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Countering Democratic Backsliding in (Future) EU Member States: Article 10(3) TEU Unlocked

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Abstract

The Group of Twelve's report aims inter alia to fortify the rule of law and democratic legitimacy within the European Union (EU). In this context, this paper identifies a new trajectory for operationalising the value of democracy on the basis of key developments in the European Court of Justice's case-law, marking a paradigm shift in the EU's approach to upholding foundational values enshrined in Article 2 Treaty on European Union (TEU). Following the use of Article 19(1)(2) TEU as an operationalising expression of the value of the rule of law, the question will be considered whether Article 10(3) TEU can be used in the same way in order to operationalise the value of democracy. We contend that Article 10(3) TEU offers an unexplored avenue to prevent and address democratic backsliding in Member States, thereby safeguarding democratic participation in a potentially expanding Union. Four key recommendations are made to EU institutions: (1) recognise that the value of democracy should actively be promoted; (2) use Article 10(3) TEU as an operationalising provision for the value of democracy; (3) recognise the directly effective nature of Article 10(3) TEU; and (4) include Article 10(3) TEU in procedures and cases related to democratic backsliding.

1 | INTRODUCTION

There is no doubt that democracy is under threat. Long gone are the days when this public good was so well established that no one would even think of uttering the words 'illiberalism', 'electoral autocracy' or 'democratic backsliding'. Yet those words accurately describe some of the current dynamics materialising in the European Union (EU). Some developments in EU Member States reflect a worrying trend of power consolidation, attacks on independent state institutions, cronyism, corruption, wilful disinformation campaigns and online mass manipulation. These trends are in line with a worldwide tendency towards autocracy, and in fact, they are unmistakably supported and amplified by malignant global actors. If the idea of Europe and the EU is to survive, then it is time to think and act upon the threats democracy faces. To protect democracy, EU law can and must be used, especially now that it has been imbued with the very values that, after World War II (WWII), were sought to prevent the horrors of the totalitarian regimes of the 20th century. Considering the dark turn that the 21st century is currently taking, those who

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believe in democracy, the rule of law and fundamental rights must be standing around the corner, ready to fight back with the very values they inherited. Come what may.

Through its recommendations, the report of the Group of Twelve¹ aims at, inter alia, strengthening the rule of law and the EU's democratic legitimacy. Many developments have characterised these fields in the recent history of the EU, namely, since the European Court of Justice (hereafter the 'Court of Justice') rendered its *Associação Sindical dos Juizes Portugueses*² judgment in 2018. This judgment constitutes the first stepping stone or 'pierre fondatrice'³ in a paradigmatic shift that one can witness in the EU's approach towards the judicial enforcement of the foundational values enshrined in Article 2 TEU. Through its dynamic case-law, in particular on Article 19(1) (2) TEU,⁴ this paper considers that the Court of Justice has paved a new way for the operationalisation of other Article 2 TEU values such as the value of democracy. The relevance of this value is even more crucial in the context of the EU's foreseeable enlargement or key elections in Europe due to information manipulation on social platforms.

Interestingly, this case-law has provided impetus for the European Commission to increasingly use the tools at its disposal, namely, by initiating infringement procedures and requesting financial penalties, in order to curb the liberticidal trend of some Member States undermining common values and resulting in 'democratic backsliding'. This notion will be further developed below as defined in relation to the enforcement of the value of democracy.

In light of the dominant role of the Court of Justice in shaping the EU's approach towards 'democratic backsliding', the present paper argues that Article 10(3) TEU, which provides that 'every citizen shall have the right to participate in the democratic life of the Union', constitutes a new avenue for preventing and repressing illiberal 'democratic backsliding' in Member States. By operationalising Article 10(3) TEU, taken in combination with the value of democracy provided for in Article 2 TEU, this paper argues that the EU can unlock a new means to counter illiberal tendencies finding routes into Member States' governing institutions as well as an additional tool for enforcing citizens' right to participate in the democratic life of an enlarged Union.

This new course of action could be enacted without the need for Treaty change, while significantly contributing to the reinforcement of the EU's action in the fields of democracy or the rule of law, thereby strengthening its resilience in light of a foreseeable enlargement as well as digital threats to democracy.

To this end, the notion of 'democratic backsliding' will firstly be described as well as its relation to the EU's emergence as a supranational contrepouvoir. Additionally, this section will show the intertwined nature of the EU values of the rule of law, fundamental rights and democracy.

The potential of Article 10(3) TEU, framed as the legal basis for the operationalisation of the value of democracy, will then be discussed. In this context, the EU citizen, who is at the heart of this provision, and the correlated link between European and national democracies will be examined. Moreover, the nature of the obligations stemming from Article 10(3) TEU will be expanded on. It will be demonstrated that this provision is endowed with direct effect and that by its clear, precise and unconditional language, it establishes a self-executing right that citizens can directly invoke before national courts. The last sections of this part will be devoted to the material scope of Article 10(3) TEU, its relationship with the threshold of systemic deficiencies and how its use could lead to discussions relating to national identity and ultra vires action by the EU in reaction to which the provision could be limited to situations affecting the essence of associated fundamental rights.

Lastly, it will be concretely established that Article 10(3) TEU can constitute a new avenue to operationalise the value of democracy by developing a case in point. This last section aims at demonstrating that Article 10(3) TEU could be used, namely, by the European Commission in the context of infringement procedures and by citizens in

¹Report of the Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', 18 September 2023, <https://www.diplomatie.gouv.fr/IMG/pdf/20230919_group_of_twelve_report_updated14.12.2023_cle88fb88.pdf>.

²Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.

³L.D. 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, 1202.

⁴See, for instance, Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034; and Case C-430/21, RS, ECLI:EU:C:2022:99.

front of national courts, in order to enforce EU citizens' right to participate in the democratic life of an enlarged Union.

2 | THE RISE OF THE EU AS A SUPRANATIONAL CONTREPOUVOIR THROUGH ITS FOUNDATIONAL VALUES

Following a global trend towards the erosion of the foundations of liberal democracy,⁵ to which the EU is not immune, some EU Member States are engaging in systemic attacks on the rule of law, democracy and fundamental rights.⁶ With this widespread backlash against the axiological foundations of the EU, one can witness the advent of 'hybrid', 'illiberal', 'diffusely defective democracy' or 'semi-authoritarian' regimes in the EU's Member States.⁷ Considering the political saliency, its entrenched nature and the 'ideological leadership' of the concept of illiberalism,⁸ this paper will use this notion as the type of democratic backsliding for which Article 10(3) TEU could constitute a remedy. Indeed, given the ideological character of illiberalism, making it compete with populism, conservatism and far-right doctrines, it represents a serious challenge to liberal constitutional democracy in the EU. Illiberalism is, as such, a type of democratic backsliding promoted 'often in the name of democratic principles and by winning popular support [...] [which] proposes solutions that are majoritarian, nation-centric or sovereignist',⁹ solutions that stand in stark opposition to the EU's conception of democracy. While this latter notion cannot easily be defined, the EU's system has been designed to be (1) consensus-based, rather than majoritarian, due notably to a strong Court of Justice, able to review legislation in light of the Treaties' implicit general principles and fundamental rights; (2) based on supranational cooperation, with two typically supranational institutions (the European Parliament and the Commission); and (3) representing a pooling of sovereignty, through a carefully crafted system of attributed competences.

As argued by Carrera et al., '[c]ontestation about the rule of law, the meaning and application of fundamental rights and democracy takes place not only within Member States but among Member States and EU institutions and among Member States within EU institutions. In essence the dilemmas emerging here are the product of an evolving sovereignty struggle'.¹⁰ This struggle increasingly takes the form of contestation by Member State authorities of the primacy of EU law,¹¹ including that of Article 2 TEU, and their insistence on respect of State sovereignty and

⁵See Y. Gorokhovskaia and C. Grothe, 'Freedom in the World 2024: The Mounting Damage of Flawed Elections and Armed Conflict' (Freedom House, 2024) <<https://freedomhouse.org/report/freedom-world/2024/mounting-damage-flawed-elections-and-armed-conflict>>.

⁶R.D. Kelemen, 'The European Union's Authoritarian Equilibrium', (2020) 27(3) *Journal of European Public Policy* 481; D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008); U. Sedelmeier, 'Anchoring From Above? The European Union and Democratic Backsliding in Hungary and Romania', (2014) 52(1) *Journal of Common Market Studies* 105; J. Dawson and S. Hanley, 'What's Wrong With East-Central Europe?: The Fading Mirage of the "Liberal Consensus"', (2016) 27(1) *Journal of Democracy* 20; A. Bozóki and D. Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', (2018) 25(7) *Democratization* 1173; P. Krekó and Z. Enyedi, 'Explaining Eastern Europe: Orbán's Laboratory of Illiberalism', (2018) 29(3) *Journal of Democracy* 39; M. Bogaards, 'De-democratization in Hungary: Diffusely Defective Democracy', (2018) 25(8) *Democratization* 1481; A. von Bogdandy and L.D. Spieker, 'Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions', (2023) 29(2) *Columbia Journal of European Law* 65; A. Gora and P. De Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law', (2022) 29(3) *Journal of European Public Policy* 342; M. Laruelle, 'Illiberalism: A Conceptual Introduction', (2022) 38(2) *East European Politics* 303; N. Sitter and E. Bakke, 'Democratic Backsliding in the European Union', *The Oxford Encyclopedia of European Union Politics* (2019); C. Emmons and T. Pavone, 'The Rhetoric of Inaction: Failing to Fail Forward in the EU's Rule of Law Crisis', (2021) 28(10) *Journal of European Public Policy* 1611; L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', (2017) 19(3) *Cambridge Yearbook of European Legal Studies* 3; D. Silander, 'Democracy in Europe: Enlarged but Eroding—A Union in Existential Crisis', in A. Bakardjieva Engelbrekt, P. Ekman, A. Michalski and L. Oxelheim (eds), *The EU Between Federal Union and Flexible Integration* (Palgrave Macmillan, 2023); L. Pech and K.L. Scheppele, 'Rule of Law Backsliding in the EU: Learning From Past and Present Failures to Prevent Illiberal Regimes From Consolidating Within the EU', (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; C. Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity Under Article 7 TEU', (2021) 42(4) *International Political Science Review* 501.

⁷Ibid.

⁸M. Laruelle, 'Illiberalism: A Conceptual Introduction', (2022) 38(2) *East European Politics* 303.

⁹Ibid, 309.

¹⁰S. Carrera, E. Guild and N. Hernanz, 'The Triangular Relationship Between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism' (Centre for European Policy Studies, 2013) <<https://www.ceps.eu/ceps-publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu/>>, 24.

¹¹For instance, the action initiated by the European Commission on 17 July 2023, Case C-448/23, *European Commission v. Republic of Poland*.

the principle of subsidiarity.¹² This shows that the crisis of liberal constitutional democracy in the EU translates to all levels of the composite and vertical constitutional structure of the EU. There is, therefore, a transnationalisation of the illiberal-driven backsliding process due to its increasing cross-border salience and a negative intergovernmental spillover effect of illiberalism in EU decision-making.¹³

It is questionable whether the EU's separation of powers, *trias politica* or, in EU legalese, the principle of institutional balance is sufficiently equipped to deal with this problem. According to Blanke and Mangiameli, the system of separation of powers in the EU's composite structure has resulted not in a strictly separated *trias politica* at Member State level and EU level but rather in '[...] a system of checks and balances, which are established on the one hand horizontally between the European institutions, and on the other hand vertically between them and the [Member State] institutions.'¹⁴ This can be illustrated by the evolution of the EU's response to illiberal-driven backsliding from a 'non-response',¹⁵ 'EU inaction',¹⁶ 'unexpectedly low sanctioning record'¹⁷ to the devising of 'material sanctions'¹⁸ and repeated infringement actions based on Article 19(1)(2) TEU¹⁹ to address attacks on the EU's foundational values, which the Member States are supposed to share.²⁰ As such, this evolution shows that the EU, to some extent, has emerged as a supranational *contrepouvoir* that can and must defend its values when they are threatened by its Member States.

Democracy, the rule of law and fundamental rights are values mentioned in Article 2 TEU and are part of the very identity of the EU.²¹ In the EU, the rule of law, fundamental rights and democracy are co-constitutive insofar as the rule of law implies the existence of democracy and respect for fundamental rights and vice versa.²² As Carrera et al. have written, 'While each element can be examined separately, it is critical never to lose sight of the elementary truth that the three are inherently and indivisibly interconnected.'²³ This stance is also taken by the European Commission, which has laid out on various occasions its way of seeing the link between the rule of law, democracy and fundamental rights.²⁴ Most notably, the European Commission expressed their intrinsic relationship in the following way: '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.'²⁵ The Court of Justice also drew multiple links between the three notions in its case-law, notably in the *Les Verts* and *Kadi* cases.²⁶ In *Les Verts*, the Court's reasoning was based on a procedural conception of the rule of law, placing judicial remedies for the preservation of the European Parliament's prerogatives, as the

¹²S. Carrera, E. Guild and N. Hernanz, see n. 10.

¹³M. Blauburger and U. Sedelmeier, 'Sanctioning Democratic Backsliding in the European Union: Transnational Salience, Negative Intergovernmental Spillover, and Policy Change', (2024) *Journal of European Public Policy* 1.

¹⁴H.-J. Blanke and S. Mangiameli, *The Treaty on European Union (TEU): A Commentary* (Springer, 2013), 428; referring to P. Kirchhof, 'The European Union of States', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart/C.H. Beck, 2010), 232.

¹⁵C. Emmons and T. Pavone, see n. 6, 1611.

¹⁶L. Pech and K.L. Scheppele, see n. 6.

¹⁷C. Closa, see n. 6, 501.

¹⁸M. Blauburger and U. Sedelmeier, see n. 13, 2.

¹⁹See an overview until Case C-896/19, *Repubblika v. Il-Prim Ministru*, ECLI:EU:C:2021:311; L. Pech and D. Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice', (2021) 3 *Swedish Institute for European Policy Studies* 1, 64 et seq.

²⁰Case Opinion 2/13, ECLI:EU:C:2014:2454, para. 168.

²¹Case C-156/21, *Hungary v. Council and Parliament*, ECLI:EU:C:2022:97, para. 127.

²²S. Carrera, E. Guild and N. Hernanz, n. 6, 20. For Dumont, sometimes democracy and the rule of law conflict: H. Dumont, 'La démocratie, moteur des mutations de l'état de droit et vice-versa: Points de repère pour penser une relation dialectique équilibrée', in R. Leysen, K. Muylle, J. Theunis and W. Verrijdt (eds), *Semper Perseverans. Liber Amicorum André Alen* (Intersentia, 2020), 79.

²³Ibid.

²⁴European Commission, 'A New EU Framework to Strengthen the Rule of Law', COM(2014) 158 Final, Annex I; Regulation (EU) 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 [2020] OJ L 4331 1, Recital 3 (Conditionality Regulation).

²⁵Recital 6, Reg 2020/2092.

²⁶Case C-294/83, *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23: 'The EEC is a Community based on the rule of law inasmuch neither its Member States nor institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter'; Case C-402/05, *P Kadi and Al Barakat Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 316: 'the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty'.

EU's 'only political institution';²⁷ front and centre of the EU's conception of the rule of law. In its *Kadi* case-law, the Court of Justice additionally established a clear link between the rule of law and respect for fundamental rights. If the principle of equality is to be taken as being part of the foundation of liberal democracy,²⁸ as many democratic theorists have argued,²⁹ the Court of Justice has gone further by stating that '[a]lthough Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principle of non-discrimination, it is clear 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'.³⁰ In essence, these excerpts aim to show that EU institutions, in particular the Court and Commission, recognise the co-constitutive nature of the rule of law, democracy and fundamental rights. Being not only conceptually but institutionally linked, it will be argued below that these values can be subject to similar mechanisms of enforcement.

3 | ARTICLE 10(3) TEU: A LEGAL REMEDY AGAINST ILLIBERALISM

The present section will undertake a legal analysis of Article 10(3) TEU and demonstrate how it can become the provision through which the EU can tackle rising illiberalism. In particular, this section will discuss firstly how the value of democracy can be operationalised. Secondly, the EU citizen, who is at the heart of this provision, and the correlated link between European and national democracies will be examined. A third subsection will reveal the type and nature of the obligations stemming from Article 10(3) TEU. A fourth subsection will discuss the legal characteristics of Article 10(3) TEU, arguing in favour of its direct effect. A fifth subsection will lay out the potential scope of Article 10(3) TEU, while a sixth subsection will argue in favour of the use of the measure only in cases of systemic deficiencies affecting the value of democracy. Finally, a last subsection will explore how the use of Article 10(3) TEU could lead to discussions relating to national identity and ultra vires action by the EU in reaction to which said provision could be limited to situations affecting the essence of associated fundamental rights.

3.1 | Operationalising the value of democracy: The question of the legal basis

The values of the EU as enshrined in Article 2 TEU define the very identity of the Union.³¹ Thus, per the Court, 'the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties'.³² While it is undisputed that the Union can and must defend its foundational values, what is less clear is how it can do so.

A first avenue would consist in enforcing Article 2 TEU autonomously. This possibility is increasingly being discussed due to the Commission's infringement procedure before the Court of Justice for Hungary's alleged violation of LGBTIQ+ rights, where it invoked Article 2 TEU as a stand-alone provision for the first time.³³ However, this

²⁷K. Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice', (2013) 62 *International & Comparative Law Quarterly* 271, 282.

²⁸R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Harvard University Press, 1996).

²⁹T. Christiano and S. Bajaj, 'Democracy', *The Stanford Encyclopedia of Philosophy* (Spring Edition, 2022) <<https://plato.stanford.edu/entries/democracy/#Equa>>.

³⁰Case C-156/21, *Hungary v. Council and Parliament*, ECLI:EU:C:2022:97, para. 229.

³¹Case C-156/21, *Hungary v. Council and Parliament*, ECLI:EU:C:2022:97, para. 127.

³²*Ibid.*

³³Case C-769/22, *Commission v. Hungary*, OJ 2023/C 54/19; see also, on this action, 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(1) *Maastricht Journal of European and Comparative Law* 3; L.D. Spieker, 'Berlaymont Is Back: The Commission Invokes Article 2 TEU as Self-standing Plea in Infringement Proceedings Over Hungarian LGBTIQ Rights Violations' (EU Law Live, 2023) <<https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtiqrigh-violations-by-luke-dimitrios-spieker/>>; L. Kaiser, 'A New Chapter in the European Rule of Law Saga? On the European Commission's Attempt to Mobilise Art. 2 TEU as a Stand-Alone Provision' (Verfassungsblog, 2023) <<https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/>>; L.S. Rossi, 'La valeur juridique des valeurs', (2020) *Revue trimestrielle des droits de l'homme* 639; M. Safjan, 'On Symmetry: In Search of an Appropriate Response to the Crisis of the Democratic State', (2020) *Il diritto dell'Unione* 673, 696.

approach appears highly controversial, as some authoritative sources have argued against it.³⁴ The controversy surrounding a free-standing or stand-alone invocation of Article 2 TEU revolves mainly around it being a vague and open provision, the values of which are arguably not rules of law actionable before a court.³⁵

As such, given that Article 2 TEU cannot as of yet be applied autonomously, a second avenue worth exploring to counter illiberal tendencies with the value of democracy would be through the value of the rule of law. Indeed, as the Venice Commission has stated in its famous 'Rule of Law Checklist', the core elements of the rule of law encompass legality, meaning 'a transparent, accountable and democratic process for enacting law', 'respect for human rights', and 'non-discrimination and equality before the law'.³⁶ It can, therefore, be inferred that the rule of law, in the substantive version of the Venice Commission, essentially covers many aspects of democracy. Furthermore, in the EU, the values of the rule of law, democracy and respect for fundamental rights are co-constitutive. As such, enforcing democracy through the rule of law would be theoretically possible. Moreover, relying on the major constitutional development that the *Portuguese Judges* case represents in Union law³⁷ presents the advantage that it is a more reliable approach insofar as 'it arguably depoliticises the case and avoids the uncertainties attached to new and untested legal concepts'.³⁸ Consistency with existing *acquis*, including case-law, are effectively catalysts of legal certainty, and reliance on the indirect avenue would in consequence appear preferable.

A contrario, some have observed with regret that EU institutions too often tend to address a wide variety of problems with the 'rule of law hammer', as the EU's tools are purportedly primarily rule of law instruments.³⁹ Another counterargument against enforcing democracy through the rule of law is of legal nature. The rule of law has been operationalised in the *Portuguese Judges* case through an operationalising provision giving it concrete expression, namely, Article 19(1)(2) TEU. This provision essentially covers all aspects related to the independence of the judiciary⁴⁰ insofar as it enjoins the Member States to establish remedies sufficient to ensure effective legal protection in the fields covered by Union law. Yet some commentators have argued that that provision is not the only one through which the Court has operationalised the value of the rule of law.⁴¹ According to this view, the value of the rule of law is also operationalised by Article 49 TEU, which regulates accession to the EU and for which a principle of non-regression has been recognised. Because the Copenhagen criteria include democratic criteria, this avenue could also represent a way of addressing illiberal tendencies insofar as non-regression represents a yardstick against which democratic backsliding can be measured and countered. However, the fact that the Court has not referred to this principle in its seminal conditionality rulings indicates that it may be reluctant to expand on it, maybe even to uphold it as a legal standard, owing probably to the fact that it could lead to fragmented approaches towards the enforcement of the rule of law. That is because non-regression is a *fortiori* defined by reference to the conditions prevailing in a Member State upon accession, because those conditions determine whether a State can become a Member State and enjoy all the rights deriving from the application of the Treaties.⁴² Finally, a last rebuttal to using the value

³⁴L.D. Spieker, 'Beyond the Rule of Law: How the Court of Justice Can Protect Conditions for Democratic Change in the Member States', in A. Södersten and E. Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS, 2023), 74; referring to Opinion of A.G. Pikamäe, Case C-457/18, *Slovenia v. Croatia*, ECLI:EU:C:2019:1067, paras. 132 et seq, and Opinion of A.G. Tanchev, Case C-824/18, *A.B. and Others*, ECLI:EU:C:2020:1053, para. 35.

³⁵L.D. 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, 1200; referring to D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', (2015) 11 *European Constitutional Law Review* 512, 520.

³⁶European Commission for Democracy through Law (Venice Commission), 'Rule of Law Checklist', CDL AD(2016)007, Study No. 711/2013, 7, Point 18.

³⁷Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117; the President of the Court of Justice put the *Portuguese Judges* cases on an equal footing with judgments like of *Van Gend & Loos*, *Costa v. ENEL* or *Les Verts*: L.D. Spieker, see n. 34, 1213.

³⁸L.D. Spieker, see n. 35, 1187.

³⁹A. Gora and P. De Wilde, see n. 6, 358.

⁴⁰Although Leloup et al. argued that the rule of law in the EU has been interpreted more broadly than Article 19(1)(2) TEU, notably through Article 49 TEU and the correlated principle of non-regression in *Repubblika*, see M. Leloup, D. Kochenov and A. Dimitrovs., 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 *Repubblika v. Il-Prim Ministru*', (2021) *RECONNECT Working Paper (Leuven) No. 15* <<https://ssrn.com/abstract=3875749>>; for a more sceptic view on this judicial development, see J. Scholtes, 'Constitutionalising the End of History? Pitfalls of a non-regression Principle for Article 2 TEU', (2023) 19(1) *European Constitutional Law Review* 59.

⁴¹*Ibid.*

⁴²Case C-896/19, *Repubblika v. Il-Prim Ministru*, ECLI:EU:C:2021:311, paras. 61–63.

of the rule of law to safeguard democracy in the EU Member States is that such an avenue would entail a type of unnecessary hierarchisation, a preference for the rule of law over democracy, whereas it can be argued, in light of the conditionality judgments, that all Article 2 TEU values are co-equal.⁴³

However, as Spieker notes, the operationalisation of the Union values 'could be extended to any norm of EU law containing a specific obligation and giving expression to a value enshrined in Article 2 TEU'.⁴⁴ This is done through 'mutual amplification',⁴⁵ through which the Court creates a nexus between Article 2 TEU and an operationalising provision containing a specific obligation and giving expression to one of the values of that overarching provision. This justifies an extensive reading of the scope of the operationalising provision, thus bringing specificity to Article 2 TEU and extending the scope of the operationalising provision.⁴⁶

Hence, the most realistic avenue to address illiberal tendencies in the Member States with the value of democracy appears to be Article 10(3) TEU. This affirmation relies on several arguments, notably related to existing case-law. First, the Court of Justice affirmed that 'Article 2 TEU is not merely a statement of policy guidelines or intentions but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for Member States',⁴⁷ thereby establishing the nexus values–principles–obligations.

Secondly, in 2019, the Court of Justice, sitting in Grand Chamber formation, laid down certain foundations on which the operationalisation of the value of democracy could be built on the basis of this nexus. In its *Puppinck* judgment, the Court's Grand Chamber affirmed the following: '[...] as stated in Article 10(1) TEU, the functioning of the Union is to be based on representative democracy, which gives concrete expression to the democracy as a value. Democracy is, under Article 2 TEU, one of the values on which the Union is founded.'⁴⁸ It is no coincidence that the Court's Grand Chamber transposed the language of its landmark *Associação Sindical dos Juizes Portugueses* judgment—'gives concrete expression'—to operationalise the value of the rule of law.⁴⁹ This observation reinforces the finding according to which the Court of Justice is willing and able to develop its own approach and narrative on the enforcement of the values contained in Article 2 TEU beyond the value of the rule of law. The President of the Court, Koen Lenaerts, also noted before those judgments that 'Articles 9 to 12 TEU give expression to the principle of democracy in the EU legal order.'⁵⁰ Article 10(3) TEU has rarely been discussed in literature as concretising the value of democracy,⁵¹ let alone in the case-law where it was never mentioned in this sense. That may be due to the relative democratic stability that the EU enjoyed up until now. However, given current circumstances, it is time to activate the dormant clause of Article 10(3) TEU. Article 10(3) TEU provides that '[e]very citizen shall have the right to participate in the democratic life of the Union.' As such, it imposes a specific obligation and gives concrete expression to a value enshrined in Article 2 TEU.⁵² As a consequence, it appears that Article 10(3) TEU is a more

⁴³For a similar interpretation, see F. Erlbacher and K. Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations', in European Commission Legal Service (ed), *70 Years of EU Law: A Union for Its Citizens* (Publications Office of the European Union, 2022), 34.

⁴⁴L.D. Spieker, see n. 35, 1206.

⁴⁵A. von Bogdandy and L.D. Spieker, see n. 6, 72.

⁴⁶L.D. Spieker, see n. 35, 1204.

⁴⁷Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, paras. 157–158.

⁴⁸Case C-418/18 P, *Puppinck and Others v. Commission*, ECLI:EU:C:2019:1113, para. 64, which was reiterated on the same day by Case C-502/19, *Criminal Proceedings Against Oriol Junqueras Vies*, EU:C:2019:1115, para. 63, albeit in a different way: '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' (our emphasis).

⁴⁹Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, para. 32.

⁵⁰K. Lenaerts, see n. 27, 275.

⁵¹For a comprehensive analysis of the legal tenets of the value of democracy in the EU, see Y. Bouzora, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis', (2023) 8(2) *European Papers* 809; J. Cotter, 'The Last Chance Saloon: Hungarian Representatives May Be Excluded From the European Council and the Council', (Verfassungsblog, 2020) <<https://verfassungsblog.de/the-last-chance-saloon/>>; D. Krappitz and N. Kirst, 'Chapter XII: An Infringement of Democracy in the EU Legal Order', in D. Utrilla and A. Shabbir (eds), *EU Law in Times of Pandemic, the EU's Legal Response to Covid-19* (EU Law Live Press, 2021); for a short discussion on Article 10(3) TEU, see L.D. Spieker, see n. 45, 77.

⁵²L.D. Spieker, see n. 35, 1206.

eligible candidate for value enforcement in the Member States than Articles 10(1) and 10(2) TEU, alone or read together.⁵³ This latter finding relies on the following considerations.

While the argument can be made that the representative character of the EU's democracy (Article 10(1) TEU)⁵⁴ implies that Member States' elected assemblies should be organised in accordance with the same principle, several counterarguments invite us to refute such a finding in the context of value enforcement in Member States. Firstly, a literal and contextual reading of the provision reveals that this first paragraph only addresses the perceived democratic deficit of the EU per se,⁵⁵ without establishing a link with the democratic systems of the Member States. Secondly, this provision seems to preclude a reading interpreting it as providing the EU with a margin of appreciation to intervene in response to undemocratic institutional developments in some Member States, especially considering that it does not establish any link with the form of democratic representation of the Member States, because it states on which form of democracy the Union is founded, not its Member States. In its case-law on the value of the rule of law and Article 19(1)(2) TEU, the Court of Justice also specifically leaves discretion to the Member States with regard to how to exercise institutional autonomy in their national judicial systems.⁵⁶ By analogy, institutional autonomy should also be left to Member States when it comes to the organisation of their system of democratic representation. The Court of Justice has specifically emphasised that no provision of EU law requires Member States to adopt a particular constitutional model with regard to the organisation of the various branches of the state,⁵⁷ as long as it is democratic. In this regard, it underlined Article 4(2) TEU,⁵⁸ which requires the EU and its institutions to respect the national identities of the Member States inherent in their fundamental political and constitutional structures. Consequently, the operationalisation of Article 10(1) TEU would most likely run afoul of these fundamental principles of EU law.

As far as Article 10(2) TEU⁵⁹ is concerned, it seems that the argument drawing on the EU's alleged democratic deficit against Article 10(1) TEU can, by analogy, also be transposed to Article 10(2) TEU. Moreover, even though it is undisputed that democratic accountability is in fact an essential element of democracy, the operationalisation of Article 10(2) TEU would not remedy any problems that may fall outside this particular aspect of democratic society: such as attacks on minority groups or the undermining of the plurality of the media. The arguments developed by other authors in favour of the use of Article 10(2) TEU for the purpose of the enforcement of the value of democracy actually show the limited relevance to enforce democracy in all its aspects.⁶⁰ This relates to the fact that Article 10(2) TEU can only be invoked when envisaging the possibility of excluding Member States' delegations from the Council or stripping them of their voting rights. Other than the fact that this scenario is politically unfeasible and therefore only of a theoretical nature, as demonstrated by Bouzora,⁶¹ it would only address a small aspect of the wider and more complex issue of democratic backsliding in the EU. For others, excluding some Member States from the Council or preventing them from voting is actually paradoxical in terms of democratic standards, as was argued by drawing on voter disenfranchisement in criminal law.⁶²

⁵³See, for arguments in favour of using Articles 10(1) and 10(2) TEU: J. Cotter, see n. 61; D. Krappitz and N. Kirst, see n. 61; T. Verellen, 'Hungary's Lesson for Europe: Democracy Is Part of Europe's Constitutional Identity. It Should Be Justiciable' (Verfassungsblog, 2022); for arguments against: T. Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7', (2022) 28 *Res Publica* 701; for a similar approach pertaining to Article 10(3) TEU, see L.D. Spieker, see n. 45; see also M. Claes, 'Safeguarding the European Union's Values Beyond the Rule of Law', in A. Södersten and E. Hercock, *The Rule of Law in the EU: Crisis and Solutions* (SIEPS, 2023); see also K. Lenaerts, see n. 27, 275: 'Articles 9 to 12 TEU give expression to the principle of democracy in the EU legal order'.

⁵⁴Article 10(1) TEU: 'The functioning of the Union shall be founded on representative democracy.'

⁵⁵K. Lenaerts, see n. 27, 275; H.-J. Blanke and S. Mangiameli, *The Treaty on European Union (TEU): A Commentary* (Springer, 2013), 420 and 433 et seq.

⁵⁶Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 229.

⁵⁷Case C-430/21, RS, ECLI:EU:C:2022:99, para. 43.

⁵⁸*Ibid.*

⁵⁹Article 10(2) TEU: 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.'

⁶⁰Y. Bouzora, see n. 51; J. Cotter, see n. 51, D. Krappitz and N. Kirst, see n. 51.

⁶¹Y. Bouzora, see n. 51.

⁶²T. Theuns, see n. 53, 701 et seq.

3.2 | The EU Citizen in Article 10(3) TEU: Link between European and national democracies

As is well-known, EU citizenship is attached to the possession of the nationality of one of its Member States.⁶³ The subject of Article 10(3) TEU being the EU citizen, it concerns exclusively the nationals of the Member States. Article 10(3) TEU establishes the link between EU citizenship and the right to participate in the Union's democratic life, thus establishing the link between nationality of a Member States and the right to participate in the EU's democratic life. Given the inextricable relationship between national and Union democratic systems, European democratic life is to a great extent contingent on national democratic life.⁶⁴ Due to the citizens' dual hat, the linkage between EU and national democracies could be seen as being channelled through the EU citizen, thereby establishing a concrete link between EU- and national-level democracies, which Article 10(1) TEU arguably lacks. In a similar vein, it has been observed that '[...] EU citizens are seen as political actors. EU citizenship reflects the idea that the process of European integration must be not only in the hands of the Member States but also of the peoples of Europe. In that sense, it contributes to the democratisation of the EU.'⁶⁵

This essentially means that, regardless of the fact that their democratic rights have been undermined in their national democracy, Member States still are under the obligation to ensure that all citizens shall be entitled to participate in the Union's democratic life. This then justifies that the Union acts when and where such a participation is rendered impossible due to national democratic backsliding. Furthermore, the Union's democratic life cannot thrive if national democracy is eroding. Citizens play a paramount role in countering this. By way of consequence, when deprivation of rights at the national level affects their ability to indulge in the EU's democratic life, limits or 'red lines'⁶⁶ should be drawn by the EU itself to preserve the citizens' democratic rights. Furthermore, the fact that this provision bestows upon the citizens of the Union a subjective right to partake in the EU's democratic life means that this right is enforceable against the Member States. This citizenship-based approach would enable all EU citizens to assert their rights in relation to the Member States (and the EU itself, if the situation so requires), namely, in case of adoption of measures—whichever form they might take—in violation of their right to civic participation in the Union's democratic fabric. What is more, the enforcement of rights bestowed upon Union citizens by virtue of Union law is dependent on their concretisation by Member States in their national legal orders.⁶⁷ As such, the principle of effectiveness of EU law, interpreted by the Court of Justice as a means to secure the authority of EU law over national law,⁶⁸ would provide legal grounds for the use of Article 10(3) TEU. Hence, in cases where Member States make it virtually impossible to exercise the right conferred by Article 10(3) TEU, action at Union level seems justified and warranted.

3.3 | Type and nature of the obligations stemming from Article 10(3) TEU: Positive and negative obligations of result

In its conditionality judgments of 16 February 2022, the Court stated that '[o]bservance of the principles of the rule of law constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly from their membership of the European Union.'⁶⁹ Similarly, the value of democracy is given concrete

⁶³Article 9 TEU provides that 'Every national of a Member State shall be a citizen of the Union'.

⁶⁴A. von Bogdandy and L.D. Spieker, see n. 7, 18; A. von Bogdandy, 'The Emergence and Democratization of European Society' (Oxford University Press, 2023); L.D. Spieker, 'Beyond the Rule of Law: How the Court of Justice Can Protect Conditions for Democratic Change in the Member States', in A. Södersten and E. Hercok (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS, 2023), 87.

⁶⁵K. Lenaerts, 'Linking EU Citizenship to Democracy', (2015) 11(11) *Croatian Yearbook of European Law and Policy* 7, 15.

⁶⁶A. von Bogdandy, see n. 64.

⁶⁷S. Robin-Olivier, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections', (2014) 12 *International Journal of Constitutional Law* 1, 170.

⁶⁸*Ibid.*

⁶⁹Case 156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 231–233.

expression in the principle of democracy, containing legally binding obligations for Member States, which are obligations of result. The result must be that Member States enable civic participation in the EU's democratic fabric. Hence, European citizenship, in the form it takes in Article 10(3) TEU, entails (1) a positive obligation: enabling citizen participation in the Union's democratic life, which, as inter alia Articles 10(1) and 10(2) TEU provide, finds concrete expression as a right to direct and indirect representation in the European Parliament for the former and in the (European) Council for the latter. Moreover, Article 10(3) TEU additionally implies (2) a correlate negative obligation on the part of the Member States, that is, the obligation to refrain from preventing participation in the Union's democratic life, namely, by the adoption of measures that would—directly or indirectly—hinder EU citizens' rights in this regard. As the Union's democratic life is intrinsically intertwined with democratic life within the Member States, this negative obligation also entails that EU citizens be protected against any national measure interfering with their right to effectively enjoy all aspects of the Union's democratic life.

3.4 | Direct effect of Article 10(3) TEU

On a preliminary note, it is established that the Court of Justice has ascertained the principle of direct effect in its *Van Gend en Loos* judgment, asserting that EU law creates not only obligations for Member States but also rights for individuals.⁷⁰ Consequentially, individuals can invoke EU law directly in front of national and European courts.⁷¹ In order for a provision to be granted direct effect, the Court of Justice requires it to be precise, clear, unconditional and not needing any additional implementing measures.⁷²

Applying these requirements to Article 10(3) TEU, it is argued that Article 10(3) TEU articulates a fundamental principle of democratic participation within the EU, declaring that 'every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.' An analysis of the language of this provision reveals its clarity, precision and unconditional nature,⁷³ thereby substantiating its direct effect.⁷⁴

Firstly, the wording of Article 10(3) TEU is characterised by its clarity, as it unambiguously sets forth the entitlement of every citizen to engage in the democratic processes of the EU. The phrase 'every citizen shall have the right' leaves no room for interpretation or ambiguity, establishing a straightforward (subjective) right.

Secondly, the provision is precise in its formulation, leaving little discretion regarding the scope and nature of the conferred right. The use of the terms 'participate in the democratic life' and 'Decisions shall be taken as openly and as closely as possible to the citizen' adds specificity to the intended rights, providing a clear framework for the understanding and enforcement of the provision. Considering the abstract character of the notion of 'democratic life', this paper will show how it is entrenched in the EU's constitutional charter.

Finally, the language employed in Article 10(3) TEU is unconditional, lacking any qualifying clauses or conditions that might impede its direct applicability. In particular, as developed in previous sections and given the nature of the rights contained in Article 10(3) as well as the situations in which it is vowed to be relied upon, conditioning its effective implementation on national measures would go against its very essence.⁷⁵ In this regard, a parallel with Article

⁷⁰Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

⁷¹B. De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2021).

⁷²Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

⁷³See, by analogy, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393, paras. 249 and 250; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 253.

⁷⁴L.D. Spieker, see n. 64, 87.

⁷⁵Case C-28/67, *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, ECLI:EU:C:1968:17.

19(1)(2) TEU can be drawn as well as with the Court's case-law on the provision.⁷⁶ Article 19(1)(2) TEU imposes an obligation on Member States to provide remedies sufficient to ensure effective legal protection. Prima facie, one could have objected to the direct effect of this provision insofar as the provision of remedies sufficient to ensure effective legal protection in the fields covered by EU law might arguably have required implementing measures by the Member States. However, the Court of Justice did not perceive this as an obstacle and has, on a case by case basis, consolidated its stance on Article 19(1)(2) TEU's direct effect.⁷⁷

In light of these considerations, it can also be concluded that Article 10(3) TEU does not necessitate any implementing measures for its enforcement. The provision, by its clear, precise and unconditional language, establishes a self-executing right that citizens can directly invoke before national courts. Given its unambiguous language and the absence of conditions, Article 10(3) TEU should be construed as having direct effect in the European legal order, empowering citizens to assert their rights to democratic participation without the requirement of implementing measures at national level.

Naturally, it is for the Court of Justice to confirm the direct effect of any given provision of the Treaties.⁷⁸ While the Court has not yet done so, one should not exclude future cases giving the Court of Justice the opportunity to recognise Article 10(3) TEU's direct effect.

3.5 | Scope of Article 10(3) TEU

In Section 3.3, it was contended that the reference to 'citizens' entails that Article 10(3) TEU's scope *ratione personae* covers all nationals of the EU's Member States. As such, the provision confers an inalienable right on EU citizens, which is enforceable against Member States (and the Union itself should it ever take an illiberal path). On the other hand, the reference to 'democratic life' in this provision implies a reference to all rights associated to the value of democracy, as any other interpretation of this notion would deplete it of its very substance. Table 1 illustrates the rights that are being referred to, as well as the secondary law concretisations associated with them.

Contrarily to Article 19(1)(2) TEU, Article 10(3) TEU does not contain any indication as to its scope *ratione materiae*. Article 19(1)(2) TEU mentions 'the fields covered by Union law' as a reference to the situations in which Member States are to ensure 'effective legal protection'. Notwithstanding the lack of a similar formulation in Article 10(3) TEU, the mention of 'democratic life of the Union' seems to give sufficient indications as to the provision's scope *ratione materiae*. Crucially, given the inextricable links between national democracies and Union-level democracy, 'democratic life of the Union' per se also covers situations falling beyond the scope of Union law, such as purely internal situations. And, as mentioned earlier, civic participation in a democratic society entails the ability to engage in a flurry of activities, spanning from participation in EU elections as a candidate or through the right to vote to having access to accurate and true information on the Union's activities, the right to voice dissatisfaction about government policies and its stance on the EU,⁷⁹ enjoying academic freedom, to being represented by a democratically accountable government in the Council. Consequently, this right encompasses freedom of expression (plurality, tolerance and broadmindedness), freedom of association (constitution of representative institutions and political parties, and electoral rights), right to vote, freedom of thought, conscience and religion, right to information, freedom of arts and sciences, right to education, equality before the law, right of access to documents, right to petition and so forth.

⁷⁶Case C-430/21, RS, ECLI:EU:C:2022:99, para. 58; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393, paras. 249 and 250; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 253.

⁷⁷Case C-430/21, RS, ECLI:EU:C:2022:99, para. 58; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393, paras. 249 and 250; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 253.

⁷⁸Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 254.

⁷⁹K. Lenaerts, see n. 65, 10.

TABLE 1 Concretisation of the Value of Democracy in Primary and Secondary Law

Value in the TEU (Article 2 TEU)	Primary law concretisation	Concretising instruments of secondary law (non-exhaustive list)
Democracy	Articles 10 (emphasis on 10(3)), 11 and 12 TEU Articles 10, 11, 12 and 13 and Title III Equality; Title V Citizens' Rights of the Charter	Regulation (EU) 2024/1083 of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations 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 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law ('Whistleblower Directive') Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents Regulation (EU) 2022/1065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC

Note: For a similar approach, see F. Erlbacher and K. Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations', in European Commission Legal Service (ed), *70 Years of EU Law: A Union for Its Citizens* (Publications Office of the European Union, 2022), 51–53, and T.L. Boeckestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values', (2022) 23 *German Law Journal* 431, 451.

3.6 | The threshold of systemic deficiencies

'[D]emocratic life of the Union' could be construed as meaning that there should be a sufficiently direct causal relation between breaches of values (democracy, pluralism, tolerance, dignity, liberty and equality), principles (democratic accountability, responsibility and transparency) and obligations stemming from democracy (civic participation in Union democratic life) and the adverse effects of such breaches on EU citizens' EU-level democratic interests. Without such a causal relationship, Article 10(3) TEU would serve as a 'federalising device', insofar as the rights attached to the value of democracy would apply in a 'free-standing' way, 'ie regardless of whether the national measure at issue adversely affects the rights attaching to that status'.⁸⁰ Conversely, this 'does not rule out the possibility that

⁸⁰K. Lenaerts, see n. 65, 13.

[certain] provisions of EU law may give rise to obligations on the Member States that relate to the political dimension of EU citizenship [...].⁸¹ By analogy with the case-law on rule of law conditionality, this would mean that for obligations to be imposed on Member States by Article 10(3) TEU, the link between the breach of the value, principles or obligations pertaining to democracy and the impact on citizens' rights to democratic participation at Union level should be 'genuine' or 'real'.⁸² In other words, remedial action on the basis of Article 10(3) TEU should not be triggered when it comes to situations in which the relation between cause and effect is merely hypothetical, too uncertain or vague. A risk deemed serious enough, based on an assessment of the probability of its occurrence,⁸³ should also be covered by Article 10(3) TEU.

The demonstration of a strong causal relationship appears necessary only to the extent that, as with budget conditionality, action on the basis of Article 10(3) TEU would cover measures or actions taken by Member States that adversely affect Union-level rights and policies. In the case of conditionality, that link was necessary because conditionality aims at protecting the Union's budget against violations of the principles associated to the value of the rule of law. In this case, an identical causal relationship is deemed necessary because action on the basis of Article 10(3) TEU would aim at protecting citizen participation in Union-level democracy against national violations of the principles associated to the value of democracy.

In line with these affirmations and with what has been argued by other authors,⁸⁴ a required threshold could be inferred from Article 10(3) TEU. The need to establish a certain threshold is supported by the very wording of Article 10(3) TEU, which gives an indication as to its scope. Indeed, not every national situation of democratic backsliding has a bearing on the right of EU citizens to participate in the 'Union's democratic life'. As was argued by Spieker, 'the more the situation departs from the scope of Union law and comes solely under Article 2 TEU, the more a violation [...] must constitute a "serious and persistent" breach in order to be invoked before the CJEU'.⁸⁵ Consequently, deficiencies of a systemic nature should be included in the scope *ratione materiae* of Article 10(3) TEU, especially when such situations depart from the scope of Union law.⁸⁶ Such systemic deficiencies occur when they are widespread, regular and persistent⁸⁷ and when they are deeply rooted and reach beyond punctual occurrences, taking a characteristic nature.⁸⁸

In turn, and drawing on the principle of proportionality, which is applicable to all Union action, the nature, duration, seriousness and scope of identified breaches by Member States of the value of democracy, principles arising from it or obligations derived from them should guide the European institutions as to the right and proportionate course of action to follow in order to counter it.⁸⁹ These criteria should determine, for instance, whether a judgment, rendered upon an infringement action or a preliminary reference, suffices or whether other penalties such as financial sanctions should be put in place upon request by the Commission.

⁸¹Ibid, 16.

⁸²Case 156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para. 147.

⁸³Case 156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 262 and 267.

⁸⁴L.D. Spieker, see n. 35, 1211.

⁸⁵Ibid.

⁸⁶Ibid; see also A. von Bogdandy et al., 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law—The Importance of Red Lines', (2018) 55 *Common Market Law Review* 983.

⁸⁷A. von Bogdandy and L.D. Spieker, see n. 6, 3.

⁸⁸The existence of systemic deficiencies could, through an analogy with *LM and Aranyosi*, be substantiated by documents, judgments and information of EU and international bodies. See to that effect para. 89 of *Aranyosi*: 'To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.' (Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198).

⁸⁹Recital 18, Reg 2020/2092.

3.7 | National identity, ultra vires and the essence of fundamental rights

National constitutional identity is undoubtedly to be safeguarded as provided for by Article 4(2) TEU. Member States' fundamental structures, be they political or constitutional, are for them to determine and are left to national discretion. Neither the Union nor its Treaties impose a constitutional or political model that the Member States are required to follow. The very identity of the EU's multilevel system is rooted in diversity; it is constituted, as illustrated by von Bogdandy and Spieker, by 'republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, competitive and consensual democracies, strong and weak political party systems, strong and weak social institutions, unitary and federal systems, strong, weak or absent constitutional courts (...), not least Ottoman, Catholic, Protestant, secular, socialist, anarcho-sindicalist, postcolonial and statist constitutional traditions'.⁹⁰ Nonetheless, the EU's legal structure '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. 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'.⁹¹ Hence, when exercising their institutional autonomy, Member States are required to comply with their obligations deriving from Union law.⁹²

In its conditionality judgments, the Court of Justice affirmed once again that Article 4(2) TEU does not give a *chèque en blanc* to Member States stating that 'even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, (...), it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another'.⁹³ The Court of Justice further added that 'whilst they have separate national identities, (...), the Member States adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times'.⁹⁴ The implications of such affirmations, namely, with regard to the concept of 'European constitutional identity', have been widely discussed by others.⁹⁵ In the context of the present paper, it will only be argued, by relying on the above-mentioned developments, that the Court of Justice's reasoning in this case can be interpreted as including the value of democracy taken in combination with the right contained at Article 10(3) TEU.

Similarly, there is little doubt that Union action on the basis of Article 10(3) TEU will be contested by some, notably relying on ultra vires arguments and the fact that some situations may fall outside of the Union's conferred competences provided for by the Treaties. More precisely, one might think of an argument based on the material scope of the Charter of Fundamental Rights. In this regard, Article 51(1) of the Charter provides that it shall be applicable to the Member States only when they are implementing Union law.⁹⁶ Similarly to situations that have presented themselves in relation to the enforcement of the value of the rule of law,⁹⁷ it is conceivable that some cases based on Article 10(3) TEU might involve situations going beyond the Charter's scope of application.

As was argued by others before,⁹⁸ in such cases, only the essence of the fundamental rights encompassed in the value of democracy should be preserved. This is justified insofar as the Charter would not be Article 10(3) TEU's

⁹⁰A. von Bogdandy and L.D. Spieker, 'Countering the Judicial Silencing of Critics—Article 2 TEU Values, Criminal Liability and Reverse Solange', (2019) 8 MPIL Research Paper Series, 18.

⁹¹Opinion 2/13, ECLI:EU:C:2014:2454, para. 168.

⁹²Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, ECLI:EU:C:2021:393, para. 111; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 113.

⁹³Case C-156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para. 233.

⁹⁴Case C-156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para. 234.

⁹⁵See, for instance, P. Faraguna and T. Drinóczi, 'Constitutional Identity in and on EU Terms' (Verfassungsblog, 2022) <<https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>>.

⁹⁶Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

⁹⁷L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', (2022) 14 *Hague Journal on the Rule of Law* 130.

⁹⁸A. von Bogdandy and L.D. Spieker, see n. 7, 12; referring to Opinion of Advocate General Kokott in Case C-490/20, *Stolichna obshtina, rayon 'Pancharevo'*, ECLI:EU:C:2021:296, para. 118.

'shadow' in such cases,⁹⁹ due to the fact that the situations concerned might be significantly departing from the scope of Union law. After all, the drafters of the Treaties underlined that Article 2 TEU only contains a 'hard core' of values.¹⁰⁰ Yet, as the scope of Article 10(3) TEU was argued to cover also purely national situations (see Section 3.5), as deduced from the formulation 'democratic life of the Union' and the intertwined nature of Union and national democracy, this would mean that in some cases, the Charter would be inapplicable. By way of consequence, the obligations imposed by Article 10(3) TEU in situations where the Charter is not applicable must be constrained to obligations of a foundational nature covered by Article 2 TEU, in this case, to the essence of fundamental rights associated with the value of democracy.¹⁰¹ The teachings of European arrest warrant (EAW) case-law are particularly relevant in this regard as they show that the rebuttal of the presumption of respect of the Union's values, fundamental to the principle of mutual trust, can be invoked only when absolute rights are at stake and when the essence of other, non-absolute, rights is undermined.¹⁰² Within these limits, action based on Article 10(3) TEU will enable the safeguarding of fundamental guarantees preventing the Union to bypass structuring principles of the Union's legal order, including national identity (Article 4(2) TEU), structural autonomy, the Charter's applicability in Member States (Articles 51(1), 51(2) and 52(5) European Union Charter of Fundamental Rights (EUCFR)) and the principle of conferral (Article 5 (1) TEU).

3.8 | Interim conclusion

Based on the foregoing, it appears that Article 10(3) TEU, read in light of Article 2 TEU and the value of democracy has untapped potential in order to tackle situations preventing EU citizens from indulging in the Union's democratic life. Considering the two first paragraphs' ineptness to provide a legal basis for EU action against illiberal attacks on democracy, it has been shown that Article 10(3) TEU is legally better equipped to serve the purpose of operationalising the value of democracy. Central to this provision is the EU citizen, who represents the link between national and EU-level democracies, thus embodying a double-hatted legal subject explicitly endowed with the right of participation in EU-level democracy. Akin to national judges, this double hat implies that developments at national level may have the effect of impeding citizens' rights and obligations at EU level. If their participation in the latter is made virtually impossible due to anti-democratic developments at national level, the right conferred upon them by the Treaties cannot be effectively exercised. In such cases, EU institutions, national courts or EU citizens should be entitled to rely on Article 10(3) TEU to address systemic deficiencies, if a sufficiently direct link is established between an instance of breach of democratic standards and citizens' ability to avail themselves of the Union's democratic life. In such cases, the essence of fundamental rights associated with the value of democracy, such as freedom of expression, the right of assembly, academic freedom and other rights, could be safeguarded. Finally, such action could not be argued to be ultra vires insofar as obligations of result flow from Union law, even if the EU has no democracy-related competence. In such cases, a breach of the EU's obligation to respect national identity could not be invoked, especially when actions brought against backsliding Member States stem from their unwillingness to comply with democratic obligations of result flowing from Union law.

⁹⁹K. Lenaerts, see n. 65, 15.

¹⁰⁰A. von Bogdandy and L.D. Spieker, see n. 6, 12; referring to Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, 11.

¹⁰¹A. von Bogdandy and L.D. Spieker, 'Protecting Fundamental Rights Beyond the Charter', in M. Bobek and J. Adams-Prassl et al. (eds), in *The EU Charter of Fundamental Rights in the Member States* (Hart, 2020), 525–531.

¹⁰²A. von Bogdandy and L.D. Spieker, 'Countering the Judicial Silencing of Critics—Article 2 TEU Values, Criminal Liability and Reverse Solange', (2019) 8 MPIL Research Paper Series 18; referring to Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, para. 82.

4 | UNLOCKING THE UNTAPPED POTENTIAL OF ARTICLE 10(3) TEU: A FEW EXAMPLES

4.1 | By the European Commission: Systemic infringement actions

The action brought by the European Commission against Hungary in Case C-92/23 constitutes a case in point in order to demonstrate the added value that Article 10(3) TEU could represent for the European Commission if used as the enabling provision for the operationalisation of the value of democracy.¹⁰³ On 17 February 2023, the European Commission initiated an infringement procedure before the Court of Justice on the basis of Article 258 TFEU against Hungary. This action concerns the refusal by the Hungarian Media Council to renew Klubrádió's right to make use of certain radio frequencies, thereby effectively and immediately precluding the radio station from broadcasting. The European Commission contends, in essence, that Hungary's Media Council failed to fulfil its obligations under Directives 2002/20/EC, 2002/21/EC, 2002/77/EC and 2018/1972, which all regulate different aspects of electronic communications.¹⁰⁴ In addition, affirming that the Hungarian Media Council's decision not to renew Klubrádió's broadcasting licence is effectively implementing Union law, the European Commission considers that the Charter is applicable to the case at hand. In particular, the European Commission alleges a violation of the right to freedom of expression as provided for in Article 11 of the Charter.

Klubrádió is a well-known public broadcaster in Hungary, and media sources have characterised it as being a 'liberal-leaning' 'opposition radio voice' that 'regularly featured opposition politicians and other critical voices'.¹⁰⁵ It is worrisome that, as an 'opposition voice', Klubrádió has been fighting for its right to freedom of expression, freedom of information and freedom to conduct a business since the early days of Hungary's Fidesz-dominated government. Klubrádió's battles with the Hungarian executive are not new, as it has been fighting for its broadcasting licence in court proceedings for over a decade. In 2012 already, media sources reported the ongoing efforts of the Media Council to silence the radio.¹⁰⁶ At the time, there was already talk of blatant violations of the rule of law, as the Hungarian Media Council, manned by Fidesz loyalists, ignored court rulings ordering it to recognise Klubrádió as the winner of the tender in which it participated. The progressive dismantling of the principle of judicial independence in the country has further silenced the radio's possibilities of contestation.

First of all, media pluralism is a fundamental tenet of democratic life. As affirmed by the European Court of Human Rights (ECtHR), the State is the 'ultimate guarantor of pluralism'. In other words, it falls within State parties' obligations to ensure that the media, whichever form it may take, provides the public with 'impartial and accurate information and a range of opinion and comment'.¹⁰⁷ When the State does not meet its obligation to guarantee the impartial and accurate character of the information provided to its citizens, the essence of the value of democracy is being compromised. When, as is the case in Hungary, the State becomes the main stakeholder and de facto controlling authority of the media landscape, using its prerogatives to discredit political rivals and spread disinformation, democracy is under attack.

This case is therefore crucial to illustrate why the EU is missing out on a useful instrument in its toolbox to significantly curb liberticidal trends impairing EU citizens' right to participation in the EU's democratic fabric. As such, this case is reminiscent of early rule of law-based cases brought against Hungary, notably in the field of judicial independence. In 2012, the European Commission initiated an infringement procedure against Hungary, in which it considered that the Member State had failed to fulfil its obligations under Union law, in particular under the Equality Directive 2000/78,¹⁰⁸ by lowering the compulsory retirement age of judges from 70 to 62.

¹⁰³For earlier analyses of this case, see A. von Bogdandy and L.D. Spieker, see n. 6, 12.

¹⁰⁴Dir 2002/20, Dir 2002/77, Dir 2002/21 and Dir 2018/1972.

¹⁰⁵Euronews, 'Klubrádió: EU Asks Hungary to Keep Radio Station on the Air as MEPs Weigh In on Commission' (2021) <<https://www.euronews.com/2021/02/15/klubradio-eu-asks-hungary-to-keep-liberal-radio-station-on-the-air>>.

¹⁰⁶L. Gall, 'The Clubbing of Klubradio' (Politico, 2012) <<https://www.politico.eu/article/the-clubbing-of-klubradio/>>.

¹⁰⁷*Manole v. Moldova*, App No. 13936/02 (ECtHR, 2009), paras. 99–100; *Centro Europa 7 srl v. Italy*, App No. 38433/09 (ECtHR, 2012), para. 134.

¹⁰⁸Dir 2000/78.

The European Commission's infringement procedures in both cases are to be welcomed. However, it is flagrant that such cases lack constitutional foundations. In the action brought in relation to Klubrádió, except for Article 11 of the Charter, alleged violations of EU law relate to technical secondary legislation. This entails two fundamental problems, relating first to the nature of fundamental rights and second to the effectiveness of infringement cases on the basis of technical legislation. Firstly, the scope of the Charter's fundamental rights is constrained to individual rights violations, excluding threats of a systemic or structural nature, as is this case.¹⁰⁹ Its application additionally requires a cross-border element and implementation of EU law by Hungary. Secondly, it is true that secondary legislation crystallises obligations derived directly from primary law. However, not all cases concern those obligations derived from the Union's values. The newly adopted European Media Freedom Act, for instance, constitutes to a certain extent a concretisation of the value of democracy.¹¹⁰ Yet, as Spieker notes, infringement actions based on secondary law are mostly ineffective: '[e]xperience shows that such an approach leads to superficial, eventually unsuccessful, results.'¹¹¹ Consequently, without any reference to the EU's foundational values, these infringement cases overlook the broader problem that undergirds their very existence. In the same way that the lowering of the compulsory retirement age of judges obviously constitutes a violation of the value of the rule of law, a measure that aims at de facto precluding an opposition radio channel from broadcasting is obviously a violation of the value of democracy. Recognising that there have been violations of the EU's constitutional tenets vitiating such measures could have a strong performative function, thereby shaping public and institutional discourse. Unfortunately, in cases involving the value of democracy, it seems that the EU is just coming to this realisation.¹¹²

Including Article 10(3) TEU as being part of the grounds of infringement in the action brought in relation to Klubrádió would have allowed the identification of the constitutional and foundational problems raised by the case. *In casu*, the actions of the Hungarian authorities taken in order to establish a government-controlled media landscape are undoubtedly symptomatic of a regular, persistent and deeply rooted practice in Hungary. The progressive rerouting of state subsidies to right-wing media is widely documented,¹¹³ as is the concentration of media ownership in trusted Fidesz-loyalist hands.¹¹⁴ As has been mentioned, the attacks on Klubrádió are systemic, and this does not constitute an isolated case. This undoubtedly constitutes an additional element calling for action at the EU level.

However, the systemic nature of this case is not isolated from all other efforts by the Hungarian government to undermine the foundations of liberal democracy. As was argued in Section 2, these efforts are permeating and take place in a context of attacks on the independence of the judiciary, undermining migrants' and the LGBTIQ+ community's fundamental rights, on academic freedom and so on. Public opinion in Hungary suffers greatly from those systemic attacks, and public trust is slowly eroding.¹¹⁵ In this regard, the proposal of Scheppele et al. regarding systemic infringement actions appears more relevant than ever.¹¹⁶ Effectively, it would allow for a remedy breaking

¹⁰⁹L.D. Spieker, see n. 34, 1187.

¹¹⁰Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM(2022) 457 Final, Brussels, 16.9.2022. While this proposal and the agreement surrounding it are warmly to be welcomed, one can but regret the lack of constitutional foundation in this proposal. In the whole text, only eight references are dedicated to democracy, and the values are mentioned only once in a vague manner (Recital 2). Furthermore, the legal basis is Article 114 TFEU, which inscribes the initiative in a market-centred approach.

¹¹¹L.D. Spieker, see n. 34, 1187.

¹¹²Interestingly, the above-mentioned infringement procedure initiated against Poland in June 2023, which was retracted upon the change of government, relied on Articles 2 and 10 TEU read in conjunction as a violation of the principle of democracy (European Commission, 'Rule of Law: Commission Launches Infringement Procedure Against Poland for Violating EU Law With the New Law Establishing a Special Committee', 8 June 2023 <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134>).

¹¹³A. Brouillette, A. Bátorfy, M. Dragomir, É. Bognár and D. Holdis, 'Report on Hungary' (EUI Centre for Media Pluralism and Media Freedom, 2016) <<https://cmpf.eui.eu/media-pluralism-monitor/mpm-2016-results/hungary/>>.

¹¹⁴*Ibid.*

¹¹⁵Fifty-six per cent of Hungarian citizens taking part in the survey tend to disagree or disagree strongly that citizens in their country can access accurate information from multiple media sources about topics at stake. A strong majority (61%) of Hungarian citizens taking part in the survey tend to disagree or disagree strongly with the fact that they can express their political opinion without fearing negative consequences. More generally, 70% of Hungarian citizens taking part in the survey are not very satisfied or not at all satisfied with the way democracy works in their country (<https://europa.eu/eurobarometer/surveys/detail/2966>).

¹¹⁶K.L. 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.

the manifest 'pattern' of illiberal democratic backsliding in Hungary and beyond, while making sure that concerned Member States cannot play cat and mouse by adapting their infringing national rules just enough to meet the narrow requirements of narrow and ineffective infringement decisions.¹¹⁷

4.2 | By EU citizens before national courts

This paper argued that Article 10(3) TEU is endowed with direct effect (Section 3.4). If recognised as directly effective, Article 10(3) TEU could be relied upon in front of national courts by natural or legal persons. In particular, the provision could be invoked to contest any national measure adopted in violation of the rights it enshrines. In such cases, national courts will have to assess the compatibility of said measures with Union law, in particular with Article 2 TEU and its value of democracy taken in conjunction with Article 10(3) TEU. Such a course of action could be highly effective in the case of Klubrádió, presuming the independence and impartiality of national courts.

In this scenario, national courts could, where necessary, rely on Article 267 TFEU and the preliminary reference mechanism it enshrines, in order to clarify the requirements stemming from Article 10(3) TEU read in conjunction with Article 2 TEU and the value of democracy. It is on the occasion of such a preliminary reference that the Court of Justice could establish that Article 10(3) TEU has direct effect, the obligations stemming from that provision and how it should be interpreted in national legal orders. In light of these refinements, national courts would have to ultimately decide on the (in)compatibility of measures impeding the right to participate in the Union's democratic life. If such measures are deemed incompatible, and in accordance with the principle of primacy of EU law, national courts would have to set these measures aside.¹¹⁸ In the case of Klubrádió, presuming the independence of national courts, the Media Council's decision would be set aside, thereby enabling this media to continue broadcasting its dissenting content.

5 | CONCLUSION

The value of democracy is closely linked to the rule of law on a conceptual, institutional and jurisprudential level. The parallels drawn between these two notions enable the transposition, to some extent, of the arguments that have led to the enforcement and operationalisation of the rule of law by the EU and its institutions in a context of growing tendencies of democratic backsliding in its Member States.

In this context, this paper has argued that the value of democracy should be operationalised by a combined reading of Article 2 TEU and of Article 10(3) TEU. The use of this latter provision is, essentially, enabled by the fact that Article 10(3) TEU contains an opposable right, the scope of which can be read extensively by reference to Article 2 TEU. Moreover, a textual analysis of Article 10(3) TEU demonstrated that it is endowed with direct effect, thereby enabling citizens to rely on it before national courts. The scope of the right enshrined in Article 10(3) TEU was construed as requiring an established causal relationship between national measures and their effect, which consist in adversely affecting the exercise of the right to civic participation in the EU's democratic life. A threshold, determined with regard to the existence of systemic deficiencies, was also proposed in relation to its use.

Furthermore, avenues were explored aiming at reconciling the principle of national identity and procedural autonomy with the EU's prerogative, through its institutions, to defend its own identity. This reasoning is based on the fact that, even though Member States have a broad discretion in the organisation of their constitutional and political institutions, they have to comply with the rights and obligations stemming from Union law. Moreover, in order to avoid allegations of ultra vires action by the EU and its circumvention of the Charter's scope of application

¹¹⁷Ibid, 120.

¹¹⁸By analogy with Case C-824/18, *A.B. and Others (Nomination des juges à la Cour Suprême—recours)*, ECLI:EU:C:2021:153, para. 150.

as provided for by Article 51(1) EUCFR, the operationalisation of Article 10(3) TEU should be limited to breaches of the essence the rights associated to the value of democracy.

Finally, a case in point, namely, the infringement procedure initiated by the European Commission against Hungary in relation to the National Media Council's refusal to renew Klubrádió's broadcasting licence, has illustrated the theoretical arguments developed in this paper. By relying on the value of democracy enshrined in Article 2 TEU in combination with Article 10(3) TEU, the European Commission could have a strong performative and discursive function in addition to using the classical remedies it has at its disposal (eg interim measures, lump sum and financial penalties). In this context, the course of action that the European Commission could have taken was discussed. Lastly, the value of democracy, read in conjunction with the right enshrined in Article 10(3) TEU, could be relied upon in front of national courts. This could additionally lead to the Court of Justice providing indications on how democracy should be operationalised through the preliminary reference mechanism. As a consequence, national courts have a duty to set aside national measures adopted in violation of the value of democracy and Article 10(3) TEU.

In light of the aforementioned considerations, the following recommendations, which can be enacted without any revision of the EU's establishing Treaties, can be made. Considering the importance of fostering active democratic participation in the EU Member States and ensuring full effectiveness of EU citizens' right, this paper invites EU institutions, in particular the European Commission and the Court of Justice, to consider the implementation of the following recommendations:

1. Recognise that the EU's axiological foundation (Article 2 TEU), in particular the value of democracy, should actively be promoted.
2. Use Article 10(3) TEU as an operationalising provision for the value of democracy in cases of democratic backsliding.
3. Recognise the directly effective nature of Article 10(3) TEU, thereby enabling citizens to rely on it before national courts.
4. Include Article 10(3) TEU in procedures and cases showcasing a strong causal relationship between measures taken by national authorities and EU citizens' right to participate in the Union's democratic life.

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