AN EU SOCIAL CONTRACT OF THE TWENTY-FIRST CENTURY

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If you ask ChatGPT what the European Union social contract is, the answer is a very long, not very concise, and exclusively normative answer, no mention to symbology or imaginary is done. The artificial intelligence responds to the answer as probably most citizens and many academics would. However, this article argues that the social contract, as an epistemological construction, transcends this exclusively normative perspective; moreover, it carries a symbolic and ideological weight that explains its use and abuse to gain an extra dose of legitimacy, obedience, or to reinforce specific political or dogmatic postulates.

My argument will be as follows. In the first section, I will review the epistemological construction of social contracts and its constitutive elements. Starting with a historical perspective, I draw from this analysis to suggest a notion of the pact of association updated to our time. The exposition of these theories, from the embryonic understanding of social contracts to current theories, highlight concrete elements that I believe are still constitutive social contract theories and may help envision a democratically participated and decided social contract.

Then, I will turn to the case of the European Union by examining the pre-normative debates and narratives from its origins to present times, remarking solidarity and fear as leitmotifs of the progressive process of union between previously contentious states. Finally, I end by analysing the need to consider our reality and the way we communicate and decide in the Artificial Intelligence era to frame the new social contract theories.

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I. RETHINKING SOCIAL CONTRACTS

It is neither easy nor straightforward to define the concept of the social contract because its epistemological construction has been evolving and mutating, much like the constitutive political concepts, principles, and values that shape it. The social contract is a metaphorical pact of political association, at least in its origins (Grotius, Hobbes, Rousseau, Pufendorf or Locke), which establishes or renews a political organisation. This figurative

agreement includes distinctive elements of political association from other social or political groups, and it may embody its own purposes, aspirations, constitutional identity, and morality. In this pact, contracting parties typically enter into association, rather than aggregation, to willingly and autonomously cede a portion of their sovereignty to ensure their security, achieve peace, and promote well-being.

It is also acknowledged by literature that the terms of the contract must safeguard the most fundamental interests of the contracting parties, leaving the associates in a better position in terms of security and freedom than if they were outside the contract. Historically, it has been believed by the authors of the so-called Golden Age, such as Hobbes, Rousseau, and Locke, that the greater homogeneity and material equality among the contracting parties, the greater the guarantees of success and stability the pact of association will have. The parties consent tacitly or explicitly to the terms of the contract despite the contract itself or its contractual nature not being explicitly mentioned.

It is obvious that these terms of the definition of the social contract strongly resonate with the treaties, objectives, and functioning of the European Union (EU). Since its origins, although these values have varied, it can be stated that the EU construction can be analysed through the prism of the social contract theory. The EU can be understood as a social contract of social contracts. This means that its member states—each functioning as a social contract in their own right—come together to form a new, overarching social contract. By joining the EU, these member states, as contractual participants, have voluntarily ceded portions of their sovereignty. This collective agreement is primarily aimed at achieving shared goals such as peace, security, and well-being This paper analyses different instruments, debates, decisions, and norms of the EU that can be considered part of the social contract. It also advocates for an explicit, rather than metaphorical, social contract for the EU, where the inhabitants of the Union have the opportunity to participate, deliberate, and express

themselves, unless they choose not to do so or they aim to violate the founding values and principles of the Union or the European Union Charter of Fundamental Rights (CFR). It is argued that twenty-first-century social contracts are living and dynamic documents that are democratically deliberated upon, participated in, and decided. This living nature captures the Hobbesian sense of the social contract as a transitional process, not a fixed premise, a never-ending device to settle and improve our political form of association.[1]

With these characteristics, the EU will be better positioned to create a more inclusive, democratic, and sustainable new express social contract. This paper eschews the idea that social contracts are 'rigid' and 'exhaustive' and advocates moving beyond the social contract's intellectual and metaphorical nature, its euphemistic symbolism, and the implied tacit consent. I propose a participatory, deliberative, and democratic decided social contract, emphasising the importance of the latter term 'to decide' (*theory of dezisionismus)* by the parties. I acknowledge that this ambitious epistemological construction challenges some of the structural elements of traditional social contract theory. However, it seems the better approach for updating the theory to the twenty-first-century political reality and the era of information, artificial intelligence, and Homo Digitalis, where more people than ever demand participation in decision-making political processes.

This paper will focus on the analysis of a social contract for the EU, a metaphor of the social contract which has been continuously referenced by EU institutions and policymakers.[2] Today, such references are increasingly

[1] Peter J. McCormick, *Social Contract and Political Obligation* (Routledge 1987).

[2] Calls for renewal of the social contract have emerged as responses to multiple crises. Already in 2013, Benoît Coeuré, as a member of the Executive Board of the European Central Bank, pointed out the need to reform the social contract to respond properly to the economic crises that Europe was facing at that time. In the

evident even beyond the context of the EU. A very recent instance of reference to this social contract is one made by Javier Milei, the Argentinian President, in his presidential discourse, asserting a statement by Alberto Benegas Lynch:

> Liberalism is the unrestricted respect for the life project of others, based on the principle of non-aggression, in defence of the right to life, liberty, and property, whose fundamental institutions are private property, markets free of state intervention, free competition, division of labour, and social cooperation'.

According to the President, the new social contract chosen by the Argentinians is summarised in this sentence.[3] I welcome this concretisation of the elements of the social contract, serving as a new pact of association, which is one of the requirements of the epistemological construction this paper advocates for. At first glance, President Milei's explicit mention of a new social contract aims to reaffirm the new political scenario and guiding values opened in Argentina after the results of the last presidential elections.

The question that we can pose, not only to President Milei but to all these political actors, is why, like a sort of Nietzschean 'eternal return,' the reference to the social contract appears and disappears from the political agendas of diverse political entities and actors. The answer depends mostly on the context and period in which the instrumentalisation of the phenomenon arises. As Lloyd and Shreedhar remark: 'The method of justifying political pinciples, arrangements by appeal to the that would be

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same vein, Vice-President of the European Commission Frans Timmermans first, (in 2019) and Prime Minister of Portugal, António Costa, later, during his speech at the opening session of the Porto Social Summit 2021, insisted on renewing the European social contract by committing to developing innovative and inclusive responses at their own level.

[3] See 'Discurso histórico del Presidente Milei en su asunción inaugural- 10/12/23' (Youtube 10 December 2023) minutes 26:26. <www.youtube.com/watch?v=a17GYC99r5g> accessed 11 December 2013.

made among suitably situated rational, free, and equal persons'.[4] Additionally, it can also be noted that the calls for a new or a renewed social contract stem from the consideration that the social contract or the expectations placed upon it have failed. Even though, in most cases, the contractarians were not conscious of their association in a social contract, only after a failure the mention of the contract appeared. In considering the renewal of references, it must also be noted that there has been a geographical and material (sectorial) spread of the social contract theory. The social contract is no longer as it was conceptualised in the seventeenth century, an element of European ideology and related solely to European cultural elements, nor is it restricted to the bargaining of security, peace, well-being (and private property in Hobbes and Locke) for a portion of individual sovereignty.[5]

Very recently, the metaphor has been used to justify the obedience to the sovereign but has also been used in a multitude of different ways. For example, social contract theory has been used:

1. To reinforce a concrete political narrative (such as the renewal of the EU social contract to stress solidarity or India's right to education);
2. To reinforce political legitimacy (such as the agreement between China's urban population and the Communist Party, offering well-being for support to the Chinese Communist Party regime);
3. To envision new political goals;
4. To strengthen communitarian philosophy, how the social contract theory might be understood differently from a non-Western

[4] Sharon A. Lloyd and Susanne Sreedhar, 'Hobbes's Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2022) <https://plato.stanford.edu/entries/hobbes-moral> accessed 15 January 2024.

[5] David Gauthier, 'The Social Contract as Ideology' (1977) 6 (2) Philosophy & Public Affairs 130.

perspective if values salient in African communitarian philosophy are properly understood.

5. To guide citizens in coping with technological, environment and gender relations (in India) or to embrace the values of liberalism (in Argentina).[6]

Alongside this geographical spread of the theory, there has also been a material or sectional dispersion. Proposals for gender/sexual social contract, racial contracts, digital social contract, environmental social contracts, a social contract addressing pandemics contractual initiatives to combat populism, and others have been conceptualised.[7]

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[6] See Minouche Shafik, 'Why India Needs a New Social Contract' (*Hindustan Times*, 19 September 2019) <www.hindustantimes.com/analysis/why-india-needs-a-new-social-contract/story-DiAttglA4Zy0T2OyWqImDM.html> accessed 11 January 2024; Selina Ho, *Thirsty Cities: Social Contracts and Public Goods Provision in China and India* (Cambridge University Press 2019) ch. 4, 60-118; Caroline Dyer and others, 'Connecting Families with Schools: The Bureaucratised Relations of "Accountability" in Indian Elementary Schooling' (2022) 43 (8) Third World Quarterly 1875; Chemhuru Munamato, 'Gleaning the Social Contract Theory from African Communitarian Philosophy' (2017) 36 (4) South African Journal of Philosophy 505.

[7] Carole Pateman, *The Sexual Contract* (Stanford University Press 1998); Julia Simon-Ingram, 'Expanding the Social Contract: Rousseau, Gender and the Problem of Judgment' (1991) 43 (2) Comparative Literature 134; Susan Moller Okin, 'Feminism, the Individual, and Contract Theory' (1990) 100 (3) Ethics 658; Charles W. Mills, *The Racial Contract* (Cornell University Press 2014); Livia Levine, 'Digital Trust and Cooperation with an Integrative Digital Social Contract' in Kirsten Martin, Katie Shilton and Jeffrey Smith (eds) *Business and the Ethical Implications of Technology* (Springer 2022); Bruno Deffains, 'Rethinking the Social Contract in the Digital Age' in Jean Mercier Ythier (ed) *Economic Reason and Political Reason: Deliberation and the Construction of Public Space in the Society of Communication* (ISTE 2022); Tony Pereira, 'The Transition to a Sustainable Society: A New Social Contract' (2012) 14 Environment, Development and Sustainability 273; Jane

It is fair to question whether this dissemination of the social contract theory has de-naturalised the theory or if the theory has simply mutated and evolved to encompass new and diverse realities. As with other key political concepts, I believe that geographical expansion does not inherently impose acculturation or de-naturalisation of the social contract theory. On the contrary, it allows for more reflection and virtuality, pushing for a less euphemistic and abstract phenomenon towards a more realistic and pragmatic application. In this sense, the same question can be posed to the main thesis of this paper: is it a form of theoretical denaturalisation to advocate for an express contract? Or, conversely, is it a necessary consequence of our time? I argue that the demands of democracy, coupled with the opportunities provided by a well-regulated technology, open new avenues for direct action of the people. Therefore, in twenty-first century, a social contract, which has always been considered a metaphorical phenomenon approved through tacit consent, needs to be more concrete, allowing individuals to participate as active contractors.

In the next section, I will review the epistemological construction of the social contract and its constitutive elements from a historical perspective to the present day. The methodology involves highlighting concrete aspects that are relevant and applicable to our current conceptualisation of social

Lubchenco and Chris Rapley, 'Our Moment of Truth: The Social Contract Realized?' (2020) 15 (11) Environmental Research Letters 110201; United Nations Research Institute for Social Development, 'A New Eco-Social Contract' (2021) 11 <https://sdgs.un.org/sites/default/files/2021-07/UNRISD%20-%20A%20New%20Eco-Social%20Contract.pdf> accessed 27 July 2024; Domonkos Sik, 'Towards a Post-Pandemic Social Contract' (2023) 174 (1) Thesis Eleven 62; Antón Costas, 'Un nuevo contrato social postpandémico. El papel de la Economia social' (2020) 100 CIRIEC-Espana Revista de Economia Publica, Social y Cooperativa 11; Katrina Perehudoff and others, 'A Global Social Contract to Ensure Access to Essential Medicines and Health Technologies' (2022) 7 (11) BMJ Glob Health e010057; Daphne Halikiopoulou and Sofia Vasilopoulou, 'Breaching the Social Contract: Crises of Democratic Representation and Patterns of Extreme Right Party Support' (2018) 53 (1) Government and Opposition 26.

contracts and, more specifically, to my theoretical experimental proposal for the EU.

II. Heading The Evolution of the Conceptualisation of the Social Contract

1. *The embryonic form*

Since its origins, political entities in all their varied forms have required the submission of individuals to political authority. From the earliest political constructions and the beginnings of political consciousness, humankind theorised about the submission of both citizens and non-citizens to the polis, its laws, and its authority. In the quest for legitimacy, the theory of the social contract flourished, even before the so-called Golden Era of social contract theories.[8] Some elements of the social contract theory, such as agreement, tacit consent, and the source of legal and political rights and obligations, were also identified throughout history.[9]

Indeed, we can question whether this historical reference departs from a sort of anachronistic apriorism, given that the expression 'social contract' appeared in the works of Grotius and Rousseau. Alternatively, we may consider whether the concept of the 'social contract' or its linguistic codification cannot be detached, or at least its signified (what the sign represents or refers to), from previous theories. With this non-trivial reservation in mind, it is common in academia to recognize in the illustrious

[8] The Golden era is normally considered from 1650 to 1800 which covers the 'big four' contract theorists: Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant. See Woojin Lim, "The Racial Contract": Interview with Philosopher Charles W. Mills, *Harvard Political Review* (Boston, 29 October 2020) <https://harvardpolitics.com/interview-with-charles-w-mills/> accessed 5 April 2024; See also Peter J. McCormick, *Social Contract and Political Obligation. A Critique and Reappraisal* (Routledge 2019).

[9] See David Hume, *Essays, Moral, Political, and Literary of Civil Liberty* (Liberty Found Books 1985).

elenctic Socratic dialogue, *Crito* by Plato, and in Socrates' acceptance of the death penalty, an antecedent or embryonic form of the social contract. This interpretation stems from the idea that Socrates' decision to abide by Athenian laws, despite their unjust application in his case, reflects a tacit agreement between the individual and the state. Thus, his actions are often viewed as an early philosophical foundation for the concept of the social contract.[10]

Other ancient contractual elements can be traced in Epicurus' content, suggesting that justice arises from a common (social) agreement not to harm each other, where relationships are not intended to cause suffering or harm at specific places or times. This approach contrasts the notion of justice originating from prudence or wisdom, as proposed by Plato and Aristotle.[11] Additionally, Aristotle's work references Lycophron the Sophist, who held that law is merely a 'contract,' serving as a guarantee for the mutual respect of rights, rather than being capable of making citizens good and just.[12] Elements of the social contract theory can also be observed in the Middle Ages as detailed in the next section.

2. The social contract as politico-theological concept

As Andrew Arato suggests, some of our significant political concepts are secularised theological ones,[13] and the social contract theory may possibly be one of these major religious-political concepts. In Christendom, the idea of

[10] David G. Ritchie, 'Contributions to the History of the Social Contract Theory' (1981) 6 (4) Political Science Quarterly 656; Joshua Cohen, Rousseau: *A free Community of Equals* (Oxford University Press 2010); François Foronda, *Avant le Contrat Social, Le contrat politique dans l'Occident médiéval, XIII^{e}-XV^{e} siècle* (Éditions de la Sorbonne 2011).

[11] Epicurus, Diogenes Laertius, and Robert Drew Hicks, *Principal Doctrines: 350 BC*, (Infomotions, Inc. 2001) para 33.

[12] Ritchie, 'History of the Social Contract Theory' (n 10) 656.

[13] Andrew Arato, *Post-Sovereign Constitution Making, Learning and Legitimacy* (Oxford University Press 2016) 269.

contract theory between government and people gained prominence in the popular consciousness of ecclesiastical writers, politicians, and ordinary individuals, intellectually grounded in the Bible and in the work of Aristotle.[14] In fact, the Latin word 'testament' (meaning testimony) in reference to the two divisions of the Bible, was a loan-translation of the Greek '*Diatheke*,' which meant both 'covenant' and 'will,' and of the Hebrew '*berîth*,' signifying the covenant that God entered into first with Abraham, then with the people of Israel.[15]

The Old Testament establishes a theological basis for contractual theory in multiple versicles. For instance, the book of Genesis mentions in 9:9 ' I now establish my covenant with you and with your descendants after you'; in 9:12 ' And God said, "This is the sign of the covenant I am making between me and you and every living creature with you, a covenant for all generations to come"'; and in 9:15 'I will remember my covenant between me and you and all living creatures of every kind. Never again will the waters become a flood to destroy all life'. Additionally, the Book of Samuel mentions in 5.3 that 'When all the elders of Israel had come to King David at Hebron, the king made a covenant with them at Hebron before the LORD, and they anointed David king over Israel'. As Ritchies remarks, 'furthermore, in the Middle Ages, men were more prone than at any other time to think in terms of the Roman conception of quasi-contract'.[16]

The pact as a form of collective action arose in the twelfth century with the proliferation of sworn societies and corporations of all kinds based on

[14] Ibid 659.

[15] See 'Testament (n.)' (*Online Etymology Dictionary*) <https://www.etymonline.com/en/word/testament> accessed 20 September 2023; 'Old Testament' (Catholic Online) <https://www.catholic.org/bible/old_testament.php> accessed 6 January 2023.

[16] Ritchie (n 16), 659.

principles of mutual contractual obligations.[17] The formula according to which the nobles of the Catalan-Aragon Crown are said to have elected their king in the twelfth century — 'We who are as good as you choose you for our king and lord, provided that you observe our laws and privileges'[18] — and the Magna Carta, Charter of the English Liberties granted by King John in 1215, are good examples of explicit political agreements between the sovereign and the nobles that emerged from practices consolidating the power of feudal rulers in the Middle Ages. Scholastic authors also addressed various aspects of the social contract, though medieval authors often limited the contract to sovereigns without considering the relationship of subjection.[19]

Given the evolutionary nature of the theory of the social contract and its capacity for development (*Entwicklungsfähigkeit*), and assuming that the Old Testament and the works of Aristotle were determinant in the reception and development of the social contract theory in the Middle Ages by Christendom, it is conceivable that some important elements of this theory can also be found in Islam and medieval Judaism. This assumption is grounded in the fact that the Old Testament is also a holy book for these other two Abrahamic religions, and in the significant influence that the works of Aristotle have had on prominent thinkers of both creeds. Therefore, some elements of the works of Al-Farabi, Ibn Khaldun, Mosheh ben Najmán, and Moses Ben Maimonides related to the elements of the

[17] Alain Boreau, 'Essor et Limites Théologiques du Contrat Politique' in François Foronda (ed), *Avant le Contrat Social, Le Contrat Politique dans l'Occident Médiéval, XIII^e^-XV^e^ siècle* (Éditions de la Sorbonne 2011). 243

[18] Montserrat Bajet Royo, *El Jurament i el Seu Significat Jurídic al Principat Segons el Dret General de Catalunya (segles XIII-XVIII): Edició de la 'Forma i Pràctica de Celebrar els Juraments i les Eleccions a la Ciutat de Barcelona en el Segle XV'* (Universitat Pompeu Fabra 2009).

[19] Boreau, 'Essor et Limites Théologiques du Contrat Politique' (n 17) 243.

social contract need to be at least acknowledged in this evolutionary theory.[20]

It is hard to deny the fact that social contract theory was conditioned by this theological substrate, at least during this period of its conceptual evolution. Interestingly, the theological approach to the social contract at this time was not related to citizens or citizenship, unlike Ancient Athens and Rome or later during the so-called Golden Era of the American and French revolutions. Instead, the 'contractors' were the believers: Jews, Christians, or Muslims (members of the Ummah), who, with some differences, only needed to believe in the 'right' God and obey the religious commandments.[21]

3. The Golden Era

It is widely accepted that the golden era of the social contract theory occurred during the seventeenth and eighteenth centuries. During this period, the formulation of the social contract consisted of the analogy used by contractual philosophers such as Grotius, Hobbes, Pufendorf, Locke, Rousseau, Hume, and Kant to explain the relationship between individuals in a 'state of nature,' 'natural law,' and the State, Commonwealth, or league of States, aimed at protecting rights of individuals such as life (Hobbes), liberty (Rousseau), and private property (Locke). It is not feasible to delve deeply into all the contributions that these authors made to the theory of the social contract.

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[20] See Luis Xavier López Farjeat, 'Al-Fārābī and the Relation Between Politics and Religion in Light of His Summary on Plato's Laws' (2016) 18 (36) *Signos Filosóficos*, 38. See also David Novak, *The Jewish Social Contract. An Essay in Political Theology* (Princeton University Press 2005); Abu Naser Al-Fārābī, *On the Perfect State* (Richard Walzer tr, Clarendon Press 1985); Ibn Khaldun, *The Muqaddimah* (Princeton 2015); Moses Maimonides, *The Guide of the Perplexed* (Chicago University Press 1963).

[21] See Antoni Abat Ninet, 'A Secular God and a Creed', in *The Religion of the Constitution,* (Edward Elgar Forthcoming 2026) <academia.edu/106131408/CHAPTER_I_A_SECULAR_GOD_AND_A_CREED_I_THE_RELIGION_OF_THE_CONSTITUTION>.

I believe, it is valuable to highlight specific elements of the works of Hobbes and Rousseau, the main social contract theorists, that contribute to the understanding of the theory of the social contract even today and since the emergence of new contractarian proposals, such as those of Rawls and Nozick, in the twentieth century, which have improved, responded to, and updated social contract elements to fit the realities of the twentieth century. The idea is to reflect on the lasting influences of the works of these authors and to filter our understanding of the EU social contract through the 'original' definition of the phenomenon.

A. Hobbes

Hobbes' contributions to the social contract, which endure to this day, can be categorised into at least four main areas: a) the condition of human nature, which links the topic with the ancient relationship between physis and nomos; b) the rationale of 'the state of war' and the rational exit; c) the covenant of union and subjection and d) the principle of authorisation and representation and the consequences of the covenant, the possible rupture, limits and the right of resistance. Hobbes remarked as 'the final cause of the Common-wealth as the preservation (security) of men, who, despite their natural inclination towards liberty and dominance over others, accept, throughout a covenant, the introduction of restraints upon themselves'.[22] Men then will observe the original contract and the laws of nature, more concretely, the contract as the second law of nature. The purpose and rationale of government lie in its capacity, through the exclusive possession of legitimate coercive authority, to deter individuals from reverting to the natural condition of mankind.[23]

The contact creating the Common-wealth is unique in that it simultaneously creates the conditions which make obligations and contracts meaningful, it is self-justifying and, more importantly, self-enforceable.

[22] Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, Penguin 1950) pt 2 ch 17.

[23] McCormick (n 2) 15.

Additionally, it is significant that the contract is not between the sovereign and the people but between each individual and every other individual that shall authorise all the actions and judgements of a Man or Assembly of Men.[24] McCormick points out that neither the original assembly nor the original contract ever actually took place,[25] and the vast majority of the specialised Hobbesian doctrine considers that the agreement is hypothetic, meaning that the contract is not so in a normative sense.[26] However, constituent assemblies and constitutions (among other legal founding documents) can be considered as original assemblies and original social contracts. Let us consider, for instance, the foundation of new states, where the political entities are created ex-novo by a constituent assembly that approves a constitution. In cases such as that of Mustafa Kemal Ataturk in the founding of the Republic of Türkiye, of Mohandas Gandhi in the Republic of India, or Nelson Mandela in the Republic of South Africa, the analogy of Hobbes in relation to one man can be dissected.

The sovereign is not a party to the contract but only a recipient of powers under the contract.[27] The obedience to the sovereign commands comes from the contractual obligation, and to avoid the natural condition of mankind, the *Bellum omnes contra omnes.* Hobbes considers 'the Covenant to generate the Common-wealth and the "sword" to enforce it as necessary evils. Thus, men cannot observe justice and the other laws of nature without a common power to keep them all in awe'.[28] Hobbes follows, stating that '[w]e might as well suppose all Mankind to do the same; and then there neither would be

[24] Hobbes, *Leviathan* (n 25) 133.

[25] McCormick (n 2)15.

[26] Hobbes, *Leviathan* (n 25). Macpherson's reference to the pact is always conditional or hypothetical, as if the pact was celebrated.

[27] Ibid 21.

[28] Ibid.

no need to be any Civil Government, or Common wealth at all; because there would be Peace without subjection'.[29]

In Chapter XVIII of the Leviathan, Hobbes remarks twelve consequences derived from the institution of the Common-wealth by the social contract. I believe that some of the elements listed are still valid today and can provide some perspective on the nature of the EU's political pact. However, others are less considerable due to the specific circumstances of Hobbes' times and the absolutist nature of the seventeenth-century Leviathan. On the consequences of the social contract that may help us to characterise the EU social contract and sovereignty, Hobbes pointed out that it is from the Common-wealth that all the rights and faculties are derived by the consent of the People assembled.[30] In this sense, the adhesion, alienation or association is a voluntary act of the subject,[31] as it happened in the Economic European Community (EEC) and is still occurring in the EU. The establishment of the EU derives from the agreement of the member states and, therefore, the consent of the Peoples of Europe assembled in their respective national assemblies.[32] And the process of accession of a new Member State (MS) into the EU implies a unanimous decision by the EU Council on a framework for negotiating with the candidate.

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[29] Hobbes, *Leviathan* (n 25) 129.

[30] Ibid 133. Note that Hampton interprets that the Social Contract does not sovereignty. See David Gauthier, 'Hobbes's Social Contract' in Susan Dimock, Claire Finkelstein, and Christopher W. Morris (eds), *Hobbes and Political Contractarianism: Selected Writings* (Oxford University Press 2022).

[31] The inclusion of the subject into the institution is conceptualised as an act of adhesion, alienation or association by it, depending on whether we focus on: Hobbes, *The elements of Law Natural and Politic*, (Ferdinand Tönnies ed, Frank Cass & CO. LTD. 1969) and Hobbes, *De Cive: The Latin Version,* (Howard Warrender ed, Oxford University Press 1983) or the *Leviathan* (n 25). See also Quentin Skinner, 'Hobbes on Representation' (2005) 13 (2) European Journal of Philosophy 155.

[32] See 'Consolidated version of the Treaty on European Union PREAMBLE' [2016] OJ C202/15.

The first consequence remarked by Hobbes implies that the Covenant does not contradict previous agreements to which the subjects are still obliged.[33] This consequence may be well represented by the principle of primacy of EU law (precedence and supremacy), which dictates that where a conflict between an aspect of EU law and an aspect of law in an EU MS (national law) arises, EU law will prevail in the fields that the MS has ceded its sovereignty.[34] EU primacy (at least as the European Court of Justice sees) means that EU law always prevails over national law (regardless of the question of sovereignty).[35] Controversy over the relationship between EU law and national law remains alive.[36] However, the paramount decision of the Portuguese Constitutional Court, Ruling 422/2020 on the hierarchy between national and non-national sources may establish a momentum in this regard when stating in Ground 2.8 that:

> under Article 8 (4) of the Constitution of the Republic of Portugal, the Constitutional Court may only consider and refuse to apply a rule of the European Union Law if it is incompatible with a fundamental principle of a democratic state based on the rule of law that, in the context of the

[33] Hobbes, *Leviathan* (n 25) 133.

[34] The primacy of EU law has developed over time by means of the case law (jurisprudence) of the Court of Justice of the European Union. It is not enshrined in the EU treaties, although there is a brief declaration annexed to the Treaty of Lisbon in regard to it. See 'Consolidated version of the Treaty on the Functioning of the European Union - DECLARATIONS annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES - 17. Declaration concerning primacy' [2008] OJ series C115/344; See also 'Primacy of EU law (precedence, supremacy)' *EUR-Lex* <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html> accessed 11 September 2024.

[35] Roman Kwiecien, 'The Primacy of European Lawn over National Law under the Constitutional Treaty' (2005) 6 (11) German Law Journal 1479.

[36] Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 (2-3) International Journal of Constitutional Law 473.

> European Union Law (including, therefore, the CJEU case law), does not have a parameter materially equivalent to that recognised in the Constitution since such a principle necessarily applies to the agreement on the […] On the other hand, whenever the assessment of a rule of law of European Union law, has a parameter materially equivalent to the one recognised in the Portuguese Constitution, functionally guaranteed by the CJEU (in accordance with the legal means provided in European Union Law), the Constitutional Court should not assess the compatibility of the rule with the Constitution.[37]

Another example is that, when a candidate state is negotiating its accession to the EU, it needs to respect and promote the democratic values of the EU and meet the 'Copenhagen Criteria', which include the EU acquis criteria.[38] Accordingly:

> Candidate (applicant) countries are required to accept the acquis before they can join the EU. Derogations (exceptions) from the acquis are granted only in exceptional circumstances and are limited in scope. The acquis must be incorporated by candidate countries into their national legal order by the date of their accession to the EU, and they are obliged to apply it from the date.[39]

The third consequence is that no subject can justly protest against the establishment of a sovereign declared by the majority.[40] This restraint of the right to protest is grounded in the fact that when the subject voluntarily

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[37] Constitutional Court of Portugal, Ruling no.422/2020, Case no. 558/2017, of 15 July 2020.

[38] On the conditions for membership (Copenhagen Criteria) European Council in Copenhagen 21 and 22 June 1993, 'Conclusions of the Presidency' Doc/93/3 <ec.europa.eu/commission/presscorner/detail/en/doc_93_3> accessed 19 December 2024; Madrid European Council 15 and 16 December 1995, 'Presidency Conclusions' (Bulletin of the European Union 1995) <www.europarl.europa.eu/summits/mad1_en.htm> accessed 5 March 2025

[39] See 'Acquis', <eur.lex.europa.eu/EN/legal-content/glossary/acquis.html> accessed 19 December 2024.

[40] Hobbes, *Leviathan* (n 25) 135.

joined the assembly, he clearly expressed his intention and implicitly agreed to abide by the decisions of the majority. Therefore, if he rejects or protests any of their rulings, he acts against his covenant and unjustly so.[41] The spirit of loyalty to the covenant implied by this consequence should guide decision-making within the Council, especially when such decisions require the unanimity of its members.

As a matter of example, when Hungary is abusing the unanimity vote in the Council to pressure the EU (blocking the 50 billion euros) is breaching the Hobbesian third consequence of the institution of the Covenant.[42] In this sense, as Pettit remarks, ' the subjects of a Common-wealth, whatever its origin and whatever its constitution, are not deprived of their freedom as non-obstruction just by their subjection; the laws may punish transgressions, but they do not prevent them'.[43] But such subjects are deprived of their freedom as non-obligation in the domain over which the will of the sovereign expresses itself in laws, or at least this is so when 'refusal to obey frustrates the end for which the sovereignty was ordained' and so long as the sovereign is not 'disabled to provide for their safety'.[44] Hobbes remarked that, one way in which refusal to obey will not frustrate the ends of sovereignty is when I struggle for my life or the lives of my friends against a sovereign who would have us killed.[45] This, however, is not the case of Hungarian

[41] Ibid.

[42] 'Parliament insists that the EU must freeze funding to Hungary' (News, European Parliament 2022) <https://www.europarl.europa.eu/news/en/press-room/20221118IPR55719/parliament-insists-that-the-eu-must-freeze-funding-to-hungary> accessed 19 December 2024.

[43] Philip Pettit, 'Liberty and Leviathan' (2005) 4 (1) Politics, Philosophy & Economics 131.

[44] Ibid 144.

[45] Ibid.

abuse of unanimity despite the claim of Orban's government on threats to constitutional identity and values.[46]

Hobbes' Leviathan Consequences seven and eight on the right of making rules and the right of all judicial authority, through which the subject can understand what rightfully belongs to them,[47] could well guide the distribution of competences of the Union nowadays and demand an express legal accommodation of the principle of primacy of EU law, as mentioned before with the example of the ruling decision of the Portuguese Constitutional Court.

Hobbes' theory also enables us to analyse the role that the MS has in the EU and abroad as an analogy to his analysis of the persistence of the state of nature in the relationship between the states. Hobbes's understanding of sovereignty is another crucial point. He conceived sovereignty as political philosophers did in the seventeenth century (Grotius, Spinoza, Leibniz, Locke) when the concept of the modern state rose. Today, sovereignty is parcelled into competencies. When the EU has competence over a matter, it essentially holds sovereignty or power in that area. To regain the power over this competence, the subject (MS) will have to amend the Treaties, that is, the legal accommodation of the pact of association.

The work of Hobbes has been used to criticise the hybrid nature of the EU and its lack of a common power. Due to this absence, MS keep alive the state of nature and continue to 'make war', whereas a foreign military invasion/aggression (understood in the sense of the twenty-first century reality) always threatens their potentiality of peace. However, the fact is that the EU has been implementing coercive measures (from article 7 of the TEU to the freeze funding to MS) with more or less success that seems to envision the foundation of a well-structured sovereign power. Self-preservation,

[46] Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law' (2018) 43 (1) *Review of Central and East European Law* 23.

[47] Hobbes, *Leviathan* (n 25).

well-being and peace were basic ends in Hobbes and, as demonstrated, have been the main goals and funding principles of the EEC and the EU.

The debate on the need to create an EU army referred to as 'the Sword,' is essential to the institution in Hobbes' view. Similarly, the EU's migration policies can also be discussed in terms of the necessary conditions for a well-configured commonwealth, or res-publica, rather than a civitas, even though Hobbes uses the term '*civitas'* in the Latin version of the Leviathan. The EU can be conceptualised as a union of member states, like a commonwealth, as long as there exists a *summa potentia* -a supreme power- and an EU potential communis that binds everyone. This includes common power and European civil law.

B. Rousseau

To confront the social contract of the EU with the modern roots of the theory, Rousseau's work is useful and necessary, as it provides tangible elements and insights to conceptualise and envision the theory within the framework of the Union. Some aspects of Rousseau's theory coincide with those remarked by Hobbes, such as the goal of self-preservation and personal security, the hypothetical nature of the contract, the inalienability and indivisibility of sovereignty, and the aim of justifying obligations and the terms of association.[48]

For Rousseau, the social contract aims at the foundation of a just society (*une juste société*), a political body. The pact is organised around the law as an expression of the general will, which needs to be distinguished from the will of all (*volonté de tous*), which is merely the sum of subjective individual (passionate) wills. The social contract then, through the law, imposes reason and restraint on passions.[49] The sovereign is the people, an original

[48] Jean Jacques Rousseau, *Du Contrat Social* (Pierre Burgelin ed, first published 1762, Flammarion Edition 1966) p I ch 6 and p 2 ch 1 and 2.

[49] Pierre Burgelin, 'Introduction' in Jean-Jacques Rousseau, *Du Contrat Social* (n 48) 20.

innovation. In ancient social contract theories (such as the Hobbesian), individuals in the state of nature were conceived as sovereign only to abdicate their freedom into the hands of the sovereign.

Rousseau aptly noted that:

> The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.[50]

As with Hobbes' position, if there is a breach of the pact, the subjects regain their natural freedom. Rousseau summarises all the contractual clauses as 'These articles of association, rightly understood, are reducible to a single one, namely the total alienation by each associate of himself and all his rights to the whole community.'.[51]

Once again, as with the theory of Hobbes, my understanding of the possibility of parcelling sovereignty, which may be considered problematic by many contractualist and realist authors, places the prism of EU distribution of competences and sovereignty at a different level. However, for the sake of this analysis, we may ask whether, in the competences where sovereignty or entitlement lies with the EU, the MS have effectively entered into a contract of alienation, and whether this aligns with the spirit of the agreement. Interestingly, and also related to the evolving nature of the EU construction, Rousseau states that each person, through the fundamental pact, has only alienated from his power, his freedom, and his property, the part which pertains to the community.[52]

In this vein, Joshua Cohen states that:

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[50] Rousseau, *Du Contract Social* (n 49) 51.

[51] Ibid.

[52] Henri Rodet, *Le Contrat Social et les idées politiques de J.-J. Rousseau* (Arthur Rousseau 1909) 200.

> Rousseau's solution to the fundamental problem is his ideal of a free community of equals: free, because it ensures the full political autonomy of each member; a community, because it is organised around a shared understanding of and supreme allegiance to the common good; and a community of equals-a democratic society-because the content of that understanding reflects the good of each member.[53]

This definition fits perfectly well with the EU as a political project, where MS, while maintaining their own identities, values, and casuistry, freely agree to live together as equals, establishing treaties and legislation guided by a conception of the common good (founding values and principles of the EU) through social cooperation, and in our case scenario, solidarity. Cohen follows:

> Rousseau's ideal of a free community of equals is free because it ensures the full political autonomy of each member; it is a community because it is organized around a shared understanding of a supreme allegiance to the common good; and it is a community of equals—a democratic society—because the content of that understanding reflects the good of each member.[54]

Again, the parallelism with the EU is obvious, where legitimate authority is compatible with the sovereignty and freedom of the MS.

Rousseau then distinguishes between the social pact that brings the political body into existence and justifies the terms of association and the legislation that will give movement to it.[55] Despite Rousseau considering sovereignty as indivisible and inalienable, this partial alienation of the political subject may bear some resemblance. A question that also arises is: when the political association is formed, is it the community that decides which matters are of interest to it? This query delves into the heart of democratic governance,

[53] Cohen (n 10) 10.

[54] Ibid 16.

[55] Rousseau, *Du Contract Social* (n 48) 73. See also Cohen (n 10) 24.

where the allocation of power and determination of communal interests is a crucial aspect of collective decision-making.

III. The EU Social Contract – Pre-normative, Normative and Imaginary Compounds

The proposed classification comprises of two primary sections: the pre-normative and normative. In the normative section, the codification of the EEC and later the EU in treaties serves as the determining element, while in the pre-normative section, the normative perspective is not the dominant factor. As I will discuss in detail later, the dogmatic element of the EU social contract constitutes the fundamental structure, indicating that attachment and respect by the parties exist in pre-contractual conditions. By applying the pre-normative concept (envisioned by the pioneers) and the normative concept (legally incorporated into the treaties and legislation) to the EU social pact, the objective is to underscore that the desires and aspirations were not only rationalised but also tailored to align with the primary objectives of the Union.

1. Pre-normative sense

Following this delineation, I believe that the declarations, negotiations, and visions of Churchill, Adenauer, Schuman, Monet, and others from 1946 to July 23rd, 1952 (the date of the signing of the Paris Treaty establishing the European Coal and Steel Community (ECSC) and creating a common market for coal and steel, as the first founding treaty of the European Community), can be regarded as part of the original 'pact of association' which was subsequently codified in the Treaty and reiterated whenever the Treaty was amended.

It is challenging to confine the scope of this non-codified original social pact, but it would encompass elements ranging from the speech delivered at the University of Zurich on September 19th, 1946, advocating for the Union of States of Europe (or any similar appellation), to the establishment of a

Council of Europe and the Franco-German partnership, culminating in the Schuman Declaration of May 9th, 1950. This declaration proposed the formation of a ECSC with the aim of fostering peace and solidarity between France and Germany, notwithstanding their historical enmity.[56]

The Schuman Declaration, influenced by Jean Monet, stands as a cornerstone of European integration, a pivotal political proclamation underscoring the imperative of solidarity for self-preservation, peace attainment, and the mitigation of post-World War II Europeans' apprehension of a new conflict. From a normative viewpoint, the principle of solidarity was enshrined in the Preamble of the 1951 treaty establishing the ECSC, laying the groundwork for subsequent European treaties. The Preamble of the Treaty of Maastricht (1992) functioned as a symbolic 'birth certificate,' furnishing a constitutional framework and a sense of collective identity for the European project, cementing the notion of solidarity as a guiding principle for the Union's future endeavours.[57]

The reference to solidarity in the preamble of the Treaty reflects the historical backdrop and sets the stage for the progressive political integration envisioned by the EU. The preamble of the Maastricht Treaty not only encompasses an essential interpretive principle but also issues a declarative statement on its purpose, elucidating principles of positive law. The Treaty of Lisbon fortifies the concept of solidarity, with Article 2 of the TEU enshrining solidarity among the common values of the MS that must prevail. Its inclusion in this article carries significant political and legal ramifications,

[56] European Commission: Directorate-General for Communication, The Schuman Declaration of 9 May 1950 (Publications Office 2015) <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 11 September 2024.

[57] Antoni Abat i Ninet and Acar Kutay, 'Europe's Lack of Solidarity in its Response to the Humanitarian Crisis. Jeopardizing the European Union's Constitutional Imaginary' (2020) 61 Revista Catalana de Dret Públic 99.

as a breach of the value of solidarity can trigger the application of measures outlined in Article 7 of the TEU.[58]

This special protection is designed to lend tangible applicability and a deterrent quality to the value, preventing it from remaining merely aspirational. Solidarity has now become a fundamental legal principle within the Union.[59] This emphasis on solidarity particularly reinforces, from an originalist standpoint, the recent calls for the renewal of the EU social contract, as mentioned earlier in this article. In other words, using the EU social contract to uphold private property as a foundational value of the Union, to advocate for ordoliberal or neoliberal values as emblematic of the EU, or to champion policies endorsed by xenophobic and Eurosceptic actors, would breach the founding values and diverge from the original conception of the EU social contract. Such actions would necessitate the formulation of a new social contract, implying a different political organisation.

2. Normative

The codification, mandated by the prevailing political-legal logic of our era, spans from the initial pact of agreement and its primary objectives within the ECSC of 1951 to Article 2 of the TEU and the codification of the CFR. Like any process of legal adaptation, it entails the legitimisation of law as a source of obligation and self-imposition. Moreover, it underscores the significance of the principle of the rule of law, which obliges every individual, institution, or public office to subject their actions to the dictates of law; thus, establishing the supremacy of law as an expression of the general will.

The indispensable process of legal rationalisation within treaties implies that certain elements of the social contract may not be explicitly delineated in legal norms unless we acknowledge that the EU social contract does not

[58] Ibid.

[59] Ibid.

surpass the contents of the Treaties. Conversely, the process of codification, as a rationalisation process, elucidates the *raison d'être* of the EU. The EU social contractors, as rational beings comprehending the foundational values and principles of the EU and the CFR, are now directly interlinked as members of the political organisation.

The meta-legal and ethical principles, alongside the founding values of the EU and the CFR, constitute an integral aspect of the EU social contract, encapsulating its essence and rationale and embodying the dogmatic facet of EU material constitutionalism. These founding values and principles remain immutable even as new contractors join the political organisation. This constitutive identity of the EU predates democratic deliberation and decision-making undertaken within the social contract. In essence, participation in discussions necessitates alignment with these meta-ethical values, which underpin the political organisation. Otherwise, participation is precluded. Following Rousseau, legislation serves to animate the body formed within the social pact, where 'public enlightenment' culminates in the fusion of understanding and will within the social body.[60]

Regarding aspects of the EU social contract currently under scrutiny, dissemination of the aforementioned theory can provide a comprehensive understanding of the framework and the various topics encompassed by the social contract (including urban and rural development, technological advancements, gender equality, environmental protection, and digitalisation), as well as the imperative to prioritise specific founding values or principles. For instance, the EU's adherence to the founding value of the rule of law or its emphasis on the principle of solidarity may be underscored. Additionally, the EU social contract encompasses issues such as the European Green Deal and its implementation, security concerns, migration policies, climate change mitigation, digital transformation, healthcare matters, the

[60] Rousseau, *Du Contrat Social* (n 48) 77.

role of religion in the public sphere, the potential establishment of an EU army, and others.

It is worth noting that these lists of elements may not necessarily align with those of the Member States' social contracts. Despite the EU social contract being considered a social contract among social contracts, with the EU possessing its own legal and political personality, it is not inherently required to correspond to the elements of the Member States' social contracts. A potential convergence of social contract elements, such as specific Christian founding values (encountered in Hungary, Poland, or Romania), can coexist with those of the EU, as long as they do not directly contradict the Union's founding values and principles. However, the converse is not necessarily true. Therefore, the evolution of the EU did not transpire spontaneously, and these states willingly acceded to membership.[61]

3. Symbology and imaginary

A second cornerstone of the EU social contract lies in its role within European political symbology and constitutional imaginaries, as Blokker aptly advocated, enabling citizens to play a crucial role in reinventing the EU and shaping our political project.[62] Thus, an inclusive and democratically participated social contract can serve as a tool to address

> A significant dimension of the EU's "falling short" […] due to a lack of imagination and a persistence of political elites and institutions in outdated modes of operation, largely grounded in a technocratic pursuit of "scientific rationalisation," which subordinates politics to expertise.[63]

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[61] See *Buhuceanu and Others v. Romania* App No 20081/19 (ECtHR, 25 September 2023); Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* ECLI:EU:C:2021:1008.

[62] Paul Blokker (ed), *Imagining Europe: Transnational Contestation and Civic Populism* (Palgrave Macmillan 2021).

[63] Blokker (n 62) 1, citing Jürgen Habermas, *Toward a rational society: Student protest, science and politics* (Heinemann Educational 1971).

The renewal of the pact of association may contribute to reversing myopic approaches to European politics by promoting individuals' engagement in the European project.[64]

Certainly, the proposal of this paper can be situated within the creative theories of social democratic imaginaries that have emerged in recent years.[65] As Neumann remarks:

> the appeal to EU social imaginaries encompasses inquiries not only into horizons of cultural meaning that fundamentally shape the EU but also into their further articulation as instituted (and instituting) cultural projects of power and social action.[66]

From the perspective of the EU social imaginary, the social contract is both creative and social. While the normative aspect of the social contract mainly represents the rational dimension of the phenomenon, the imaginary, as an element of the human condition, represents the institution of the EU, configuring key institutions of our society as a mixture of social imaginary significations.[67]

This reference to the EU social contract, embedded in the creation of a common symbology and imaginary, will play, in Gauthier's terminology, a key role in ideological terms.[68] For him, ideology is part of the deep structure of self-consciousness, understood as the capacity of human beings to conceive themselves in relation to other humans, human structures, and

[64] Blokker, *Imagining Europe* (n 62) 6.

[65] Suzi Adams and others 'Social Imaginaries in Debate' (2015) 1 (1) Social Imaginaries 15

[66] Sabine Neumann, 'Spatializing "Divine Newcomers" in Athens' in Thomas Galoppin, Elodie Guillon et al (eds), *Naming and Mapping the Gods in the Ancient Mediterranean* (De Gruyter 2022) 826.

[67] Suzi Adams and others, 'Social Imaginaries in Debate' (n 65) 21, citing Cornelius Castoriadis, *The Imaginary Institution of Society* (MIT Press 1987) 359.

[68] Gauthier, 'The Social Contract as Ideology' (n 5) 132.

institutions.[69] In this sense, the EU social contract may reinforce the existence of this common structure. The ideology encompasses everyone so that, as more people attain self-awareness, they do so in terms provided by the deep structure of our thought - in terms of social contract and contractarianism.[70]

However, the use of the term ideology, understood in post-Marxist terms, has also been conceived and related to as 'means of domination'. As Komárek remarks on such interpretation, ideology is primarily an instrument of domination. It 'reifies' human experience, making the products of human activity (such as markets or a particular distribution of rights, especially property) appear as natural and fixed.[71]

Therefore, an alternative narrative and conceptualisation have been used to refer, from a less dominative sense to symbology and political imaginary. As Přibáň remarks, 'institutions, like human beings or concepts, have a social existence; they are created, used, expanded, criticised, blended, abandoned, and replaced by other concepts with new semantics and persuasive force'.[72] He continues, noting that 'the imaginaries of statehood, nationhood, European polity, and transnational societal integration are not products of theoretical speculations and political programs'.[73]

This a-legal perspective transcends the normative sense accommodated by the dogmatic part of the treaties and its deontology. This does not mean that there is no legal reference or consequence of the symbology attached to the

[69] Ibid 131.

[70] Ibid 163.

[71] Jan Komárek, *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 3. See also Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).

[72] Jiří Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium, and Communitas' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 21.

[73] Ibid 21.

EU social contract call. On the contrary, the plea to reinvigorate the pact of association can also be understood as a further step towards a kind of constitutionalism that has emerged in the past decades in the EU, reaffirming its utopian character.[74]

Komárek aptly states:

> Constitutional imaginaries are understood as sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. They are as important as institutions and officeholders. They provide political action with an overarching sense and purpose recognized as legitimate by those governed.[75]

Consequently, the EU social contract may play an important role in strengthening, from a symbolic perspective, the narratives and purposes of the EU imaginaries and European institution-building.[76] This is especially true, if we understand political imaginary, as Přibáň remarks, as 'the symbolic capacity to present the pluralistic construction of social reality as one commonly shared and meaningfully constituted polity'.[77]

As an example, we can consider whether EU's response to the brutal military aggression of Russia toward Ukraine can be traced as a central semiotic image of the EU social contract and founding values. Thus, the Russian intervention has been fuelled by Kyiv's aim to join the EU and openly and publicly commit to adhering to the EU founding values and principles. Russian aggression toward Ukraine is a direct challenge to the EU social contract and to a candidate country, a potential contractor that freely and

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[74] Jan Komárek,'European Constitutional Imaginaries: Utopias, Ideologies, and the Other' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 1.

[75] Ibid 1.

[76] See András Jakab, *European Constitutional Language* (Oxford University Press 2016) 63.

[77] Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium, and Communitas' (n 72) 1-10.

peacefully wants to adhere to the political organisation. Additionally, it is also an attack on the EU socio-political and constitutional imaginary, as it directly assaults our social imaginary significations.

IV. A Twenty-First Century-Social Contract

From a more theoretical perspective and tracing the historical development related to social contract theory, my current understanding of contractual theory necessarily encompasses the works of John Rawls, one of its foremost modern exponents. Rawls revitalised the idea of social contract theory after a period when it fell out of favour with political philosophers.[78] Additionally, the work of Jürgen Habermas is crucial in understanding how individuals may deliberate, communicate, and decide in the public sphere, thus shaping the social contract.[79]

Justification is not simply about providing evidence or deducing conclusions on political legitimacy or morality from established premises. Instead, the contractual model elucidates the rationale that connects our perspective as individuals with specific interests and objectives to our perspective as members of society.[80] In our case, the perspective, interests, and objectives of EU inhabitants (not necessarily tied to the citizenship of a MS) are aligned with our perspectives as members of the Union. In his *Theory of Justice*, Rawls posits that we can view a political system as a mechanism that makes social decisions when it is informed by the viewpoints of representatives and electors.[81] The understanding of a democratically deliberated social contract nourishes this conception of the political system.

Following the methodology outlined in this paper, we can assert that the proposal for an explicitly democratically deliberated and decided EU social

[78]John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999).

[79]Jürgen Habermas, *Theorie des kommunikativen Handelns* (Surkhamp 1997) vol 2.

[80] Ibid.

[81] Ibid 228.

contract also reflects certain Rawlsian characteristics. Rawls argues that the selection of the two principles - the first principle concerning fundamental liberties, and the second principle, which encompasses access to leadership positions and responsibility and wealth and income distribution - arises through a contract.[82] Similar to Rawls, I believe that some of the founding values of the EU are highly abstract and intended to serve as final public criteria for the basic structure, ensuring justice and reasonableness for free and equal persons.

In this sense, as Nussbaum remarks, Rawls assumes that the principle of justice applying to each society has already been fixed.[83] She states that the 'basic structure' of a society is defined as 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.[84]

This Rawlsian conception of the pre-contractarian "natural law" tradition perfectly encapsulates the epistemological framework proposed in this paper for a contemporary EU social contract. In essence, the 'natural law' and fundamental rights and duties are represented by Article 2 of the TEU and the CFR, serving as the prerequisites for engaging in dialogue and decision-making regarding the EU social contract. Following Rawls, these are the principles of justice that are deemed justified because they were established through consensus in an original position of equality, or, if not initially perceived, they become evident through philosophical reflection.[85] These principles of justice are largely embraced by the EU, upheld by institutions, and adjudicated by judges, ensuring regular adherence and appropriate interpretation by authorities.[86]

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[82] John Rawls, *The Theory of Justice* (n 78).

[83] Martha C. Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' (2004) 32 (1) Oxford Development Studies.

[84] Nussbaum (n 84) 5, citing John Rawls, *The Theory of Justice* (n 78) 32.

[85] John Rawls, *Political Liberalism* (Columbia University Press 1993) 39.

[86] Ibid 79.

In this context, EU contractors find themselves in a sort of Rawlsian original position where everyone favours the same founding values and principles, along with the CFR. In Rawls's terms: 'the agreement in the original position is unanimous, yet everyone is situated so that all are willing to adopt the same principles'.[87] Certainly, the EU aligns with that of a well-ordered political association, relatively homogeneous in its basic moral beliefs, and characterised by broad agreement on what constitutes well-being. This mirrors Rawls's concept of a united society and its political conception of justice, which serves as a model in his *Theory of Justice*. However, such a society would only be stable if everyone continued to adhere to the two principles based on an overarching moral theory that incorporates them as integral components. Yet, according to Rawls, uniform acceptance of a moral theory is implausible.[88]

Similarly, with the EU, evidence indicates that it is not entirely unified in its political conception of justice, leading to varying interpretations of the founding values and principles outlined in Article 2 of the TEU and even the CFR, as exemplified by Hungary, Poland, and Romania, as mentioned above. In response to this criticism, Rawls's concept of an overlapping consensus emerges as the most viable basis for EU political and social unity, ultimately fostering full acceptance and understanding of the essence of EU material constitutionalism.[89] I firmly believe that conflicting yet reasonable comprehensive interpretations and doctrines of the EU's founding values and principles, compatible with the full rationality of human beings as far as can be determined through a political conception of justice, can establish and maintain unity and stability amidst reasonable pluralism.[90]

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[87] John Rawls, 'Reply to Alexander and Musgrave' (1974) 88 Quarterly Journal of Economics 633.

[88] Rex Martin, 'Overlapping Consensus' in Jon Mandle J and David A. Reidy (eds) *The Cambridge Rawls Lexicon* (Cambridge University Press 2015) 588.

[89] John Rawls, *Political Liberalism* (n 87).

[90] Ibid 133-135.

In the envisioned application of the idea of overlapping consensus to our case scenario, the consensus and the reasonable doctrines endorse the dogmatic part of EU material constitutionalism, each from its own point of view. Again, in applying Rawls, the political principles underlying the basic structure differ from those governing personal and familial relationships, which are characterized by affection, unlike the nature of the political.[91] These central points of well-ordered societies may help to frame the scope of the EU democratic deliberated and participated social contract.

Another important consideration when applying Rawlsian work to the proposal of this paper is the division between domestic and international Rawlsian principles of the social contract.[92] The proposal of a democratic EU social contract calls for the involvement of individuals, EU, and MS institutions. This plural call has implications when applying Rawlsian theory. However, the dichotomy exposed by Nussbaum somewhat fades because the relationship between MS in the EU cannot be qualified as international, and even less so in the sense that Rawls defined in his work, despite states representing the interests of the peoples within them.[93] Rawls believes that the consensus on the principles of justice can also be achieved through philosophical argumentation, deliberation, and rationality and at this point, the famous debate between Rawls and Habermas comes into focus.[94] Despite this paper not delving into the debate among individuals within the framework of the new EU social contract, it is necessary to make some references in order to envision democratic participation and deliberation within the social contract framework.

The central premises of Habermas's theory of law and democracy, which may be analogically applied to social contract participation, are the principle

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[91] Ibid 137.

[92] Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' (n 84).

[93] See John Rawls, *The Law of Peoples* (Harvard University Press, 2001).

[94] See James Gordon Finlayson, *The Habermas-Rawls Debate* (Columbia University Press 2019).

of discourse and the principle of democracy.[95] The first of the principles implies that norms will be legitimate when free and equal citizens deliberate and make decisions in such a way that all can agree to them without coercion or distorted beliefs.[96] According to this principle, the validity of a decision is related to a 'rational consensus', in a sense that norms are valid only if those affected can agree to them as participants in a rational consensus.[97] For Habermas, the introduction of this principle presupposes that practical questions can be impartially and rationally decided.[98]

The legitimacy of the law, therefore, will ultimately be based on a communicative mechanism.[99] Another principle that Habermas introduces in his normative theory in '*Faktizität und Geltung*' is the principle of democracy, which consists of uniting the wills of citizens in acceptance of a legal norm that will be applied on their behalf.[100] As Habermas states, the main idea is that the principle of democracy arises from the connection of the principle of discourse with legal content, understanding this fusion as a logical genesis of rights, which must continue their gradual reconstruction.[101] Habermas defines the purpose of the principle of democracy as establishing a legitimate procedure to produce laws. Legitimate validity for legal norms can only be claimed based on a legally

[95] Antoni Abat Ninet and Josep Monserrat Molas, 'Habermas and Ackerman: A Synthesis Applied to the Legitimation and Codification of Legal Norms' (2009) 22(4) Ratio Juris 513.

[96] Ibid.

[97] Abat & Kutay (2009) citing Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998) 138.

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid 514.

articulated discourse to which all members of the juridical community affected by the norm give their consent.[102]

The principle of democracy presupposes the possibility of deciding rationally on practical questions and of engaging in all kinds of possible discourses from which laws derive their legitimacy. Consequently, our understanding of the EU social contract is intimately related and will give shape to this claim.

In '*Faktizität und Geltung*', Habermas does not renounce the universal values contained in human rights.[103] Therefore, we could say that his intention was to exclude morality from the theory, but he finds that he cannot do so entirely because he recognises the need for the role that morality plays in the foundation of universal rights. This contradiction affects universal rights—hierarchically, the most important rights of all, which are the focus of his work.[104] The proposal presented in this article considers that the dependence on and maintenance of morality, referred to by Habermas, is represented by Article 2 of the TEU and the CFR as the basic structure of the contract and the framework for democratic action.

V. Conclusion

Contemplating the context and reality in which we live, the EU, like any political organisation, needs to reduce the risk of political instability by implementing safeguards and measures to protect its contract of social association. Aligned with the founding values and principles of the EU and the increasingly democratic mandate in its functioning (as seen in the European Green Deal), this paper argues that the only way to address the exposure the EU social contract faces is by strengthening the principles of solidarity, democracy, and the rule of law.

[102]Abat and Monserrat (n 95) 513, citing Habermas, *Between Facts and Norms* (n 98) 175.

[103]Ibid.

[104]Ibid.

An original interpretation of the EU social contract lies in the leitmotifs that led to the creation of the EEC fear and solidarity as the way to respond to it. It is my premise that an institutionally and individually participated EU social contract will strengthen a new version of the agreement of association by promoting social dialogue, civic engagement, and EU integration. If, in its origins, the solution to fear and angst about a new conflict was solidarity, today's existential and political crises affecting the EU need to be addressed from the basic structure of the EU and democratic participation. In this sense, the social contract theory evolves from the legally and politically indeterminate and dispersed notion towards a more tangible, express, and solemn social contract, enabling individual deliberation and participation to collaborate in this task. If the EU social contract is democratically participated in, it will offer more possibilities to pave the way for a 'stronger together Europe', as highlighted by the President of the Commission, Ursula Von der Leyen.[105]

An institutionally and individually participated EU social contract will strengthen the agreement of association by promoting social dialogue, civic engagement, and EU integration. First, it overcomes the consent-based policing model by placing individuals at the centre of the social contract agenda. Although individuals can be bound by their consent, this consent must be real (explicit) and not fictional. Second, a tangible contract introduces a real contractual form governed by the principle of autonomy of the will. This principle means that the contract can be made on any non-prohibited matter, respecting the founding values and principles of the EU and the CFR. Then, the contract is perfected by express consent. Third, an open and transparent democratic participation and deliberation process on the express social contract increases the levels of inclusivity, sustainability,

[105]'2021 State of the Union Address by President von der Leyen' (*European Commission,* 15 September 2021) <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701> accessed 13 June 2024.

transparency, and accountability, fostering a more inclusive community. This approach opens new avenues for developing the societal aspect of the contract, also promoting an open society. Fourth, it allows to cultivate participatory forms that politically engage individuals in the social contract drafting, thus displacing political populism and other disruptive elements from the contract by 'popularising' the social contract as an institution through its content, development, and remarking Dworkin's well-known objection that an imaginary agreement cannot bind any actual person.[106]

The EU social contract is a unique opportunity to activate and enhance citizens' deliberation and participation in Europe, build a twenty-first century EU imaginary, and, following the wording of the preamble of the CFR, place the individual at the heart of the activities of the EU.

[106]Ronald Dworkin, 'The Original Position' in Norman Daniels (ed), *Reading Rawls*, (Blackwell 1975) 16.