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DIALOGUE AND DEBATE: ESSAY

The concept of European society in a historical perspective: a legacy from the 20th Century

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Abstract

This article examines the constitutional imagination of European policymakers and legal scholars in the 20th and 21st centuries who participated in key treaty drafting processes that led to the listing of a series of values central to Europe's identity in the 2012 Treaty on the European Union (TEU) and the 1919 Treaty of Versailles, which established the League of Nations – or Société des Nations (SDN) –and the International Labour Organization (ILO). Based on this historical comparison, the article argues that the concept of a European 'society' characterised by a specific set of what I call 'social-democratic values' (listed in Article 2 of the TEU) should be read in continuity with the 20th-century civilizational project of modern international law scholars who shaped the working of the SDN in the interwar era. Many international legal scholars close to the SDN were inspired by the French sociological school and social-democratic ideals: they anchored the working of international legal rules on the solid rock of an 'international society' marked by a series of values which seemed 'modern' in the sense that they reflected the emergence of a 'society of individuals' whose freedom and social rights went beyond those granted by sovereign states at the time. When seen against this historical background, the introduction in Article 2 of the TEU of a concept of 'society' characterised by such social-democratic values, such as pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, to ground the EU's constitutional order, betrays less the influence of contemporary sociological thinkers on the EU constitutional framers, than that of socio-legal theories developed by interwar scholars who wanted to modernise the operations of European colonialism and internationalism.

Keywords: EU constitutional order; rule of law; social values; democratic backsliding

1. Introduction

After the end of the Cold War, founding Member States of the European Union (EU) sought to enlarge their Union to new Member States of Central and Eastern Europe, while at the same time EU legal scholars and politicians looked for ways to consolidate their political legacy into a Constitutional Treaty strengthening democracy, human rights and the rule of law on the European continent. Article 2 of what became the Treaty on the European Union (TEU), which was already found in the Constitutional Treaty signed (but not ratified) in 2004, lists 12 values, which, like the 12 stars of the European flag, shine to illuminate Europe's moral and social-democratic progress. The first six values refer to core liberal principles of the Member States ('the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'[1]) while the following six

[1]Consolidated version of the Treaty on European Union [2012] OJ C326/13.

constitute what I call 'social-democratic values'[2] that a European 'society' in the making is supposed to represent and defend ('pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'[3]). International legal scholars have begun to view this reference to the concept of 'society', in the singular, to which values are attributed, as an object for reflection, but the genealogy of the concept of 'society' itself, conceived as a notion of international legal discourse in Europe, has rarely been explored.

This article engages in such a genealogical attempt, based on the comparison between how international law practitioners have written about, and debated, the concept of an 'international society of individuals' emerging in Europe from World War I, and the concept of society in which certain values prevail, as discussed in EU circles after the collapse of the Soviet Block. This comparison is premised on the hypothesis that there is a meaningful resonance between the concept of 'society' found in the language of EU treaty law under Article 2 of the TEU and the language of the 1919 Treaty of Versailles, which called for the erection of a new 'Society' of Nations, with a capital S and a capital N: a 'Société des Nations' (SDN), as this international organisation was called in French.[4] Although the abstract concept of a society of individuals (in the singular) and the concrete organisation of a Society of Nations (also in the singular, but capitalised) present some key differences, the interwar apostles of the SDN, just like the Constitutional Treaty drafters of the 2000s, referred to 'values' as key elements of the singular 'international society' they wanted to create with nations, conceived as 'societies of individuals', as the operating units. What values they had in mind, and how they relate to contemporary values, and to the existence of a society outside the scope of the nation, is the object of this article.

This historical exploration leads me to argue that the large set of values listed in Article 2 of the TEU, some of which can be related to distinct but still related intellectual traditions (liberal and social-democratic),[5] date back to various eras; and that the social-democratic values listed in Article 2 were first found in international legal treaties and conventions in the interwar period with the establishment of permanent international organisations in Geneva, one of which was the SDN. In addition, this paper argues that Article 2's reference to the concept of 'society' comes directly from this 'modern' legal tradition of the interwar internationalists. To demonstrate this thesis, the article draws on the analysis of specific archives of negotiations of both the SDN and the EU Constitutional Treaty as well as on recent historical scholarship on international law.

The paper is composed of two parts: the first part reviews the drafting and redrafting of Article 2 on values during the Constitutional Treaty negotiations, in order to understand how certain values moved from the first to the second sentence of the Article, thereby revealing the fluidity between each list and the political and tactical choices behind the final wording; the second part reviews some of the writings on the negotiations of the SDN's Covenant and associated instruments of global governance in the interwar era. The comparison between both eras shows that the social-democratic values that were at the heart of the SDN's intellectual project were revived by the Constitutional Treaty's main architects in the early 2000s. In contrast to what I call

[2]The term 'social-democratic' has a history that is quite different in many EU Member States; by using this term, I signal an elective affinity between the second set of six values listed in Art 2 and the values defended by a broad intellectual movement in interwar Europe, in which I place for instance French 'socialism', in which Marcel Mauss or Albert Thomas, two Durkheimian scholars, were key leaders. But I do not claim that these values are only defended by those political parties which declared themselves to be 'socio-democratic' parties in the strict sense (for instance, in Scandinavian countries).

[3]TEU [2012] (n 1).

[4]The French acronym is used throughout the paper, in contrast with the concept of 'League', which is used in English.

[5]The second set of values (equality, pluralism, tolerance . . .) may be deemed 'liberal' too, as these values are often mentioned in a liberal society. So, I do not see these two labels as strictly antithetical; they refer to two different 'planes' of liberal democracies, one being political/statal, the other social/democratic (in the sense of creating conditions for individuals to exert their democratic rights in an open society). By adding 'democratic' to 'social', I also point to the fact that the distinction between the two sets of values (civil/political and social/economic) is fluid, and that such a distinction is the object of political battles; S Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

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the 'liberal values', which Article 2 connects to the core functioning of the EU's Member States, and which emerged with, and were consolidated by, the creation of the United Nations (UN), its Universal Declaration of Human Rights, and postwar constitutions grounded on the philosophy of 'militant democracy',[6] the social-democratic values of the interwar era (equality between men and women, solidarity, dignity of workers, etc) were consistently referred to in the international legal covenants of the time and were associated with the rise of a modern 'society' itself grounded on individualistic values such as freedom, pluralism, and equality between men and women. In the conclusion, I suggest some lessons that come with this finding; in particular, the fact that such an emphasis on social-democratic values was related, in the interwar era, with a colonial mindset which affirmed the superiority of Western European 'civilisation' over that of other territories, such as Eastern Europe and the Middle East – to mention only the neighbouring regions of Europe.

2. The perception of Europe as a unique community of values in the TEU: historical background and functions of these values in the EU

A. The defence of democracy in the context of the EU's enlargement to Central and Eastern Europe

The process of constitutionalisation of the EU in the late 1990s and early 2000s didn't radically depart from the process of EU 'integration' since the early stages of the EU. Constitutionalisation was not undertaken through the creation of a Constituent Assembly, that would have erected *ex nihilo* the future EU legal order by re-establishing it on radically new bases. On the contrary, the process emphasised continuities and small steps: the constitutional establishment of values in the EU treaties was proposed and seen as 'just a first step', a '"visualisation" of the (previously often hidden) European values' which 'initiates a corresponding process of integration'.[7] To that extent, as Christian Calliess writes, the listing of values was meant to 'contribute to a gradually increasing self-assurance by provoking a constant examination of the aims and purposes of European politics', which meant assuming that 'values have the power to effectuate integration through constitutional law'.[8]

This iterative process whereby EU institutions could demonstrate heightened reflexivity was in line with previous episodes in EU constitutional history: first, institutions were created at the EU level, followed by examination of their efficacy and conformity with common values and guiding principles, leading to the constant adaptation to institutions in multiple cycles of reform and expansion of EU law. For instance, in the early age of EU integration, the EU founding fathers planned first for the integration of dual-use industries (steel and coal) and military industries and personnel under the control of a provisional governance structure, as defined by the European Coal and Steel Community (ECSC) and the European Defence Community (EDC) treaties, before a later European constitutional treaty would finally define their permanent organisation in the European Political Community (EPC) Treaty.[9] Even though that first attempt of constitutionalisation of the European order in the 1950s failed, multiple cycles of reform and expansion of EU law later sought to advance toward the constitutionalisation of EU law through both treaty revision and the creation of an explicit doxa of EU principles read through the decisions of the

[6]The concept of 'militant democracy' designates 'the idea that elected governments should erect legal barriers to protect democracy from extremist parties' and was at the heart of constitutionalists' thinking at the time the West German Basic Law of 1949 was discussed, so as to prevent that the election of a far right party would end democracy at home, as had happened in the 1930s in Europe; A Malkopoulou, 'Introduction: Militant Democracy and Its Critics: Populism, Parties, Extremism' in A Malkopoulou and AS Kirshner (eds), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press 2019) 1–12.

[7]C Calliess, 'The transnationalization of values by European Law', 10 (2009) German Law Review 1367–82.

[8]Ibid., 1378.

[9]G Mallard, *Fallout: Nuclear Diplomacy in an Age of Global Fracture* (Chicago University Press 2014).

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European Court of Justice (ECJ). This series of precedents in EU legal history created the conditions for the EU policy elites to call for an explication of which values formed the constitutional core of its identity in a quasi-constitutional framework in the late 1990s and early 2000s, on the cusp of the 21st century.

Having observed the debates the Convention on the Future of Europe, which was in charge of writing an EU Constitutional Treaty in 2003 and 2004, Clemens Ladenburger has demonstrated the importance of the dual context of the EU enlargement negotiations with Central and Eastern European post-Communist nations, and the early-2000s rise of the far right in Austria, in the genesis of what was to become, in 2012, Article 2 of the finally adopted TEU, in which such values were eventually written down.[10] In the 2000s, the EU Member States had many reasons to worry about the risk of 'democratic backsliding', which threatened catastrophic effects at a time when EU Member States had indeed advanced very quickly in the creation of a Union, including a common currency and a common Central Bank with the Maastricht Treaty, but yet without a coherent constitutional framework that could safeguard the EU against the risk of hostage taking by one Member State.[11] Hence, there was a perceived need to ask Member States to commit to respect certain values if they wanted to be part of the new European Community.

This realisation took time to be translated into a new treaty. Before the Convention on the Future of Europe started its work in 2002 and 2003, a 'Reflection Group', including members of 15 foreign ministries of the EU and led by Carlos Westendorp, convened in 1994 and 1995 to prepare the 1996 Intergovernmental Conference (IGC) on the revision of the Treaty on European Union, which ultimately led to the creation of the Convention. In their 1995 report, well before the Austrian crisis of 2000, the Reflection Group already called upon the EU to adopt 'a unique design based on common values', which they sought to strengthen by adding to the future EU Treaty 'a catalogue of rights' and inserting 'a provision allowing for the possibility of sanctions or even suspending Union membership in the case of any state seriously violating human rights and democracy'[12]: what would become Article 7 of the TEU.[13] The Reflection Group also called on the IGC to consider extending the list of values from classical political liberal values to 'social values', which it found to be at 'the foundation of our coexistence in peace and progress', and which a majority within the group found to deserve to be part of a 'Social Agreement' that would 'become part of Union law'.[14] Of course, the difference between these two sets of values is somewhat ideal-typical, as some social and cultural rights (for instance, to education) may also be essential to the enjoyment of civil rights (for instance, the right to vote, which is conditioned on the ability for men and women to understand political alternatives and thus to access education and information, as well as on the equality between men and women). Nevertheless, the Reflection Group used the civil/political and social distinction as a broad compass to guide its reflections.

The possibility of sanctions in case of democratic backsliding in the future Constitutional Treaty was thus seen as an essential precondition for the accession talks that were to start with former Communist Block European states after Maastricht by both the IGC and then the

[10]C Ladenburger and P Rabourdin, 'La constitutionalisation des valeurs de l'Union, Commentaires sur les articles 2 et 7 du Traité sur l'Union européenne' 657 (2022) *Revue de l'Union européenne* 231–9.

[11]For a review of the concept, see MA Vachudova, 'Populism, Democracy, and Party System Change in Europe' 24 (1) (2021) Annual Review of Political Science 471–98 and N Bermeo, 'On Democratic Backsliding' 27 (1) (2016) Journal of Democracy 5–19; on the Eastern European context, see MA Vachudova, 'Ethnopopulism and Democratic Backsliding in Central Europe' 36 (3) (2020) East European Politics 318–40.

[12]Reflection Group's Report (Messina 2 June 1995) <https://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm> accessed 27 January 2025.

[13]However, Art 7 did not plan for the eventual exclusion of an EU Member State if it clearly violates the rule of law, but only a suspension of rights: a complete exclusion of the delinquent Member State would have cut off access to EU judicial remedies for the citizens of that Member State, thus leaving them with no recourse if judicial independence is no longer ensured at the national level; see Ladenburger and Rabourdin (n 10) 232.

[14]Reflection Group (n 12).

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Convention on the Future of Europe. The Central and Eastern European states' lack of long-term democratic experience due to the Cold War, during which their demands for democratic government had been repeatedly crushed by Soviet occupying troops, whether in Budapest in 1956 or in Prague in 1968, worried some of the older EU Member States. In this context, the leadership of the Convention, called the Praesidium and composed of the three main drafters – Valéry Giscard d'Estaing (Chairman), Giuliano Amato and Jean-Luc Dehaene (Vice-Chairmen) – began work on both a catalogue of principles that the EU and its Member States should respect, and a mechanism to punish violations of such principles.

Retrospectively, we can see that recent actions adopted by EU institutions against some of its 'new' EU Member States in defence of EU values confirm that the goal behind explicitly listing such core values was indeed to give the EU some legitimacy to fight against democratic backsliding in the domestic polity of its EU Member States – a domain that it had never claimed jurisdiction over before the adoption of the Article 2 of the TEU. In the late 2010s, the European Parliament, the European Council, and the European Commission took such actions against Hungary and Poland in response to increasingly alarming signs of democratic backsliding: in 2018 the European Parliament activated the procedure planned by Article 7 of the TEU against Hungary, shortly after the European Commission activated the procedure against Poland.[15] When taking such actions, the EU institutions explicitly mentioned the 'rule of law' (one of the first six values listed in Article 2), by which they primarily meant the independence of justice. The activation of Article 7 proved a powerful impetus for EU Member States to rally around the defence of values breached by a Member State, even if the process also showed the clear limits of the institutional mechanism planned by the treaties.[16] Indeed, after conducting a series of hearings on the matter for both Poland and Hungary, the Council failed to act, as it has yet to take a position on Hungary,[17] meanwhile, Poland has been greeted back into the EU community of liberal Member States after its last elections.[18]

The initial disappointment due to the lack of nerve demonstrated by the Council in Article 7 procedures was soon replaced by renewed hope among EU policymakers and think tankers when the EU Commission and Council undertook a flurry of new initiatives to give strength to the values listed in Article 2. Indeed, after experiencing blockages in the Council, the Commission explored other legal avenues to creatively enforce the respect of the values listed in Article 2 by its Member States,[19] focusing on two main instruments that at first appear unrelated to a general 'rule of law conditionality': first, a directive that seeks to protect the EU budget from misuse due to threats like corruption or attacks on the independence of the judiciary, and which allows the Council to freeze EU funds, in particular, the record-breaking 750 billion euros of the post-COVID Recovery and Resilience Fund;[20] and second, the 'horizontal enabling conditions' which are prerequisites that must be guaranteed since 2021 by any Member State receiving Cohesion Policy funds so that the European Commission can reimburse payments for investments, and which include, among others, respect of the EU Charter of Fundamental Rights. The Commission

[15]K Kovacs and KL Scheppele, 'The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union' 51 (3) (2018) Communist and Post-communist Studies 189–200.

[16]KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' 39 (2020) Yearbook of European Law 3–121.

[17]C Tonne, *Defending Democracy in the European Parliament: An Institutional Drama* (Princeton University Press 2026).

[18]J Rankin 'EU to end sanctions procedure against Poland' (The Guardian 2024) <https://www.theguardian.com/world/article/2024/may/06/eu-end-sanctions-procedure-against-poland> accessed 27 January 2025.

[19]KL Scheppele and J Morijn, 'Frozen' (Verfassungsblog 2023) <https://verfassungsblog.de/frozen/> accessed 27 January 2025.

[20]Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, 1–10. The Commission, the Council and the European Parliament negotiated this new budget tool over three years from 2018 and 2020. The budget tool also received the support of the European Court of Justice (ECJ), which reconfirmed its validity and rejected the request by Hungary and Poland for annulment in 2021.

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used this second tool to freeze 76 billion euros destined to Poland, the largest recipient of Cohesion Funds, which were released after the Tusk government declared those enabling conditions were met.[21] Regarding Poland, the Commission froze a considerable 130 billion euros of EU funds in total over rule of law concerns, until the new Tusk government was formed in 2024.[22] In the case of Hungary, the European Commission also used both instruments. In September 2022, the Council froze about 7 billion euros under the EU budget conditionality directive, while the Commission decided independently to freeze the reimbursement of up to 21 billion euros worth of investments in the 2021–2027 plan.[23] This multiplicity of actions show that the EU institutions (the Commission, the Council and the ECJ) do intend to use all the regulatory means at their disposal to fight in defence of all 12 values listed in Article 2: not only the first six, but the other six more 'social-democratic' values as well. Indeed, while some of the actions are taken on behalf of the defence of the 'rule of law' (when the independence of the judiciary is threatened), others invoke the defence of the 'autonomy' of universities and 'pluralism' (which, particularly in Hungary, became threatened when universities passed into the politically suspect control of private conglomerates close to Hungary's power centre).

While the literature on judicial remedies and sanctions explored by the European Parliament, Council, Commission and Court of Justice against Member States suspected of democratic backsliding and rule of law violations is rich and vastly expanding, less attention is being paid by legal scholars to the origins of that list of 'values' found in Article 2 of the TEU, which establish the solid rock against which legal proceedings are started.[24] In the next subsection, I show how Article 2 was structured to differentiate the 'liberal' political values that could trigger sanctions from the European Commission, Council or Parliament, in the mind of treaty drafters, from the 'social-democratic' values that were initially more aspirational in kind.

B. The fluidity between liberal and social-democratic values in question

While today, the perception by EU institutions of all 12 values of Article 2 may seem fluid indeed, it is worth going back to the debate of the Reflection Group of 1995 to understand how it differentiated between the 'liberal' and 'social-democratic values' which the EU claimed as its constitutional core. Article 2 of the 2012 TEU has the exact same language as Article 2 of the 2003 Constitutional Treaty, which emerged from the work of the 1995 Reflection Group and then the Convention on the Future of Europe. The TEU's drafters cut and pasted the preamble and some of the articles of the Constitutional Treaty after the latter's rejection following its failed ratification in France and the Netherlands. Article 2 itself states:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which

[21]J Liboreiro, 'Breaking down the €137 billion in EU funds that Brussels has unfrozen for Poland' (Euronews 2024) <https://www.euronews.com/my-europe/2024/02/29/breaking-down-the-137-billion-in-eu-funds-that-brussels-has-unfrozen-for-poland> accessed 27 January 2025.

[22]D Freund, 'Poland and Hungary: More than two thirds of EU funds frozen—Background' (Freund 31 January 2023) <https://danielfreund.eu/poland-and-hungary-more-than-two-thirds-of-eu-funds-frozen-background/?lang=en> accessed 27 January 2025.

[23]European Commission, 'Questions and Answers on Hungary: Rule of Law and EU funding' (Press corner 13 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6466> accessed 27 January 2025.

[24]KL Scheppele and RD Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU' in F Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 413–56; L Pech, 'The Future of the Rule of Law in the EU' (Verfassungsblog 2023) <https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/> accessed 27 January 2025. While my analysis largely converges with Clemens Ladenburger's genealogy of Art 2, my perspective pays more attention to the reference to a concept of 'society' to ground the existence of such values.

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pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[25]

The article thus positions the first six values as 'common to the Member States of the EU'. One could add that they are in fact common to all constitutional democratic liberal states which abide by the 1948 UN Universal Declaration of Human Rights (UNDHR). They characterise the type of state admissible (democracy, rule of law, respect for human rights) and individual fundamental rights expected (dignity, equality, freedom) in the Union. However, Article 2 then adds another six values which have slightly more 'social' and 'cultural' undertones, as they refer to notions in the realms of culture and democratic life (pluralism), religion (tolerance) and social/political justice (non-discrimination, justice, solidarity and equality between men and women, which both ensures the equality of voting rights but also the equality in pay for similar work conditions for men and women).

A lively debate exists in German legal scholarship over whether the six additional values attached to the recognition of a 'society' within the EU are of equal status to the first six liberal values characterising the structure of Member States; and relatedly, whether a breach of all 12 values, or only a violation of the first six values, can trigger an action from the EU institutions under Article 7.[26] This debate may have important consequences, as EU institutions may look to the opinions of legal experts in deciding whether or not the six social-democratic values are held to be independently justiciable or sanctionable under Article 7 TEU. In the perspective of the main drafters of Constitutional Treaty Article 2, they considered that inobservance of the values in the first sentence could be used to strip a Member State of its voting rights in the Council (under Article 7 of the TEU), whereas such a possibility must be more distant if the value was cited in the second half. As they declared, 'Article 2 must be read keeping in mind its close association with Article 45 of the Constitution, which establishes the procedure for suspending rights to Union membership in the event of a breach of the principles and values of the Union by a Member State'[27] (what later became Article 7 of the TEU). For instance, the inclusion of 'equality' in the first sentence and 'solidarity' in the second sentence was a compromise achieved despite President Giscard d'Estaing's argument that 'to include in Article 2 values such as "equality" or "solidarity", which would not have watertight legal definitions might lead to proceedings being initiated against Member States without justification'.[28] However, 'solidarity' did make it into the second sentence of Article 2, as well as 'equality between men and women' and 'pluralism'.[29] Thus, according to this original reading of Article 2, EU Member States would only be sanctionable in the form of suspension of rights for a breach in the six first values that directly guide the action of Member States (rule of law, human rights protection, etc), but not for any lapse of tolerance within their society, or the continued proven existence of discriminations against women in access to jobs, levels of pay, etc.[30]

[25]TEU [2012] (n 1).

[26]J Bast and A Von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism' 62 (2024) Common Market Law Review 1471–500.

[27]European Convention 2002–2003, 'Reactions to draft Articles 1 to 16 of the Constitutional Treaty—Analyses' (CONV 574/1/03, 26 February 2003). <https://web.archive.org/web/20201229221204/https://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00574-re01.en03.pdf> accessed 27 January 2025.

[28]Ibid.

[29]The amendment to introduce 'equality between men and women' was deposited by many members of the Convention. Other values suggested concerned 'pluralism' or 'diversity', 'cultural and linguistic diversity', 'respect for the rights of disabled people and minorities', 'social justice', 'openness', 'cultural diversity', 'national and regional identities', and 'national minorities'. See European Convention 2002–2003 (n 27).

[30]Art 7, however, does not make any distinction between the first and second sets of six values, rather stating: 'On a reasoned proposal by one-third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art 2'. See TEU [2012] (n 1).

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Furthermore, the drafters of the post-2000s treaties designed to continue the creation of 'an ever closer union among the peoples of Europe'[31] conditioned accession to the EU for Eastern and Central European candidates upon the adherence to liberal values, but paid less attention to the other six values in the negotiation process. Article 49 of the TEU states that 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union',[32] which suggests that respect for all 12 values has to be equally demonstrated during accession negotiations. But the strict rule of law review process for accession of candidate countries mostly focused on the Member States' respect of the first six liberal values, looking at the independence of the judiciary, anticorruption measures, and rule of law issues – sometimes even after accession.[33]

In addition to the difference in legal status between the two sets of values, the drafters of what became Article 2 also pointed to different intellectual and legal origins for each set of values. The 'social-democratic values' are described in more detail in previous European texts cited in the preamble of the Constitutional Treaty (and subsequently the TEU): 'the European Social Charter signed at Turin on 18 October 1961 and ... the 1989 Community Charter of the Fundamental Social Rights of Workers';[34] these texts are also returned to in Article 3 of the TEU, which develops their meaning in more detail than does Article 2. Indeed, Article 3 states that the Union shall promote such values abroad, and that it:

> 3.3 .... shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe 's cultural heritage is safeguarded and enhanced ...
>
> 3.5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[35]

Thus, in Articles 2 and 3, the TEU defines this second set of values that may not be at the core of the functioning of its Member States, but which are values it would seek to find both in its Member States' societies (in the plural) and more broadly, in all societies around the world, through the EU's own efforts at value promotion and in its humanitarian interventions. Accordingly, Article 21 of the TEU indicates that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.[36]

[31]TEU [2012] (n 1).

[32]Ibid.

[33]For example, under the Cooperation and Verification Mechanism (CVM), monitoring of rule of law issues in Bulgaria and Romania only closed in 2023, long after their admission. European Commission, 'Rule of Law: Commission formally closes the Cooperation and Verification Mechanism for Bulgaria and Romania' (Press corner, 13 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4456> accessed 27 January 2025.

[34]Treaty [2012] (n 1).

[35]Ibid.

[36]Ibid.

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In some sense, one may wonder if the fact of promoting such social-democratic values is specific to the EU, or whether such values are universal, in the sense that all societies of the world espouse them. The idea that Europe differs from other regions of the world because of the 'values' it embraces and promotes may constitute a provocative idea, although it is consensual in EU policy circles. There, official and informal talk often mentions the way in which the EU makes different foreign policy choices because it considers itself first and foremost a 'community of values', whereas other large states, such as the United States or China, have a more 'realist' understanding of international relations, in which economic interest trumps respect for democracy, the rule of law, equality between men and women, etc.[37] This idea is provocative on at least two counts. First, because the Article 2 values are also enshrined in UN Declarations – like the 1948 UNDHR, the International Covenant on Civil and Political Rights (174 parties), or the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified now by most states (today, 189) – which thus show a universal aspiration by all societies to live up to such standards.[38] Second, the EU Member States have recently shown an inability to reach a consensus on whether conflict conditions in Associated States, in particular when they call into question respect for human rights and broad humanitarian law principles – such as in the case of the war between Israel and Hamas –, should lead to EU institutions ending the Association in defense of EU values[39] leading to widespread criticisms of the EU as upholding a double standard in Global South and European public opinion.

C. The European aspiration for a 'society of individuals'

What may be specific to Europe in Article 2 is in fact the reference to the notion of 'society', mentioned in the second sentence, as the level at which these other six social, religious, cultural and democratic values can be found. This phrasing wasn't a necessity; the article could have simply mentioned the existence of social-democratic values widely shared among societies in Europe and which complement the liberal political values of each Member State. But in contrast, Article 2 says that 'these [first six] values are common . . . in a society' in which a certain set of other values (justice, tolerance, etc) are respected. This additional sentence seems to suggest that this Union is embedded in 'a society' that is more than an alliance of liberal democratic states, but rather, a single unit which integrates the individuals (citizens and residents of all the EU Member States) who respect and defend the second set of six social-democratic values mentioned: the latter translate individuals' aspirations to be 'freed' from the cultural, social, racial or religious divisions and related forms of ignorance and hatred across group boundaries that have long plagued the continent (and the world). This society of individuals is thus not just any kind of society: it is not a society where power and legitimacy rests on distinct groups defined by religion or race, in contrast to colonial societies of the mid-20th century, which drew lines between white citizens and indigenous peoples who abided by religious law (allowing some type of legal pluralism between group-based customary and civil law traditions[40]). Rather, this society resembles what sociologists called in the interwar era a 'society of individuals',[41] by which they mean a society in which 'the

[37]M Cremona, 'Values in EU Foreign Policy' in M Evan and P Koutrakos (eds), *Beyond the Established Orders: Policy interconnections between the EU and the rest of the world* (Hart Publishing 2011) 275–315.

[38]Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 (CEDAW) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> accessed 27 January 2025.

[39]M Chamon 'Suspension of EU Association Agreements Does Not Require Unanimity' (Verfassungsblog 2025) <https://verfassungsblog.de/suspension-of-eu-association-agreements-does-not-require-unanimity/> accessed 27 August 2025.

[40]G Mallard, 'The Eclipse of Global Legal Pluralism in Ethnology: A French Trajectory' in PS Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 141–66.

[41]N Elias, *La société des individus* (Fayard 1981[1939]).

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individual' is the core pillar of its operations and where the law applies to all those individuals equally, without difference based on race, religion or gender.

The existence of this 'society of individuals' is in fact already suggested in the 2000 EU Charter of Fundamental Rights (placed in its entirety in the Constitutional Treaty, but later kept separate in the Lisbon Treaty).[42] The preamble of the Charter states:

> The peoples of Europe, in creating an ever-closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.[43]

Here, the text does not refer to the creation of a 'European society' as bestowing a new identity ('Europeanness') on all individuals who are EU citizens and residents, on top of their own national (eg, French or German) identity[44] and/or other local/national identity (eg, in the case of migrants, Algerian, Syrian or Malian, etc) by the sheer fact of living in the EU and participating in this EU society. It is to be noted that neither in Article 2 of the TEU, nor in other articles, is the concept of 'European society' mentioned: the adjective 'European' is not found in the text of Article 2. No mention is made of the existence of a 'European society' that would foster a new supranational 'identity' spearheaded by the Erasmus programs, or the Schengen space of freedom of circulation. In fact, the notion of 'society' that the Conventionists seem to have had in mind when drafting Article 2 is perfectly abstract: it is rather the 'society of individuals', which ultimately gives its scaffolding to EU law, conceived not just as the law of its Member States (when they minimally respect the first six rules regarding law and democratic values), but the law that best operates in a 'society of individuals' who believe in justice, solidarity, antidiscrimination, cultural pluralism and religious tolerance. This abstract 'society of individuals' operates without any new distinguishing cultural identity: in fact, it operates precisely in contra-distinction with societies that base their operations on group identities.[45] At least, this is the interpretation we can develop from Article 2 read in isolation from the preamble – as the latter rather blurs this interpretation, as will be developed later.

My interpretation of Article 2 thus affirms, first, that Article 2 postulates the existence in Europe of a 'society of individuals' as an abstract concept and guiding principle and not a specific reality in a Member State or in the sum of Member States; and its ideal citizens/residents are all seeking freedom and happiness thanks to their emancipation from 'traditional communities' defined by religious, racial or cultural identities (constituted by strict boundaries between groups). Second, I argue that Article 2 starts from the presupposition that this society of individuals constitutes the abstract philosophical terrain in which progressive international law (or EU law) can best grow. The history of the successive drafts of Article 2 shows how drafters gradually asserted the normative existence of such a 'society of individuals' within the body of EU law from which they claimed to unearth its implicit existence. In the first draft of the Constitutional Treaty

[42]On the debate this insertion created in the Working Group (WG) on the Charter, the WG agreed that 'The whole Charter – including its statements of rights and principles, its preamble and, as a crucial element, its "general provisions" – should be respected by this Convention and not be re-opened by it'. European Convention, 'Summary of the meeting chaired by Commissioner António Vitorino' 26 September 2002. <https://web.archive.org/web/20201229221215/https:/european-convention.europa.eu/pdf/reg/en/02/cv00/cv00295.en02.pdf> accessed 27 January 2025.

[43]Charter of Fundamental Rights of the European Union [2000] OJ C364/01 <https://web.archive.org/web/20210928234314/http://european-convention.europa.eu/pdf/df/charteEN.pdf> accessed 27 January 2025.

[44]A Von Bogdandy, 'On Meaning and Promise of European Society', Working Paper MPIL 2024/30.

[45]Ibid.

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presented to the Convention,[46] the creation of a just society of individuals was only aspirational and normative (rather than descriptive): that society of individuals was to be erected in the future, thanks to a greater integrated Union. Indeed, the version of Article 2 presented by the main drafters for discussion at the Convention in Brussels on 26 February 2003 read:

> The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity.[47]

Article 1, which came directly before it, stated that 'The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together'.

The shift from this version of Article 2 to the version presented in June 2003 by the Constitutional Treaty drafters and which eventually made it into the TEU occurred through amendments placed by members of the Convention. As Giscard d'Estaing summarised in one of the sessions of the Convention, among the many reactions received by Conventionists to the first draft of Article 2 cited above, there were two main types of questions: 'the first related to the definition and content of the values mentioned', and the second 'related to the possible introduction of a reference to religion'.[48] As far as the second point was concerned, it received the support of old Western EU Member States, whose populations still voted for the Christian Democratic parties which had created the EU in the 1950s, and East European future Member States (like Poland), who saw their adherence to the European project as continuing their fight to gain freedom of religion (which they could not practice during the Soviet era). But it was otherwise quite controversial. In any case, the new version of Article 2 that crystallised in the final text of the Constitutional Treaty (and then TEU) abandoned the wording that the erection of such society was an 'aim', and thus purely aspirational. Additionally, the reference to a 'society at peace' was dropped in favour of the reference to 'a society' *tout court*[49] in which the six social-democratic values affirming the primacy of individuals and their equality before the law, over the differentiation of persons according to their social/group identity, was found. This change suggested that erecting and defending such a society of individuals was already a guiding principle of all EU policies in Europe, and not a future goal.

In Article 2 of the TEU, this 'society of individuals', in which individuals are valued on the basis of their own merit and in which racial, cultural or religious differentiation before the law is rejected, is an abstract concept that serves as a guiding principle to orient the policies of EU Member States and the actions of EU institutions; hence the use of the singular – as one guiding principle—, and not the plural, which would refer to specific, concrete, European societies in each Member State. The use of the singular, I venture, is to be interpreted as a sign of abstractness, not concreteness, at the continental level: it does not refer to a concrete European identity differentiating the European society from others in the early 21st century, but to the abstract 'society of individuals', as defined by a century of social and legal theory, as will be discussed in the next section. This mention of such an abstract 'society' also hints at the idea that the source of international law in general, and EU treaty law in particular, is not exclusively grounded on the

[46]The Convention consisted of 121 individuals, including representatives of national Member States' parliaments as well as candidate countries, and representatives of the EU Parliament and Commission. European Convention, 'Organization' <https://web.archive.org/web/20210804181020/http://european-convention.europa.eu/EN/organisation/organisation2352.html?lang=EN> accessed 27 January 2025.

[47]European Convention 2002–2003 (n 27).

[48]European Convention 2002–2003 (n 27).

[49]French officials like Robert Badinter and Dominique de Villepin, among others, suggested to keep the second sentence 'but delete "at peace"'. European Convention 2002–2003 (n 27).

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will of States.[50] Historically, and particularly during the interwar period (as will be discussed later), European legal scholars have sought to reconcile the notion of state sovereignty with the participation of other actors under the protection of the international legal order, including individuals.[51] The reference to such a 'society' of individuals may also hint at the importance of considering other standards than those which only pertain to the functioning and structuring of Member States when considering the principles that EU law should respect and help promote. Thus, with Article 2, state sovereignty is here reconciled with the participation of other actors under international law in the making of EU law: broad principles of democratic governance formulated by domestic law, international organisations, and civil society organisations that sustain the existence of a 'society of individuals' have a place in the normative basis of EU law.

D. The imagined historical religious origins of the EU values

During the Conventionists' discussion of Article 2 in 2003 another important series of suggestions were concerned with the historicity of such a 'society', and whether the drafters considered such historical origins as characterising a common 'European identity': a key question was whether that pluralistic, tolerant and solidaristic society mentioned in Article 2 should be conceived as a legacy of a shared European Christian past. In the Maastricht Treaty of 1992, later consolidated in the Amsterdam Treaty, the Preamble mentioned the EU's desire to 'deepen the solidarity between their peoples while respecting their history, their culture and their traditions',[52] thus insisting on the plurality of identities coexisting within and under EU law. The Amsterdam Treaty didn't make reference to a European society, nor to a shared cultural heritage or identity, but rather emphasised their different histories, with each one deserving respect from each Member State. In contrast, the preamble of the Constitutional Treaty draft that was presented in June 2003 with the final version of Article 2 asserted that the Treaty drew 'inspiration from the cultural, religious and humanist inheritance of Europe, which, always present in its heritage, has embedded within the life of society its perception of the central role of the human person and his inviolable and inalienable rights, and of respect for law'.[53] The subsequent sentence even claimed that a 'reunited Europe intends to continue along this path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived' and that 'it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world'. When interpreted in association with the preamble of the Constitutional Treaty, which later became the preamble of the TEU, the wording of Article 2 thus underlines the ambivalence of the drafters of the Constitutional Treaty with respect to abandoning the idea of a 'European identity': as the preamble suggests that they still leaned on the idea that this abstract 'society of individuals' must be grounded on a common cultural tradition – in the singular –, which found its roots in a religious Christian past.

During the Convention of 2003, the drafters repeatedly expressed their conviction that the core values of the EU found their broader inspiration in 'the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.[54] Thus, according to the drafters, the EU states are not singled out here among all states on the planet because they have confirmed 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law' (from the preamble of the TEU), but more importantly, because they invented the 'cultural, religious and humanist'

[50]A Peters and T Sparks (eds), *The Individual in International Law* (Oxford University Press 2024).

[51]J Nijman, *The Concept of International Legal Personality: an inquiry into the history and theory of international law* (T.M.C. Asser Press 2004).

[52]Consolidated version of the Treaty on European Union [1997] OJ C340 p. 145–72.

[53]European Convention 2002–2003 (n 27).

[54]TEU [2012] (n 1).

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traditions in the first place, and because these cultural traditions are assumed to be the source of the universal values later expressed in the UNDHR and many other texts affirming the values found in Article 2 TEU.

Here, the history of negotiations of the Constitutional Treaty shows that the notion of religion was relegated to the preamble as a compromise between the main drafters of the Constitutional Treaty and other Constitutional Convention representatives, particularly but not exclusively from Poland, who had argued that Article 2 should contain a reference to the 'Judeo-Christian heritage' of Europe.[55] Even though some Convention members expressed scepticism about this idea, the Chairman of the Convention, President Giscard d'Estaing, agreed:[56] he said that the Praesidium had also discussed the subject and had come to the conclusion that, if a reference were to be introduced recognising the contribution of religions to European civilisation, it would be 'more appropriate to insert it in the preamble than in the main body of the Constitution'.[57] There was a prevalent feeling that the 'society of individuals' defended in the Treaty was the outcome of a 'civilisation' based on Christian and humanist 'heritage' fostered in Europe.

Whether the assertion that EU states invented the cultural, religious, and humanist traditions from which values like liberty, democracy, and the rule of law emerged has framed EU law and policy in many fields, from trade to foreign policy, is beyond the scope of this article. Here, I would like to point out that this narrative, according to which the values of Article 2 are a direct legacy of Europe's religious past, shouldn't be taken simply at face value. The reference to the Christian heritage of Europe is an important note that signals the key role played in the EU integration process by Christian Democratic parties after World War II, and whose importance was still felt within EU elite circles at the time of the drafting of the Constitutional Treaty – but which has declined since then, with the passing of that generation. Within the ranks of the postwar generation of EU leaders, many were indeed inspired by the 'personalist' philosophy of Jacques Maritain,[58] including, possibly, President Giscard, but new generations have now closed the parenthesis. The thirty-year period during which Christian Democratic parties ruled Western European states after World War II, and during which some currents in the Catholic Church – among other Christian Churches – called for the Church to 'modernise' its traditional social philosophy, may seem to historians to be the exception rather than the norm. Inscribing that link between the Church's modernisation project and the EU project in favour of peace, democracy and the rule of law represented an important (but somehow vain) attempt to guide future generations tempted to leave the founding fathers' narrow path. Indeed, in the more recent past, the Catholic Church's conservative social doctrine, which denied the legitimacy of 'individualism' during the whole 19th century, has made a comeback[59] with the rise of a far-right agenda in the United States and Europe that is strongly supported by Christian churches (including but not exclusively by the Catholic Church). Religious traditions are now being re-invented by far-right political parties to justify a masculinist agenda, as in the form of anti-abortion campaigns, in

[55]In the post-Holocaust era, the idea of Christianity as a marker of civiiszation had indeed sometimes expanded into a 'Judeo-Christian' identity in a revisionist attempt to erase the centuries-long oppression of Jews by European states, in whichever form they took. T Green, 'The term "Judeo-Christian" has been misused for political ends – a new "Abrahamic" identity offers an alternative' (*The Conversation*, 24 December 2020) <https://theconversation.com/the-term-judeo-christian-has-been-misused-for-political-ends-a-new-abrahamic-identity-offers-an-alternative-125523> accessed 27 January 2025.

[56]Different proposals for including a reference to religion in an early draft of Art 2 suggested a: 'reference to God (modelled on the Polish Constitution)/reference to Christianity/mention of Judaeo-Christian roots/reference to the Graeco-Roman, Judaeo-Christian, secular and liberal traditions– Kroupa + Skaarup + Fini + Teufel + Korok + 3 members of the Convention + Muscardini + Wittbrodt + Fogler + Teufel + Brok + 16 members of the Convention'. See European Convention 2002–2003 (n 27).

[57]European Convention 2002–2003 (n 27).

[58]CAM McCauliff, 'Union in Europe: Constitutional Philosophy and the Schuman Declaration, May 9, 1950' 18 (441) (2012) Columbia Journal of European Law 441–72; CAM McCauliff, 'Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom' 41 (593) (2011) Seton Hall Law Review 593–624.

[59]RA Nisbet, *La tradition sociologique* (Presses universitaires de France 1984).

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which abortion is removed from the realm of a right of women over their bodies, or in the form of crusades against 'gender theory', which Christian religious leaders see as the source of all evils, to take just a few examples.[60] The time when a President like Valéry Giscard d'Estaing could empower a Minister like Simone Veil to push for the French law that legalised abortion (1974) seems long gone.

Considering the long-term past in the context of the present, it may seem quite paradoxical that 'religious traditions' are referenced in this document as having played a key role in the genesis of values such as human rights or equality between men and women, when the historical record may show otherwise. But the Constitutional Treaty drafters knew that the convergence they called for between the EU project and the modern philosophy of the Christian Church was fragile. We may hypothesise that this is precisely why they wanted to underline that link in the preamble of the Treaty.

Still, another interpretation is possible: that the link between the Christian religion and the rise of a society of individuals wished for by EU founders was also a legacy of the internationalist discourse of the prewar and interwar eras marked by the transformation of the European colonial project. This interpretation thus gives less attention to the postwar founding fathers and their Christian democratic beliefs, than to the intellectual and political context in which colonialism was reinvented by international legal experts in the interwar era. In the next section, I will explore this legacy between 'modern' interwar international law and EU constitutional thinking in the early 21st century.

3. The interwar origins of the constitutional imagination of Europe's treaty drafters

A. The question of religion and civilisation in the interwar international legal discourse

This section goes deeper into the analysis of the concept of 'society' used in Article 2 of the TEU by exploring the multiple semantic associations found in the TEU in reference to the society of individuals, the role of Christianity in its genesis, and its association with social-democratic values in the interwar period. In the interwar era the same terms and concepts that we find in the preamble and Article 2 of the TEU already worked together in discourses of international law scholars and diplomats who erected the first pan-European legal order with the Société des Nations (SDN).

Historically, in the late 19th century, reference to the Christian religion served as a marker of 'civilisation' for most European law scholars and diplomats – a moment that the influential interwar Catholic and Nazi legal scholar Carl Schmitt believed to have constituted the apex of 'European civilisation'.[61] Being 'civilised' by virtue of sharing a Christian heritage was indeed the ticket to enter the international community of states admitted to play a role in the international society at times of colonial expansion.[62] Prewar jurists of the generation of Lassa Oppenheim repeated 'the conventional wisdom of the 19th century that had the standard of civilisation as the doctrine determining membership in the family of nations', and for whom the standard of civilisation was equivalent to having been transformed by the 'Christian civilisation'.[63] Before and

[60]E Fassin, 'Campagnes Anti-genre, Populisme et Néolibéralisme en Europe et en Amérique Latine' 119 (3) (2020) *Revue Internationale et Stratégique* 79–87.

[61]C Schmitt, *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europeam (Telos Press Publishing 2003[1950]).

[62]A Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019).

[63]AB Lorca, *Mestizo International Law: A Global Intellectual History, 1842–1933* (Cambridge University Press 2014) 35. This point is also amply developed in M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* (Cambridge University Press 2001).

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during the SDN, discourses on the importance of European civilisation and Christianity for the progress of mankind were quasi-hegemonic in diplomatic and academic circles.[64]

The idea that the civilised nations must share Christian traits to be admitted into the international society still irrigated the interwar socio-legal imagination, although it took a different form than in the prewar era. Liberal values such as democracy, freedom, respect for human rights or rule of law issues, which today are the main causes for concern in the EU, were less important than the social-democratic values listed in the second sentence of Article 2, like tolerance, non-discrimination, and cultural pluralism, which 'civilised' nations in the interwar era had to demonstrate to be admitted to the SDN. These latter values were more easily traced back to the Christian doctrine of social justice than the former more liberal notions of democracy. Indeed, the creation of this Société des Nations was meant to transform not only the relationship between European great powers, but to turn the late-19th-century colonial project of the great powers from a land- and minerals-grabbing project into a 'progressive' project of establishing a broader international solidarity between individuals of all nations. In this context, it was the second set of values, whose tone was much closer to the Christian philosophy of the Church (solidarity between individuals across generations and across nations, fairness and benevolence in employment relations, etc) that formed the normative basis of the international society of 'civilised' nations.

This conceptual equation between the 'society of nations' protecting post-Christian social-democratic values and an international society of 'civilised' nations lay at the foundation of the interwar imagination of modern internationalists looking for a new principle to distribute membership to sovereign states in the SDN, after the simple criterion of 'Christianity' was abandoned – for instance, with Japan's entry to the SDN.[65] For Nicolas Politis, a Greek international law scholar and President of the Assembly of the SDN, it wasn't enough for a state to declare itself a state to become a member of the SDN: he believed that by 'mistakenly assuming states to be the real subjects of the law, treating them as persons, international law had been left in a weak position . . . ' because in doing so, 'international law ignored individuals as legal subjects'.[66] Quoting Duguit, Politis 'declares membership in the French sociological school affirming that, like all law, international law consists of imperatives addressed to individuals, based on the solidarity existing between them',[67] first at the level of their nation, and then at the inter-national level. Solidarity, a post-Christian concept closely associated with the concept of 'brotherhood' (or 'fraternité' in French), was re-worked to become a secularised sociological concept, which explains why many interwar jurists like George Scelle, Nicolas Politis or Max Huber 'examined the sociological underpinnings of the law to justify international obligations beyond or against state consent'.[68]

For this generation of 'modern internationalists' of the interwar period, 'there is no doubt that the international society exists', that 'international law is the law of the international society', and that 'it is the individual who establishes the social relations at the base of the international society'.[69] The reference to an abstract concept of a 'society of individuals' that international law was supposed to protect was a strong indicator differentiating the writings of realist internationalists for whom there was no other grounding to international law than the will of states – and for whom state sovereignty was absolute –, and the writings of 'modern' internationalists, for whom international law found its legitimacy in the protection of individuals' rights.[70] Not surprisingly, many of these modern internationalists, including Scelle, Politis, and

[64]It was also widely used by sociologists who pushed for the creation of the SDN. E Durkheim and M Mauss 'Note sur la notion de civilisation' (1913) XII. L'Année Sociologique 46–50.

[65]Nijman (n 51).

[66]Lorca (n 63) 209.

[67]Ibid.

[68]Ibid., 205.

[69]Ibid.

[70]M Vec and L Nuzzo (eds), *Constructing International Law. The Birth of a Discipline* (Klostermann 2012).

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William Rappard, taught at the Institut de Hautes Études Internationales (the ancestor of the Geneva Graduate Institute), which was situated in Geneva, close to the SDN and the International Labour Organization (ILO) headquarters.[71] In the latter's writings, attention to the internal structure of the state, and the articulation between states and individuals' rights, was less prevalent than the reference to the advent of such a 'society of individuals' permitted by the development of international legal norms. To that extent, Scelle, Politis, or Hubert formed part of the 'sociological tradition'[72] in international law.

That the Constitutional Treaty and then TEU drafters were able to repeat in the early 2000s a European-centred narrative that links social-democratic values with a Christian past shows that the old civilisational perspective remains deeply ingrained in Europe's legal imagination, despite criticisms by post-colonial philosophers, historians, sociologists, and law scholars who have deconstructed the claim of European authorship, or invention of, international law by Christianity and Christian nations. As post-colonial scholars have demonstrated, such intellectual traditions as humanism or the Enlightenment were nourished by cross-cultural transplants and dialogues between East and West, between Roman language and Arab or Asian traditions.[73] Finding such a reference to the alleged Christian European religious origins of socio-democratic values in the preamble of the TEU, and before in the 2003 Constitutional Treaty, shows that the drafters still thought of Europe as the cradle of civilisation, whose gift to the world was a civilisation in which fundamental human rights are at the centre – despite evidence to the contrary, as well as strong evidence of a deep hiatus between norm and practice in Europe's 20th century history.

B. The values promoted by interwar international organisations

The social-democratic values cited in Article 2 TEU were not only part of an intellectual tradition dating from the interwar era; in fact, they were operating concepts found in the documents establishing international organisations during and after World War I. Due to the importance of social-democratic parties and movements in the interwar era, the international organisations erected after World War I emphasised the same social-democratic values cited by Article 2 TEU.[74] It is important to note that the term 'Société des Nations' (SDN) in French introduces an important nuance when compared to the notion of a 'League of Nations': a League often characterises a belligerent union, while a Société is focused on peace, and its membership is not restricted to the group of victors. In this case, at the Paris conference to discuss the statutes of the SDN, Swiss diplomats Max Huber and William Rappard ensured that its membership would be open to neutral countries, and then after some time, to the vanquished nations (like Germany) as well, as long as they complied with social-democratic values.[75] Except for the general restriction on armaments, which is not found in the TEU (but is found in other treaties to which EU Member States are parties), the list of international obligations that Member States of the SDN had to observe to join and maintain their membership strongly resembled the social-democratic values listed in the second sentence of Articles 2 and 3 of the TEU. According to Article 23 of the Covenant, parties to the Société should:

[71]V Monnier, *William Rappard, Défenseur des libertés* (Slaktine 1995).

[72]Koskenniemi (n 63).

[73]A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); A Anghie, B Chimni, K Mickelson and O Chinedu Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill Academic Publishers, Martinus Nijhoff, 2003); S Subrahmanyam, *Aux origines de l'histoire globale. Leçon inaugurale prononcée le jeudi 28 novembre 2013* (Fayard/Collège de France, 2014).

[74]C Anderson, *Eyes off the prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge University Press 2003).

[75]Monnier (n 71).

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> (a) endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;
>
> (b) undertake to secure just treatment of the native inhabitants of territories under their control;
>
> (c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs; . . .
>
> (f) will endeavour to take steps in matters of international concern for the prevention and control of disease.[76]

The Covenant established this list of objectives, grounded on certain values, as a condition for admission and continued membership in the organisation: violation of such values could lead the governing bodies of the international organisation to issue sanctions against the Member State found in breach. Indeed, although the Covenant was found in the Versailles Treaty, a peace treaty between the Allies and Germany, which was negotiated among the four winners of the war in Paris, the Société it created to secure the peace was open, as 'any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations' (Article 1). Going beyond Article 7 of the TEU on the suspension of voting rights of EU Member States for violating Article 2, Article 16 of the Covenant planned for the expulsion of 'Any Member of the League which has violated any covenant of the League [which] may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon'.

In addition to the social-democratic values listed above, part XIII of the Versailles Treaty, which established the International Labour Organization (ILO), also mentions in its preamble some conditions for a sustainable peace to emerge in this international society, asserting that:

> whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures.[77]

By establishing these two Geneva-based organisations (the SDN and the ILO), the Versailles Treaty thus called for the creation of a 'society' in which individuals would find their place based

[76]League of Nations, *Covenant of the League of Nations*, 28 April 1919 <https://www.ungeneva.org/en/about/league-of-nations/covenant> accessed 27 January 20205.

[77]International Labor Organization, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919 <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1> accessed 27 January 2025.

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on their own individual merit, without suffering injustices based on race, religion or gender, and where the most vulnerable would be protected.[78]

Overall, the Versailles Treaty set up an international legal framework guided by such social values as those found in the second sentence of Article 2 of the TEU. In addition, Article 22 of the Covenant of the SDN made it explicit which values should guide the type of statehood necessary for a political community to be a full member of the 'Société', by stating that national states in Central Africa would have to bear the tutelage of mandate powers until they could, alone, 'guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic', and that until then, it remained the task of mandate powers to fulfil these tasks.[79] Here, no mention was made of democracy, but some hint of human rights protection (freedom from being captured in the slave trade, or freedom of religion) can be found, as well as mention of rule of law principles, such as having a fully functioning predictable judicial order in mandate territories, whose independence would become the subject of yearly review by the Mandate Commission (Article 22).[80] Although the mandate system 'was not set up primarily for the protection of human rights, but for the settlement of rival political claims' in general, and the transfer to Allied victors of German colonies in particular, Rappard, a long-time member of the Mandates Commission during the whole interwar period, wrote that indeed, 'provisions examined by the Mandate commission included a concern for the welfare of the indigenous populations', which were expressed in the language of Article 22 of the Covenant cited above, and which pre-dated and pre-figured the social–democratic values cited in Article 2 TEU – some of which were also found in the UN Charter after World War II.[81]

The association between an aspirational 'society of individuals' to be created thanks to international cooperation between Member States of a common Society of Nations was therefore already developed in the interwar period.[82] Here, it is worth remembering the meaning given to the concept of 'nation' (the second term in the name 'Société des Nations'), which had become not only a central concept of political theory, but also of sociological theory, especially in the French Durkheimian school of sociology, whose influence on international law scholars and civil servants in Geneva-based international organisations (like Paul Mantoux, Nicholas Politis or Albert Thomas) ran deep, as we now know thanks to the pioneering work of Martti Koskenniemi.[83] Indeed, in French sociological and legal thinking before and after World War I, the concept of 'nation' was precisely equated with a 'society of individuals', freed from the constraints of customs and traditions, who could decide freely for themselves both how they would conduct their lives and in which political society they wanted to live – according to the Wilsonian principle of 'self-determination' which gave so much hope to colonial subjects at the end of World War I. Of course, this society was made up of social groups, institutions, parties, and other collective entities, but what differentiated this modern 'society of individuals' from past political societies was that, in such a society, the rights of such collective entities never trumped the rights of the individuals who composed them. This conception of a nation as a society of 'individuals' (sometimes better thought of as 'persons'[84]), where no group had rights superior to the rights of individuals, came

[78]M Kohen, 'Does General International Law Incorporate the Concept of Social Justice' in GP Politakis, T Kohiyama and T Lieby (eds), *ILO 100 Law for Social Justice* (International Labour Office 2019) 91–100. <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@jur/documents/publication/wcms_732217.pdf> accessed 12 September 2025.

[79]M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2010).

[80]S Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015).

[81]W Rappard, 'Human Rights in Mandated Territories' (1946) The Annals of the American Academy of Political and Social Science 118–23.

[82]M Fournier, *Emile Durkheim, 1858–1917* (Fayard 2007).

[83]Koskenniemi (n 63).

[84]B Karsenti, *La société en personnes* (Economica 2003).

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from the thinking of French solidarists working in the sociological school of Léon Duguit, Emile Durkheim and Marcel Mauss, in particular. This same network of sociologists and intellectuals who lobbied for the creation of the ILO (some of whom served in key posts, like Albert Thomas, its first Director General) had played a key role in the defence of the right of 'the individual', Captain Alfred Dreyfus, falsely accused of treason by the army, after the French army's higher echelons decided to sacrifice a Jewish scapegoat to defend its collective self-image.[85]

Following this logic, the international 'society of nations' was distinct from a 'society of empires', which looked like the Berlin Congress of the late 19th century, revered by Carl Schmitt. For sociologists and legal scholars in the interwar era, a society of individuals was an abstract concept, which grounded a description of the contemporary stage reached by SDN Member States or mandates in the international society of the interwar period. In fact, in his unpublished masterpiece titled 'The Nation', which amply discusses the creation of the SDN and modern international public law, Marcel Mauss differentiated political communities along a linear scale to determine how far societies had moved up toward the realisation of such a 'society of individuals'. Mauss conceived of the nation in contradistinction with other political entities, like 'tribes' (as described by the colonial anthropology of the time) or 'empires' (the preferred political association of Europe in the 19th century up until the end of World War I).[86] The 'nation' referred to a society in which intermediary bodies no longer buffered relations between individuals and the state, where a strong sense of territorial boundaries limited the desire for imperial expansion, and where the state could be used by democratically elected government as an instrument to achieve social justice and protect the most vulnerable. Such a conception of the nation conceived as a 'daily plebiscite', in the words of Ernest Renan (an influential 19th-century French writer), was very much in line with the French Republican definition. Not surprisingly, Mauss found that in the interwar era, only two Western countries could claim the title of nations: France and the United States.[87] In these two nations, Mauss wrote, 'the two poles in the continuum of social beings, individuals and the society, symbolised by the state, face one another',[88] and individuals only recognise the authority of the law of their own nation-state, not the law of religious communities (especially constituted as minorities) that exist within the boundaries of nation-states. These two nations were thus different from all other societies, which Mauss still associated with 'empires', characterised by the presence of a central political authority, but a low development of a common national consciousness, as individuals in empires still identified with religious identities and ethnic groups before their state, and attributed rights to such groups that were sometimes superior to the rights of the individuals.[89]

This sociological theory became quite influential and guided the thinking of the administrators of SDN mandates in Africa and Asia (like Rappard) in deciding whether the social conditions in Mandate territories were ripe for independence to be granted, as it was assumed at the time that the creation of a 'society of individuals' was a condition for a sustainable peace, and that societies characterised by 'factionalism' (or 'tribalism') would fall into civil war immediately after independence, as happened when the Mandate Commission authorised the independence of Iraq in the late 1930s.[90] Based on a similar sociological observation that most Member States of the SDN had yet to integrate individuals within a proper nation-state, Mauss warned his contemporaries that even if formally equal states were members of the SDN, most political societies in this institution could not yet be called 'nations' in the proper sense, and that the

[85]G Mallard, *Gift Exchange: The Transnational History of a Political Idea* (Cambridge University Press 2019).

[86]M Mauss, *La Nation* (Presses universitaires de France 2013) 77; see Mallard (n 85) 93.

[87]It was then all the more paradoxical that the United States rejected membership in the SDN.

[88]J Terrier and M Fournier, 'Présentation: *La Nation*, une expédition dans le domaine du normatif' in M Mauss, *La Nation* (Presses universitaires de France 2013) 1–42.

[89]Under the category of empires, Mauss listed 'societies of Muslim law, Chinese law, Hindu law', as well as Tsarist Russia, ancient Greece, Egypt, Mexico, Germany, and colonial societies. Mauss (n 86) 82, cited in Mallard (n 85) 93.

[90]Pedersen (n 80).

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defence of social-democratic values remained a long-term objective.[91] This limitation served as a normative basis used to justify why some new sovereign states must accept limitations to their sovereignty placed by the SDN: French, British, and other great powers must accept to report to the Mandate Commissions about their administration of colonial populations under the rule of their 'empires'; and the newly independent states emerging from the defeated empires of Central and Eastern Europe, which were not yet considered to constitute 'nations' of free individuals in the Durkheimian sense, must accept to respond to individual petitions sent to the League's Minority Section (chaired by Erik Colban), established as part of the Secretariat by the League's first co-Directors (Eric Drummond and Jean Monnet) for the purpose of monitoring the rights of minorities in their territories.[92]

Along these lines of thought, the role of the SDN, and of its international system of petition and monitoring for minorities, served to move the societies that were still in the age of 'empires' (in Central and Eastern Europe especially) toward the next stage: that of nations constituted of free individuals emancipated from the oppressive rule of collective groups and institutions, and the customs of inherited religions and ethnic traditions. As Jane Cowan writes, about the system that was put in place to monitor Eastern and Central European states' compliance with the values of the SDN in the interwar era, 'the minority petition constituted an unprecedented political encounter that radically challenged the state-centric premises of international relations and that cleared the ground for individual citizens' engagement in a human rights regime after 1948'.[93] But more importantly for the argument of this article, one can thus see in the type of instruments of human rights and democracy governance applied in Eastern and Central Europe by Western Europe's core states and experts an uncanny continuity between the interwar era and the decade of EU enlargement that followed after the post-Cold War disintegration of the Soviet Union: the monitoring of the state administration of minorities in the newly independent states of Eastern Europe established in the Treaty of Saint Germain, which broke up the Habsburg Empire, already targeted Eastern and Central European states. But there was an important difference: the interwar monitoring institutional arrangement focused on minorities exclusively, whereas the instruments used by the EU institutions to monitor progress toward enlargement (and even after, in the case of Romania and Bulgaria) after the Cold War focus on rule of law, democracy and human rights promotion. This shift signals a change in the priorities of international organisations as far as respect for values in Eastern European states are concerned.

4. Conclusion

This article argues that many of the values cited in Article 2 of the TEU and its preamble, as well as the narrative about their post-Christian historical origins, partake of a common civilisational discursive matrix dating back to interwar European thinking, when European legal experts and statesmen sought to affirm the key role of European 'social-democratic values' in the making of independent nations conceived as modern 'societies of individuals'. A surprising finding may be that the reference to an abstract concept of 'society' in which some of these values (not all) are found does not represent the innovative aspect of Article 2 of the TEU. Rather, this 'sociological' understanding of the sources of international (or EU) law harks back to the emergence of a 'modern' understanding of international law in the interwar era marked by sociological approaches to international law.[94] At that time, international law was reconceptualised as the law of a society of 'nations', made up of 'individuals' to whom states had recognised obligations

[91]Mauss (n 86) 176, cited in Mallard (n 85) 93.

[92]J Cowan, 'The Success of Failure? Minority Supervision at the League of Nations' in MB Dembour and T Kelly (eds), *Paths to international justice: social and legal perspectives* (Cambridge University Press 2007) 29–56.

[93]Ibid., 30.

[94]Koskenniemi (n 63).

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deriving from their social-democratic character. This understanding helps explain why certain values associated with the protection of individuals as individuals are cited as key to the formation of the 'society' that EU Member States seek to erect and defend. In fact, one may say that compared to the interwar era, Article 2 of the TEU innovates by adding at its forefront a focus on rule of law issues, democracy, and freedom, which the European great powers of the interwar era were not interested in debating.

From the interwar era to the early 21st century, the justification for Western European powers to limit a state's sovereignty or a state's right to belong to an international organisation has thus changed (at least as far as Eastern European states are concerned): in the interwar era, concerns for social-democratic values (such as the trafficking of women, forced labour and slavery, etc) mattered most in initiatives coming from the SDN's various commissions of inquiries, whereas today, concerns for liberal values pertaining to the organisation of the state (such as respect for the 'rule of law' conceived as the independence of justice, for instance) prevail. Interwar-era criticisms of state practices voiced in the name of 'values' weren't articulated through the language of rule of law and democracy as much as in the name of social-democratic values: interwar law practices at the SDN and international law scholarship in general weren't focused on the examination of the constitutional provisions within great powers that allowed a discriminatory international order to reproduce itself by anchoring colonies in permanent subaltern status. At that time, attention to the illiberal character of certain democracies had not yet emerged as a language, in contrast to today.

One hypothesis to explain this historical reversal is that, in the interwar era, the defence of the social-democratic values that formed the core of a 'society of individuals' by internationalists from Western Europe (in Paris, London, or Geneva) enabled the great powers to continue to encroach on the sovereignty of emerging nation-states (through the Mandates or Minority exceptions), while the great powers themselves were excluded from criticism in their interventions at home or abroad. On the contrary, increasingly after World War II, jurists from the Global South believed that violations of social-democratic values by great powers (such as those witnessed in French Algeria, or the American Jim Crow South) could be the basis for criticism in international fora,[95] and even for sanctions by international organisations (as happened much later, when the UN sanctioned apartheid South Africa in the late 1970s).[96] The rise of what is now called the Global South as a powerful agent in international law after World War II meant that the United States and Europe could then become the objects of criticism for intervention in their colonies or mandates in ways that were clearly racist, oppressive and exploitative, as their behaviour then contravened the accomplishment of the social–democratic principles of a society of individuals that they were supposed to help realise across the globe. This emphasis on 'social-democratic values' leading to international condemnation by jurists from newly independent states in the 1960s and onward may be the reason why the European Constitutional Treaty drafters downplayed the importance of social-democratic values compared to liberal values, such as the independence of the judiciary and the fight against corruption, which now form the core causes for the European Commission or Council to take action against Eastern European Member States.

[95]Such as that which came from the pens of Global South jurists from Latin America or Asia, like Carlos Calvo, Luis Drago, Ruy Barbosa, Alejandro Alvarez, and Senga Tsurutarō to name a few; Lorca (n 63) 235.

[96]Anderson (n 74).

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