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Revisiting "An Ever Closer Union of Law and Values". Still Paddling Together?[1]

> Perhaps the great constitutional struggles and failures around the world today are groping towards the third way of constitutional change, symbolised by the ability of the members of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition as they paddle. A constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice[2].

1. Concepts and themes. Still paddling together?

Today constitutional and supranational law anchored in liberal values face fundamental questions as to the reasons for the insufficiency of the institutional setting that has proven unable to prevent abuse of majoritarian

[1] This paper draws on, develops, and brings together various strands of ideas and research presented in T.T. Koncewicz, *Understanding the Politics of Resentment. Of the Principles...*; T.T. Koncewicz, *The Politics of Resentment...*; T.T. Koncewicz, *How the EU...*; T.T. Koncewicz, *On the Rule...*, part 1; T.T. Koncewicz, *On the Rule...*, part 2; T.T. Koncewicz, *Values...* and most recently in-depth analysis T.T. Koncewicz, *The Politics of Integration...* I also acknowledge the research carried out as Principal Investigator in H 2020 project "Reconciling Europe with its citizens through democracy and the rule of law (RECONNECT)".

[2] J. Tully, *Strange...*, p. 29.

rule created by no-holds-barred majoritarian politics[3]. Constitutional imagination – understood as an uneasy combination of the myriad of texts, precedents, policies, competences – challenge us to look critically at the *status quo*. The restoration of the rule of law (constitutional setting) and the supranational embeddedness and anchoring of the rule of law are very much first-order problems[4]. Where the law is not only used to empower, liberate and protect but also to disempower, capture, the role of the law itself and of lawyers[5], the rule of law and the separation of powers as well as the communal bonds and memories are affected. For the system to regain ("recapture") its liberal credentials, the courts and the public must have something tangible to fall back on. Recapture of the system must be anchored in a long-term fidelity, which goes beyond and transcends the events of "here and now"[6]. This challenge invites the existential turn in the discourse about the shape of and reasons for our continuing loyalties to the supranational[7] governance[8].

A cosmopolitan order[9] in Europe has emerged with the ascent of the European Convention on Human Rights and the incremental growth and expansion of the EU. The story of rights protection has been one of success and is well-rehearsed. The trajectory from individual justice (emphasis on identifying and punishing the human rights violations in individual cases) to constitutional justice might have already happened and has already been charted and explicated[10]. It has entailed changes in the European Court of Human Rights' procedures and methods (e.g. pilot judgments) and

3 On this constitutional design in error T.T. Koncewicz, *The Democratic...*

4 Among others: W. Sadurski, *Poland's...*; L. Pech, P. Wachowiec, D. Mazur, *Poland's Rule...*; F. Zoll, L. Wortham, *Judicial...*; G. de Búrca, *Poland...*

5 The distinction is borrowed from M. Wyrzykowski, *To my jesteśmy...* On the critical distinction between lawyers who earn the title and mere law graduates who sell their services to the highest bidder see also T.T. Koncewicz, *Lawyers...*

6 In this context A. Arato, A. Sajo rightly ask: "Is a democratic community bound to follow constitutional rules of dubious democratic nature? Or can these be replaced in violation of legality, for example in an extra-parliamentary democratic process? If so, under what conditions?", see: A. Arato, A. Sajo, *Restoring...*

7 "Supranational" is understood here as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions", see: *Transnational Legal...*

8 I revert to this aspect in: T.T. Koncewicz, *On "The Law of Integration" ...*; see also discussion in Part 3 *infra*.

9 According to A. Stone Sweet "a cosmopolitan legal order is a transnational legal system in which all public officials bear the obligation to fulfil the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship", see: A. Stone Sweet, *A Cosmopolitan...*

10 Among many analyses consult S. Greer, L. Wildhaber, *Revisiting...*

transformed its self-perception (constitutional court for Europe)[11]. However, while all this is undoubtedly of great salience, it is no longer enough in the light of the current challenges that the supranational legal order of the EU (hereinafter, SLO) faces[12].

The ambition of this analysis is to move beyond the dominant human rights and constitutional frames and offer a new trajectory for the supranational governance[13]. This is necessary given the fact that the supranational governance has proven ineffective when it comes to counteracting new kinds of legalistic dangers that feed off the politics of fear, where the law is used not to empower but to disempower, not to liberate but to oppress, not to bring to the surface, but to hide[14]. One of the major scientific and political tasks is to improve the understanding of the accelerations of threats on the individual, social and political levels and in this way to develop counter strategies and counter narratives[15]. In other words, supranational governance needs a new conceptual justification that would explain the ethnography[16] and the practice of supranational law when faced with the novel forms of contestation[17].

Of crucial importance is the novel term supranational legality. It draws on "the dimensions of legality beyond law *per se*, attending to the ways in which the means of transnational law become available to new participants with alternative ends, using laws against law, to press for reform"[18]. So understood the supranational legality would function as a legitimacy yardstick

11 W. Sadurski, *Partnering...*

12 Several in-depth studies on the subject have appeared in the literature. By way of example see L. Pech, K.L. Scheppele, *Illiberalism...*; L. Pech, S. Platon, *Menace...*; R.D. Kelemen, K.L. Scheppele, *Defending...*; T. Konstandinides, *The Rule...*; *Strengthening the Rule...*; T.T. Koncewicz, *Understanding the Politics of Resentment. Of the Principles...*; T.T. Koncewicz, *The Politics of Resentment...*; T.T. Koncewicz, *How the EU...*; P. Blokker, *The democracy...*

13 Governance is understood here as "the political networks, institutions, mechanism, and agencies required to solve problems that confront multiple states o regions, and it is needed when there are limited alternative enforcement mechanisms available. It seeks to include national governments, international organizations, as well as a wide range of non-state actors, NGOs, and various community agencies in formulating global directives, policies, regulation, and accountability", see: E. Darian-Smith, *Laws...*; see also: *Transnational Legal...*

14 K.L. Scheppele, *Autocratic...*

15 P. Blokker, *Varieties...*

16 Term borrowed from S.E. Merry, *New Legal...*

17 C. Kilpatrick and J. Scott define contestation as "the actions or activities that cast doubt on, or sit uncomfortably with, the premises, principles, and norms that underpin the EU's legal order as proclaimed by the Treaties and the authoritative judgments of the Court", see: C. Kilpatrick, J. Scott, *Challenging...*, p. 1.

18 A.C. Aman, C.J. Greenhouse, *Transnational...*

and frame-setter for acceptable practice within the order[19]. It would prevent "free riding" by providing stability and continuity. The design and governance must be reconfigured to be able to respond to the systemic deficiencies in the functioning of the liberal democracies at the level of domestic politics. It is argued here that the value discourse (Part 2.4) associated with supranational legality provides a truly paradigmatic turn in the studies on the supranational governance and design. It invites attention to heretofore neglected first order questions of belonging and identity and of our continuous willingness to live together as part of the supranational political community. All the actors are called on to rethink their allegiances and frame them firmly within the framework of values. For that to happen, though, a new narrative is needed that would provide a discursive framework for the actors to defend transnational democracy and the rule of law, not just human rights, as the constitutional essentials (First Principles)[20] of the SLO[21]. A theory providing an integrated approach to building a set of institutions is needed to enforce and reinforce supranational legality built on the overlapping consensus among European peoples[22] as well as to offer viable counter-strategies to defend the viability of such a consensus. Such theory would call for going beyond mere rights regime and instead embracing supranational legal order in which democratic structures, constitutional profiles and shared values have as much protection as the human rights, all as part of the emerging supranational legality and practice of the First Principles of the European public space.

This analysis appreciates the urgent and pressing challenges and questions that the EU and the SLO face today. It calls for the constitutional imagination on the part of all actors operating within the European public space. The European decision makers as the repositories of the common interest have special responsibilities in this regard. As of now "the ever-closer union" continues to be bound together by the fact of statal membership with the citizens still lurking in the shadow of this state-driven narrative[23]. The

[19] C. Kilpatrick and J. Scott continue by arguing: "These premises, principles, and norms range from the precisely formulated to the noticeably vague. They include (...) the values on which the EU is said to be founded: human dignity, freedom, democracy, equality, the rule of law, and respect for human rights", see: C. Kilpatrick, J. Scott, *Challenging...*, p. 1. Also interesting analysis U. Wagrandl, *Transnational...*

[20] D. Edward, *An Appeal to First Principles* (manuscript on file with the Author).

[21] Consult P. Blokker, *The Democracy...*, pp. 34–35; J. Grogan, L. Pech, *Meaning...*; J. Grogan, L. Pech, *Unity...*, p. 44.

[22] For the application of the Rawlsian concept consult T.T. Koncewicz, *The Politics of Resentment...*

[23] See in depth: T.T. Koncewicz, *L'État...*; T.T. Koncewicz, *Understanding the Politics of Resentment. Of the Principles...*

design is still dominated by a Union of states and at best market-driven and self-interested economic operators. As a result the European decision-makers must no longer shy away from taking on the big questions of today in a bold and imaginative way. The thinking in terms of details and technicalities must be framed within the catalogue of building blocks as the challenges before the EU go clearly beyond institutional and procedural dimension and technocratic tinkering. Dealing with the systemic internal and external shifts that the supranational legal order undergoes right now, one must avoid danger of being trapped in the world of legal expertise and arcane legalistic approaches to the current crises.

This explains why, in what follows, the analysis moves beyond *ad hoc* patching-up. While clearly European scholarship has amply demonstrated the need to retool the institutional design of the EU[24], this analysis argues this is no longer enough. The discussion must weave together high hopes, concerns, and yes, also disappointments, healthy skepticism, and political constraints. The latter must be as much part of thinking and researching about the changing fabric of the supranational governance as the former. Therefore, and in line with the introductory statement, this analysis aims at moving beyond the legal, and instead embracing also the axiological. The question "how" the EU governance should be adapted and react must go hand in hand with revisiting the "why" question. Indeed, as commented by David Edward "(...) our endless discussion of How has caused us to lose sight of Why"[25]. Therefore, the EU must be better at defending the narrative and explaining at the domestic level not only what and how the EU is "doing things", but also why it acts to defend voluntary commitments and duties adopted by the states on the Accession. The EU needs to have its own clear position and voice when it comes to defending its narrative(s), one that would be respected and heard in the national capitals. The non-legal intangibles and researching people's attitudes toward the EU are as pivotal for the global debate about the EU governance as exclusively limited to legal enforcement. Sociological constitutionalism[26] has a role to play in the context of the supranational. Merging "why" with "how" holds out a promise of the research focused on the substantive context of the supranational governance and design. As such it invites collaboration across various fields (e.g. law, political

[24] See: J. Pech, D. Kochenov, *Strengthening...* as well as other research publications (deliverables) on the RECONNECT website.

[25] D. Edward., *Luxembourg...*, p. 126.

[26] *Sociological Constitutionalism...*

science, sociology) and caters to methodological diversity. Only then the avowed interconnectedness as one of the paradigms of supranationality will take on more tangible and identifiable dimension. As things stand right now, domestic rule of law and domestic democratic process are unfortunately of no concern to Dutch, French etc. people. This explains why changes to the Preamble to the Treaty on European Union[27] as explained in this analysis are seen as the crucial part of any future changes to the Treaties.

Centrifugal tensions are not new to the supranational legal order. Yet, when they start affecting the very fabric of the supranational governance and design, our discussion must be taken to another level of conceptualization and problematization. The novelty of the argument here is that these tensions move now beyond the technical and traditional dichotomy of "market regulation v deregulation" and "Union competence v Member State competence", and instead zero in on the big questions of the mega-politics centered around belonging and identity among the European peoples[28]. The sacrosanct ever closer union among the peoples of Europe seem to be the focal point of the principled disagreement that calls into question the very belonging to the community and its continued existence[29]. In other words, the readiness to live together, or paddle in accordance with the opening words of Tully, is on the line. The post-1945 liberal consensus[30] was built around the paradigm of never-again constitutionalism and reinforced by the legal commitment to ensure that dictatorships would never arise out of constitutionalism. Political power at the domestic level was to become subject to new international and supranational checks and balances with the legitimacy of the power depending on continuous adherence to the core values of liberalism, values that transcend momentary desires. Four founding blocks frame the analysis that follows.

Firstly, it must be stressed that by belonging to the supranational legal order, its actors limit their choices by committing to the order's practice

[27] Consolidated Version of the Treaty on European Union, OJ C 2016, 202/01 (hereinafter, TEU).

[28] The term "mega-politics" is taken from R. Hirschl, *The Judicialization...*, p. 123. He points out that the judicialization of "mega-politics" includes the very definition – or *raison d'être* – of the polity as such and notes the growing reliance on courts for contemplating for example the definition of the polity as such *vis-à-vis* European supranational polity (p. 128).

[29] T.T. Koncewicz, *L'État...* and in a more condensed form T.T. Koncewicz, *Understanding the Politics of Resentment*, Verfassungsblog.

[30] For more detailed theoretical analysis consult N. Walker, *The Philosophy...*, pp. 7–11.

and its understanding of the supranational legality[31]. All actors operating within the EU legality must profess their fidelity to the core non-negotiable principles of the European public space. Without such a commitment, our discussion will be stuck in the self-congratulatory talk of tinkering here and there while comfortably side-stepping the core issues and problems to tackle. If the political elites, and in particular the European Commission as the guardian of the Treaties, do not grasp the nature of the crisis as striking at the very foundations of the common projects, *ad hoc* tinkering will unfortunately remain the norm.

Secondly, our discussion must be placed within the broader context where liberal values driving the European project face fundamental questions and challenges by the majoritarian rule dictated by no-holds-barred majoritarian politics[32]. While in extraordinary times of constitutional tensions the efforts should be directed toward protecting the constitution and its values[33], the vexing question of the constitutional restoration and/or recapture after the democratic retrogression comes to the fore[34]. Where the law is not only used to empower and liberate and protect but also disempower, capture, the role of the law itself, the rule of law and the separation of powers as well as the communal bonds and memories are affected. For the system to regain ("recapture") its liberal credentials, the courts and the public must have something tangible to fall back on. Recapture of the system must be anchored in a long-term fidelity, which goes beyond and transcends the events of "here and now". In this context, Andrew Arato and András Sajo have rightly asked: "Is a democratic community bound to follow constitutional rules of dubious democratic nature? Or can these be replaced in violation of legality, for example in an extra-parliamentary democratic process? If so, under what conditions?"[35]. The integrity of the constitution "a day after" following the majoritarian rule of lawlessness. looms large. Dealing with a constitution which has been turned into a tool to perpetuate and entrench the governing party's power even in the case of a lost election challenges the constitutional

[31] As argued by A.C. Aman and C.J. Greenhouse: "practice allows us to acknowledge power effects without making a priori ascriptions of motivation or intent (...) it allows us to think laterally across interrelated developments in a flexible way, without exaggerating the coherence or orderliness of these developments, or presupposing there systemic or hierarchical character", see: A.C. Aman, C.J. Greenhouse, *Transnational...*

[32] On this constitutional design in error T.T. Koncewicz, *The Democratic...* Also analysis *infra*.

[33] A. Barak, *Judge...*

[34] T.T. Koncewicz, *Unconstitutional...*

[35] A. Arato, A. Sajó, *Restoring...*; A. Sajó, *Militant...*

doctrine beyond the legality question. Constitutional imagination understood as an uneasy combination of the myriad of texts, precedents, policies, competences challenge us to look critically at the *status quo*. How to recapture the essentials of the constitutional order without violating the rule of oneself? This question invites the existential turn in the discourse about the shape of our constitutional loyalties and how we tell and retell our story and explain what we are doing to restore the rule of law after the rule-of-law-less period of governance.

Thirdly, by looking critically at the original design of the EU, this paper offers the European decision-makers the tentative interconnected road map for the holistic and integrated approach to design questions that beset the Union. The EU has not only been challenged, but also and more dangerously, has been exposed to a paradox. On the one hand, the order is said to be thickening all the time, and nowhere more so than in Europe. Europe has the thickest of thick transnational legal orders anchored in the liberal and democratic norms. And on the other hand, even in the heart of the thickest supranational public legal orders – the intersection of the Council of Europe and the EU – it seems to be on the defensive and unable to respond effectively to the anti-liberal challenge. The EU not only faces the challenge of retooling its Treaty framework but first and foremost of placing it in a more axiological setting of belonging and self-understanding, while revisiting its foundational (and often implicitly assumed) ideas. The implicit must be brought to the fore now and this is where the challenge of revisiting the Preamble to the TEU (Part 2.2), rethinking of the membership of the Union (Part 2.3), and rediscovering Article 2 TEU (Part 2.4), takes on existential importance.

Fourthly, the argument made here militates in favour of the novel and much-needed trajectory for the EU. It is suggested that such new trajectory would take the EU from rights-based constitutional regime (already in place in Europe) to more ambitious democracy-based supranational rule of law and value constitutionalism[36]. The latter would serve as a novel source of legitimacy for all governance arrangements within the supranational law and the benchmark to comply with by all actors operating within the supranational regime. It would focus on defending the constitutional features/profiles and democratic cores of the units that made up the fabric of the supranational legal order. As such it would give the substantive dimension going beyond

[36] F. Schorkopf, *Value...*; T.L. Boekestein, *Making...*; T.T. Koncewicz, *Values...*; R. Baratta, *La "communauté de valeurs"...* On the judicial construction of Article 2 TEU also consult L.S. Rossi, *La valeur...*

the market-driven aspirations of the traditional and foundational politics of integration. The intertemporal dynamics of the retrospect and the prospect are crucial here. While the politics of integration has in retrospect paved the way for the supranational legal order, today a conceptual leap of faith is needed to move forward and build the prospect of the design and governance that would be ready to respond to the changing fabric of the supranational order.

Without such a recalibration of our perspectives and loyalties, the governance and design are doomed to be stalled in no more than a patching-up process without the clear vision of what's next and what the destination of the journey should be. Granted, looking back anchors but is no longer enough. What is needed is the principled approach that would look to the causes, not simply cure the symptoms. This analysis must not be read as a closed box. Quite the contrary. It has been written to embrace new challenges and to adapt to ever-changing background circumstances. The road map offers a conceptual and systemic framework for dealing with the transformations that affect the original ideational concepts that we have come to accept as given. The *status quo* is no longer an option. European project finds itself at a critical juncture and faces its moment of constitutional reckoning. A necessary revisiting of the very premiss of the European project looms large. It needs to test critically the implicit assumptions of the Founding Fathers by emphasizing explicitly at the level of the Treaty text the existence of a certain supranational core that binds all actors to the mast of the ever closer union among peoples and states of Europe, today in flux more than ever before.

This is the spirit that informs the present analysis.

2. Building blocks for the new discourse on EU law

2.1. First Principles of the European public space

The supranational legal order is faced with the challenge of ordaining a catalogue of First Principles[37] and interweaving them within the constitutional legal order of the member states. The European Commission and the European Parliament must be responsible for better explaining to the wider European audience that at the heart of the SLO has been a fundamental commitment to the set of First Principles that the Member States, institutions, and civil

[37] D. Edward, *An Appeal to First Principles* (manuscript on file with the Author).

society actors, are bound to respect and uphold and trust that others will uphold. In our view the process of unearthing, reconstructing, and operationalizing the catalogue of First Principles would provide a reference point for the political leaders' own itinerary and focalize their efforts. The rule of law is but one of these First Principles as it has transformed "political power" into "political power constrained by law"[38]. The commitment to First Principles, though, has always suffered from being overshadowed by the market-driven aspirations of the first Communities and now the Union (the afore-mentioned normative asymmetry). The catalogue of First Principles is intertemporal as it cuts across the past, present and the future. The challenge is to revisit the "First Principles" of European integration (dimension of the past), to rethink Europe's present vocation (dimension of the present) and finally, to embrace new vistas (dimension of the future).

"Locking itself into Europe" on Accession Day must be seen as a commitment that comes from deep introspection and distrust; mindful of states' innate urge to either wage war or anticipate one, post-war revelation had seen these states come together and recognize their demons[39]. By locking in, the states have entrusted supervision over the foundational values (or primary myths of peace and prosperity) of institutions typically not under their control[40]. Yet, the constitutional design of the European Union suffers from the existential drawback. The states that are the source of distrust and fear are called on to sit at trial over one of their fellow Member States. States are the source of the very problem that Article 7 TEU seeks to overcome a lack of respect for the common values on which the Union (not Member States) is based[41]. Of course, there should be a synergy here as Article 2 TEU is based on the implicit recognition that the same values inform and animate any Member State's constitution. Yet, the rise of the politics of resentment questions this synergy[42]. Membership ethos explains that Member States are bound to adopt a certain attitude toward other actors and is reflected,

38 "Constrained political power" might be said to be the driving force behind the European consensus and one of the paradigms of post-war constitutional settlement in Europe. Insistence on the element of constraint was in turn driven by distrust of popular sovereignty, and fear of backsliding into the authoritarianism. On this see: J.W. Müller, *Beyond Militant...*

39 In similar vein J.W. Müller, *Should the EU...*, pp. 147–149.

40 See in depth V. della Salla, *Political Myth...* On the European mythology also T.T. Koncewicz, *If You Are Europe...*

41 R.D. Kelemen, K.L. Scheppele, *Defending...*

42 C. Fasone, L. Rye, T.T. Koncewicz, *Ideas...*; T.T. Koncewicz, *Understanding the Politics of Resentment. Of the Principles...*

among others, in their duty to have due regard to the Union system and abide by the most fundamental treaty rules[43].

Faced with the politics of resentment[44] and growing fears of spreading constitutional capture, Europe needs a discursive framework for articulating and accommodating the practical meaning of its overlapping consensus. This paper's argument is that such a framework should be centered on basic challenges that are presented as a narrative combining the past, present, and future. The politics of resentment challenge us to revisit the forgotten founding narratives (First Principles) of European integration (dimension of the past), to rethink Europe's present vocation (dimension of the present) and finally, to embrace new vistas (dimension of the future). Resentment-driven constitutional capture poses an existential threat to post-1945 Europe and its founding narratives of living together and never-again constitutionalism that animated Europe's founding fathers. "Europe is not Europe in the sense that Germany is Germany, or France is France. Europe is all about Doing Europe which aims for the effective and unsentimental doing Europe transforms bad history into a good future and a better life for everyone irrespective of race, language, or religion (...). Doing Europe embodies Never Again"[45].

2.2. Overhauling the Preamble to the Treaty on the European Union

The Preamble to the Treaty on the European Union, while reaffirming the commitment to the European integration, must also respond to the changing landscape and the new dynamics of the integration. "Doing Europe" with an overlapping consensus and tolerance might no longer be the dominant European narrative. Instead, the politics of resentment and constitutional capture are pushing Europe to a standstill and an identity crisis. As explained in the introductory part the European Union's constitutional design is falling short of the novel challenge that comes along with the politics of resentment. Rethinking the external constraints and limitations imposed on the domestic *pouvoir constituant* in response to constitutional capture of liberal constitutions looms large[46]. As society advances, are "we the European peoples" ready to continue living together in a constitutional regime, internally divergent, and always ready to respond to the exigencies and demands of

[43] *Editorial Comments. Union membership...*

[44] T.T. Koncewicz, *L'État...*

[45] U. Beck, E. Grande, *Das kosmopolitische...* (my translation); see also: *The End of the Eurocrats'...*

[46] For an outline of the argument see K.L. Scheppele, *Unconstitutional...*

new realities? Therefore, it is argued that the Preamble to the TUE should recognize that the overarching commitment to Europe must now be coupled with the determination and acknowledgment of the shared essentials that would underpin this commitment. Otherwise, the words ring hollow and the ever-closer Union stands detached from reality[47]. It is time to recognize that the democratic retrogression and the politics of resentment change the European Union's original consensus in the most profound way. First, not all Member States seem to share the same values (also Part 2.3) Second, not all Member States are necessarily (as was presumed in the past) liberal democracies. Third, mutual trust in the Member States' legal systems is a rebuttable presumption. This systemic diversity is a new phenomenon: the European Union is no longer based on the acceptance of only one political system, a liberal democracy. The consensus was betrayed by the parties to it. Member States are no longer different (with diversity understood in the traditional sense as an asset of internally diversified polity). Rather, the European Union is becoming a union of different Member States in systemic terms; states are unwilling, as opposed to unable, to share the same values and live by theme as part of their original consensus for coming together.

To make the European Union more responsive to the democratic threats, it is crucial that all actors acknowledge their commitment to shared democratic aspirations, core values of dignity, equality, and freedom, and embrace the project as their own. All actors must be ready to proclaim their local mandate through a commitment that tramples the momentary desires of the people and their representatives and puts forward a necessity for effective enforcement. The revamped Preamble to the TEU could then operate as a reference point for the supranational fidelity and belonging, both of which the Union today desperately needs.

"Essential characteristics of EU law"[48] today must go beyond traditional First Principles of supremacy and direct effect, to embrace the rule of law, separation of powers, independence of the judiciary, and enforceability of these mechanisms as part of the ever-evolving consensus. Together these essential characteristics of EU law have given rise to what the court has imaginatively called "a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and

47 On this also T.T. Koncewicz, *L'État...*

48 Term used in the Opinion 2/13 of the Court of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454 (hereinafter, Opinion 2/13), § 167.

its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever – closer union among the peoples of Europe'"[49].

The Preamble to the TEU as currently worded falls short of recognizing that the political, legal and social landscape has changed. In short it no longer reflects the reality of the European integration defined by growing polarization and the once-taken-for-granted permissive consensus on the wane. While the integration in 2024 has gone well beyond the institutions, it still finds difficult to find its voice that would explain the essential questions and connect with the true beneficiaries of the integration: citizens of the Union. Visibility and credibility of the Union are at stake. It is the high time that the European elites see the existential dangers for the European project and act accordingly. It is not their project, but rather must be seen as working first and foremost for the European peoples. When it comes to fundamentals, there is no place for bargaining. First Principles demand fidelity and call for re-examination in the light of a rebuttable presumption that values like rule of law are no longer shared. We believe that without a proposed revamping of the Preamble to the TEU the Union will continue in a state of self – denial and "the business as usual". Such an approach would only exacerbate the current predicament of the supranational design. The Treaties will continue to be in the error of normative asymmetry, unable to catch up with the changing world and deal adequately with the new dangers which were not contemplated by the Founding Fathers.

The above considerations lead to offer the following anchoring elements. Looking critically at the Preamble to the TEU, rather than pipe dreaming of yet another ill-advised grand constitutional treaty, would help anchor what is truly important and essential for the European project. In our view it is the Preamble that must speak to the peoples of Europe and explain:

- what is behind the Founding Fathers' dream of living together of the European peoples and states;
- in the name of whom ("we the European peoples") the Preamble is speaking;
- who we are, where we are coming from and where we are heading;
- what values we live by.

In this light, the revamped wording of the Preamble to the TEU would help ordain and systematize more technical changes. To be considered here are:

[49] Opinion 2/13, § 167.

- reaffirming an ever-closer Union among peoples and states of Europe as the true *raison d'etre* of the European integration where every political power is and must remain a constrained political power;
- being mindful that one of the driving forces behind European integration has been and must be learning from the past;
- recognizing that mutual trust between the Member States is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU and enforced by the Court of Justice in accordance with its mandate and function under the Treaties;
- recalling that the dream of living together must be anchored in law and institutions which replace war and provide regulatory device for disputes arising out of the membership in the Union;
- expressing trust that the liberal democracies must be anchored in the respect for the law and reiterating that there is no democracy without the rule of law;
- recalling that the Union offers a binding procedural framework for managing the difference(s) through good faith dialogue and transforms clashes of power into procedures governed by the rules and applied by independent institutions;
- reiterating that at all times Member States remain states bound by the rule of law and honour the constitution as the supreme law of the land, fundamental rights of its citizens and minorities, separation of powers and the judicial independence;
- reaffirming Member States' respect for the common institutions and the decisions taken by these institutions in pursuance of the Treaty objectives;
- acknowledging the existence of certain First Principles of the European public space which must be respected and upheld as a pre-condition of belonging and collective self-understanding of the Union;
- emphasizing that for the Union to exist and function the core of the supranational legal order must be respected and that for the commitments to be viable Member States are not free to interfere with the core of the European public space;
- emphasizing that constrained political power, separation of powers, rule of law, judicial independence and effective protection of citizen's rights constitute the very core of the European consensus that makes the Union credible and operative;

- recognizing that the Union can exist only when all the Member States comply with and honor the core of the supranational legal order;
- recalling that the essence of the citizens' rights is to be protected and respected by all the Member States at all times;
- reiterating the vocation of the Union and its institutions to protect the essence of the citizens' rights whenever they are violated.

In this way the Preamble to the TEU would have the potential of serving as the manifesto of fidelity and the reference point for the Union in 2024 and beyond. As currently worded it does not reflect the new dangerous world in which the Union operates.

2.3. Membership of the Union and a plea for a new supranational social contract

The process of revisiting the Preamble to the TEU must be coupled with the critical rethinking of one of the original founding assumptions that all member states are good enough and act in good faith. Rather, our argument is that such an idealized notion of membership is counterfactual and resembles a myth The politics of resentment provide an example of a systemic assault on the very foundations of EU law[50].

For the European Union to have a chance against the rising politics of resentment, the language, and perspectives through which the European Union looks at the Member States, must be challenged and consequently change[51]. In Opinion 2/13 the Court stated that: "This legal structure (of the Union) is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected"[52]. The critical rethinking of the membership challenges the political will and imagination, readiness, and yes also political courage of the European leaders, to stand up for, and defend, the common project against the domestic idiosyncrasies, fleeting voters' preferences, and electorates, and to contribute to truly European politics. It is recognized that the membership clause would focalize the

[50] The term "very foundations" is a reference to dictum in *Simmenthal* case.

[51] Opinion 2/13.

[52] Ibidem, § 168.

problem of systemic deficiencies in the functioning of the liberal democracies at the level of domestic politics. Rethinking the membership and the lenses through which it looks at its member states requires a bold conceptual shift from the EU as market-driven entity to a democracy-enforcing supranational community of equal states invested in the legal order and committed to the common project and its systemic and organisational principles. Member states must be invested in the legal order and the integration project by repeated acknowledgement that they want to respect the understanding of democracy, liberal values and the First Principles that brought them together. The states must speak with one voice and reaffirm their commitment to the EU values that underpin the community. Only such commitment could then translate into more technical aspect of the tools.

All this explain the importance to be attached to the introduction of a general clause on the membership of the EU. Such clause would go beyond what the Treaty on the European Union offers now. It would be tied to Articles 2 and 19 TEU[53] and as such add an important founding block to the much neglected discourse of what it really means to be a member state of the Union in 2024 and beyond. What I call here here "supranatiopnal fidelity clause" would draw on the supranationality legality as sketched above and revolve around the following founding elements:

- existence of the of non-negotiable constitutional essentials binding on all actors and practiced by all in good faith as a result of belonging to the union of states and peoples in accordance with the state aims and principles of the Preamble;
- importance of special attitude towards other actors and in consideration of interests of the community of which member states form part and to which they owe a duty of fidelity;
- the emphasis on the community that goes beyond the collection of States and is more than the sum of its parts;
- the supranationality understood as the commonality of values and interests;
- element of the community interest and framework to prevail over reciprocal relations between the Member States;
- setting up a common framework of procedures, rights and obligations and doing things *dans le cadre de l'ordre communautaire*.

[53] T. Tridimas, *Wreaking...*; K. Lenaerts, *On Checks...* In Polish see comprehensively T.T. Koncewicz, *Filozofia...*

The line of argument presented thus far would not be complete though without appreciating the importance of a gradual shift from the market to the community of values. This shift provides a truly paradigmatic turn in the studies on the supranational governance and design. It invites the neglected first order questions of belonging and identity and of our continuous willingness to live together as part of the supranational political community. This is where the dots of the present analysis are connected.

2.4. "Union of values"

2.4.1. What's in a name?

The value discourse[54] and the importance of locating the constitutional core that would help define the EU beyond the common market have gained prominence with the worrying pattern of democratic backsliding in some Member States that calls into question the assumption of commonality among all Member States[55]. While commitment to the EU project by all actors involved is crucial, one of the tenets of "the rule of law crisis"[56] is that today such an assumption is no longer valid, but rather counterfactual as not all Member States are ready to acknowledge that the values are indeed

54 Parts 2.4.1, 2.4.2 and 2.4.3 develop and contextualize my previous analysis; see: T.T. Koncewicz, *Values*... Also T.T. Koncewicz, *The Politics of Integration*...

55 For references see the introductory Part 1.

56 This is a generic term used here to signify the process by which the member states call into question their commitment to respect the core values of the Union and fail to engage in the process of good faith bargaining to round off the edges of these values. In what follows "the rule of law crisis" and "value crisis" are used interchangeably. Having made this terminological caveat, one must be very clear, that not everything should be grouped under the high-handed tag of the "value crisis" in the EU. When properly defined, the value crisis is not about well-intentioned disagreements among reasonable democrats on how best to implement a technical piece of EU law or bring its domestic legislation into line with the requirements of the EU law. There is a categorical difference between a lack of implementation of EU law and/or interference with citizens' EU rights, on the one hand, and the blatant rejection of the Court of Justice's authority, targeting national judges for sending preliminary rulings to the Court or masterminding a hate campaign against the judges that dare to say "no" to such practices of intimidation, on the other. The argument is made in the paper that it is exactly these extreme examples of breaches of shared values that demand the explicit spelling out of the constitutional core of the EU that is shared by all as part of once implicit and non-negotiable elements of the original consensus. If such a core cannot be agreed upon and enforced in times of crisis, then, the integration project itself is being undermined and loses its ethos. The call for revisiting the core of the SLO must thus be read in this light.

common and shared[57]. Quite to the contrary, some Member States question the common understanding of the basic ideas, chief among them, the rule of law[58]. And yet, despite the necessity to conceptualize, internalize and operationalize more values within the EU and its discourse, writing about European values has never been an easy endeavor[59]. It has been rightly pointed out that the way values have been inserted into, and presented in, the Treaties is marred with incoherence and leaves us with more questions than answers[60]. Sionaidh Douglas-Scott has raised some of these uneasy and pertinent questions: "Why are some ambitions described as aims or objectives rather than values? Why should peace, or social justice, be classified as aims rather than values? And what to make of the fact that so many different values and aims, and principles, of a different ideological bent appear grouped together? Are (the values) universal, and if so, can they truly have developed from the singular, particular European inheritance?" She then concludes on a somber note: "Overall, the early Treaty provisions present themselves as a rather incoherent jumble (...) by an overabundance of other objectives, principles and policy statements, their (values) expression in the Lisbon Treaty provides a confusing and particularly inept way to construct a meaningful moral identity or philosophical framework for the EU"[61].

And then there is a terminological conundrum: Are we focusing on the European values or the values of the European Union?[62] According to the most eloquent proponents of the value-turn in the European studies, Williams, a pragmatist, and utilitarian analysis, through the prism of principles and legal order geared up solely to the attainment of the objectives of the common market, are the key reasons why the value discourse never really took off within the EU. He adds to this the lack of political resolution to make

[57] European Commission, *Standard Eurobarometer 89*... provides a critical survey the citizen's perspective as to whether the assumption of "sharing" is indeed correct and if so, what makes up the concept of "sharing".

[58] For the argument that some member states are no longer "good" consult D. Kochenov, *Europe's Crisis*... and *supra* Parts 2.2 and 2.3.

[59] See in detail: M. Frischhut, *The Ethical*...; see also: I. Ward, *Europe*...; T.T. Koncewicz, *Values*...

[60] S. Douglas-Scott, *The Problem*..., pp. 413–414.

[61] Ibidem, p. 414. Her voice of concern and questions merit attention. She in fact pleads for not just more value discourse within the EU but also points out the values which should take center stage in such a discourse moving forward and which thus far has been neglected (e.g. justice).

[62] This last question is important as the most recent surveys show that the public does not perceive the EU as the only and authoritative repository of the values that should be classified as European. European values seem to embrace more than just the values of the EU. See: European Commission, *Standard Eurobarometer 89*...

clear the identity and substance of values applicable to, and respected by, the EU[63]. While principles are those legal norms that lay down essential elements of a legal order, values engage a different understanding[64]. Quoting Habermas, he points out that a sense of obligation is attached to principles whereas a sense of purpose is emitted by values, which are to be understood as intersubjectively shared preferences[65]. The values are those ends deemed worthy of pursuit. Politically, they "describe those qualities and states of condition that are considered desirable for shaping action or political programmes"[66]. He continues that while "principles *command* action and enable judgment, albeit within interpretive parameters, values *recommend.* They are more aspirational in character, helping to provide a sense of 'ultimate ends' and filling those gaps which appear when principles fail to provide sufficient guidance or conflict with each other"[67].

In other words values understood as ideals and aspirations are informing the everyday practice of the community that aspires to such ideals: through virtue. Values-ideals need practice and doing. For his part Frischhut points out that values can be approached from the social science point of view, political science, and legal point of view[68]. He argues, quoting the work of Di Fabio, that "from the *social science* point of view values are the basic attitudes of people who stand out due to their social firmness, conviction of correctness and emotional foundation". Importantly, values act normatively, but are subject to change through social factuality[69]. From the political science perspective, "values are guiding ideas for the activities of political institutions based on politico–philosophical value judgments"[70]. Finally, from the legal perspective, "values describe goods that a legal system recognises as given or abandoned"[71]. As such "they may serve as interpretive guidelines, standards of norm control, and unfold a legitimatory meaning"[72].

With all this, Article 2 TEU comes to the fore.

63 A. Williams, *The Ethos...*

64 Ibidem, p. 256.

65 Ibidem.

66 Ibidem, pp. 256–257.

67 Ibidem, p. 257

68 M. Frischhut, *The Ethical...*, p. 131.

69 Ibidem.

70 T. Schmitz, *Die Charta...* as quoted in M. Frischhut, *The Ethical...*, p. 131.

71 F. Reimer, *Wertegemeinschaft...* as quoted in M. Frischut, *The Ethical...*, p. 131 (all emphasis is mine).

72 C. Calliess, *Europa...* as quoted in Frischhut, *The Ethical...*, p. 131.

2.4.2. Understanding Article 2 TEU

Article 2 TEU[73] might play the role of a myth-reservoir provided that the text of the Treaties would be carried over and be reflected by into the context and practice. Article 2 TEU might usher in a new phase in the trajectory of the EU supranational design[74]. Accordingly, Article 2 TEU must cease to be a dormant clause and ought to be reconstructed as the cornerstone of the EU supranational *acquis* called "the very foundations of the supranational legal order". Clearly there must be a certain Union content attached to the guiding values of the political community. These values, while clearly anchored in the domestic legal systems and the constitutional traditions of the Member States, must take on their own meaning if they are indeed to serve as a behavioral and identitarian yardstick for the Union and for belonging to the Union. If such a core cannot be agreed upon and enforced in times of crisis, then the integration project itself is undermined and loses its ethos.

In the context of the EU the values talk straddles a fine line between sharing commonality and nurturing the necessary distinctiveness while remembering and sustaining the original myth behind the EU and its initial lofty self-understanding as an authoritarianism-curbing entity[75]. This original myth followed the unstated and implicit assumption of a community made up of liberal democracies or a community that settles for the imperfect and recognizes that in less-than-perfect world not all Member States are good enough. Now the resentment-driven constitutional capture replaces the founding narratives with zero-sum politics, a vision of "us versus them" and a competing constitutional narrative of fundamental disagreement over values. It proclaims that "we, the European peoples" are not ready to live together in one pluralistic constitutional regime. It challenges the standard story of the origin of the EU: that it was founded to bring peace and prosperity to Europe by ending the possibility of war and encouraging the common rebuilding of economies.

With this background transformation, the value discourse for the European Union must be anchored in the principled pragmatism. It must recognize the validity and relevance of the original position of all participants in the bargaining. It holds out a hope that the discursive opening will allow the participants to co-exist and make the system work. Yet, for a consensus to

[73] For general discussion M. Klamert, D. Kochenov, *Article 2 TEU*...

[74] R. Baratta, *La "communauté de valeurs"*...

[75] On the original (primary) myth of the EU consult V. della Salla, *Political Myth*...

work, "we, the European peoples" should acknowledge certain fundamentals that bind and discipline us and that brought us together. Part of the deal behind the overlapping consensus has always been the acknowledgment that parties are ready to enter a bargaining process to find similar grounds of understanding of the fundamental commitments. Bargaining presupposes managing the disagreement over time to build a common understanding of the basic principles.

Article 2 TEU must be seen as responding to the problems of authority and its legitimacy in the post-foundational phase. Neil Walker has pointed out that a new agenda is defined by the return to ideals. It neither dismisses the idea of mission legitimacy as an anachronism for a mature polity nor views its democratic process as a sufficient alternative. The EU mission must be adjusted to the twenty-first century. He argues that "the historical problem of the EU lies neither in the rigidity of its mission nor in its having become stale or exhausted, but *in an abiding failure to treat seriously* enough the development of a deep and distinctive purpose and *set of guiding values*"[76]. Article 2 TEU has an important systematizing, tone-setting, and mobilizing role to play as it affects all three key stakeholders in EU law: the EU, the Member States, and citizens. Becoming a community of values is a process and must never be reduced to one point in time. Only with the engagement of all three kinds of stakeholders will the European values command their own content and work out its own parameters. This is the embodiment of the European democratic model.

One should be very clear and precise about the language resorted to when talking about European values. Agreeing on the core that binds us should never be seen as imposing uniformity but rather be understood as enforcing the foundational features of the legal order that reflect its overlapping consensus and that are essential to its functioning, and more broadly, to its survival. This is not "imposed uniformity" but rather the acceptance of being bound by the essential principles that make up the EU. A consensus loses its normative value and credibility when it fails to enforce the agreed-upon constitutional essentials. After all, if we cannot agree on the core of our commitments, then the whole political community (and the EU is undoubtedly one) loses much of credence and credibility. The choice of words (enforcing credible commitments, not imposing uniform standards) is particularly important as it frames and orders our discourse about the

[76] N. Walker, *The Philosophy...*, p. 16 (all emphasis is mine).

(allegedly) shared values as we struggle to move along. The value discourse in the supranational context must tread a fine line and needs conceptual framing and re-framing that steers clear of a sentiment that some values are imposed or not shared at all. All too often too much is read into existing differences, instead of focusing on, and locating, the commonalities that are shared. For the latter to happen, though, supranational governance and design need a discursive framework for articulating and accommodating the practical meaning of its overlapping consensus. While "the value talk" has a special role to play here, it is at the same time fraught with the dangers of overreach and conceptual pitfalls. On the one hand, it can act as a catalyst for reinforcing the commonality and belonging, but on the other it can easily create a sentiment among some member states of being pushed out or subjected to the tyranny of values[77]. Thus, achieving a balance is anything but easy, provided one should be achieved.

The novelty of the approach suggested here is to reflect the amorphous and ever-contested nature of the EU supranational governance while at the same time arguing that Article 2 TEU has two parts: the founding of the Union and the claim to commonality. While the former is about axiologically anchoring the EU legal and political system and brings to the fore questions of mega-politics centered around identity and belonging, the latter searches for the glue that binds the SLO. Trying to make sense of the very general and open-ended character of this provision and explain its gist, it is argued that, while interrelated, these two parts differ in quantitative sense. The founding is static and expresses a specific moment in time. The anchoring in commonality on the other hand is about process and not one point in time. Rather commonality is born out of becoming, interacting, living together, and learning from the Other. The more this process goes on, the more substantive contours of the consensus follow in the footsteps of the becoming. As such Article 2 TEU expresses broad parameters of belonging and when read in conjunction with Article 4 TEU[78], which addresses both respect for national identities and the principle of sincere cooperation[79], Article 2 TEU does not,

[77] A. von Bogdandy, *Common...*; A. von Bogdandy, *Principles...*

[78] On Article 4 (2) TEU: L.F.M. Besselink, *National...*; L.F.M. Besselink, *Respecting...*; A. von Bogdandy, S. Schill, *Overcoming...*; B. Guastaferro, *Beyond the Exceptionalism...*; more recently J. Scholtes, *Abusing...*; for the latest judicial developments M. Bonelli, *Has the Court...*

[79] What is crucial is the search for an accommodation in a shared constitutional space, exchange, tolerance, and acceptance of the other. It seems that while expression of the constitutional identity and the question of substance (what properties can be ascribed to national identity in order for state expression to be recognized as such identity) should be a matter for Member

and must not settle the decision, on the *finalité politique* of the Union. Accepting the commonality of fate and values does not and must not lead to cancelling out the member states' claim to distinctiveness within the community.

The reference to values in Article 2 TEU has also two dimensions: the acceptance (the Union is founded on shared values) and the practice. While the former speaks to a textual perspective and the grand narrative of values, the latter focuses on the context and praxis centered around virtues. Only when values are translated into, and functions through virtues of "doing values", does the reference to the values in the Treaties take on tangible meaning. Values are meant to be practiced and the praxis builds a sentiment of indeed being shared and experienced together. Values without virtues resemble an empty shell: full of constitutional rhetoric, but not much more. The member states sign in good faith the treaty and commit themselves to a certain discipline that goes beyond the interests and preferences of any one state. In this way they recognize that such a discipline will be binding on them in their collective actions in the European public sphere. The acceptance tells only half of the story, though. The outcome of the exchanges is recognized and legitimated only when it respects the procedural frameworks that constrain and discipline the process of reaching the compromise. The latter must be discourse-based. Crucially, though, for the discourse to have this tone-setting and defining impact, it must be anchored in at least some recognition of commonality and essentials and the responsibility for the common good that this discourse serves. We are part of the SLO, and the element of sharing must be not only present throughout the process, but also assumed at the very beginning.

Being "founded" not only implies that at any given moment all the values essential to the consensus must be shared, but it acknowledges that the differences should not be simply waived off[80]. While the belief in the founding (anchoring) made the parties come together, it was always accompanied by constitutional good faith from the parties to the consensus. Differences and disagreements can only be ironed out and managed within the consensus-friendly arrangement and disposition of the constituent

States (here Member States understood not only as constitutional courts but also legislative organs), the final legal categorization of the constitutional identity *within*, and its consequences *for*, the legal order of the EU, should be left to the Court of Justice as the ultimate interpreter of EU law. For more on the division of work in the reconstructing of the constitutional identity G. van der Schyff, *The Constitutional...*, pp. 572–577. On this also M. Bonelli, *Has the Court...* with the references to the case law.

80 P. Akaliyski, Ch. Welzel, J. Hien, *A Community...*

parties. Anchoring in the commonality does not have to be read as imposing and ordaining, but rather as inviting to search for the common understanding within the pre-agreed framework. It creates the space for talking about possible tensions that might arise in the daily practice and operation of the consensus. In this sense, practice ("how the consensus operates") follows the act of founding. The latter secures the former in that practice will be always read in the light of the original decision to share and disagree, all this in good faith.

The value discourse as understood here appreciates that the interdependence must be practised and internalized. For such discourse to succeed it must be interwoven into and read against the background of the in-built contestation and bargaining of the supranational overlapping consensus. Our different ways of life must be learnt and dissected, not rejected up front. Values could have a role to play but these values must be explained, taught, and practiced. Either the States at drafting stage assumed this sharing and commonality element for a fact or recognized that this is a desired state of things still to be attained, strived for, and practised before reaching the state of being indeed shared. While this implicit assumption might have been at least true in some respects which allowed the Founding Fathers to move the project forward in the first place, the need for building and practising the commonality was still paramount none the less. Only practice and doing values could build a true sense of belonging and a level of comfort in the heads of all the actors involved and convince them that our ways of life are anchored in the core that binds us all to a common discipline. Trust would follow the practice of doing values[81]. Here the member states would be giving a nod to a process and working toward the goal of reaching a true shared commonality. Sharing and commonality would thus be perceived as an objective towards which all actors strive through learning and practicing mutual trust[82].

2.4.3. Artcle 2 TEU and the European consensus

While human rights were given a special place in this international and supranational system of checks imposed on the domestic *pouvoir constituant*, they were never meant to be alone. The states have recognized that liberal

[81] Also H.D. Klingemann, S. Weldon, *A crisis...*

[82] The cutting-edge research of K. Nicolaidis comes to mind in this context and provides an amazingly rich testing ground for many ideas offered in the present paper, see: K. Nicolaidis, *My EUtopia...*, pp. 143–144.

democracies would work best alongside two complementary safeguards, including: (1) the rule of law and the constitution as the supreme law of the land; and (2) mechanisms of supranational and international control whereby self-governing states hold each other accountable according to principles of human rights, guarantees of democracy, and openness to the world[83]. The contemporary challenge of constitutional design consists of reimagining the consensus in procedural and remedial terms. The substance of the consensus (what the parties to the consensus have agreed to respect as shared) must be now complemented by procedure (how to ensure that parties adhere to the constitutional essentials despite the fact they might not share the essentials anymore).

While arguing that such a shift from substance to procedure is necessary, there are still limits at play. European politics of resentment lead to a new conflict, away from party lines (Left versus Right) and toward political elites versus the angry public[84]. The liberal narrative of the rule of law and embracement of "the other are replaced with the apotheosis of local communities composed of supposedly similar individuals. The politics of resentment propose a disagreement about the common values and as such challenge the consensus to embark on more fundamental re-examination of the consensus's continuing viability. After all, those who do not want to be part of the consensus should exit the consensus. When a party to the consensus continues to fundamentally oppose it, no amount of enforcement will help. This is a true constitutional challenge that goes beyond procedural tinkering. It will force a radical rethinking of the consensus, an analysis to the very core of who the parties to the consensus are, and question whether the states want to continue living together. With the politics of resentment on the rise, the European consensus might be just minutes away from fundamental challenges of mega-politics of identity and self-survival[85]. The gist of the European overlapping consensus has been the acknowledgment by the parties that they are ready to enter into bargaining process in order to find similar grounds of understanding of the principal commitments. Bargaining presupposes disagreement that will be managed over time to build a common understanding of the basic principles. Parties with unreasonable and

[83] C. Dupré, *The Unconstitutional...*

[84] See "Journal of Democracy" 2007, vol 18, special volume: *Is East-Central Europe Backsliding?* and in particular analysis by I. Krastev, *The Strange...*, p. 56; and more recently J. Dawson, S. Hanley, *The Fading Mirage...*

[85] Persistent undermining and rejection of the consensus' essentials by one Member States belongs to the category of megapolitics in the above sense.

irrational doctrines that question the liberal democracy as a form of government must be excluded from the consensus because disagreement must not undermine all parties' commitment to support liberal democratic principles under a democratic constitutional regime[86]. The emerging constitutional doctrine of the politics of resentment is anything but reasonable within the consensus's meaning. As such, the politics of resentment pose a mega-politics question of belonging and identity. If other parties' commitment to the consensus continues and their resolve to defend the basic principles on which the consensus is based is genuine, this question must be addressed sooner rather than later. For the European Union to have a chance against rising politics of resentment, the language it uses and perspectives through which it looks at the Member States must change.

With the post-war consensus in flux, it is submitted that Article 2 TEU might be destined to play a role of myth-reservoir provided that the *text* would be carried over into the context and practice. If the union of states does not make a leap towards community of values shared by, and enforced in the name of, the European peoples, the supranational design will be doomed to be on the defensive against illiberal attacks, and ultimately compromised *tout court*. This community of values is built on the meta-value of the overlapping consensus which concretely translates into the right to disagree reasonably on the one hand, and the duty to be *loyal* to the constitutional essentials that keep the consensus alive on the other.

More importantly, the paper has pleaded in favour of the community of values that respect the right to disagree reasonably as much as it defends right to be loyal to the constitutional essentials that keep the consensus alive. The paper accepts that Article 2 TEU might usher in new phase in the trajectory of the supranational design. It advocates the reading of Article 2 TEU according to which Article 2 TEU must be reconstructed as the cornerstone of a novel and emerging part of the supranational *acquis* called "the very foundations of the supranational legal order". Article 2 TEU must be seen as responding to the problems of authority and its legitimacy in the post-foundational phase. Neil Walker has pointed out that a new agenda is defined by the return to ideals. It neither dismisses the idea of mission legitimacy as an anachronism for a mature polity nor views its democratic process as a sufficient alternative. The mission must be adjusted to the twenty first century. He argues: "the historical problem of the EU lies neither in the rigidity of its

[86] J. Rawls, *Political*, p. 165; J. Rawls, *The Idea...* For discussion consult also T.T. Koncewicz, *The Politics of Integration...*

mission nor in its having become stale or exhausted, but *in an abiding failure to treat seriously* enough the development of a deep and distinctive purpose and *set of guiding values*"[87]. The paper has recognized this and has argued that Article 2 TEU has an important systematizing, tone setting and mobilizing role to play as it affects all three stakeholders in the EU law: the EU, the Member States, and the citizens. Becoming a community of values is a process and must never be reduced to one point in time. Only with the engagement of all three stakeholders will the European consensus and its underpinning values be able to command their own content and work out its own parameters[88].

3. Connecting the dots. Still paddling together after all?

The Union has a chance to survive, when all actors operating within the EU legality, will be able to profess and renew on the continuous basis their fidelity to the core non-negotiable principles of the European public space. Without such a commitment, our discussion will be stuck in the self-congratulatory talk of tinkering here and there while comfortably side-stepping the core issues and problems to tackle. No doubt, the question of who will be the constitutional storyteller of the SLO's First Principles and the contours of the overlapping consensus is crucial. For any myth to survive, though, supranational governance and design need not only crafty storytellers but also a good story to tell, an engaged audience to listen, counter-strategies to defend the myth(s), and counternarrative(s) to explain and justify the original consensus that brought states and European peoples together. The EU seems to be falling short in all these registers of myth-telling, defending, and building new myths for the generations to come[89]. The memory of why the states joined in 1952 must be of fundamental importance as the EU moves forward, ponders, and narrates its myths, and scrambles to respond to the gravest threat to the post-war settlement and shatter one of the founding myths of the first Communities that of the constrained political power and the overlapping, and not perfect consensus. The gist of the European consensus (Part 2.4.3 *supra*) has been always the acknowledgment by the parties

87 N. Walker, *The Philosophy...*, p. 16 (all emphasis is mine).

88 More on this T.T. Koncewicz, *Values...*

89 I develop this axiological strand in my *On "The Law of Integration"*. While the present paper is a selfstanding analysis, it should be read as being in an indirect conversation with the piece to be published in "Przegląd Konstytucyjny" 2024, no. 2.

that they are ready to enter bargaining process to find similar grounds of understanding of their principal commitments. The consensus was pragmatic as it has always presupposed a disagreement that would be managed over time to build a common understanding of the basic principles[90].

As was argued throughout the analysis the "value crisis" that calls into question the commonality among member states poses a mega-politics question of belonging and identity. If other parties' commitment to the consensus continues and their resolve to defend the basic principles on which the consensus is based is genuine, this question must be addressed sooner rather than later. To make the Union more responsive to the democratic threats, it is crucial that all actors acknowledge their commitment to shared democratic aspirations, core values of dignity, equality, and freedom, and embrace the project as their own. All actors must be ready to read their local mandate through a commitment that tramples the momentary desires of the people and their representatives and puts forward a necessity for effective enforcement. As argued throughout the text only the sum of respecting the core of constitutional essentials of the consensus, commitment of the member states to the core and a special ethos of membership can ensure long-lasting credibility and legitimacy of the supranational design and governance. The supranational critical juncture brings to the fore the questions not mere of design and governance (narrative building and actors' fidelities) but also content that embraces shared values (supranational legality) and purpose of the Union and its self-understanding (fight the illiberal democracies or accommodate them). The unstated and implicit assumption of a community made up of liberal democracies has been being challenged and pitted against the rival rebirth of the nationalistic narrative of uniqueness and self-sufficiency.

In 2024 and beyond the Union and the consensus of which shared values are part, are faced with the challenge of finding the right balance between building a truly supranational consensus around basic values on the one hand while catering to the existing domestic overlapping consensuses on the other. The values and the mutual trust highlight this challenge perfectly, even though they often come with more questions than answers. More broadly, this imperfection and uncertainty speak to the very DNA that has been woven into the European project and its founding myth of "an ever-closer union among peoples of Europe" (Article 1 TEU). The value discourse must be part

[90] T.T. Koncewicz, *L'État...*; T.T. Koncewicz, *Understanding the Politics of Resentment. Of the Principles...*

of this ever-evolving landscape and never stray away from the project's and consensus' in-built contestation and bargaining.

This aspiration stands in stark contrast to reality as in 2024 "the ever-closer union" continues to be bound together by the fact of statal membership with the citizens still lurking in the shadow of the state-driven narrative. It is thus worth repeating: if the union of states does not make a leap towards community of law and values, and follow the paths and avenues opened by the Court, shared legality and practice anchored in common values and enforced in the name of the European citizens will be constantly called into question.

In 2024 and beyond the readiness to live together as neighbors, and no longer as perfect strangers, is on the line. For this promise and dream to finally become a reality it is crucial to accept that all actors must embrace the shared values as their own and acknowledge their commitment to their own and the Union's democratic aspirations and core values of the European public space of dignity, equality, rule of law, and freedom. In other words, at the very minimum, all actors to the consensus must be ready to read their local mandate through the credible commitments that trample the momentary desires of the people and their representatives and embrace the values that define us as Europeans and our community as a community of law and values. A community that springs from the dream of coming together and the reality of (still) living apart. Therefore, the challenge of transition from traditional seeing "other-as-a stranger" to more demanding embracing "other-as-a neighbor" with whom we agree to share certain constitutional essentials and together live by First Principles, is staring right into our eyes.

Abstract

The ambition of this analysis is to move beyond the dominant perspective of human rights and instead embrace the neglected dimension of the axiology of the supranational integration. The technical question "how" supranational governance must today respond to the changing context of the law of integration and go hand in hand with revisiting the "why", despite all our differences, we are still ready to live together within the supranational community. Such a shift in the emphasis is necessary given the fact that the law of integration read only through the prism of market has proven ineffective when it comes to counteracting new kinds of legalistic dangers that feed off "the politics of fear", where the law is used not to empower but to disempower, not to liberate but to oppress, not to bring to the surface, but to hide and manipulate. In these circumstances one of the major scientific and political

tasks is thus to improve the understanding of the novel threats on the individual, social and political levels and in this way to develop counter strategies and counter narratives. In other words, supranational governance needs a new conceptual justification that would explain the ethnography and the practice of supranational law of integration when faced with the novel forms of contestation. It is argued that the value discourse associated with supranational legality provides a truly paradigmatic turn in the studies on the supranational governance and design. In this spirit the analysis invites attention and more robust research to the neglected first order questions of belonging and identity in a common legal order where all the actors are being challenged to rethink their allegiances and anchor them firmly within the framework of common values and aspirations. For that to happen, though, a new narrative is needed, one that would provide all the actors of the law of integration with the discursive framework and a point of reference to defend and better explicate transnational democracy and the rule of law, and not just human rights, as the constitutional essentials (First Principles) of the supranational legal order.

Keywords: supranational legal order, supranational legality, "an ever closer union among peoples of Europe", First Principles, value discourse, rule of law, Preamble, Treaty change, Union membership, "community of law, values and aspirations", law of integration, identity-belonging, "overlapping consensus"

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