if it doesn’t appear in this substantivized form until “the end of the 19th century in Germany” (Joyeux, 2016, p. 15). German philosopher Otfried Höffe traces this principle back to Antiquity, via a federalism/centralism dichotomization at the foundation of Greek and Roman political organizations. For Höffe, “Rome had a centralist order,” unlike the Greeks. Yet, according to Höffe, “Rome has consistently prevailed in European politics,” to the detriment of a European political philosophy that was “originally inspired by the Greeks” (Höffe, 1996, p. 56). But in the Middle Ages, as in Antiquity, the principle of subsidiarity was understood in subordination to the principle of totality, “this expression [meaning] that the individual as part of the social whole is finalized to this whole before being finalized to himself: he cannot survive outside society, to which he belongs like a member to a body—the usual organicist comparison in pre-individualist thought” (Millon-Delsol, 1993, pp. 12-13). In other words, the principle of subsidiarity born of Modernity is far distant from that of ancient and me-

dieval times; the usual comparison between “freedom of the Ancients” and “freedom of the Moderns” or the resurgence, within counter-revolutionary theories, of the holistic conception as an organizing political principle as in Louis de Bonald, are just a few surface examples. Be that as it may, the principle of modern subsidiarity finally emerged in the thinking of the Catholic Church’s social doctrine at the end of the 19th century, and especially from the 1930s onwards in a confrontational mode: for the Church, it was a question of opposing liberalism, socialism and fascism simultaneously, and proposing a third way.

Pius XI’s encyclical *Quadragesimo anno* marks the fortieth anniversary of Leo XIII’s encyclical *Rerum novarum*. In this encyclical, the Pope considers that, while the State is a necessary organization, social order requires “that public authority therefore abandon to lower-ranking groups the care of less important matters where its efforts would be excessively dispersed,” the natural object of all intervention in social matters being “to help the members of the social body, and not to destroy or absorb them.” With this statement, Catholic subsidiarity was intended as a bulwark against the sacred statism of fascist and socialist-communist regimes, but it did not, as such, settle the question of what could be considered not only “lower-ranking groupings,” but also “matters of lesser importance” and, above all, *who* should ultimately have the legitimacy of this judgment and the last word on the distribution and organization of competences in this field. Hence the question of interpretations of this principle. Thus, subsidiarity is sometimes seen as a mechanism for coordinating, rather than disjoining, the upper and lower strata of the State, where the State can usefully be called upon to provide a subsidy to the latter (Roger, 2012, p. 76); sometimes by a character of the Catholic ethic that must be embodied by the state—the “subsidiary State”—in the face of the Welfare State that disempowers individuals and the centralizing State that exercises unreasonable authoritarianism (Minnerath, 2004, pp. 98-99), which could bring it closer to the minarchist conception of the state in libertarian theory, and which “must guarantee that each natural or contractual level (companies, non-state public communities) can develop its virtualities in the service of the common good, and ensure that it replaces them only for as long as is necessary to restore their autonomy” (Musanganya, 2023, p. 93); sometimes, from a functional perspective. It is the latter that is supported in the conception understood by European Union law, and which corresponds to the philosophical abandonment of natural law thinking. Indeed, the transition “from Catholic subsidiarity to European subsidiarity” is marked by a narrowed understanding of what is at stake in this principle: “Philosophically, subsidiarity refers to a model of society in which the capacities of each person and each instance are conceived as natural, and within which the allocation of competences is not open to debate. There is nothing like this in the institutional functioning of the Union, or not yet. From Catholic subsidiarity to European subsidiarity, we inevitably move from a naturalistic logic to a utilitarian one, insofar as what underpins the latter is nothing other than an argument for the efficiency and control of public action” (Barroche, 2008, pp. 787-788). In this transition, the common denominator that remains between these two conceptions (Catholic and European) is that it is a question of “protecting man from a hold that would reduce his capacities and rights” (Barroche, 2008, p. 788). In addition to the decisive influence of positivism on legal matters in Europe in the 20th century, it should be noted that this very impoverished consideration

of subsidiarity, in which the only question is whether the agents, from the communes to the European Commission, can indeed fully realize the competences entrusted to them (Badie, 2015, p. 294), “enables us to extend Community competences as much as to restrict them” (Musanganya, 2023, p. 96). As a result, from the dynamic of “progressive secularization [that] was led by the founding fathers of the European Union” (Donegani, 2013, p. 684) and embodied by the recently deceased Jacques Delors – in whose political thought, from Christian socialism to European federalism, “an almost Saint-Simonian inclination that tends more towards the administration of things than the government of men” (Barroche, 2007, p. 157) – the European conception of subsidiarity is emptied of its substance and of any historicity exogenous to the functionalist narrative of the institution it can only serve without ever damaging it. This negation of the ontological content of subsidiarity to comprehend it only as a container (the only “substantial” or “material” subsidiarity that remains “concerns the relationships between the legal instruments of the different levels,” as opposed to a so-called “procedural” subsidiarity: Da Fonseca, 2020, p. 142) has led, among other things, to the fact that “actors began by seeing it as an instrument of consensus, then distrusted its reversibility and preferred other rules [...] deemed clearer” (Marchand-Tonel, 2012, p. 11). These are all markers that in practice distance the legal understanding of subsidiarity from the imperative that “decisions are taken as closely as possible to the citizens of the Union”³.

But modernity is not only marked by individualism; it is also marked with the stamp of statism and, above all, the model of the nation-state. In Europe, the latter is based on the French experience, which is a precursor in this field, dating back to Philip Augustus at the end of the 12th century, after a significant shift from the title of “King of the Franks” (*Rex Francorum*) to that of “King of France” (*Rex Franciæ*). Historiography has traditionally associated this phenomenon with the Treaties of Westphalia, which established this legal and political organization: the European Union was in fact built around the weakening of nation-states in favor of a structure no longer considered “inter” but “supra” state, like the empires preceding the Westphalian turn of 1648, suggesting “that nation-state sovereignty is declining and perhaps served merely as an interlude in a world dominated by imperialistic institutions” (Farr, 2005, p. 156). Its entire subsidiarity is therefore functionally articulated around States or European institutions (or even regions); there is no room, in this respect, for purely private entities, which are devoid of any legitimacy to embody “Union citizenship” in its most salient dimension: legal production. On the contrary, supporters of a federal Europe “serve another nationalist aim”: “Federalism serves another nationalist aim: it knits together the national polity. Nationalists have long worried that decentralization exercises a centrifugal force on the polity, scattering us into isolated enclaves. But [...] decentralization can serve rather than undermine the project of integration” (Gerken, 2014). With subsidiarity “as close as possible to the citizen,” the Union has understood this dimension. However, it remains

³ The wording “citizens of the Union” can itself be confusing. Is subsidiarity valid only as devolution of power within the area of influence of any political structure (in this case, the European Union)? Is it, then, true subsidiarity – or is this process more akin to a “distributed” form of devolution, depending on the citizenship quality (interestingly, the expression used does not suggest the terms “individual” or “person”)?

deeply rooted in a nationalist-statist type of project, whether advocates of the traditional nation-state (or “Europe of the nations”) or those of the European post-national state in the form of a federal-type political association. But here too, Hayek can be of considerable help by going back to his 1939 essay and looking through his theoretical work, including his famous essay, “The Use of Knowledge in Society.” To follow Hayek in this matter is to consider that “a choice between a United States of Europe or an intergovernmental Union of Sovereign European States” constitutes “a false choice” (Turk, 2021, p. 5), and for good reason: Hayek’s consideration of “(1) the power of dispersed knowledge, (2) the advantages of limited and dispersed political power, and (3) the emergent rather than designed social order” (Turk, 2021, p. 1) makes it unreasonable to think of the Union’s organizational structure in purely Westphalian terms if the conditions for peace in Europe are to be preserved.

It is on this basis that Barnett reiterates his essential criteria for considering a polycentric constitutional order: knowledge, interest and power. As “A government can no more determine prices than a goose can lay hen’s eggs” (Mises, 1949/1998b, p. 394), the Union can no more hope to curb Barnett’s modest but fundamental contribution from a normative point of view, due to the very nature of information and knowledge: “My contribution is merely to stress that consent to transfers of jurisdiction must be both permitted and required if prices are to convey the information that can be conveyed effectively in no other manner” (Barnett, 1998, p. 53). Consenting to full subsidiarity also means consenting to “transfers of jurisdiction” within a liberating, and therefore competitive, normative framework, in the face of constant state or bureaucratic interference that requires, demands and protects monopoly in order to curb both knowledge and freedom (Lavoie, 1985): “A society that does not recognize that each individual has values of his own which he is entitled to follow can have no respect for the dignity of the individual and cannot really know freedom” (Hayek, 1960/ 2011, p. 141).

CONCLUSION

The article argued that while endogenous factors—the fruit of a centralizing bureaucratic evolution of the Union—have endorsed a situation where the normative architecture has become less and less receptive to this paradigm shift, the interpretative category of contextual factors, whose rapprochement with the Hayekian theory of interstate federalism, is not only capable of genuinely moving Union law towards a form of “polycentric constitutional order,” recapturing the initial impetus of the European Coal and Steel Community, but this theorization of Union law would benefit from being oriented towards taking this notion into account for the destiny of the European Union itself. In fact, the question of this theorization is still little approached in Europe from the angle of decentralizing the monopolistic public production of legislation, normative architecture and the adjudication of disputes. And yet, on the dial of the incarnation and organization of the consciousness of human action, as well as of the evolution of knowledge, it is already very late indeed. Wouldn’t this “dogmatic slumber” risk once again, to paraphrase a key figure in European integration, Jacques Maritain, fertilizing the conditions for “the totalitarian catastrophe that has unleashed hell on Europe”?

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