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‘Concretised’, ‘Flanked’, or ‘Standalone’? Some Reflections on the Application of Article 2 TEU

Lucia Serena Rossi[*]

TABLE OF CONTENTS: 1. The pending case *Commission v Hungary* (C-769/22) – 2. Respect for Article 2 TEU as a duty inherent to the EU membership – 3. A system of interconnected values and principles – 4. The relationships between Article 2 TEU and the Charter of Fundamental Rights – 5. The Hungarian overall challenge to Article 2 TEU – 6. Applying Article 2 TEU: ‘concretised’, ‘flanked’, or ‘standalone’?.

ABSTRACT: The present article aims to assess some delicate constitutional issues raised by the pending case *Commission v Hungary* (C-769/22). It first explains the general duty for Member States to respect the values of Article 2 TEU as an essential requirement of their EU Membership, within the meaning of the judgment *Repubblika*. Then, it dwells upon the model provided by Article 2 TEU, the interconnection among its values and principles, and the connections of those values with other principles affirmed by the Treaties and analyses the extraordinarily comprehensive violation of that model by the Hungarian legislation. Finally, it argues that there are three different potential dimensions for applying Article 2 TEU.

KEYWORDS: Article 2 TEU – self-standing application – non-regression – model of EU values – Hungary – infringement action.

1. The pending case *Commission v Hungary* (C-769/22)

The pending case *Commission v Hungary*,[1] whose hearing was broadcast on 19 November 2024,[2] provides an opportunity to elaborate more general reflections on the

[*] Full Professor of EU Law at Alma Mater Studiorum, University of Bologna and former Judge at the CJEU (2018–2024), luciaserena.rossi@unibo.it. Many thanks to Giacomo Di Federico, Federico Casolari and Loïc Azoulai for their valuable comments.

[1] Case C-769/22 *Commission v Hungary* (action brought on 19 December 2022, pending).

[2] For first comments and reports on the hearing, see S Okunrobo, ‘Case C-769/22: A Further Step in the Protection of the Fundamental Rights within the European Union’ (European Law Blog, 17 May 2023), at www.europeanlawblog.eu; T Chopin and E Leclerc, *The Legal Case against Hungary’s Anti-LGBTIQ+ Law: A Shift in the Protection of the Fundamental Rights of the European Union* (Notre Europe Jacques Delors Institute Policy Brief, October 2023), at institutdelors.eu; W Bruno, ‘Three Questions to Rule (On) Them All: The Full Court Hearing in the Case Commission v. Hungary on the

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use of Article 2 TEU. This case concerns a challenge to the values of Article 2 TEU so new and unparalleled in gravity that it required the Court to sit in full session. The Commission brought an infringement action against Hungary for issuing in 2021 Law LXXIX, adopting stricter measures supposedly against paedophilia and amending certain laws for the protection of children.

According to the Commission, Hungary has failed to fulfil its obligations under EU law by prohibiting children from accessing content portraying gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality; by imposing on media service providers an obligation to classify under a particular category and between 22.00 and 05.00, all programmes the essential element of which is the promotion or portrayal of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, and by excluding such programmes from classification as public interest media or as socially beneficial advertising; by imposing on the Media Council an obligation to request that the Member State having jurisdiction over the media service provider take effective measures and take action to put an end to infringements detected by the Media Council; by prohibiting professions related to sexual culture, sexual life, sexual orientation and sexual development from being aimed at the promotion of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality and by imposing on the body with direct access to the registered data an obligation to make available, to persons entitled to access them, the registered data of persons who have committed, against children, offences against sexual freedom and sexual morality.

The Hungarian legislation applies to different subjects: all children or young adults on the Hungarian territory, their parents, churches, schools, media services and electronic commerce providers. Claiming to fight paedophilia, the new legislation imposes on those subjects different restrictions or obligations, with the declared objective to prevent children and young adults from accessing any content that is pornographic, pictures sexuality, represents or promotes gender identities not corresponding to sex at birth, sex reassignment, or homosexuality. That legislation received very critical opinions from the Venice Commission[3] and at the EU institutional level.[4]

Justiciability of EU Values against Member States (C-769/22)' (EU Law Live, 25 November 2024); L Kaiser, A Knecht and LD Spieker, 'European Society Strikes Back: The Member States Embrace Article 2 TEU in *Commission v Hungary*' (Verfassungsblog, 26 November 2024), at verfassungsblog.de.

[3] Venice Commission, 'Opinion 1059/2021 on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children' (10–11 December 2021).

[4] See, in particular, European Parliament, 'Resolution of 8 July 2021 on breaches of EU law and of the rights of LGBTIQ citizens in Hungary as a result of the legal changes adopted by the Hungarian Parliament' (2021/2780(RSP)). On the reactions of the EU institutions, see M Bonelli and M Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary' (2023) 30 *Maastricht Journal of European and Comparative Law* 3.

The Commission's action is based on several pleas concerning the violation of different sources of EU law. Some alleged violations regard internal market rules, notably the freedom to provide services, such as Article 56 TFEU, the Audiovisual Media Services Directive,[5] the E-Commerce Directive[6] and the general Service Directive.[7] Others concern fundamental rights, as protected by the General Data Protection Regulation (GDPR)[8] and the Charter of Fundamental Rights (notably by Articles 1, 7, 8, 11 and 21). Moreover, the Commission also charges Hungary of violating Article 2 TEU, not in combination with other EU rules, but as an autonomous plea. While the other pleas, as serious as they can be, are 'classical', the one concerning the use in an infringement action of Article 2 TEU as a self-standing provision is new. It is precisely on that plea that the parties intervening at the hearing were requested to focus and to concert their pleadings ('*concentration et concertation des plaidoiries*').

The present article aims to assess some delicate constitutional issues raised by that plea, whose importance stretches far beyond the pending case, arguing that there are three different potential dimensions for applying Article 2 TEU. It will first explain the general duty for Member States to respect the values of Article 2 TEU as an essential requirement of their EU membership, within the meaning of the judgment *Repubblika* (section 2); it will then dwell upon the model provided by Article 2 TEU, the interconnection among its values and principles, and the connections of those values with other principles affirmed by the Treaties (section 3) and with the Charter of Fundamental Rights (section 4); it will subsequently analyse the extraordinarily comprehensive violation of that model by the Hungarian legislation (section 5). Finally, the article will try to answer three important questions concerning the different uses of Article 2 TEU in relation to the powers of the Union (section 6).

2. Respect for Article 2 TEU as a duty inherent to the EU membership

In *Achmea*, the Court of Justice affirmed that EU law is based 'on the fundamental premiss that each Member State shares with all the other Member States and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU'.[9]

[5] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[6] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[7] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[9] Case C-284/16 *Slovak Republic v Achmea BV*, EU:C:2018:158, para 34 and the case law cited.

According to the Court,

> 'Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU'.[10]

Respecting the values and principles of Article 2 TEU is an essential requirement of the EU membership, as it results from a joint reading of Article 2 TEU and Article 49 TEU.[11]

The inherent connection between Article 2 TEU and the EU membership emerged for the first time in *Wightman*,[12] with reference to the values of liberty and democracy. The Court noted that:

> '[a]s is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union […] the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values'.[13]

In *Repubblika*[14] the Court made a step forward.[15] First, it noted that the European Union is composed of states that, according to Article 49, have freely and voluntarily committed themselves to respect the common values referred to in Article 2 TEU and to 'undertake to promote them'.[16] Then the Court added that 'compliance by a Member State with the values enshrined in Article 2 TEU is *a condition for the en-*

[10] Ibid.

[11] LS Rossi, '2, 4, 6 (TUE)…l'interpretazione dell'"Identity Clause" alla luce dei valori fondamentali dell'UE' in R Adam, V Cannizzaro and M Condinanzi (eds), *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli 2018) 858; LS Rossi, 'La valeur juridique des valeurs, L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56 *Revue trimestrielle de droit européen* 640.

[12] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, EU:C:2018:999.

[13] Ibid para 63.

[14] Case C-896/19 *Repubblika v Il-Prim Ministru*, EU:C:2021:311, paras 63–64.

[15] As noted by A von Bogdandy and LD Spieker, 'Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions' (2023) 29 *Columbia Journal of European Law* 74, the Court in this judgment, still combing Art 2 with Art 19 TEU, put the former at the centre of the reasoning.

[16] *Repubblika* (n 14) paras 61–62.

joyment of all of the rights deriving from the application of the Treaties to that Member State'.[17] On these grounds the Court affirmed the so-called 'principle of non-regression':[18]

> 'A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law. […] The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary'.[19]

The line of reasoning developed in *Repubblika* was confirmed by *Asociaţia Forumul Judecătorilor*,[20] *Eurobox*,[21] and by the twin judgments on conditionality *Hungary v European Parliament and Council*[22] and *Poland v European Parliament and Council*[23] (insofar as they are coincident, only the former will be quoted hereinafter). Reference to a regression in the legislation of Member States can also be found in the Opinions of some Advocates General.[24]

Moreover, after this judgment, the old 'Copenhagen Criteria'[25] and their assessment[26] should be read in the light of Article 2 TEU and the relevant case law of the

[17] Ibid para 63 (emphasis added).

[18] On this principle see M Leloup, D Kochenov and A Dimitrovs, 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*' (2021) 46 *European Law Review* 692.

[19] *Repubblika* (n 14) paras 63–64.

[20] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393.

[21] Sometimes the Court uses the term 'precondition'. See Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para 161 and the case law cited therein.

[22] Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2022:97.

[23] Case C-157/21 *Poland v European Parliament and Council*, EU:C:2022:98.

[24] See the Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2021:974, para 214; the Opinions of AG Collins in Joined Cases C-181/21 and C-269/21 *G and Others v MS and X*, EU:C:2022:990, paras 54–55, and in Case C-817/21 *RI v Inspecţia Judiciară and NL*, EU:C:2023:55, para 51; the Opinion of AG Rantos in Case C-718/21 *LG v Krajowa Rada Sądownictwa*, EU:C:2023:150, para 32; and the Opinion of AG Pikamäe in Joined Cases C-554/21, C-622/21 and C-727/21 *Financijska agencija v Hann-Invest d.o.o. and Others*, EU:C:2023:816, paras 5 and 69.

[25] See C Hillion 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004).

[26] For a critical analysis of the pre-accession procedures see D Kochenov, 'Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration Online Papers* 1; and D Kochenov, *EU Enlargement and the Failure of Conditionality* (Wolters Kluwer 2008). According to I Jarukaitis, *The European Union as a Community of Values: The Importan*ce *of the Dialogue between the Court of Justice of the European Union and National Courts* (Vilnius University Press 2024) 25, 'there was no separate negotiating chapter on the "protection of fundamental rights" or the "rule of law", although the reading of the European Commission's

CJEU, requiring the European Commission to watch, with particular attention in the pre-accession negotiations and in post-accession, the respect for the values of Article 2 TEU.[27] That induced the Commission to include also the candidate countries in its annual report on the rule of law situation in the EU.[28]

Regression is a litmus test that EU institutions can use as a warning sign to detect and a tool to assess the gravity of a violation of the values contained in Article 2 TEU. In this regard, it can be said that the rule applies to all the values enshrined therein, independently of the fact that the case law of the Court has so far dealt solely with the rule of law element.

However, considering some doubts raised in legal literature,[29] certain aspects must be clarified. First, there can be no automatism: non-regression does not mean that national legislation can never change. Not every regression should be relevant, but only serious, persistent, and systemic ones.[30] In other words, only regressions having a significant negative impact on the values of Article 2 TEU may be relevant. Non-regression means no 'backsliding', which is a systemic concept.[31] Second, a regression in

opinions on the candidate countries' applications for accession and of the annual progress reports on accession to the EU shows that the Commission always included in its assessment of the candidate countries their conformity with the Copenhagen political criteria, including compliance with the principles of democracy, the rule of law and respect for fundamental rights. However, the overall analysis of this criterion was visually overshadowed by a detailed assessment of the capacity to assume the obligations arising from the membership in specific negotiating chapters […] It is interesting to note in retrospect that at the time it was the economic issues that were more of a concern than the questions related to the values of the EU'.

[27] In this light, Jarukaitis (n 26) suggests that a separate negotiating chapter devoted to the Copenhagen Criteria directly related to Art 2 TEU could increase the awareness of the candidate States and their citizens. On the effects of the judgment on the pre-accession, see also A Łazowski, 'Strengthening the Rule of Law and the EU Pre-Accession Policy: *Repubblika v. Il-Prim Ministru*' (2022) 59 *Common Market Law Review* 1803.

[28] European Commission, 'Communication: 2024 Rule of Law Report: The rule of law situation in the European Union', COM(2024) 800 final.

[29] See LD Spieker, 'The Conflict over the Polish Disciplinary Regime for Judges – An Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: *Commission v. Poland*' (2022) 59 *Common Market Law Review* 777; and J Scholtes, 'Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2' (2023) 19 *European Constitutional Law Review* 59.

[30] On the concept of systemic violations, see M Ioannidis and A von Bogdandy, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59; KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3; A von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 *Common Market Law Review* 705.

[31] The concept of 'backsliding' has been introduced by L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. According to those authors, '[t]hese are states where the rule of law had in fact been achieved and is now being systematically dismantled, which is a different sort of problem from not being able to achieve the rule of law in the first place. Backsliding implies that a country was once better, and then regressed' (at 12).

the legislation or administrative practices in the concerned Member State should be evaluated, not in abstract terms but by carrying out an overarching analysis of the broader context and by taking into account its actual impact on society. Third, even if in *Repubblika* the comparison of the Maltese legal situation pre- and post-accession was crucial for the Court to adjudicate the matter,[32] the condition of compliance with the values of Article 2 TEU, in light of Article 49 TEU, can be confined neither in time nor in space.

On the one hand, respect for these values is not limited to the time of accession, as, according to Article 49 TEU, the Member State must not only respect – at the time of accession – the values referred to in Article 2 TEU but must also be '*committed to promoting*' those values.[33] This general commitment pertains to post-accession periods and mirrors the parallel obligation imposed on the Union by Article 3(1) TEU to promote its values. The Court clarified that 'compliance with those values cannot be reduced to an obligation which a candidate State must meet to accede to the European Union and which it may disregard after its accession'.[34] It is precisely this commitment to promoting EU values that reinforces non-regression in relation to the principles of classic standstill[35] and *a fortiori* of the *rebus sic stantibus* rule under international law.[36] Moreover, this commitment implies that if, during the initial period of accession, some flexibility could be tolerated for new members in adjusting their systems, different levels of compliance with the values of Article 2 TEU at the time of accession cannot justify ongoing asymmetries among the Member States regarding those values.

On the other hand, the condition of respecting those values cannot be limited only to acceding States but concerns all Member States, including the founding ones. That necessarily stems from the general principles of EU law, notably from Article 4 TEU, which establishes the equality of Member States before the Treaties (paragraph 2)[37] and the principle of sincere cooperation (paragraph 3), which requires the

[32] *Repubblika* (n 14) paras 59–60.

[33] See in this sense *Hungary v European Parliament and Council* (n 22) para 234.

[34] Ibid para 126. According to K Lenaerts, 'On Checks and Balances: The Rule of Law within the EU' (2023) 29 *Columbia Journal of European Law* 25, 63, 'the level of value protection of the EU values within a Member State existing at the moment of acquiring that status is not the finish line but rather the starting point'.

[35] See Rossi, '2,4,6 (TUE)…' (n 11).

[36] See Vienna Convention on the Law of Treaties [1969], Art 62.

[37] See on this principle LS Rossi, 'The Principle of Equality Among Member States of the European Union' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 1; LS Rossi, 'Article 4 TEU on the Relationship between the EU and the Member States' in C Campbell, P Herzog and G Zagel (eds), *Smit & Herzog on the Law of the European Union* (LexisNexis/Matthew Bender 2023). On the principle of sincere cooperation, see F Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione dell'Unione al tempo della crisi* (Editoriale Scientifica 2020).

Member States to refrain from any measure that could jeopardise attaining the Union's objectives.[38] Since, according to Article 3(1) TEU, the first of the Union's objectives is to promote its values, the interdiction of significative regression can also be seen as a qualified specification of the latter principle.

Respecting the values of Article 2 TEU is, therefore, the condition not only for becoming a 'Member of the Club', but also for fully 'staying in the Club'. That is confirmed by the procedures of Article 7 TEU and, more recently, by the adoption of the Regulation on Conditionality,[39] linking solidarity to the respect of the values of Article 2 TEU.[40] EU membership could also be seen as an 'inclusive package', where the costs in terms of sovereignty and the benefits of being part of a common system go hand in hand.

Furthermore, respecting the values of Article 2 TEU is a duty of each Member State towards both the Union and the other Members. The Court of Justice has constantly affirmed that respect for the values of Article 2 TEU is also the foundation of the mutual trust between the Member States.[41]

It is important to point out that the values and principles contained in Article 2 TEU do not come out of the blue with the Treaty of Lisbon, nor have they been 'invented' by the Court of Justice. They are the result of a slow and cautious process of constitutionalisation at the level of primary law of the European Union. This process started with the Treaty of Maastricht (that created the Union), notably with its Preamble,[42] passing through the introduction by the Treaty of Amsterdam of a new first paragraph in Article F TEU[43] and a new Article F1, later transformed into Article 7 TEU by the Treaty of Nice, until Article I.2 of the Constitutional Treaty, whose text has been transferred into what is currently Article 2 TEU.

[38] See Opinion 2/13 on EU accession to the ECHR, EU:C:2014:2454, para 173: 'The Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties'.

[39] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[40] See *Hungary v European Parliament and Council* (n 22) para 129: 'the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law'.

[41] See Opinion 2/13 (n 38) para 168: 'EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected'.

[42] The Preamble affirmed that the Members States were 'confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

[43] Art F: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

This evolution confirms that the choice of the values on whom the European Union is founded has been pondered and deliberated. As the Court noted, the values contained in Article 2 TEU 'have been identified by the Member States'.[44] The duty of respecting the values of Article 2 TEU has undoubtedly not been imposed on Member States against their will since, by ratifying the Treaty of Lisbon (or successive accession Treaties), they accepted Articles 2 and 49, thus freely and voluntarily committing themselves to respect and promote those values. Consequently, similarly to what happens for the concept of 'common constitutional traditions',[45] once those values have been identified and accepted by the Member States, they become 'common', so that they cannot be unilaterally waved by a single State.

3. A system of interconnected values and principles

According to Koen Lenaerts, the values of Article 2 TEU 'are embedded in the very DNA of the European integration project. Those values are the soul of the EU that enables the Member States to grow together whilst preserving their national identity'.[46] They are part of the European 'constitutional framework' that the Court explicitly mentioned in Opinion 1/17.[47] As the Court of Justice clarified in the twin judgments on conditionality, Article 2 TEU enshrines the founding values and principles that 'define the very identity of the European Union as a common legal order', an identity that the European Union 'must be able to defend'. According to those judgments, 'Article 2 TEU is not merely a statement of guidelines or intentions, but contains values, […] which are given concrete expression in principles containing legally binding obligations for the Member States'.[48]

Moreover, Article 2 TEU is not just a list of disconnected values and principles but, as the Court stated in *Opinion 2/13,* 'a set of common values on which the Union is founded':[49] in other words, a system of interconnected values that provides a model for EU membership. That model entails a wide margin of appreciation for each Member State in deciding the national 'value-mix' and its practical implementation in society in the light of its Constitution. Although in academic literature there are many different

[44] *Hungary v European Parliament and Council* (n 22) para 127.

[45] See LS Rossi, 'Autonomie constitutionnelle de l'Union européenne, droits fondamentaux et mèthodes d'intégration des valeurs "externes"' in A Iliopoulou and L Xenou (eds), *La Charte des droits fondamentaux, source de renoveau constitutionnel européen* (Bruylant 2020) 57.

[46] Lenaerts (n 34) 61.

[47] Opinion 1/17 on the EU–Canada CETA, EU:C:2019:341, para 110.

[48] *Hungary v European Parliament and Council* (n 22) para 232.

[49] Opinion 2/13 (n 38) para 168: 'This legal structure is based on the fundamental premise that each Member State shares with all the other Member States and recognises that they share with it a set of common values on which the EU is founded, as stated in Article 2 TEU'.

takes on this point,[50] *RS*[51] indicates that Article 2 TEU could neither 'harmonise' national constitutions nor confer new competence to the Union. Still, Article 2 TEU expresses the essential features of the European identity 'as a common legal order' and, at the same time, the essence of the EU membership, and, as has been highlighted above, no unilateral derogation to this model could be accepted.

In *RS* the Court struck the delicate balance between national identity and European identity, in respect to Articles 2 and 19 TEU. On the one hand,

> 'neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences. Indeed, under Article 4(2) TEU, the European Union must respect the national identities of the Member States, inherent in their fundamental political and constitutional structures'.[52]

On the other hand, the same judgment affirms that: 'in choosing their respective constitutional model, the Member States are required to comply, *inter alia*, with the requirement that the courts be independent stemming from the abovementioned provisions of EU law'.[53] If Article 4(2) TEU recognises that the Union must respect the national identities of the Member States, the same Article also affirms the principle of equality of those States before the Treaties. The formula 'United in diversity' resumes the balance between national constitutional identities and a European identity[54] based on the essential requirements inherent to membership, which, as affirmed in *Repubblika*, are grounded on Articles 2 and 49 TEU.

[50] According to Lenaerts (n 34) 53: 'Article 2 TEU requires an "alignment", but not a "constitutional modelling", which would be contrary to the respect of national identity by the Union prescribed by Article 4 (2) TEU'. In the same sense, see P Mori, 'Identità nazionale, valori comuni e condizionalità' [2024] *Rivista Quaderni AISDUE* 218. According to von Bogdandy (n 30), that article only establishes 'red lines'. See also A von Bogdandy and LD Spieker, 'EU Values as Constraints and Facilitators in Democratic Transitions' in M Bobek et al (eds), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos 2021) 119. See, however, W Schroeder, 'Transition 2.0 and the Rule of Law Mainstreaming in the European Union' in ibid 544, speaking of 'minimum constitutional harmonisation'. According to LD Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023) 278, 'similarly to directives, Article 2 only contains an obligation of result'. The same author (ibid 171) speaks of 'constitutional homogeneity'.

[51] Case C-430/21 *RS (Effect of the decisions of a constitutional court)*, EU:C:2022:99.

[52] Ibid para 43.

[53] Ibid.

[54] On the concept of national identity, see G Di Federico, *L'identità nazionale degli stati membri nel diritto dell'Unione europea* (Editoriale Scientifica 2017). On the relationship between European identity and national identities, see Rossi, 'Article 4 TEU' (n 37). See also F Casolari, 'Il processo di europeizzazione delle identità nazionali degli Stati membri: riflessioni sulle traiettorie del costituzionalismo europeo' (2024) *Rivista Quaderni AISDUE* 267, who speaks of a 'Europeanization of national identities'.

The model of values of Article 2, albeit very broad, is clear. In connection with the two first paragraphs of Article 10 TEU, it describes representative and participative democracies,[55] where the rule of law and human rights traditionally connected to democratic societies are granted. As the Court recently affirmed, 'under Article 10(1) TEU, the functioning of the European Union is to be founded on representative democracy, which gives concrete expression to democracy as a value. Democracy is, under Article 2 TEU, one of the values on which the European Union is founded'.[56]

This model, on the one hand, certainly draws on the constitutional traditions of the Member States[57] and international sources, notably the Council of Europe ecosystem, representing common constitutional choices and tracing the path for a common future. On the other hand, it is strongly anchored to the idea that a direct link exists between the Union and its citizens, creating rights that can be invoked against their States under the control of a strong, capillary and unitarian judicial system composed by the CJEU and the national judges. An idea that was born long before the introduction by the Treaty of Maastricht of the citizenship of the European Union, finding its first roots in the theory of direct effect, affirmed by *Van Gend & Loos* of 1963*:* in the logic of that judgment, the 'newness' of the EU legal order precisely consists in that direct link. From this perspective, the obligation to respect the values mentioned in Article 2 TEU is not only a duty of each Member State towards the Union and the other EU countries, it is also a duty towards the EU citizens and all other individuals falling in the scope of EU law.[58]

As Article 2 TEU is a system of interdependent values,[59] it is important to consider the interconnections among the different parts of this article and the connections between the latter and other primary law provisions. Article 2 TEU is composed

[55] Case C-418/18 *Puppinck and Others v Commission*, EU:C:2019:1113, paras 64–65, and Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 158. On Art 10 TEU and the principle of democracy, see J Cotter 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) 47 *European Law Review* 69, T Verellen, 'Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable' (Verfassungsblog, 8 April 2022), at verfassungsblog.de; YL Bouzoraa, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis' (2023) 8 *European Papers* 809.

[56] Case C-808/21 *Commission v Czech Republic*, EU:C:2024:962, para 114. See, for first comments M Schuler, 'Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court's Judgments in Cases C-808/21 *Commission v Czechia* and C-814/21 *Commission v Poland*' (European Law Blog, 20 November 2024), at www.europeanlawblog.eu.

[57] According to Casolari (n 54) 267, this has been a 'bottom up' process.

[58] As pointed out by Pech and Scheppele (n 31) 11, 'Rule of law backsliding is a decisive issue for the whole EU because it not only affects the citizens of the country where this phenomenon is happening, but it also affects other EU citizens residing in any such 'illiberal regime' as well as, indirectly, all residents in the EU through these regimes' participation in the EU's decision-making processes and in the adoption of norms that bind all in the EU'.

[59] See in this sense K Lenaerts and JA Gutierrez-Fons, 'High Hopes: Autonomy and the Identity of the EU' (2021) 8 *European Papers* 1495, 1500.

of two paragraphs. The first paragraph enumerates the founding values: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The second paragraph mentions the principles[60] of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, referring to society. While the CJEU has already recognised the binding force of some of the values enshrined in the first paragraph, it seems more difficult to argue that each principle of the second paragraph has the same force and even more delicate would be the issue of their justiciability, if an analogy can be drawn with Article 52(5) of the Charter. However, being part of the same model, all the values and principles of Article 2 TEU are interconnected and operate in synergy.

The Court clarified the connection between the rule of law and other values and principles of Article 2 TEU:

> 'While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa'.[61]

Furthermore, the principle of pluralism is strictly related to the value of democracy, which in turn is connected to the fundamental right to freedom of expression.[62]

An interesting question arises about the meaning of the reference to 'a society' in the second paragraph of Article 2 TEU. Certainly, as highlighted in legal scholarship, Article 2 TEU establishes the values for the entire European society, which can be seen as a 'singular collective'.[63] However, a Member State can only be found responsible for breaches of Article 2 in the national society, i.e. the part of the European society under its control. It can be argued that the second paragraph of Article 2 TEU indicates the principles to be implemented in society as a consequence of the duty to respect the values affirmed in the first paragraph both by the Member States and the European institutions. Therefore, the effects on society can be a benchmark for assessing the

[60] For an analysis of different theories on the relationships between principles and values see Spieker (n 50) 37–41.

[61] *Hungary v European Parliament and Council* (n 22) para 6.

[62] Case C-633/22 *Real Madrid Club de Fútbol and AE v EE and Société Éditrice du Monde SA*, EU:C:2024:843; and Case C-140/20 *Commissioner of An Garda Síochána and Others*, EU:C:2022:258 para 43.

[63] This concept has been introduced by A von Bogdandy, *The Emergence of European Society, through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024) 40. For a perspective of European society as an empirical entity, see L Azoulai, 'The Law of European Society' (2022) 59 *Common Market Law Review* 203; L Azoulai, 'Reconnecting EU Legal Studies to European Societies' (Verfassungsblog, 19 March 2024), at verfassungsblog.de.

State's breach of the principles and values of Article 2 TEU, notably the systemic dimension, seriousness and persistence of the violation, and a significant regression. The EU membership requires not only formal respect for the values of Article 2 TEU but also their concrete application in society. NGOs, and civil society can all contribute to monitoring the impact on society of the violations of Article 2 TEU.[64]

The fact that the effects on society can be regarded as a benchmark of the respect of the EU values is confirmed in the conditionality case *Hungary v European Parliament and Council*, where the Court affirmed that 'a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value'.[65] This statement also shows how the interconnection between values and principles in Article 2 TEU works: the violation in society of one of the principles of the second paragraph (discrimination) is symptomatic of the breach of one of the values affirmed in the first paragraph (the rule of law).

Besides the 'internal' connections among values and principles of Article 2, the model of this provision reflects – and is reflected by – other provisions of the Treaties and the Charter of Fundamental Rights. The Court has so far decided many cases relating to *single values* contained in Article 2 TEU, always *in connection* with other EU law provisions. It is interesting to consider the nature of such connections and their reach.

The Court started developing its case law on Article 2 TEU from the rule of law. Several judgments based on Articles 2 TEU, 19 TEU, and sometimes also Article 47 of the Charter, focused on the breaches of the rule of law, notably on the threats to judicial independence[66] or fair trial.[67] Such threats are particularly dangerous for the EU legal order. The judicial dialogue between the Court of Justice and the national judiciary is, in fact, essential to the functioning of the preliminary ruling mechanism, which allows the Court to grant uniform application of the EU law, as well as to guarantee the equality of the Member States and the citizens before that law.

The Court has always underlined that Article 19 TEU[68] expressly refers to the 'fields covered by Union law', 'irrespective of whether the Member States are implementing Union law within the meaning of Article 51 of the Charter'.[69] A new

[64] Some theoretical instruments have been proposed concerning the rule of law, such as the Venice Commission's Rule of Law Check List, adopted in Venice, 11–12 March 2016, at www.venice.coe.int; the studies of the UN International Law Development Organisation, 'Measuring the Rule of Law: It Works When It Creates a Culture of Justice', at www.idlo.int; or the OECD, 'Strengthening the Rule of Law: Making the Case', at commission.europa.eu. See also T Ginsburg and M Versteeg, 'Rule of Law Measurement' in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 494.

[65] *Hungary v European Parliament and Council* (n 22) para 229.

[66] See, recently, Case C-197/23 *S S.A. v C sp. z o.o.*, EU:C:2024:956, and the case law cited therein.

[67] Case C-819/21 *Staatsanwaltschaft Aachen v MD*, EU:C:2023:841.

[68] On the use of Art 19 TEU in infringement actions and in preliminary references, see Lenaerts (n 34) 36.

[69] See Case C-192/18 *Commission v Poland (Independence of the ordinary courts)*, EU:C:2019:924, para 101 and the case law cited.

action against Poland is now pending before the Court, concerning the violation of Articles 2, 4(3) and 19 TEU.[70] As regards the nature of the connection between Articles 2 and 19 TEU, the Court, starting from *Associação Sindical dos Juízes Portugueses*, has often repeated that the latter 'concretise'[71] ('*concrétise*' in the original French text), i.e. '*gives concrete expression* to the value of the rule of law affirmed in Article 2 TEU'.[72] Different wording (but in the French version, it is always '*concrétiser*') has been used by the Court to define the relationship between Article 2 and Article 10 TEU: 'Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU'.[73]

Even if other languages use different terms (in Italian is '*incarna*', i.e. 'embodies'), this formula seems to imply that Article 2 TEU need to be operationalised by other provisions of the Treaties, as it had no value *per se*. But what does this formula exactly mean? Article 19 TEU could have hardly been interpreted as in *Associação Sindical dos Juízes Portugueses* without the anchorage to the values of Article 2 TEU. In this case, the *concrétisation* is, at least, reciprocal and Article 2 TEU does not seem to be the 'weak' partner of the couple.[74] That is even more so regarding the relationship between Article 2 and the first paragraph of Article 10 TEU, which qualifies democracy as 'representative' when referring to the 'functioning of the Union': in this case, it is Article 2 TEU that calls Member States into play. The two provisions belong to the same model of EU values and work in synergy. As we will see in the last section of this article, Article 4(3) TEU could be added to this relationship in some cases.[75]

[70] Case C-448/23 *Commission v Poland* (action brought on 17 July 2023, pending).

[71] I use this Gallicism instead of the formula used in the English version of the CJEU judgments, which is 'gives concrete expression'.

[72] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 32. See also *Commission v Poland* (n 69) para 98 and the case law cited therein, and Case C-119/23 *Virgilijus Valančius v Lietuvos Republikos Vyriausybė*, EU:C:2024:653.

[73] See Case C-207/21 P *Commission v Poland*, EU:C:2022:560; Case C-502/19 *Criminal proceedings against Oriol Junqueras Vies*, EU:C:2019:1115, para 63; and Case C-418/18 P *Patrick Grégor Puppinck and Others v Commission*, EU:C:2019:1113, para 64.

[74] Rossi, 'La valeur juridique des valeurs' (n 11) 650. In addition, see LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1182, 1206, speaking of 'mutual amplification', which seems to imply an equal-foot relationship between Art 2 TEU and other provisions of the Treaty.

[75] On the principle of sincere cooperation see F Casolari, 'EU Loyalty after Lisbon: An Expectation Gap to Be Filled?' in LS Rossi and F Casolari (eds), *The EU After Lisbon: Amending or Coping with the Existing Treaties* (Springer 2014); M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014); T Roes, 'Limits to Loyalty: The Relevance of Article 4(3) TEU' (2016) 52 *Cahiers de droit européen* 253.

4. The relationships between Article 2 TEU and the Charter of Fundamental Rights

As the breaches of human rights in Article 2 TEU and of the fundamental rights of the Charter can be conceptually different, also in light of variable intensity and potential justifications, it is correct to represent them distinctly. In fact, the Court sometimes refers to human rights in Article 2 without leaning on the Charter.[76] That being said, massive violations of the Charter can indeed strengthen the plea based on serious and systemic violations of Article 2 TEU.

However, Article 2 TEU often appears in the case law of the Court in connection with the Charter of Fundamental Rights. In those cases, the 'concretisation' is not mentioned, and the Charter seems to flank Article 2 TEU on an equal footing. Beyond the cases concerning judicial independence, where Article 2 TEU and Article 47 Charter are considered with Article 19 TEU, the Court has examined other values affirmed by Article 2 TEU through the lens of the Charter.

In *Wightman*, the Court underlined the importance of the values of liberty and democracy, as referred to 'in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order'.[77] In *Patriciello*, the Court affirmed that 'freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based, constitutes a fundamental right guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union'.[78] Then, in *Tele2Sverige* the Court underlined the particular importance of the right to freedom of expression in any democratic society, specifying that 'that fundamental right, guaranteed in Article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded'.[79] Recently, in *Real Madrid*, the Court recalled that Article 11 of the Charter constitutes one of the essential foundations of a pluralist, democratic society and is one of the values on which, under Article 2 TEU, the European

[76] Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 *Ministero dell'Interno and Others (Common leaflet – Indirect refoulement)*, EU:C:2023:934, para 130 and the case law cited; Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie and HF v Belgische Staat*, EU:C:2018:296 para 46: 'Further, it must be emphasised that the crimes and acts that are the subject of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Article 2 TEU, the European Union is founded, and the peace which it is the Union's aim to promote, under Article 3 TEU'.

[77] *Wightman* (n 12) para 62.

[78] Case C-163/10 *Criminal proceedings against Aldo Patriciello*, EU:C:2011:543, para 31.

[79] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige*, EU:C:2016:970, para 93.

Union is founded, and interferences with the rights and freedoms guaranteed by Article 11 must be limited to what is strictly necessary, particularly the interferences concerning journalists and also publishers and press organisations, given the importance of the press in a democratic society governed by the rule of law'.[80]

In the abundant case law on the European Arrest Warrant,[81] asylum, migration,[82] and judicial cooperation in criminal matters,[83] the Court underlined that systemic deficiencies in the rule of law can result in a lack of effective judicial protection or a real risk of inhuman or degrading treatment, which can undermine the mutual trust between the Member States, which is particularly indispensable in these fields.

However, it is important to clarify the peculiar relationship between Article 2 TEU and the Charter, which, according to Article 51, can only be applied when the situation is caught by a substantive provision of EU law to be activated.[84] As a consequence, the Charter cannot concretise Article 2 TEU alone.

But it also seems difficult to maintain that Article 2 TEU could, alone, bring the situation within the scope of EU law, activating the Charter.[85] As it will be seen in the last section of this article, Article 2 TEU can apply within the limits of the competence of the Union, not establishing itself any competence of the latter. In particular, it does not seem possible to extend to Article 2 TEU the reasoning that was developed by the Court in *Max Planck*[86] and *Bauer*[87] to bypass the lack of horizontal direct effect of directives, according to which the directive brings the case into the scope of the Charter under Article 51 of the latter, and it is the Charter itself (notably Article 31) that has direct effect also in horizontal situations.[88]

The idea of flanking Article 2 with the Charter presupposes, therefore, that the situation falls in the fields of competence of the EU law, not that the scope for the Charter is provided by Article 2 itself. In the pending Hungarian case, the possibility to apply both Article 2 and the Charter is abundantly provided for by the directives, the GDPR and the provision of free movement of services.

[80] *Real Madrid* (n 62) paras 49–50.

[81] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the System of Justice)*, EU:C:2018:586, para 35.

[82] Case C-392/22 *Staatssecretaris van Justitie en Veiligheid*, EU:C:2022:913.

[83] Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie*, EU:C:2022:100.

[84] According to K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 1567–68, 'the Charter is the shadow of EU Law'.

[85] For a different opinion, see Spieker (n 74).

[86] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874.

[87] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871.

[88] LS Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (EU Law Analysis, 25 February 2019), at eulawanalysis.blogspot.com.

5. The Hungarian overall challenge to the values of Article 2 TEU

As seen in the previous section, the Court has so far examined single values of Article 2 TEU. But what if a Member State rejects the entire model of values of that Article? The pending case *Commission v Hungary* raises precisely this question.[89] The new Hungarian legislation, which can be read in the context of the alarming rule of law backsliding in Hungary, reveals, under the pretext of fighting paedophilia, a deliberated strategy aiming to gain political consensus and strengthen national identity at the expense of vulnerable minority groups.

These strategies, as pointed out by Nadia Urbinati,[90] are typical of populist democracies, where the leader often establishes a direct and emotional relationship with those in society whom he/she defines as the 'right' (or good) people.[91] Once elected, the leader's declared intent is to represent not 'the People', but only the 'right' people, i.e., his/her electoral majority. That may bring populists in power to adopt measures against the 'wrong' minorities, aimed at 'purifying' society. Such practice can also lead to a claim of declared anti-European identity: the leader affirms to protect the 'pure' national identity against the morally 'impure' Europe and its values. These measures, avowedly adopted to defend the national interest and often also the national identity,[92] may seriously jeopardise almost all the values of Article 2 TEU. In fact, on the one hand, those measures can affect the rule of law, notably, the traditional democratic checks, such as the judiciary, free media, and opposition, which are accused of hampering the plans of the leader, ergo 'the will of the People' (the 'right' people of course).

In the pending case against Hungary, even if the rule of law seems to remain in the background, the freedom of the press is questioned, as well as the elements that, according to the Court are integral parts of the rule of law, the Venice Commission

[89] Another overall challenge to the values of Art 2 TEU could probably be the Polish legislation on Russian influence (the so called 'anti-Tusk' law), which is currently the object of a pending infringement action: European Commission, 'Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee' (Brussels, 8 June 2023), at ec.europa.eu.

[90] N Urbinati, *Me the People. How Populism Transforms Democracy* (Harvard University Press 2019).

[91] For similar considerations, see X Groussot, 'Illiberal Democracy and Rule by Law from an EU Perspective' in A Rosas, J Raitio and P Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023); J Přibáň, 'The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash' in Bobek et al (eds) (n 50) 47–50.

[92] For the historical reasons that led Populists to govern Hungary and other Member States, see D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *Common Market Law Review* 623. See also T Drinóczi and A Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2021).

Moreover, the challenge to the rule of law in that State is a general concern[93] that has already led to a suspension of the EU grants in the application of Regulation 2020/2092.[94] The Commission has recently referred Hungary[95] to the Court for its Sovereignty Protection Act, which established the Sovereignty Protection Office, whose task is to investigate activities carried out, supposedly in the interest of foreign bodies, by a wide range of entities, such as civil society organisations, media and journalists. As indicated in a report by five NGOs,[96] this legislation has a stigmatising and chilling effect on the concerned entities, creating an environment where even receiving EU funds can be considered a threat.

On the other hand, the need to strengthen the identity of the majority as 'the right people' – and therefore the emotional connection with the leader[97] – may drive the latter and his/her establishment to look for 'wrong' (or bad) people inside the domestic society, targeting and ostracising specific groups or minorities. Moral, religious, or simply 'good old-fashioned' considerations are usually used to legitimise the leader's authority as the defender of the 'right' part of society against the 'wrong' one. That is the case with the new Hungarian legislation on paedophilia.

Unlike the cases decided by the Court so far, this legislation, composed of several measures of different gravity and intensity, seems to violate not one of the values or principles of Article 2 TEU, but almost all of them, overall challenging the very model of values – and the common identity – of the Union.

First of all, human dignity is being violated. This legislation stigmatises as 'wrong' children and teenagers in a delicate phase of their lives, when sexual identity is forming, humiliating them and exposing them to public contempt, with a particularly disruptive psychological effect. In addition, freedom is being violated: free access to objective and serene information on sexual and gender identities is denied,

[93] According to the 2024 Rule of Law Report, on January 2024 Hungary had 45 leading judgments of the European Court of Human Rights pending implementation. See European Commission, 'Commission Staff Working Document: 2024 Rule of Law Report: Country Chapter on the rule of law situation in Hungary', SWD(2024) 817 final, 36.

[94] See European Commission, 'Commission considers that Hungary has not sufficiently addressed breaches of the principles of the rule of law and therefore maintains measures to protect the Union budget' (Brussels, 16 December 2024). On the application of financial instruments in case of violations of the rule of law, see M Coli, 'Stato di diritto e condizionalità finanziaria: un binomio ormai inscindibile per la tutela dei valori dell'Unione europea?' (May 2024) *Questione Giustizia* (Speciale Democrazia e *Rule of Law* in Europa) 43.

[95] European Commission, 'The Commission decides to refer Hungary to the Court of Justice of the European Union considering its national law on the Defence of Sovereignty to be in breach of EU law' (Brussels, 3 October 2024).

[96] Amnesty International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, K-Monitor and Transparency International Hungary, *Assessment of Hungary's Compliance with Conditions to Access European Union Funds* (27 November 2024) 55–57, at helsinki.hu.

[97] Urbinati (n 90).

just when young adults desperately need to understand themselves and their place in the world. But, above all, what is violated is the fundamental freedom to be oneself.

Human rights are being violated, not only in the evolute meaning of the ‘modern’ individual rights protected by the Charter and by the ECHR, but also in the basic meaning of the 1942 UN Universal Declaration of Human Rights, which affirms the essential universal rights of each human being as such. The Hungarian legislation notably challenges Articles 19,[98] 22,[99] 26(2),[100] and 26(3)[101] of that Declaration. Most notably, the rights of people belonging to the LGTBIQ+ minority group are being violated by the Hungarian legislation that equates them to paedophiles, suggests that they are dangerous, and severely restricts the possibility of defending their ideas and identity.

Furthermore, all the principles of pluralism, non-discrimination, tolerance, justice and solidarity are being violated. Pluralism would require that all ideas can be expressed,[102] which is severely limited by the new Hungarian rules on the media. Moreover, there is no tolerance, justice, solidarity and equality in legislation that points to an ‘impure’ part of society to get rid of and that openly and directly discriminates against vulnerable individuals on grounds of sexual orientation and gender identity.

As to the effects on society, this legislation is deeply divisive; it feeds contempt, hatred and potential violence against the ‘wrong’ ones, and it creates inside European society a black spot, where the same essential rights and values aren’t granted to everyone as everywhere else. That is a very high price to pay as a tribute to the idol of the national identity. But, even admitting (*quod non*) that some of the reasons invoked by Hungary in this essentially ‘identarian’ dispute can be traced to national

[98] ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.

[99] ‘Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality’.

[100] ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace’.

[101] ‘Parents have a prior right to choose the kind of education that shall be given to their children’.

[102] See Case C-274/99 P *Bernard Connolly v Commission*, EU:C:2001:127, para 39: ‘As the Court of Human Rights has held, “Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the ECHR], it applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”” (Eur. Court H. R. Handyside v United Kingdom judgment of December 7 1976, Series A no. 24, § 49; Müller and Others judgment of May 24 1988, Series A no. 133, § 33; and Vogt v Germany judgment of September 26 1995, Series A no. 323, § 52)’.

identity under Article 4(2) TEU, it is still true that such identity can prevail on the values of Article 2 TEU, as explained in *RS*, only if the related measures passed the proportionality test,[103] which doesn't seem the case in this instance.

Regression within the meaning of *Repubblika* is blatant. The Hungarian legislation constitutes an extraordinarily serious and systemic violation of Article 2 TEU, not only because it severely affects a large number of individuals in many different fields of society but also because it does not just violate one single value of Article 2 TEU; it questions the entire model of values of the Union.

None of the twelve Member States that intervened, even if with different arguments, at the hearing[104] supported Hungary, while other traditional 'friends' of the latter just chose to stay away from the hearing.

6. Applying Article 2 TEU: 'concretised', 'flanked', or 'standalone'?

As the Court affirmed in relation to the values contained in Article 2 TEU, the Union must be able to defend those values '*within the limits of its powers*'.[105]

Three questions arise concerning the powers of the Union: 1) Does an action for breach of Article 2 TEU circumvent the procedures laid down in Articles 7 and 269 TFEU, by creating a parallel procedure not envisaged by the Treaties?; 2) Can Article 2 TEU stand alone as a plea in infringement actions, or should it always be concretised by other provisions?; 3) Could Article 2 be applied, neither as concretised nor flanked by other provisions, but just alone, i.e. in the absence of other violations of EU law?

As to the first question, it must be recalled that in the previous twin cases on conditionality Hungary and Poland argued that the regulation on conditionality circumvented both Article 7 TEU and Article 269 TFEU.[106] The Court answered that several provisions in the Treaty and the Charter embody the values of Article 2 TEU, which 'grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State'.[107] Thus, Article 7 TEU is not the only way to protect those values.

The Court recognised that:

[103] See, e.g., Case C-742/19 *BK v Republika Slovenija (Ministrstvo za obrambo)*, EU:C:2021:597. On this topic, see LS Rossi, 'Regole dell'Unione europea ed eccezioni nazionali: la questione "identitaria"' in Constitutional Court of the Italian Republic and Court of Justice of the European Union, *Study Meeting: Member States' National Identity, Primacy of European Union Law, Rule of Law and Independence of National Judges* (Rome, 5 September 2022), at cortecostituzionale.it.

[104] They were, notably, Belgium, Denmark, Finland, Germany, Greece, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden.

[105] *Hungary v European Parliament and Council* (n 22) para 27.

[106] Ibid paras 94–96.

[107] Ibid para 159.

> 'the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, by an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU'.[108]

Then, the Court explained that, indeed, those procedures are different in purpose, scope, conditions and nature.[109] It must be noted that this passage refers to a potential conflict between the procedures provided for by Article 7 and Article 269 TFEU with those established by EU secondary legislation (in that case, the regulation on conditionality). The pending case against Hungary raises a different question: does the use of Article 258 TFEU to promote an infringement action for breach of Article 2 TEU create a parallel procedure in conflict with Articles 7 TEU and 269 TFEU? The potential conflict would be among different norms of the same rank in the Treaties. The idea of Article 7 TEU as a *lex specialis* with respect to Article 258 TFEU precluding the use of the latter cannot be accepted. Those remedies indeed operate at different levels, political or legal. The object of an infringement action is to condemn a Member State for failure to fulfil whatever obligation under the Treaties, not to suspend that State from the rights deriving from the Treaties. Moreover, while the infringement action may only lead to economic sanctions, Article 7 can also entail political sanctions, such as the suspension of voting rights. The two procedures, therefore, are distinct and disconnected: if that based on Article 7 is more serious in consequences, it remains, however, merely hypothetical in practice. As to Article 269 TFEU, its difference from Article 258 TFEU is apparent and excludes any circumvention. The first is limited only to the procedural aspects of Article 7 and is conceived 'in favour' of the State accused of breaching Article 2 TEU: the latter procedure, instead, is 'against' the State accused of breaching the treaties.

The second question is whether Article 2 TEU; can act alone or, rather, as some Member States affirmed at the hearing, must it always be concretised by other provisions. Those States affirmed that adding Article 2 TEU as an autonomous ground for action would exceed the competence of the Union, and, moreover, would have no practical added value.[110] One can recognise that Hungary could be declared to have breached EU law, even without resorting to Article 2 TEU, for violating the EU legislation on the internal market, non-discrimination, and data protection. That legislation brings the Hungarian law within the scope of the Charter pursuant to Article

[108] Ibid paras 167–68.
[109] Ibid paras 169–79.
[110] See Bonelli and Claes (n 4) 4.

51. It would be simple to submit the abstractly legitimate objective of fighting paedophilia to the classic test of proportionality, finding that the Hungarian legislation is widely disproportionate both in respect of the EU legislation and the Charter. Moreover, in this case, referring to Article 2 TEU is not capable of triggering, the application of the Regulation on conditionality, as there are here no consequences on the EU budget stemming from breaches of the rule of law.[111] Nor would that reference allow to raise the amount of Article 260 TFEU penalties imposed in accordance with Article 260 TFEU: as the recent case *Commission v Hungary* on international protection[112] shows, even when Article 2 is not at stake, penalties can be very high; and, in any case, to the discretion of the Court, much higher than the Commission's request. Also, the amount of damage compensations in *Francovich* actions would not be affected by the addition of Article 2 TEU, since that amount is limited to the damage suffered *in concreto* as a consequence of the violation of a norm of the Union conferring individual rights.

However, in the case under consideration, vis-à-vis an attack on the very model of Union values, an autonomous reference to Article 2 appears necessary. On the one hand, the overall violation of Article 2 TEU in the pending case is clear and total and cannot be resumed – and reduced – to any of the other alleged breaches of EU primary and secondary law. On the other hand, it is only by referring to the comprehensive framework of Article 2 TEU that all the single Hungarian measures violating different EU norms are revealed as parts of a unique deliberate strategy against a vulnerable group. It is precisely because they belong to the same design, whose overall aim challenges the values of Article 2 TEU, that even apparently innocent or low-intensity measures[113] represent serious threats to those values.

It can be argued, therefore, that Article 2 TEU does not always need to be concretised by other provisions, following the scheme of Articles 2 and 19 TEU. In certain cases, such as the pending case against Hungary, Article 2 TEU can constitute, within the scope of the Treaties, an autonomous plea *flanked* by other provisions.

A different issue is whether Article 2 TEU can be concretised by Article 4(3) TEU. It can be argued that it would rather be the opposite. One could imagine solutions involving the duty of sincere cooperation, which could be seen as a sort of general 'enhancer' of the duty to respect every obligation stemming from the Treaties (and derived legislation). Accordingly, Hungary should be condemned for the joint breach of Articles 2 and 4(3) TEU, which requires Member States to refrain

[111] See Regulation (EU, Euratom) 2020/2092 (n 39), Art 4.

[112] See Case C-123/22 *Commission v Hungary*, EU:C:2024:493, para 107: 'It should be noted that the deliberate evasion by a Member State of the application of a common policy as a whole constitutes an unprecedented and exceptionally serious infringement of EU law, which represents a significant threat to the unity of EU law and to the principle of equality of the Member States, referred to in Article 4(2) TEU'.

[113] Such, for instance, the time limitation for broadcasting certain advertising.

from any measure that could jeopardise attaining the Union's objectives. In its turn, the principle of sincere cooperation is usually – even if not necessarily – 'concretised' by other provisions.[114] In the Hungarian case, the inclusion into this scheme of Article 3(3) TEU – on the need to combat social exclusion and discrimination – and Article 10 TFEU – requiring the Union to fight discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation – could be, in the abstract, envisaged. Accordingly, by violating Article 2 TEU, Hungary would also breach the duty of sincere cooperation in that it hampers the Union in pursuing the objectives set out in Articles 3(3) and 10 TEU.

However, one can doubt the usefulness of such a reasoning. Would it be so different, in terms of the competence of the Union, to rely on Article 2 plus Article 4(3) TEU instead of Article 2 TEU *tout court*? Indeed, summing Articles 2, 4(3), 3(3) and 10 TEU, and mixing State duties and EU objectives would probably increase – instead of solving – the problems in the interpretation of Article 2 TEU. Rather, it seems more straightforward, and less acrobatic, to recognise that in case of an overall challenge to the very model of Article 2 TEU, this Article can act alone, not in splendid isolation, but alongside other pleas concerning different breaches of EU law. That would not amount to a banalisation of Article 2 TEU – something that should be avoided for preserving its foundational meaning – on the contrary, it would entail a high political and symbolic value.

That leads us to the last question: could Article 2 be applied, neither 'concretised', nor 'flanked' by another provision of EU law, but just alone? Wouldn't this mean applying Article 2 TEU beyond the scope of the Treaties and the powers of the Union? This question is at the moment merely hypothetical. Regarding the pending case, there are so many breaches of EU law that one could hardly doubt that it falls within the scope of that law. Moreover, considering the comprehensive strategies of populist democracies, it seems really difficult to imagine serious, persistent, and, above all, systemic violations of the values of Article 2 that have no impact on any other provision of EU law.[115]

However, generally speaking, some values, such as the rule of law and democracy, could also be violated outside the scope of EU law. Venturing into the domain of nightmares, one cannot exclude extreme situations of a Member State's regression towards a non-democratic regime, such as a suspension or flagrant violation of electoral procedures or a *coup d'état*, which would affect the essence of EU membership. On the one hand, if outside the scope of the Treaties, Article 7 would certainly still apply, infringement actions can only cover 'obligations under the Treaties' and, in principle, the Court, in the conditionality case, ruled out the idea of a parallel procedure circumventing Article 7 TEU.

[114] See on this point Casolari (n 37) 95.

[115] See in this sense, T Tridimas, 'Wreaking the Wrongs. Balancing Rights and the Public Interest the EU Way' (2023) 29 *Columbia Journal of European Law* 188.

On the other hand, however, as we have seen, Articles 49 TEU and 2 TEU impose obligations, albeit broad, on the Member States. The question that remains, therefore, open is whether these two provisions alone or, according to some authors,[116] in combination with – or in the light of – Article 4(3), could provide a sufficient legal basis for infringement actions in circumstances of persistent paralysis of the mechanisms of Article 7 TEU and serious and extreme challenge to democracy.

In such particular and extreme circumstances, it cannot perhaps be excluded that the Court, albeit facing serious conceptual challenges, could give an affirmative answer to that question. However, since that question is abstract at the moment, the Court does not need to answer it in the pending Hungarian case.

[116] See Casolari (n 37) 125; Scheppele, Kochenov and Grabowska-Moroz (n 30) 72, suggesting a combination of arts 2 TEU and 4(3) TEU.