A European Society of Constitutional Interpreters

The Societal Forces Behind *Commission v Hungary*

Luke Dimitrios Spieker

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On 21 April 2026, the full court wrote history, finding for the first time a separate infringement of Article 2 TEU. Criticism followed immediately, rejecting the Court's interpretation of Article 2 TEU as an act of judicial activism or self-empowerment. On this reading, the activation of Article 2 TEU seems to have emerged largely from within the Court, side-lining political processes. However, this narrative is incomplete – it ignores the multiplicity of societal forces at play.

Landmark decisions come in different forms: some strike like a sudden thunderbolt smashing established doctrine to pieces, others arrive quietly revealing their potential only in retrospect, and still others are the outcome of a long, public, and controversial process. *Commission v Hungary* firmly belongs to the third type. To understand these processes requires a "thick description" Antoine Vauchez has called for, namely studying the social field from which landmark decisions emerge. This corresponds to "European society as a method", connecting EU legal studies to real-life conditions in which EU law operates. Such an analysis demonstrates that the activation of Article 2 TEU is much less an act of self-empowerment than a collective interpretation of the Court, Commission, Member States, civil society, and legal scholarship. Borrowing from Peter Häberle, we can see a *European society of constitutional interpreters* at work. The contribution tells their story.

The Court as Trailblazer

Let's begin where the conventional narrative starts: the Court. In 2012, when illiberal developments slowly emerged, possible yardsticks were far from settled. The breakthrough came in 2018 with *ASJP*, in which the Court started concretising Article 2 TEU through more specific Treaty provisions. While many judges, such as Thomas von Danwitz, Koen Lenaerts, or Marek Safjan, underlined the connection to Article 2 TEU, its justiciability remained controversial. Advocates General Tanchev and Pikamäe, for instance, rejected the idea that Article 2 TEU could serve as "standalone" yardstick. On the other side of the spectrum was Lucia Rossi, who joined the Court in October 2018 and who openly pressed for Article 2 TEU's justiciability.

Despite this controversy, indications that Article 2 TEU has a legally binding character became more pronounced. In the rule of law conditionality judgments, the full court emphasized that "Article 2 TEU is not merely a statement of policy guidelines or intentions…" (para 232). Nonetheless, this came with a caveat: these values "are given concrete expression in principles containing legally binding obligations". In this sense, the Court might have opened the door towards a self-standing justiciability of Article 2 TEU – but other actors actually crossed the threshold.

The Commission as Engineer

The Court has the final word on any interpretation brought before it. Yet, as Peter Häberle argued, this interpretation is shaped by a multiplicity of "*Vorinterpreten*". The Commission's Legal Service is a central actor in this respect. Conventionally, it is cast as an engine of EU law's development. For a long time, however, the institution remained cautious, following the Court's lead. In 2013, Commissioner Viviane Reding saw no avenue but Treaty change to address developments in Hungary and Poland. Even after the Court's breakthrough in *ASJP*, the Commission moved on safe ground, either on internal-market terrain (Hungary) or within the established case law corridor (Poland).

The shift came between 2018 and 2020. While the incoming von der Leyen Commission carried an ambitious agenda, the Legal Service grew receptive to "creative legal engineering" – far-reaching proposals with controversial legal bases, such as the Rule of Law Conditionality Regulation (Article 322 TFEU), NextGenerationEU (Article 122 TFEU), the Minimum Wage Directive (Article 153 TFEU), or the EMFA (Article 114 TFEU). The appointment of Daniel Calleja-Crespo as Director-General in 2020 seems to have reinforced this approach. His vision surfaces in a reflection on the Treaties' "untapped potential": comprehensive reform being unattainable, the Treaties must be read dynamically to meet the Union's challenges. In short: Where there is a political will, there is a legal path. Scholarship is split on the legitimacy of this approach – some see a legitimate guarantee of the Union's capacity to act, others lament the erosion of the law's restraining force.

The unexpected invocation of Article 2 TEU in the Hungarian infringement proceedings emerged from this context of creative lawyering. Applications are usually constructed by the agents. Still, such a move in an "affaire sensible" requires a blessing from the very top, where the tone was set: immediately after the Hungarian law was adopted, von der Leyen and the responsible Commissioners referred to a breach of the Union's "fundamental values". Against this backdrop, the Legal Service added the central charge: "*the contested provisions also violate the values laid down in Article 2 TEU.*"

Yet, the Legal Service did not pursue a maximalist approach. At the hearing Calleja insisted that Article 2 TEU could be invoked before the Court only within the scope of other Union law. Moreover, parallel Article 2 TEU-based procedures, such as the "Lex Tusk" and Hungary's "Sovereignty Act" were followed by visible restraint, Article 2 TEU vanishing from the later application.

The Member States as Driver

While the Commission engineered the proceedings, the push to invoke Article 2 TEU came from elsewhere: a large group of Member States. A couple of months before the Hungarian law, 14 Member States had issued a declaration expressing their commitment to Article 2 TEU, condemning the stigmatisation of LGBTIQ* persons, and explicitly contemplating a "litigation strategy". After the law's adoption, 18 Member States branded the measures as breach of the EU's "core values" and called upon the Commission to initiate proceedings. After another letter of 17 Member States, the President of the European Council placed the matter on the agenda, leading to an exceptionally heated meeting.

This active role is also reflected in the proceedings before the Court, in which – alongside the European Parliament – 16 Member States intervened in the Commission's support. All Member State representatives affirmed the legally binding nature of Article 2 TEU. Beyond this general agreement, numerous representatives articulated their own approaches, concerns, and limits. In this sense, the Member States acted as "legal entrepreneurs", actively participating in a collective process of constitutional interpretation.

When the previous Hungarian government doubled down on its stigmatising policies, banning Budapest pride, the consensus shifted even more. In May 2025, 20 Member States – including the Czech Republic, Latvia, Lithuania, and Slovenia – signed a statement condemning these measures as "contrary to the fundamental values of human dignity, freedom, equality and respect for human rights, as laid down in Article 2". The qualification of the Hungarian policies as a breach of Article 2 TEU is thus a collective assessment of a broad majority of Member States, bridging West and East.

Civil Society as Amicus

If the Member States and the Commission occupied the foreground, civil society organisations seem to have taken a backseat. Indeed, Article 258 TFEU is no tool for strategic litigation by civil society actors. It vests an unchecked discretion in the Commission and admits no *amicus curiae*. NGOs can document facts or prepare assessments, but they can only lobby, not litigate.

Still, that marginal position has proven less inert than the procedural setting suggests. Civil society actors have grown increasingly visible around the values agenda, rallying for the protection of LGBTIQ* rights, such as RECLAIM, ILGA-Europe, or Háttér Society. Especially in the Hungarian infringement proceedings, they have acted as a sort of *amicus litigatoris*, pushing the Commission, pressing Member States to throw their weight behind it as interveners, and flagging stakes and legal options. This has helped converting diffuse political support into actual procedural interventions.

Should Article 2 TEU produce direct effect and should it be invoked by individuals in national courts, civil society organisations would take an even more active role. This is already happening in the field of judicial independence, where litigation is brought by judges' associations or NGOs.

Legal Scholarship between Torchbearer and Trainbearer

This leads, finally, to the role of legal scholars. Early on, scholarship acted as a *torchbearer* lighting paths ahead. Already in 2012, a group around Armin von Bogdandy proposed activating the values of Article 2 TEU beyond Article 51 of the EU Charter as part of the substance of Union citizenship. At roughly the same time, Kim Scheppele suggested bundling discrete breaches under the banner of Article 2 TEU as "systemic infringement action".

Neither idea was taken seriously at first. Rather, there was a "general agreement" on the limited legal effects of Article 2 TEU. Even the sturdiest defenders of the European rule of law expressed scepticism. Dimitry Kochenov and Laurent Pech concluded that "Article 2 TEU cannot be relied upon … to initiate an infringement action under Article 258 TFEU". *ASJP* seemed to reflect this caution, concretising the rule of law through Article 19(1)(2) rather than applying Article 2 TEU directly.

In the wave of case law following *ASJP*, the relationship of scholarship and practice shifted. While Luxembourg marched ahead, scholars seemed to become the Court's *trainbearer*, assessing and systematising the rapidly evolving case law. However, the interpretation of judgments is no neutral exercise. It can inspire a particular reading and thus push further development. A case such as *ASJP*, for instance, can be interpreted narrowly as independence case building on existing case law, as rule of law case responding to developments in Poland and other Member States, or as values case initiating the operationalization of Article 2 TEU. It was the latter reading that cleared the path towards *Commission v Hungary*. As such, there is a productive interaction between scholarship and practice.

This interaction is often criticized as *collaboration*. The image of academics endorsing Article 2 TEU's justiciability has shifted from naive, eccentric inhabitants of an ivory tower to academic allies of the EU institutions, lacking any "critical distance to the legal powers that be", or even to impact-hungry scholactivists hiding behind the fig-leaf of scholarly objectivity. Stripped of its polemic, this critique reveals two conceptions of legal scholarship: the external observer who describes and criticises the legal order, and the internal participant who actively participates in building it. To me, *both* seem legitimate.

By 2020 the scholarly consensus had flipped to an "overwhelming agreement" on Article 2 TEU's justiciability. Deeper criticism formed only years after the breakthrough in *ASJP*. Yet, by the time it matured, the development was already set in motion: the question was no longer *whether* Article 2 TEU would be judicially activated, but *how*.

A European Society of Constitutional Interpreters?

Commission v Hungary was not handed down by the Court acting in splendid isolation. It was brokered by a European society of constitutional interpreters: by a Legal Service overcoming its caution, by Member States pushing the institutions, by civil society actors pressing Member States to throw their weight behind the Commission, and by a scholarship that lit the path before the institutions could walk it. Reconstructing that process is to displace the lazy narrative of the lone, over-reaching Court. Instead, a large part of

European society was involved in this collective constitutional development.

This *descriptive* finding can flip into a *normative* claim. The more a certain interpretation is embedded in society, the higher its societal acceptance. This claim will raise objections. Some may argue that courts should not decide along the lines of diffuse majorities. They are designed as counter-majoritarian institutions, their currency is legal persuasiveness, not societal support. Others might perceive this European society of constitutional interpreters as an "opaque majority of unelected kings and queens", negotiating fundamental issues outside the democratic fora.

Yet, a central feature of Häberle's society of constitutional interpreters is its *openness*. He aimed at democratising constitutional interpretation. In this spirit, inclusivity, representativeness, and deliberation should guide the interpretation of Article 2 TEU. Institutions, MEPs, national governments, parliamentarians, or courts, civil society organisations, and other social forces – associations, unions, religious groups – should get involved. The values in Article 2 TEU are the values of European society after all. The process leading to *Commission v Hungary* shows how such an involvement can work.

ABOUT THE AUTHOR

Luke Dimitrios Spieker

Luke Dimitrios Spieker is a Postdoctoral Researcher at DFG Research Training Group: DynamInt at Humboldt University of Berlin, a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and Associate Editor at Verfassungsblog.

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