

The Possibility of Conflict of Values under Article 2 TEU

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Abstract

Article 2 TEU is distinctive in the extent to which it embodies a range of abstract and values and concepts that can be understood as individually contestable as well as complex in their relationship with each other. Democracy is an example of such a justiciable concept under Article 2. Beyond identifying the EU as being a representative democracy, the EU treaties provide relatively little guidance of what democracy entails. The context is the contestedness of the values in Article 2, especially across 27 polities of the Member States of the EU, and the potentially extensive review of national constitutional orders that could result from the jurisdiction of the Court of Justice of the EU over Article 2 TEU. This paper considers how the concept of democracy interacts with the other values in Article 2, principally, the rule of law and respect for human rights. In this aspect, it is argued Article 2 should be understood as presenting a complex problem of the inter-relationship of values that cannot be resolved in purely abstract terms and which must be related to the actual practice of democracy in the Member States while still allowing for distinct national approaches. The paper first considers how norm conflict theory can be helpful to understanding the interpretation of Article 2 in general. In light of this discussion, amongst the other issues it considers are the extent to which the values expressed in Article 2 can be specified on the basis of other sources of EU law and how the Court of Justice's meta-teleological method might be applied or need to be adjusted to the context of its jurisdiction relating to Article 2.

Introduction

- **Articles 2 and 7 TEU** on values of the EU and an enforcement procedure introduced at Treaty of Nice
- ‘Values based’ **disciplining** of a MS
- Existing **procedural context**:
 - Enforcement actions under Article 258-259 TFEU
 - Addition of Article 260 TFEU fining procedure
- Key issue is **overlap of political and legal sanctioning**, including extent of role of ECJ under Articles 2 and 7 TFEU: potentially very politicised jurisdiction?
- **John Hart Ely’s famous work** on US judicial review *Democracy and Distrust* (Harvard UP 1981): can the judiciary be trusted democratically?
- **Article 10 TEU**: “The functioning of the Union shall be founded on representative democracy. ...”

EU Values

- **Article 2 TEU:**

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

- Features of Article 2

- Generality, comprehensiveness (Fiss, Aarnio & Peczenik)
- Absence of hierarchy

- **Conflict of values**

- Article 10 TEU: “The *functioning* of the Union shall be founded on representative democracy. ...”

→ democracy easier to operationalise?

EU Values

Articles 2 values:

- human dignity
- freedom
- democracy
- equality
- the rule of law
- respect for human rights,
including the rights of persons belonging to minorities
- +
- pluralism
- non-discrimination
- tolerance
- justice
- solidarity and
equality between women and men prevail

⇒ these values are common to the Member States

Conflicts of Values - Theory

- **How to relate** i. incommensurable values that are not accorded ii. any hierarchical priority?
- **Amplification** and **marginalisation** of values can vary?
- The problem of **value conflict is not new**, e.g. freedom and equality
- **John Rawls** attempted to address it through:
 - Overlapping consensus
 - Reflective equilibrium
 - Principles of justice that inter-related equality and liberty

Conflicts of Values – e.g. Aarnio & Peczenik

- Nature of values: shared or communal and subject to reason:
“The focus is on argumentation. For us, the possibility of inter-subjective control, also in regard to value statements, is the core of human thinking. Values are "reasonable" matters.” (p. 323)
- Value statements correspond to principles: the former say what is good whereas the latter say what ought to be done (the correspondence or correlation is conceptually necessary)
- **Aarnio & Peczenik’s general argument is that values** to be understood as
 - i. universal or shared starting points (*prima facie*) that are, however,
 - ii. in their application contextually relative (all things considered)

* Aulis Aarnio & Aleksander Peczenik, ‘On Values. Universal or Relative?’, 9(4) *Ratio Juris* 321-330 (1996)

Conflicts of Values – e.g. Aarnio & Peczenik

- ‘All things considered’?

“Every prima-facie value (or principle) may collide with others. When applied to a particular situation, it must be weighed with other values. The result of weighing decides what ought to be done definitively, all things considered. The weighing means that the colliding prima-facie values are supported by a coherent network of evaluative, empirical and analytic arguments. The totality of these decides what weighs more in the considered situation.” (p. 326)

- *Prima facie* propositions are universal and cross-cultural, but only starting points: they are across-cultural in that they are conceptually sustainable across cultures, but they do not involve moral judgments in a particular case
- Article 2 values can be understood as **translatable into *prima facie* statements** ⇒ what can **further translate them into final, all things considered, contextual evaluations ... if they conflict?**

EU Value Conflict - Autonomy?

- Court of Justice invokes idea of '**autonomous concepts**' to assert its authority to determine the meaning of terms in EU law *without these being derived directly from national legal systems*
- Reasons or caution in deploying autonomous concepts:
 - i. Social context of law requires shared meaning and
 - ii. EU law is implemented through national legal systems
→ autonomous meaning **cannot be idiosyncratic** relative to national law?
- This **question more acute** in context of Article 2 values that are transversal and fundamental
- Methodologically, Rawls' concept of **reflective equilibrium** supports relating definition of fundamental terms to national practices relating to them *especially when those terms are so abstract*
- Article 10 TEU itself referred to the values as '**common to the MSs**'

Democracy

- **Democracy**: just one of several values in Article 2?
- **Only definition** in Treaties is that it is 'representative'
- **Representative democracy** has a known meaning within political thought and practice: versus direct democracy of the ancients

Underlying questions/issues:

- Within EU law, what are the **limits to what the majority can do?**
- **No eternal guarantee** clause in Treaties
- Any **limits to MSs power of amendment?**