Is It Enough to Say 'Common Values' When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order

Maciej Krogel*
New York University, New York, United States
maciej.krogel@nyu.edu

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Abstract

The contribution critically examines the idea that the common values from Art. 2 of the Treaty on European Union (TEU) constitute the identity of the European Union (EU) legal order. This idea, formulated by the Court of Justice in the rule of law conditionality decisions, has been endorsed by many lawyers and scholars, including Julio Baquero Cruz and Jean-Paul Keppenne in their chapter in the book on 70 Years of EU Law. The contribution engages with the fundamental normative claims behind the conception of EU common values as identity. First, it argues that, based on the EU constitutional discourse, any conception of the EU legal order's identity or essence cannot easily exclude the Treaty aims of pursuing peace and the socio-economic well-being of European peoples. Second, the paper submits that, despite the scholarly praise of 'identity based on commonality', the concept

* Emile Noël Fellow at New York University, School of Law.

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of identity suggested by the Court does not essentially differ from other constitutional concepts insofar as it conceals inevitable political disagreements, tensions, and choices. It is essentially particularistic due to its interpretative contestability, as well as its selective legislative enhancement and institutional implementation.

Keywords

EU Common Values – Article 3 TEU – Identity of the EU Legal Order – European Integration

I. Introduction

This contribution critically analyses the Court of Justice's (the Court) framing of the common values from Art. 2 TEU as the identity of the EU legal order.[1] In particular, the analysis enters into dialogue with Julio Baquero Cruz and Jean-Paul Keppenne from the Legal Service of the European Commission,[2] who comment on the Rule of Law Conditionality Regulation (the Conditionality Regulation)[3] and on the judgements of the Court of Justice confirming the legality of this Regulation.[4] Neither the judgements, nor their account elaborate on the conception of identity, for example, regarding the criteria for deciding what falls under the label of identity, or whether or not the latter should capture more than the common values from Art. 2 TEU. This contribution challenges the two fundamental normative premises of the chapter, which, as will be shown, have broader resonance in the EU legal scholarship. These premises, concerning the understanding of rule of law in the EU, can be summarised as follows:

1 Some arguments in this contribution partly develop and build on fragments of Chapter 4 of my doctoral dissertation, titled 'The Intellectual Sources of the European Union's Response to the Rule of Law Crisis in the Member States' (European University Institute 2024, unpublished).

2 Julio Baquero Cruz and Jean-Paul Keppenne, 'Fundamental Values, Constitutional Identity and the Protection of the European Union Budget Against Breaches of the Rule of Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 54-71.

3 Regulation 2020/2092/EU/Euratom of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L 433I.

4 ECJ, *Hungary v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97; ECJ, *Republic of Poland v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98.

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1) The Court of Justice's way of framing of the common values from Art. 2 TEU in the conditionality decisions is laudable as 'a strong restatement of the essence of European integration'[5] and of the 'constitutional identity' of the EU'[6];
2) This conception of identity by its very nature differs from the formulations of constitutional identity articulated by some national courts. Because the EU's conception of identity is based on the common values from Art. 2 TEU, it is 'an identity based on commonality, that is what binds us together as Europeans, and not on what separates the peoples of the EU or their legal orders'.[7] Unlike national versions, this notion of identity is not particularistic, exclusive or aggressive.

Common sense suggests that the conception of identity, if pronounced from a supranational point of view, will be naturally more inclusive and peaceful than its national versions. The adaptation of the notion of constitutional identity by the Court of Justice has been welcomed by many scholars as the EU response to illiberal identitarian claims made by national authorities.[8] This chapter attempts to critically reflect on this conceptual choice.

Section II provides the argument that a conception of the identity of the EU legal order focusing only on the common values from Art. 2 TEU without a conceptual justification for this focus is inevitably reductive and vulnerable to criticism for arbitrariness. As stems from the content of Treaty provisions, their relevant historical contexts, as well as scholarly commentaries, the pursuit of peace and of the socio-economic well-being of European peoples may not be easily excluded from any conception of identity or essence of the EU. Next, the contingency of the use of the notion of identity is illustrated. For this purpose, the focus is put on the case *RT France*, in which the General Court relied on the Treaty aim of the pursuit of peace to confirm prohibitive measures against an outlet spreading war propaganda. In remains unclear why the protection and promotion of peace have not received the label of identity, in contrast to the protection of common values.

Section III restates how Baquero Cruz and Keppenne understand the notion of identity of the EU legal order as a version of constitutional identity which is inclusive, coherent, holistic, and non-particularistic. The section challenges this understanding by drawing on the broadly conceived political

5 Baquero Cruz and Keppenne (n. 2), 69.
6 Baquero Cruz and Keppenne (n. 2), 69.
7 Baquero Cruz and Keppenne (n. 2), 69.
8 An example of early positive reaction to the judgements, celebrating '"constitutional identity" in EU terms', can be found in: Pietro Faraguna and Tímea Drinóczi, 'Constitutional Identity in and on EU Terms', Verfassungsblog, 21 February 2022, doi: 10.17176/20220222-001059-0.

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constitutional theory. From this perspective, constitutional notions such as the concept of identity constructed by the Court are essentially particularistic because of their interpretative contestability, as well as their selective legislative enhancement and institutional implementation. The seemingly universal and inclusive notion of EU constitutional identity conceals inevitable political disagreements, tensions, and choices to be made. This argument is further developed in a brief critical engagement with the scholarly call – advanced by Jürgen Bast and Armin von Bogdandy – for a principled constitutional transformation of the EU legal order in line with its normative core. The section is followed by concluding remarks.

II. Common Values and Beyond

1. Common values … and Some Other Important Issues

The text of Baquero Cruz and Keppenne is a distinct chapter of the book on 70 years of EU law, prepared by the Legal Service of the European Commission ('the Book'). On the one hand, it belongs to the first part of the book, which discusses the very 'fundamentals' of the EU legal order, along with the chapter on the general issues of common values,[9] and the chapter on the EU as a promoter of human rights in the world.[10] That part precedes more specific analyses of various areas and topics of EU law. On the other hand, the chapter is a commentary on the concrete and recent judgements, that confirmed the validity of the mechanism of horizontal conditionality for the protection of the EU budget and introduced the notion of common values as the identity of the EU legal order. In fact, the paradoxes and tensions between the universal and the particular, the comprehensive and the fragmentary, the primordial and the nascent, permeate the conception of identity as introduced by the Court and endorsed by the chapter's authors.

In their chapter, Baquero Cruz and Keppenne go as far as to claim that by stressing the need to promote and defend common values as the EU's identity, the Court restated 'the essence of European integration'.[11] While common values from Art. 2 TEU are central to the political project of the European

9 Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 34-57.

10 Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 76-94.

11 Baquero Cruz and Keppenne (n. 2), 69.

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Union, the question remains, however, whether they normatively exhaust the scope of what one may legitimately call the identity of the EU legal order and of the essence of European integration. After all, in its conditionality judgements, the Court stated that common values 'are an integral *part of* [emphasis added] the very identity of the European Union as a common legal order'.[12] This wording could suggest that the Court's conception of identity of the EU legal order might be expanded beyond common values from Art. 2 TEU.

From a historical point of view, as is well known, European integration had centred around the values and aims beyond the content of today's Art. 2 TEU, including peace, economic integration, and prosperity of the European people. The sustenance of peace as the aim of the EU has philosophical underpinnings, sometimes being linked, for example, to Immanuel Kant's project of perpetual peace.[13] This broader normative foundations of the EU have already been noted in EU constitutional scholarship,[14] and are evident from the wording of the preamble and the first provisions of the very Treaty of Paris, celebrated by the book.[15] Indeed, the book's introductory chapters underline both the historical and the contemporary relevance of European integration's aims of peace, prosperity, and solidarity.[16] Noteworthily, in another context, also Julio Baquero Cruz stressed the continuing relevance of the preservation of peace in the post-Maastricht Union, maintaining that '[e]ven today, integration can only be properly understood as a conscious self-limitation and safeguard against the recurrent tragedies and lawlessness of war, i. e. as a means to secure peace'.[17]

In addition to these historical considerations, the present Treaty wording seems to suggest that those who wish to search for 'the essence of European

12 ECJ, *Republic of Poland* (n. 4), para. 264.

13 See Immanuel Kant, *Perpetual Peace: A Philosophical Proposal*, translated by Helen O'Brien, with an introduction by Jessie H. Buckland (Sweet & Maxwell 1927), in particular 29-32. For a critical account of analogies between Kant's theory and the EU, see Garrett Wallace Brown, 'The European Union and Kant's Idea of Cosmopolitan Right: Why the EU Is Not Cosmopolitan', European Journal of International Relations 20 (2013), 671-693.

14 Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay' in: Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 137-158.

15 Preamble, Arts 1-2 of Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951). See also for that matter: The Schuman Declaration (Paris, 9 May 1950).

16 Roberta Metsola, 'Guest Contribution "Rights"' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 8-10; Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (Publications Office of the European Union 2022), 11-28 (15 f.).

17 Julio Baquero Cruz, What's Left of the Law of Integration? Decay and Resistance in European Union Law (Oxford University Press 2018), 23.

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integration', should also look beyond the values of Art. 2. The next Treaty provision, Art. 3 para. 1 TEU, contains common values along with peace and 'the well-being of its [the EU's] peoples' as the goods to be promoted by the EU. The promotion of these goods amounts to '[t]he Union's aim'. The remainder of the text of Art. 3 TEU includes more specific 'policy-area related objectives',[18] concerning the area of freedom, security and justice, internal market and sustainable development, and the economic and monetary union.[19] In addition, the aims of the promotion of values, peace and the well-being of its peoples shall guide the EU's relations with neighbouring countries.[20]

The wording of Art. 3 para. 1 TEU thus sets common values, peace, and the well-being of the Union's peoples as the three equal component parts of the EU's teleology. It is true that 'peace' and 'the well-being of European peoples' are general, relatively little-specified terms, also in comparison to the recently developing Court's case law on the rule of law as a common EU value. Art. 3 para. 1 TEU however could gain more practical relevance both through EU legislative process and through the interpretation of EU legislation. The mainstreaming of EU aims beyond common values would then be subject to concrete political choices. Treaty law certainly allows for such political process, and does not determine the prioritisation of the promotion of common values over the promotion of peace and the well-being of European peoples.

Even if the aims from Art. 3 para. 1 TEU could not be independently and directly enforceable,[21] the Court and other institutions could concretise their meaning and implications in connection to specific Treaty obligations.[22]

18 Marcus Klamert, 'Art. 3 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), 33 (paras 8 f.).

19 Art. 3 paras 2-5 TEU.

20 Dimitry Kochenov, 'Art. 8 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), 102 (para. 8).

21 See Klamert (n. 18), paras 3-4. Klamert understands Art. 3 TEU as only programmatic, but indicates Karl-Peter Sommermann's comments on Article 3 TEU as representing 'a different perspective' on the binding character of this provision. The latter perspective certainly entails a more direct role for the provision in the interpretation of EU law both by EU institutions and by the Member States. See Klamert (n. 18), para. 3. See. Karl-Peter Sommermann, 'Art. 3 [The Objectives of the European Union]' in: Hermann-Josef Blanke, Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer-Verlag 2013), 158-168 (paras 1-23).

22 For a sceptical discussion of the 'the direct and autonomous enforceability of Article 2 TEU in infringement actions', following the recent Commission's action in CJEU, *Commission v. Hungary*, Case C-769/22 after a series of CJEU's decisions linking Article 2 TEU to other provisions, see: Matteo Bonelli and Monica Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary', Maastricht J. Eur. & Comp. L. 30 (2023), 3-14.

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Hence as Karl-Peter Sommermann claims, all EU organs shall interpret EU law in conformity with the objectives included in Art. 3 TEU.[23] For Sommermann, these objectives, '[a]longside with the other policy goals and values, set out in the Preamble, in Art. 2 TEU, in **cross-sectional clauses** [bold in the original] such as Arts 8-13 of the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights, constitute a sophisticated framework of guiding principles which determine *the identity of the Union* [emphasis added] and promote a unity of action'.[24]

This interpretation of 'the identity of the Union' is particularly broad and it would make the judicial operability of the notion of identity even more contestable. However, if one wants to seek 'the identity' or 'the essence' of the EU legal order, the wording of the Treaties leaves no reason to favour the values from Art. 2 TEU over the two other component parts of Art. 3 para. 1 TEU. The aim of the promotion of peace and well-being is in fact in many respects historically more typical to European integration than the values from Art. 2 and, as Sommermann notes, even to constitutionalism in general.[25]

Indicating Art. 2 as the expression of the identity or essence of the EU legal order is therefore highly contingent. This conceptual choice should be at least justified by a specific theory of (constitutional) identity, explaining why one should emphasise only the *values* on which *the Union is founded*, rather than more generally *the Union's aim*, which is to promote these values, together with peace and the well-being of European peoples. No version of such theory has been provided either in the Court's judgements on conditionality, or in the chapter by Baquero Cruz and Keppenne.

Finally, it should not escape our attention how the official constitutional discourse of European integration has explicitly linked this broader normative foundation to the notion of European identity. Let us start by discussing the aim of the promotion of peace. Even though European integration is inextricably linked to the experience of World War II, the Preamble to the Treaty on European Union retains peace as the central objective of the Union. In particular, the experience and memory of the Cold War and the

23 Sommermann (n. 21), paras 6 f.

24 Sommermann (n. 21), para. 4.

25 Sommermann argues that in Art. 3 TEU, 'classical "goals" of a well-ordered political community as they have already been proclaimed by the doctrine of natural law and the political thinkers of the Enlightenment: external and internal security and care for the well-being of the people(s) […] are combined with achievements of liberal democracies'. See Sommermann (n. 21), para. 20.

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Iron Curtain have clear normative relevance for understanding the Treaty's *telos*. The Preamble indicates the recent context of 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'.[26] It also actually links peace to the very notion of European identity in an explicit way.[27] Namely, the objective of 'common foreign and security policy including the progressive framing of a common defence policy' is to reinforce 'the European identity and its independence in order to promote peace, security and progress in Europe and in the world'.[28] Abstract and open-ended as it is, the phrasing of this recital suggests the promotion of peace as a component part of European identity.

The recent invasion of one EU neighbouring country by another, of course, adds a particular context to the relevance of peace to the EU. In fact, Daniel Calleja and Tim Maxian Rusche argue in the introduction to the Book, that 'both topics – the pursuit of peace, made necessary by Russia's war of aggression against Ukraine, and the rule of law – remain at the centre of the European project 70 years after the first meeting of the High Authority'.[29] The context of the Russian war on Ukraine will be elaborated on in the next sub-section. Here it should be emphasised that the very text of the TEU makes a link between the EU's aim of the promotion of peace and the notion of identity.

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26 Recital 3 of the Preamble TEU. Note in this regard that the Schuman Declaration had envisioned 'a wider and deeper community between countries long opposed to one another by sanguinary divisions': The Schuman Declaration (n. 13). As Sommermann observes, the aim of the promotion of peace entails the obligation to actively preserve and create multi-dimensional peaceful relations between states and peoples: Sommermann (n. 21), para. 21. Such positive relations-building may be understood as the obligation opposite to the historical divisions of Europe.

27 Recital 11 of the Preamble TEU. For an argument supporting the development of the common system of European defence, made in connection to 'the political and legal DNA of European integration', see Weiler (n. 14), 156 f.

28 This 'progressive framing', as the Preamble states, 'might lead to a common defence in accordance with the provisions of Article 42'. See Recital 11 of the Preamble TEU. See also in this regard: Protocol (No. 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union. In addition, the Treaties explicitly refer to peace and peaceful relations in the provisions concerning the external relations and actions of the EU, including the relations with neighbouring countries, peace preservation, conflict prevention, the maintenance of international peace and security, as well as peace-keeping missions. See Art. 3 para. 5 TEU, Art. 8 para. 1 TEU, Art. 21 para. 2 lit. c TEU, Art. 42 para. 1 TEU, Art. 43 para. 1 TEU, Art. 347 TFEU; Protocol (No. 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union; Declaration concerning the common foreign and security policy.

29 Calleja and Rusche (n. 16), 12.

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Next, there is the aim of the promotion of the well-being of EU peoples, embodying the socio-economic aspects of the EU constitutional framework. Let us first look at the text of the TEU. For Sommermann, in Art. 3 para. 1 TEU 'well-being can be referred to the economic, social and ecological conditions of life'.[30] In this context it is worth noting that also the aforementioned second sentence of the very Art. 2 TEU has a socio-economic overtone, insofar as it indicates a society of 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'. This sentence in a way expresses a vision of the multi-dimensional well-being of European peoples. But Art. 3 para. 1 TEU goes beyond the content of Art. 2 TEU, to imply that EU institutions should promote both common values and well-being on an equal footing.

Beyond the Treaties, one should recall a historical instance of a constitutional document that had linked common values from today's Art. 2 TEU to socio-economic aims under the umbrella notion of European identity. In December 1973, the then nine Member States of the European Communities issued their joint Declaration,[31] in which they explicitly defined the 'fundamental elements of the European Identity' in a following way:

> 'Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European Identity.'[32]

As we can note, the rule of law, democracy, and respect for human rights (all three now included in Art. 2 TEU as EU common values) were mentioned on an equal footing with social justice. The latter has not been explicitly included in the subsequent codification of common values, but one may not easily exclude it from a conception of the EU's normative founda-

30 Sommermann (n. 21), para. 24. In his opinion in the case *Josemans*, Advocate General Bot defined the well-being from Art. 3 TEU in reference to the freedom to provide services and in the context of the limitations to the drug trade. In this regard, 'freedom to provide services must make it possible to improve the quality of life of the citizens of the Union, giving them the opportunity to access a choice of better quality, lower-cost goods and services […] in a society where economic and social progress which is balanced and sustainable is ensured.' See Opinion of Advocate General Bot delivered on 15 July 2010 in ECJ, *Marc Michel Josemans v. Burgemeester van Maastricht*, opinion of the advocate general of 15 July 2010, case C-137/09, ECLI:EU:C:2010:433, para. 92.

31 Declaration on European Identity, Bulletin of the European Communities, December 1973, No. 12. (Office of Publication of the European Communities).

32 Declaration on European Identity (n. 31).

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tions, especially in the light of the concept of well-being of European peoples in Art. 3 TEU.[33]

The above brief analysis of EU constitutional concepts deserves another occasion to be further developed. However, it suggests that a conception of identity or essence of the EU legal order (as framed by Baquero Cruz and Keppenne) should at least include justification for focusing on the common values from Art. 2 TEU at the expense of peace and well-being. The next section, by zooming in on a concrete judicial case and on Art. 3 TEU, will further demonstrate the contingency of the notion of common values as identity.

2. *RT France:* The Unlabelled Promotion and Protection of Peace

The EU's policies in reaction to the Russian aggression of Ukraine has been the recent context in which the EU's aim of the promotion of peace gained a practical and direct relevance. In *RT France v. Council of the European Union* of 27 July 2022,[34] the General Court dismissed the annulment action against a decision and a regulation combatting Russian propaganda, adopted by the Council in the week following the outbreak of the Russian invasion. These acts had temporarily prohibited broadcasting any content in any form for a number of media outlets spreading Russian propaganda. The ban had affected a French TV broadcaster, funded from the budget of the Russian State,[35] which initiated the action for annulment. In addition to bringing a number of specific implications and from raising controversies concerning among others EU competences and the limitations to the freedom of expression,[36] the judgement can be read as a significant

33 In his text exploring the 'European constitutional identity', prior to the establishment of the Treaty of Lisbon, Wojciech Sadurski listed values which in his opinion differentiate the constitutional culture of Europe from the other liberal constitutional traditions, especially the American one. Along the values such as: 'the protection of democracy against anti-democratic views and forces', minority rights, the secular state, and horizontal applicability of constitutional norms, Sadurski emphasises the positive, protective role of the state in European systems, manifesting in social rights and policies. See Wojciech Sadurski, European Constitutional Identity? (October 24, 2006). The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 06/37, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939674, 8-20.

34 General Court, *RT France v. Council of the European Union*, e of 27 July 2022, case no. T-125/22, ECLI:EU:T:2022:483.

35 General Court, *RT France* (n. 34), para. 2.

36 Björnstjern Baade, 'EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgment in Case T-125/22 (*RT France*)', HJIL 83 (2023), 257-282 (259); Gergely Ferenc Lendvai, 'Media in War: An Overview of the European Restrictions on Russian Media', European Papers 8 (2023), 1235-1245 (1243-1245); Viktor Szép and Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: *RT France v. Council*', CMLR 60 (2023), 1383-1396 (1396).

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normative contribution to the EU's conception of the preservation and promotion of peace in the time of war in a neighbouring country.

Notably, apart from referring to the more specific formulation of the EU's objectives in Art. 3 para. 5 TEU, the General Court also directly invoked Art. 3 para. 1 TEU, including the general aim of the promotion of peace.[37] The General Court confirmed that apart from protecting the EU's public order and security against propaganda, the legal acts in question pursue the objective of the promotion of and contribution to peace.[38] In this respect they aim to oppose the threats to 'the foundations of democratic societies' and to international peace.[39] According to the General Court, prohibitions imposed on media outlets belong to the means at the EU's disposal to put maximum pressure on the Russian authorities so that they bring an end to the invasion.[40]

The General Court's reasoning (including language) is at places much parallel to that of the Court in the rule of law conditionality decisions issued five months earlier, insofar as the latter tried to justify the use of the notion of identity with regard to the common values from Art. 2 TEU.[41] To start with, according to the General Court, the objective of a prohibitive measure affecting the broadcaster is not, as the applicant in the case argued, to directly achieve peace in Europe, which would allegedly render the prohibition of broadcasting a 'purely symbolic'[42] and inadequate 'political gesture'.[43] This is significant in the light of the potential claims that the aim of the promotion of peace is too elusive to serve as a basis for concrete EU actions. In line with the General Court's conclusions, the aim of the promotion of peace cannot be seen as a perfectionist, 'programmatic "desires" of the treaties',[44] to borrow the phrase from Baquero Cruz and Keppenne, who used it with regard to the Court's interpretation of common values as identity. Instead, the aim of the preservation and promotion of peace justifies concrete mea-

37 General Court, *RT France* (n. 34), para. 85.

38 General Court, *RT France* (n. 34), para. 161 f.

39 General Court, *RT France* (n. 34), paras 56, 162.

40 General Court, *RT France* (n. 34), paras 163 f.

41 See in a somewhat similar vein the argument by Loïc Azoulai, that the General Court's decision implies the need to defend the European society against an external threat, while echoing the conditionality judgements as regards the need to defend EU common values as identity. See Loïc Azoulai, 'The Law of European Society', CMLR 59 (2022), 203-214 (208-209). Azoulai also notes that '[i]n a time of catastrophe, the EU cannot content itself with ensuring the provision of transnational public goods (the internal market, the free movement area, the common currency, the common policies […]) and the protection of common values (those referred to in Article 2 TEU).' See Azoulai (n. 41), 207.

42 General Court, *RT France* (n. 34), para. 70.

43 General Court, *RT France* (n. 34), para. 118.

44 Baquero Cruz and Keppenne (n. 2), 65.

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sures belonging to a broad EU strategy. Similarly to the Court's conclusions in the conditionality rulings regarding common values,[45] the General Court stated that the abstractly formulated Treaty provisions are much more than the expression of general political guidelines, and as such may be operationalised by concrete sanctions.

In addition, in both cases the courts concluded that the EU institutions are justified to select measures which they consider as necessary to protect; respectively, common values and peace. The General Court confirmed that in order to pursue the aim of the protection of peace, institutions can choose specific, appropriate measures that are available to them to address concrete deficiencies – the strategy for which they 'cannot be criticised'.[46] Just as 'the European Union cannot be criticised for implementing, in defence of its identity, which includes the values contained in Article 2 TEU, the means necessary to protect'[47] its budget and financial interests.

Despite these resemblances in reasoning and language, only the conditionality rulings conveyed the notion of identity of the EU legal order. The preservation and promotion of peace has not been given an explicit identity label in *RT France*. The courts did not provide arguments on why we should emphasise that this identity includes the common values from Art. 2 TEU, and why the aims from Art. 3 TEU either do not belong to the notion of identity or do not deserve such direct identitarian acknowledgment. Baquero Cruz and Keppenne also did not offer an explanation of this kind in their chapter. Without such deeper conceptualisation, emphasising the common values of Art. 2 as the identity and essence of European integration, while neglecting the content of Art. 3, is reductive and vulnerable to allegations of arbitrariness. The next part of this contribution will focus on the allegedly distinct nature of the concept of identity of the EU legal order, as endorsed by the authors of the chapter.

III. A Concept of Identity Unlike Any Other?

1. The Ambition: Our Own Identity, But Not 'Aggressive, Particularistic or Apologetic'[48]

The Conditionality Regulation and the subsequent decisions of the Court develop the institutional and judicial understanding of common values. Baquero Cruz and Keppenne strongly assert that the conditionality judgements

45 See ECJ, *Hungary* (n. 4), para. 232; ECJ, *Republic of Poland* (n. 4), para. 264.
46 General Court, *RT France* (n. 34), para. 52.
47 ECJ, *Republic of Poland* (n. 4), para. 268.
48 Baquero Cruz and Keppenne (n. 2), 69.

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enhance the conception of EU common values as fully binding, interconnected, and coherent. They argue that the Court attested that common values amount to binding obligations, which the Member States need to respect at all times.[49] Moreover, they stress that according to the judgements 'the values permeate the EU legal order as a whole, ensuring its coherence', and as such they need to be implemented and protected by all EU institutions in all EU policies.[50] In addition, common values constitute 'a coherent system' and should be conceived of holistically.[51] In this regard, the Court confirmed that the first sentence of Art. 2 TEU, listing EU common values, is 'of equal importance' to the second sentence, which, in turn, states that these values characterise 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[52]

Indeed, the Court stated that common values from Art. 2 TEU as such, and not only the rule of law, constitute the identity of the EU legal order.[53] The vision of the coherent axiological system of the EU legal order, comprising of the strongly interconnected component parts, brings Baquero Cruz and Keppenne to their second central normative argument mentioned at the beginning of the present contribution: that the Court's conception of identity essentially differs from the defensive identitarian claims made by national courts towards the EU legal order. While national constitutional identities are particularistic and promote national interests, in contrast the identity of the EU legal order is founded on the togetherness and commonality of European values.[54] In this sense, while national arguments from identity tend to be aggressive and self-centred, the Court underscores the defence of the normative foundation that is, in fact, shared by all Member States.

The next section will address this argument. It will argue that such utopian vision of common identity of the EU legal order is prone to criticism from within the broadly understood tradition of political constitutional thought. The Court's conception of common values as identity, applauded by Baquero Cruz and Keppenne, loses much of its universalistic allure if we look beyond the purely textual level, from the perspective of political preferences and disagreement over the priority of values. A comprehensive political constitutional critique of the Court's conception of identity deserves a separate study. Here it will be explained why we should be cautious in praising this conception for its seemingly exceptional universalism, coherence and inclusivity.

49 Baquero Cruz and Keppenne (n. 2), 69.
50 Baquero Cruz and Keppenne (n. 2), 69.
51 Baquero Cruz and Keppenne (n. 2), 69 f.
52 Baquero Cruz and Keppenne (n. 2), 69.
53 ECJ, *Hungary* (n. 4), para. 127. See Baquero Cruz and Keppenne (n. 2), 69.
54 Baquero Cruz and Keppenne (n. 2), 69.

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2. The Political Constitutional Approach: from Common Values to Particular Choices

The optimistic conception of the 'better, more universal and non-aggressive' identity based on common values is not immune from the critique originating from the politically oriented strands of constitutional theory. Political constitutional theory, in this broad understanding, extends beyond the usually invoked debate on whether parliaments or courts should be chief institutions deciding constitutional disputes.[55] Instead, it is to be understood as the study of constitutional law and institutions, which conceives of the interpretations of (very often conflicting) principles, rights, and constitutional values as inevitably being expressions of political disagreement and conflict.[56]

From this perspective, what makes constitutional claims particularistic is not so much that their textual expression and normative undertone lack universality. Rather, the understanding and implementation of these claims always emerge as the result of preferences of particular actors under particular political circumstances, or as the settlement of political disagreement over values and principles.[57] It will always be a specific decision of a concrete institution (in this case most relevantly the Court of Justice) that will give effect and practical meaning to the notion of identity of the EU legal order, stressing particular aspects while marginalising others. The Court will have to make choices to determine the concrete implications of the highly contestable notion.

An optimistic commentator could argue that the concept of identity based on common values is inclusive enough to not risk political bias in interpretation, since while interpreting common values, the Court should acknowledge 'differences in the ways the Member States organise themselves to ensure respect for the fundamental values of the EU'.[58] After all, according to the Court's construct, Member States bear the obligation to respect common values as to the result,[59] with leeway left for national specificities. Nevertheless, in the process

55 For an example of such broader interpretation of political constitutional theory, see Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism', King's Law Journal 30 (2019), 74-96.

56 See Goldoni and McCorkindale (n. 55), 77.

57 The actual consequences of rights and values are in tension with each other, since the axiological language of law disguises societal conflicts. See John A. G. Griffith, 'The Political Constitution', M. L. R. 42 (1979), 1-21 (12). In this sense we could apply to Art. 2 TEU the famous formulation by Griffith, used with regard to freedom of expression enshrined in the European Convention on Human Rights: it 'sounds like the statement of a political conflict pretending to be a resolution of it'. Griffith (n. 57), 14.

58 Baquero Cruz and Keppenne (n. 2), 70.

59 ECJ, *A. B. and Others v. Krajowa Rada Sądownictwa*, judgement of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, para. 146; ECJ, *Hungary* (n. 4), paras 231-233. See also: Baquero Cruz and Keppenne (n. 2), 70.

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of interpretation, the Court always inevitably indicates 'what is to be the content or scope of shared "European" legal and political norms, and conversely what things will fall outside of this shared value system'.[60]

The universality of the language of common values as identity, even with a national identity clause included, will not, by itself, protect against the particularist interpretative preferences. For example, the obligation to respect the rule of law 'as to the result' may itself be the source of intense contestation among actors over whether a specific national arrangement regarding the judicial system satisfies this obligation. In addition, the protection of the rule of law in a Member State may become a highly complex and contestable process, where supranational political institutions, such as the European Commission, in fact play both a significant, and quite a controversial interpretative role with regard to common values. By way of example, in May 2024 the European Commission decided to discontinue the procedure under Article 7(1) of the Treaty on European Union against Poland, despite the largely unsettled and uncertain recovery from the rule of law deficiencies in that Member State.[61]

Beyond the interpretation of common values, political bias and preferences behind the seemingly universalistic conception of identity may concern also the institutional and legislative design. In this sense, some of the values from Art. 2 TEU are prioritised and enhanced over the others as a political choice of EU institutions. A good example is the conditionality mechanism discussed by Baquero Cruz and Keppenne. The very introduction of the rule of law conditionality provides a strong arm for the protection of this concrete value over the other elements of axiology from Art. 2 TEU. It is the rule of law, not the other values, that received material underpinning through the mechanism of budgetary penalties.[62] The link between the potential suspen-

60 Jessica C. Lawrence, 'Constitutional Pluralism's Unspoken Normative Core', Cambridge Yearbook of European Legal Studies 21 (2019), 24-40 (29).

61 Maciej Krogel, 'The Closure of the Article 7(1) TEU Procedure Against Poland: The Weight of Intentions and the Risk to Common Values in the Twilight of Illiberalism', Maastricht J. Eur. & Comp. L. 32 (2025), 315-325 (316-320).

62 Even though, as the Conditionality Regulation's definition of the rule of law is so broad as to include elements or refer to aspects of almost all the other common values from Art. 2 TEU: democracy (as regards the law-making process), equality and non-discrimination (before the law), pluralism (in the law-making process), (access to) justice and the protection of fundamental rights (through the effective judicial protection). See Regulation 2020/2092/EU/Euratom (n. 3), Recital 3 of the Preamble, Art. 2 lit. a. For a critical argument that the rule of law conditionality mechanism strengthens the EU's constitutional ideology of legalism by prioritising judicial independence and the rule of law over the equally legitimate protection of common values such as equality, social rights, and solidarity, see Pieter-Augustijn van Malleghem, 'Legalism and the European Union's Rule of Law Crisis', European Law Open 3 (2024), 50-89 (65, 67-68).

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sion of EU funds and the rule of law gives to the latter a particular gravity. The mechanism introduces sanctions that may in fact result in putting the achievement of some socio-economic EU policy objectives at risk, as the European Court of Auditors recently concluded in its report on the rule of law and conditionality.[63] As an indirect result of the conditionality mechanism, the nationals of a Member State, such as the Erasmus+ programme participants or beneficiaries of cohesion programmes, may bear the costs of the incompliance of their authorities with the rule of law.[64]

In this case, the establishment and implementation of conditionality may be framed as a set of decisions actualising the potential tension between the rule of law and the other axiological elements of Art. 2 TEU, such as equality, pluralism, and solidarity.[65] To protect the rule of law through the conditionality mechanism is a political choice[66] that gives this value prominence over the other values which do not enjoy the same financial and political safeguards. This becomes evident if we move beyond the textually universalistic dimension of common values as 'identity based on commonality',[67] and take the material perspective of the interplay of social, economic and institutional factors and power relations.[68] Despite 'the requirement to respect all EU values, and not just the rule of law',[69] the conditionality mechanism substantially enhances the protection of the latter through the socio-economic pressure, and prioritises it among the other constitutional objectives.[70] Not unlike

63 European Court of Auditors, Special Report: The Rule of Law in the EU: An Improved Framework to Protect the EU's Financial Interests, But Risks Remain, 03/2024, 22. On risks to the EU socio-economic objectives posed by the rule of law conditionality, see also Marco Fisicaro, 'Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation', Eu Const. L. Rev. 18(2) (2022), 334-356 (354).

64 European Court of Auditors, Special Report (n. 63), 22. On the potential negative consequences of the rule of law conditionality for academic freedom and the right to education, as protected by the Charter of Fundamental Rights of the European Union, see Olga Ceran and Ylenia Guerra, 'The Council's Conditionality Decision as a Violation of Academic Freedom?', Verfassungsblog, 28 March 2023, doi: 10.17176/20230328-195232-0.

65 For a criticism of the Commission's proposal for the rule of law conditionality mechanism, as embodying a reductive conception of solidarity in the EU, which entails 'disregarding the impact of such a mechanism on the citizens living in the State potentially affected', see: Marco Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values', European Papers 4 (2019), 695-722 (719).

66 See van Malleghem (n. 62), 66.

67 Baquero Cruz and Keppenne (n. 2), 69.

68 Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution', M.L.R. 81 (2018), 567-597 (573 f., 580-592), where the authors also (critically) comment on the relation between the narrowly understood political constitutional theory and the material constitutional theory, at 568-569; Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021), 280.

69 Baquero Cruz and Keppenne (n. 2), 69.

70 See Goldoni and Wilkinson (n. 68), 590-592.

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the other nationally-born conceptions, the identity of the EU legal order in fact conceals the inevitability of a number of political tensions, preferences, and decisions to be made. What exactly counts as identity will be subject to choices which are inclusive only to a limited extent.

3. Limits of the Search for the Normative Core of the EU Legal Order

Section II of this paper explained the contingency of understanding Art. 2 TEU as the identity of the EU legal order in the light of the other aims enshrined in Art. 3(1) TEU. Admittedly, there are scholars who take both provisions, add to them Art. 1 TEU,[71] and argue that altogether they form the normative core of the entire EU legal order, or even more generally, of European constitutional law.[72] Notably, Jürgen Bast and Armin von Bogdandy believe that these provisions, and in particular Art. 2 TEU, may serve as the basis for an interpretation of EU constitutional law that is both principled and transformative-progressive.[73] Taking stock of the recently developed case law on common values, these authors claim that the core provisions emanate normatively across the whole remit of EU law and policy. In consequence, the Court and EU institutions can interpret EU laws in compliance with the normative core and progressively realise the intention of the authors of the Treaties.[74] In this sense, for example, the normative content of Art. 2 TEU can rationally guide the transformation of the EU economic constitution in a principled way, oriented less on the free market principles and more on the protection of environment.[75]

This approach deserves recognition for noting the broad scope of the normative precepts of European integration, beyond the content of Art. 2 TEU.[76] However, Bast and von Bogdandy share with Baquero Cruz and Keppenne an understanding of common values which underestimates the inevitably conflict-generative and selective practice of their implementation. The assumption behind the view of Bast and von Bogdandy is that the core values from Art. 2 TEU radiate in a coherent and progressive way into the interpretations of EU constitutional rules in specific policies.

71 Concerning the establishment of the EU and its fundamental characteristics.

72 Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', CMLR 61 (2024), 1471-1500 (1478). They also consider the first 19 articles to be 'the basic part of the Treaties.' See Bast and von Bogdandy (n. 72), 1477.

73 Bast and von Bogdandy (n. 72), 1496.

74 Bast and von Bogdandy (n. 72), 1496-1499

75 Bast and von Bogdandy (n. 72), 1497-1499.

76 Bast and von Bogdandy (n. 72), 1478 f.

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For instance, the authors argue that Art. 2 TEU as the normative foundation guides the transformative interpretation in 'the judgement in the horizontal conditionality cases brought by Poland and Hungary', where 'the Court links the spending power of the EU with rule of law and solidarity and provides for a new constitutional arrangement between EU values and EU money'.[77] According to Bast and von Bogdandy, Art. 2 TEU, together with the greater acknowledgment of the European society, led the Court to embrace a remarkably different approach to solidarity and conditionality compared to its earlier interpretations of the Economic and Monetary Union during the eurozone crisis.[78] This view however does not give due regard to the normative problems with the rule of law conditionality indicated above: the limited and conditional realisation of solidarity,[79] the potential tension between the rule of law and values such as solidarity and socio-economic rights, and between the promotion of the rule of law and of the other elements of Art. 3(1) TEU, such as the wellbeing of the EU's peoples.

Another example concerns the legal discourse of values in the construction and implementation of EU policies. Bast and von Bogdandy argue that the Court should not be the only agent running the project of the principled constitutional transformation in line with common values. Instead, they assign a significant role to jurists – legal scholars, legal services, litigators, and national judges – following the example of the grand projects and contributions from the earlier decades of European integration.[80] But the idea of such a progressive project encounters serious practical challenges when lawyers and EU actors are actually involved in a fundamentally different enterprise: justifying policies that weaken the protection of rights.

To illustrate these challenges, let us take a look at the EU standards of protection of the rights of asylum-seekers. As Bast and von Bogdandy indicate, common values are not yet fully realised or respected in EU policies, including the migration and asylum policy.[81] In other words, we should see 'EU constitutional law as a legally, and not only politically, unfinished project'.[82] As a response to the so-defined problem, the authors see Art. 2 TEU as the expression of the Union's aspiration.[83] Common values should

77 Bast and von Bogdandy (n. 72), 1498.

78 Bast and von Bogdandy (n. 72), 1498.

79 See Fisicaro (n. 65), 718, and the literature cited there.

80 Bast and von Bogdandy (n. 72), 1499 f. See also Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024), 6-13.

81 Bast and von Bogdandy (n. 72), 1497.

82 Bast and von Bogdandy (n. 72), 1497.

83 Bast and von Bogdandy (n. 72), 1497.

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steer the implementation and, if needed, the amendment process of the other, less fundamental EU constitutional provisions.[84]

Nonetheless, a significant hurdle occurs when common values are actually being explicitly operationalised by EU institutions, albeit in an internally inconsistent or even regressive way. The European Commission, one of the chief EU agents involved in countering the rule of law crisis in the Member States, recently suggested that the Member States bordering foreign regimes may derogate from the EU standards of the right to asylum, in order to defend EU common values against the 'weaponisation of migration'.[85] The Commission argued that protecting the values from Article 2 TEU may necessitate limiting certain components of those values (asylum rights), even adopting a regressive adjustment in the interpretation of international asylum law binding on the Member States.[86] The Commission's statement indicates more than the uneven or incomplete realisation of axiological foundations in EU law and policies. This is not only about balancing rights or limiting their exercise on the basis of the objectives of security and public order. Rather, the Commission explicitly instructed the Member States on the possibility of limiting the protection of the normative core of the Treaties (to borrow the language of Bast and von Bogdandy) in order to protect this very core against foreign abuse.[87] This illustrates that the legal discourse of common values accompanies specific policies and interests, even greenlighting regressive and problematic national practices. As such, it raises questions about the possibility of a progressive project of coherent transformation in line with common values, featuring legal scholars and other actors of EU law.

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84 Bast and von Bogdandy (n. 72), 1497.

85 European Commission, 'Communication from the Commission to the European Parliament and the Council on Countering Hybrid Threats from Weaponisation of Migration and Strengthening Security at the EU's External Borders', COM/2024/570 final, Brussels, 11 December 2024, 1-2. Such derogation, based on Art. 72 of the Treaty on the Functioning of the European Union, is highly controversial taking into account the existing case law of the Court of Justice. See for different views on the relevant legal issues Anja Radjenovic, 'Article 72 of the Treaty on the Functioning of the European Union', European Parliamentary Research Service, PE 775.867, July 2025, available at: <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2025)775867>, last access 21 January 2026; Marlene Stiller, 'How the EU Commission Backs up Pushbacks', Verfassungsblog, 7 January 2025, doi: 10.59704/0c39891676fe2392; Daniel Thym, 'Does the Commission Cross the Rubicon? Legalising "Pushbacks" on the Basis of Article 72 TFEU', EU Immigration and Asylum Law and Policy Blog, 10 January 2025, available at: <https://eumigrationlawblog.eu/does-the-commission-cross-the-rubicon-legalising-pushbacks-on-the-basis-of-article-72-tfeu/>, last access 21 January 2026.

86 Maciej Krogel, 'Interpretations of the Right to Asylum in the Era of "the Weaponisation of Migration": Common Values and Outdated Rules?', Asiel & Migrantenrecht 7 (2025), 319-323; Stiller (n. 85).

87 See European Commission (n. 85), 5-9.

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IV. Conclusion

The rule of law deficiencies in the Member States such as Hungary and Poland are so deep as to affect the very basic norms of the Treaties. Unsurprisingly, these deficiencies provoke reflections on the European Union in terms of the essence and foundations of its constitutional order. But the use of the notion of identity of the EU legal order needs critical reflection, taking account of the Treaty principles and aims other than the protection of the common values from Art. 2 TEU. The discourse of European integration has always centred on a broader range of fundamentals than those we today indicate as the Treaty catalogue of common values. If the ongoing crises were to destroy the EU, we would lose even more than this catalogue stipulates. For these reasons, any plausible conception of common values as identity should include the criteria for deciding what falls under this label, or at least acknowledge the limits of the definition. In any case, such a conception will inevitably remain contestable and actualisable only in the forms of particular interpretations, decisions and preferences of EU actors. Constitutional concepts share this quality, even when they are underpinned by the appeal to universal values and to the commonality of principles. Calls for a common-values-led transformation of EU law include a vision and a desire for the progressive completion of the constitutional order around the Treaties' normative core. However, the actual life of common values in EU legal discourse appears to more closely resemble a practice of particular, contentious uses that vary depending on specific policy areas. Further analysis of this discursive life of values is one of the tasks of legal scholarship.

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