The Red Lines of European Society

Article 2 TEU After Commission v Hungary

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In June 2021, the Hungarian Parliament adopted a law that professes good intentions but is devoid of them: Law No LXXIX of 2021 "laying down stricter measures in respect of persons convicted of paedophilia and amending certain laws adopted in the interests of the protection of children". It prohibits making content that depicts LGBTIQ* identities available to minors. It bans any mention of sexual orientations or gender identities beyond the heterosexual or cisgender norm in sex education. It restricts television programmes containing such content to the hours between 10 p.m. and 5 a.m., placing them in a similar category as pornography.

The law portrays non-heterosexual and non-cisgender persons as dangerous – that's the true political message. Following an infringement action, the Court of Justice ruled on 21 April 2026 that the law violates the values enshrined in Article 2 TEU, as well as numerous other provisions of EU law. According to the Court, the law suggests that such persons constitute a "fundamental threat to Hungarian and European society" (para 554). Their stigmatisation and marginalisation may foster "hateful conduct" and ultimately amount to establishing, maintaining, or reinforcing the "invisibility" of this part of society (para 555).

The decision is historic – and the Court wants us to understand it this way. By sitting in full court, it signalled that the legal profession, political actors, and the wider public should take note of it. Unpacking its 621 paragraphs will be the task of EU legal scholarship for the time to come. In the following, we focus on what we see as its two central innovations. First, the Court accepts the Commission's plea and acknowledges Article 2 TEU as a *separate* ground in infringement proceedings. After years of academic controversy, there is now clarity: Article 2 TEU *itself* is a justiciable provision that sets enforceable red lines. And second, the Court advances a *collective singular* to which it attributes the EU legal order: European society.

The legal order "of" European society

Until now, the question of who "owns" the EU legal order has remained controversial. Is it the collective of the Member States? The collective of their peoples? Or perhaps a European people? This is no theoretical question: how do we describe the totality of Europeans who are called upon almost on a daily basis to emancipate themselves from Trump's America, to defend themselves against Russia, or to take responsibility for climate change? The Court offers a response that is as simple as it is compelling. EU law is "a common legal order of a society in which pluralism prevails" (para 551). The society to which this formulation most plausibly refers to is European society as later mentioned in para 554 (on the concept, see here).

How persuasive is this claim? It will provoke incomprehension, even protest, among those who treat "society" and "people" as synonyms. Few would assert the existence of a European people. Yet the Member States, as authors of the Treaties, distinguish between the two concepts: Article 1 TEU speaks of an ever closer union among the peoples of Europe, while Article 2 TEU refers – since 2009 – to a society. Accordingly, the Member States seem to assume that European integration has brought forth a European society. Few would deny that national societies have, over the past seventy years, become deeply integrated. This process of European societal integration has reached a density that leads the Member States to speak of a single "society".

How convincing is this understanding of European integration? In sociology, there is no clear threshold at

which we start referring to one society. Such qualitative transformations emerge gradually. Yet, given the depth and breadth of seventy years of European integration, it appears justified to speak of a European society.

Today's invocation of European values supports this claim. Many sociologists, as well as the EU Treaties themselves, consider common values – widely shared normative convictions – to be constitutive of a society. The Union "is founded" on values, which the Court, through this judgment, seeks to defend. For a long time, these values seemed more the object of Sunday speeches rather than yardsticks for practical action. This has changed. Many European actors now portray Russia's war of aggression against Ukraine as a threat to "our" values. This is no empty rhetoric: it legitimises the confrontation of an aggressive nuclear power, the support of Ukraine at great cost, and the reception of millions of refugees.

The Hungarian case demonstrates that the meaning of these European values is contested. Yet such conflicts are no obstacle to the emergence of European society. Since Georg Simmel, we know that conflict can be a driver of social integration. A society may even emerge through the processing and resolving of such conflicts. This is what we observe in conflicts over the values in Article 2 TEU. Whether in the Euro crisis, the migration crisis, the rule-of-law crisis, the pandemic, or the Russian war of aggression: all these conflicts revolve around the values of Article 2 TEU. They were understood as conflicts over European rights, European democracy, European rule of law, or European solidarity. These values therefore provide a vocabulary to articulate conflicts within European society and to frame them as European conflicts. The fact that the specific meaning of each value remains controversial does not undermine, but rather underlines their social relevance.

Article 2 TEU as "separate" ground

Against this backdrop, the Court develops Article 2 TEU into a justiciable provision. For those following the development of EU law over the past decade, this step should hardly come as a surprise. Responding to the overhaul of the Polish judiciary, the Court began in 2018 to concretise the abstract values in Article 2 TEU. By linking these values to more specific Treaty provisions, it gradually forged standards for the Member States' legal orders. Over the past eight years, the Court has crafted a dense web of decisions. Today, this web appears stable enough to support the leap towards Article 2 TEU's self-standing application. The Court's confirmation that Article 2 TEU can be invoked as a "separate" ground in infringement actions thus emerges from a thick body of case law.

Following Advocate General Tamara Ćapeta's Opinion, the Court justifies its decision in two steps. First, it establishes that Article 2 TEU values contain – independently from concretising provisions – legal obligations. Some assume a "categorical difference between the affirmative statements of values made in TEU Article 2 and legal obligations" or consider them too indeterminate to create legal obligations. The Court counters such considerations by relying on the provision's wording (paras 529-530), its context (paras 531-534), and drafting history (para 535). The travaux of the European Constitutional Treaty, which introduced the contentious notion of values into today's Article 2 TEU, confirm the drafters' intention that these values should contain legal obligations for the Member States. On that basis, the Court asserts that the values are – "per se", "par elles-mêmes", "als solche" – legally binding (para 536).

In a second step, the Court confirms its jurisdiction to review compliance with these values. If a provision entails legal obligations – such as Article 2 TEU – it falls within the Court's mandate under Article 19(1) TEU to ensure that "the law is observed". This applies to all provisions not explicitly excluded from the Court's jurisdiction (para 540). Moreover, Lisbon removed the prior exclusion of Article 2 TEU's predecessor – Article 6(1) TEU-Nice – from the Court's jurisdiction (ex-Article 49 TEU-Nice). Article 7 TEU cannot exclude the Court's jurisdiction either. It foresees a different procedure following political logics and permitting stronger sanctions. Accordingly, there is no overlap between both procedures that justifies any exclusivity (in detail, see here).

The values' added value

Some ask why the Commission and the Court took the controversial step of activating Article 2 TEU as a separate ground in infringement proceedings (see also here). In its carefully crafted plea, the Commission had invoked the breach of many provisions of the internal market, such as the freedom to provide services, and several Charter rights. Why the recourse to values?

First and foremost, the finding that the Hungarian measures violate Article 2 TEU sends a powerful signal. They constitute not merely a "normal" breach of EU law, but a departure from the common foundation. Many rules and interpretations are open to reasonable disagreement. This is true even for fundamental rights, such as when freedom of the press is balanced against personality rights, or artistic freedom against copyright. Article 2 TEU, by contrast, is meant to mark what is beyond dispute.

Moreover, finding a violation of Article 2 TEU in infringement proceedings can affect other procedures aimed at protecting these values. It may inform an additional, distinct determination under Article 7 TEU, and may support assessments concerning the suspension of mutual recognition regimes, such as the European Arrest Warrant. Further, judgments finding a breach of Article 2 TEU could serve as a point of reference for freezing EU funds under the conditionality regimes. While political measures are unlikely in light of Hungary's new government, the Court has now opened this possibility.

Pushing constitutional frontiers

While *Commission v Hungary* marks an important leap in the Court's value-based jurisprudence, it is no endpoint. Rather, the justiciability of Article 2 TEU creates a series of new questions, which will occupy EU lawyers in the future. Does Article 2 TEU's justiciability encompass all elements mentioned in its first and second sentence – not only the rule of law, democracy, and human rights, but also solidarity, pluralism, or justice? Does Article 2 TEU have direct effect? If so, can it be invoked by individuals?

Another crucial question concerns the reach of Article 2 TEU as a separate ground of infringement. In *Commission v Hungary*, Article 2 TEU has been invoked alongside many other breaches. As such, the case was solidly embedded in the scope of other provisions of EU law. But could Article 2 TEU be invoked also if not supported by such other provisions? And how far would it reach? Unlike Article 19(1)(2) TEU or Article 51(1) of the Charter, the values in Article 2 TEU are neither limited to "fields covered by Union law", nor to situations in which the Member States are "implementing Union law". There is no area of the Member States' legal orders that is excluded from the scope of Article 2 TEU. The Court articulates this by stating that Article 2 TEU contains "horizontal obligations" (para 546).

At the same time, the Court acknowledges the importance of the European federal balance by setting a high threshold for breaches of Article 2 TEU. Any other interpretation would "deprive the limits imposed on the scope of other provisions of EU law, and, in particular, the provisions of the Charter … of all effectiveness" (para 550). For that reason, only serious fundamental rights infringements amount to separate violations of Article 2 TEU. Otherwise Article 51 of the Charter would become meaningless. While paragraph 552 speaks of "specific conditions derived from the scope" of Article 2 TEU, the Court refers *not* to the provision's "scope of application", but rather to the high threshold for finding a breach. This becomes especially apparent in the other language versions, which refer to Article 2 TEU's "portée" (not its "champ d'application"), its "Tragweite" (not its "Anwendungsbereich"), or its "alcance" (not its "ámbito de aplicación"). All this suggests – without yet deciding – that serious fundamental rights violations may, in exceptional cases, be reviewed beyond the confines of the Charter. The Court seems to accept the Reverse Solange doctrine (for a more recent articulation, see here).

Keeping a federal balance

The Court's move raises concerns for the Union's federal balance. Many areas that were considered

beyond the reach of EU law, such as state organisation, police, assembly, or electoral law, may now be subject to European standards. Nor does the Court allow derogations from Article 2 TEU based on national identity claims. While the Union must respect national identities under Article 4(2) TEU, this does not justify departures from fundamental values (paras 557-561).

To counter such concerns, the Court emphasises that "only manifest and particularly serious breaches" may give rise to a finding that Article 2 TEU has been breached. The present case meets that threshold, not least because the Court builds on its findings on other violations. It had found a violation of human dignity due to the law's "offensive and stigmatising effect", encouraging "the development of hateful conduct" (para 488), but also a breach of the essence of Article 21 of the Charter (paras 141, 233, 306, 414, 422). Thus, the Court limited its finding of a breach to just a few lines. Four paragraphs deal with the separate violation of Article 2 TEU in the concrete case (paras 553-556).

The specific yardsticks under Article 2 TEU remain thin – for good reasons. Article 2 TEU should be understood as drawing limits, not prescribing models for the Member States' legal orders. The Court should only draw red lines which Member States may not cross. Luxembourg is aware how sensitive the European federal balance is, as remembered by critical voices. So it is unlikely that it will develop detailed standards for the national constitutional orders on the basis of Article 2 TEU. Besides safeguarding the Member States' pluralism, such restraint preserves Article 2 TEU's societal function. The values it enshrines remain open to diverse concretisations and are often contested. Narrowing their meaning too far would shrink the space for reasonable disagreement and constructive conflict – one of the forces through which European society emerges.

Also concerns about encroachments on the Member States' constitutional identities seem overstated. The shared constitutional traditions of the Member States remain the primary reservoir for concretising the values. Common values and constitutional identities are – in the words of Andreas Voßkuhle – "communicating vessels" (p 117). There can be no EU values that conflict with core constitutional principles of the Member States and vice versa. *Commission v Hungary* demonstrates this. Which Member State constitution, including the Hungarian one, would allow measures such as the Hungarian ones? The answer: *None*.

Broad support, broad legitimacy

Some voices view the judgment as an illegitimate expansion of judicial power. Yet this jurisprudence enjoys the support of the European Council, the European legislature, the Commission, and most Member States – sixteen of which supported the Commission's action against Hungary. Moreover, it should be recalled that the judges are not appointed by the Union of European Federalists, but by common accord of the Member States' governments. Hungary agreed to the appointment – and, crucially, the reappointment – of every judge, including the President. The Lenaerts presidency, which has pushed the protection of the Union's values into a new dimension, has the Hungarian government's consent.

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