

Beyond the Rule of Law

How the Court of Justice can Protect Conditions for Democratic Change in the Member States

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While the Commission and the Court have concentrated on safeguarding judicial independence in Poland, the state of Hungarian democracy has become increasingly precarious. It is high time to intervene. This raises the question of how to legally address threats to national democracy before the Court. Based on its previous case law, this contribution demonstrates how the EU value of democracy in Article 2 TEU could be operationalised through Article 10 TEU. These provisions could then serve as yardsticks to review measures undermining the conditions for democratic change in the Member States.*

1. Introduction

As far back as 2012, Commission President José Manuel Barroso warned of ‘threats to the legal and democratic fabric’ in some Member States. In his opinion, the Article 7 TEU procedure was the final, ‘nuclear option’ to counter these challenges.¹ Being triggered twice, however, has revealed this procedure to be a dead end. Instead, the Union’s strongest response to the illiberal turn in several Member States emerged elsewhere—in Luxembourg. Confronted with the overhaul of the Polish judiciary, the Court of Justice of the European Union (CJEU) developed a powerful doctrinal innovation: with the judgment in the Portuguese Judges case (*ASJP*) the Luxembourg

judges started mobilising the values in Article 2 TEU and established a forum to remedy their violations.² So far, the Court has focused especially on challenges to judicial independence and the rule of law. While the independence of the Polish judiciary is far from saved, the legal standards to address such deficiencies are firmly established today.³

Unlike the rule of law, the Court and the Commission have approached the protection of democracy much more hesitantly. However, it seems that democracy is under even greater pressure, especially in Hungary.⁴ The European Parliament speaks of ‘a breakdown in democracy

* This contribution draws on Armin von Bogdandy and Luke Dimitrios Spieker, ‘Transformative Constitutionalism in Luxembourg? How the Court can Support Democratic Transitions’ (2023) 29 *Columbia Journal of European Law* (forthcoming) and Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023).

¹ State of the Union 2012 Address, Plenary session of the European Parliament/Strasbourg (12 September 2012).

² Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

³ For a detailed account, see Dimitry Kochenov and Laurent Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (Stockholm: SIEPS, 2021:3).

⁴ Listing Hungary as ‘electoral autocracy’, see V-Dem Institute, *Varieties of Democracy Report 2022: Autocratization Changing Nature?* (Gothenburg: V-Dem Institute, University of Gothenburg 2022) 33, 45. See also Beáta Bakó, *Challenges to EU Values in Hungary* (Routledge 2023).

[...] in Hungary, turning the country into a hybrid regime of electoral autocracy.⁵ This breakdown consists of a bundle of individual actions that curtail opposition rights, media pluralism, the space for civil society, and equal opportunities in elections. Measures in the run-up to elections are particularly dangerous.⁶ Unfair party financing and campaigning rules, gerrymandering that favours the ruling party, and the abuse of public media—all this makes it increasingly difficult to ‘throw the scoundrels out’ while leaving the vote itself—the government’s cloak of legality—untouched.⁷

Such measures constitute a central obstacle for restoring full compliance with EU values in Hungary. Ultimately, a decision to change course cannot be externally imposed but must emerge from within Hungarian society. Yet, any democratic change requires the existence of a democratic choice. Safeguarding the conditions for democratic change must therefore become a priority for the European institutions.

This contribution suggests that the Court of Justice should play an active role in this endeavour. This raises the question of applicable standards. At first sight, measures such as gerrymandering or changing party and campaign financing rules to give one’s own party an advantage seem to escape the scope of EU law—except for Article 2 TEU. After briefly recalling the current state concerning the provision’s justiciability (2), the essay invites the Commission and the Court to shift their current

focus from the rule of law to democracy (3). So far, both institutions have been reluctant to address democratic deficiencies in Hungary under the banner of Article 2 TEU (4). Against this backdrop, this contribution explores how democracy as an EU value could be operationalised by recourse to more specific Treaty provisions, in particular the EU Charter of Fundamental Rights and Article 10 TEU (5).

2. Mobilising EU Values Before the Court of Justice

Leaving institutional and competence issues aside, there are two common objections to the justiciability of Article 2 TEU.⁸ First, the provision contains moral values, not legal principles. And second, even if it were to contain legal principles, these principles are too indeterminate to be justiciable. After several years of judicial activity, the first objection can be considered to have been resolved.⁹ The Court of Justice settled this issue with its judgments on the rule of law conditionality regulation. Sitting in full court, the Luxembourg judges emphasised in unequivocal terms that ‘Article 2 TEU is not a mere statement of policy guidelines or intentions’.¹⁰ As such, any doubts as to the legal normativity of Article 2 TEU are difficult to maintain and are supported only by few outliers.¹¹

Yet the second objection, namely the indeterminacy of Article 2 TEU, is much more difficult to

⁵ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0204, para 2.

⁶ On these practices, see Kim Lane Scheppele, ‘How Viktor Orbán Wins’ (2022) 33 *Journal of Democracy* 45, 50.

⁷ On being able to ‘throw the scoundrels out’ as a central feature of democracy, see J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) 329.

⁸ On why these institutional and competence issues cannot prevent the justiciability of Article 2 TEU, see Luke Dimitrios Spieker, ‘The conflict over the Polish disciplinary regime for judges—an acid test for judicial independence, Union values and the primacy of EU law’ (2022) 59 *Common Market Law Review* 777, 803.

⁹ See for example Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023); Lucia S. Rossi, ‘La valeur juridique des valeurs’ (2020) *Revue trimestrielle de droit européen* 639; Kim Lane Scheppele, Dmitry Kochenov, and Barbara Grabowska-Moroz, ‘EU Values are Law, after All’ (2020) 38 *Yearbook of European Law* 3, 67.

¹⁰ Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, para 232; Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, para 264.

¹¹ According to the captured Polish Constitutional Tribunal, Article 2 TEU does not contain legal principles but only values of ‘axiological significance’; see the press release accompanying the Judgment of 7 October 2021, K 3/21, para 19.

overcome.¹² Abstractly, there are two ways to construe the justiciability of Article 2 TEU: by applying the values in Article 2 TEU as freestanding standards, or by applying those values in combination with more specific Treaty provisions.

The first option is highly controversial. Indeed, some members of the Court have rejected a freestanding application of Article 2 TEU. According to Advocate General Pikamäe, the rule of law ‘cannot be relied upon on its own.’¹³ Similarly, Advocate General Tanchev argued that Article 2 TEU does not constitute a standalone yardstick for the assessment of national law.¹⁴ Others seem more open to considering a freestanding application.¹⁵ So far, the Court has been able to avoid this question. The Commission’s infringement procedure against Hungary for violations of LGBTIQ rights presents an opportunity to clarify this issue. The Commission based its pleas explicitly on Article 2 TEU as a freestanding provision.¹⁶ This has several advantages. For one, Article 2 TEU applies irrespective of the scope of other EU law. This allows the Court to address upheavals of the Member States’ internal constitutional structures—even without any other link to EU law. Further, addressing such upheavals under Article 2 TEU corresponds to the gravity of the situation. Instead of engaging in doctrinal contortions, to invoke violations of Article 2 TEU is to call a spade a spade.

So far, however, the Court has chosen the second option, that is, to apply the values in Article 2 TEU in combination with more specific Treaty provisions. With its 2018 judgment in *ASJP*, it started to operationalise the values in Article 2 TEU

through other Treaty provisions that give ‘concrete expression’ to the value at issue. The respective value is translated into a specific legal obligation. At the same time, Article 2 TEU has an impact on the specific provision as well. Interpreting that provision in light of Article 2 TEU justifies an extensive reading of its scope. Thus, specific Treaty provisions, such as Article 19(1)(2) TEU, can be rendered applicable—beyond their initial confines—to the Member States’ internal constitutional structures. Put differently, Article 2 TEU and the specific provision mutually reinforce each other.¹⁷ This strategy hits two birds with one stone: it makes Article 2 TEU applicable without curtailing its unrestricted scope of application. The Court seems to follow this second option. In its rulings on the rule of law conditionality regulation, it provided a vast array of possible connections between Article 2 TEU and other Treaty provisions.¹⁸

3. Shifting Focus: From Protecting the Rule of Law to Enabling Democratic Change

These powerful innovations concerned, primarily, the overhaul of the Polish judiciary. While this struggle is far from over, the precarious state of Hungarian democracy requires more attention. As such, the current focus on the rule of law should be complemented with a second focus on democracy. In particular, the Court should start operationalising democracy as an Article 2 TEU value and use it as a standard to review national measures that undermine conditions for democratic decision-making. This might help keep the channels of democratic change open. However, courts

¹² Sceptically, Matteo Bonelli, ‘Infringement Actions 2.0: How to Protect EU Values before the Court of Justice’ (2022) 18 *European Constitutional Law Review* 30, 45 ff; Tom L. Boekestein, ‘Making Do With What We Have: On the Interpretation and Enforcement of the EU’s Founding Values’ (2022) 23 *German Law Journal* 431, 437; Pekka Pohjankoski, ‘Rule of law with leverage’ (2021) 58 *Common Market Law Review* 1341, 1345 f.

¹³ Opinion of AG Pikamäe, Case C-457/18 *Slovenia v Croatia* EU:C:2019:1067, paras 132 f.

¹⁴ Opinion of AG Tanchev, Case C-824/18 *A.B. and others* EU:C:2020:1053, para 35.

¹⁵ See Rossi (n 9) 657; Marek Safjan, ‘On Symmetry: in Search of an appropriate Response to the Crisis of the Democratic State’ (2020) *Il diritto dell’Unione* 673, 696.

¹⁶ See Case C-769/22 *Commission v Hungary* (pending).

¹⁷ For further details see Luke D. Spieker, ‘Breathing Life into the Union’s Common Values’ (2019) 20 *German Law Journal* 1182, 1204; Rossi (n 9) 650.

¹⁸ Whereas Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter ‘define the scope’ of the values of human dignity, freedom, equality, and respect for human rights, Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men, see *Hungary v Parliament and Council* (n 10), paras 157 f; and *Poland v Parliament and Council* (n 10) paras 193 f.

require cases. Hence, the Commission should initiate infringement proceedings against national measures that diminish media pluralism, unfair party financing and campaigning rules, or gerrymandering.

Some might object that the Court already went too far with its efforts to safeguard judicial independence in Poland. Intervening to protect domestic democratic processes might be understood as yet another power grab by the Luxembourg court. Nevertheless, this proposal has a strong theoretical basis. Even sceptics of judicial review acknowledge that constitutional courts (including the CJEU) should play a crucial role in securing the functioning of democratic decision-making. They can guarantee the essential preconditions for democratic processes¹⁹ and correct what Niels Petersen called ‘political market failures’.²⁰ This function is evidenced by the role of constitutional courts in many fragile democracies.²¹ If the Court of Justice mobilises Article 2 TEU to keep the channels for democratic change open, it discharges a mandate assumed by many courts.

4. Current Restraint

At the moment, however, reality looks quite different. Despite the significant challenges to democracy in Hungary, the Court and the Commission have approached these issues rather hesitantly. The judgment concerning foreign-

funded NGOs illustrates this point. In 2020, the Commission brought an action against Hungary because of a new statute that imposed duties of registration, reporting, and disclosure on civil society organizations which receive funding from abroad.²² This statute specifically targeted many NGOs engaged in upholding the rule of law and democracy in Hungary. Its aim was to stigmatize these organisations and thus to generally weaken Hungarian civil society. Despite these evident risks for democratic discourse and control, the Court’s decision fell behind the already established state of jurisprudence.

Instead of addressing the Hungarian measures under Article 2 TEU, the Court construed them mainly as a violation of the free movement of capital under Article 63 TFEU. As such, the case was settled on the uncontested ground of the internal market.²³ Admittedly, the Court also relied on EU fundamental rights by stressing that ‘the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society’.²⁴ Insofar as it relied on these rights, the judgment constitutes an improvement²⁵ when compared to the first timid cases on the overhaul of the Hungarian judiciary, which were addressed as a violation of age discrimination.²⁶ Still, fundamental rights remain a rather meek accessory to the internal market. For sure, abstaining from the highly politicised value rhetoric can contribute to de-

¹⁹ See in particular John H. Ely, *Democracy and Distrust* (Harvard University Press 1980) 73, 105; Michel Troper, ‘The logic of justification of judicial review’ (2003) 1 *International Journal of Constitutional Law* 99; Christoph Möllers, *The Three Branches* (Oxford University Press 2013) 127. Comparatively, Anusheh Farahat, ‘Constitutional Jurisdiction and the Separation of Powers in the European Legal Space: A Comparative Analysis’ in Armin von Bogdandy, Peter M. Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Vol. IV* (Oxford University Press 2023).

²⁰ Niels Petersen, *Proportionality and Judicial Activism* (Cambridge University Press 2017) 18.

²¹ See eg Samuel Issacharoff, *Fragile democracies. Contested power in the era of constitutional courts* (Cambridge University Press 2015) 241. But see sceptically Tom G. Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge University Press 2017) 86.

²² Case C-78/18 *Commission v Hungary (Transparency of associations)* EU:C:2020:476.

²³ Arguing for this approach, see Mark Dawson and Elise Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’ (2013) 14 *German Law Journal* 1959. A very similar strategy can be observed in the CEU case, see Case C-66/18 *Commission v Hungary (Enseignement supérieur)* EU:C:2020:792. In detail, Vasiliki Kosta and Darinka Piqani, ‘Where trade and academic freedom meet: Commission v Hungary (LEX CEU)’ (2022) 59 *Common Market Law Review* 813.

²⁴ *Transparency of associations* (n 22), para 112.

²⁵ As promising decision, see Matteo Bonelli, ‘European Commission v Hungary (Transparency of associations) (C-78/18): The “NGOs case”’ (2021) 46 *European Law Review* 258, 268; John Morijn, ‘Separate Charter invocation as a new enforcement method: The Lex NGO case’ (2022) 59 *Common Market Law Review* 1137.

²⁶ For more detail see Gábor Halmai, ‘The Case of the Retirement Age of Hungarian Judges’ in Bill Davies and Fernanda Nicola (eds), *EU Law Stories* (Cambridge University Press 2017) 471.

escalating the conflict. At the same time, the focus on the internal market conveys a 'business as usual' image and obscures the real threats. This marginalizes the erosion of European values.

5. Future Outlook

To safeguard the conditions for democratic change in Hungary, the Court and the Commission should take bolder steps towards the judicial mobilisation of Article 2 TEU. The ongoing attacks on the freedom of press and media pluralism could become a springboard for such a reinforced approach.²⁷ In June 2021 the Commission announced an infringement procedure against Hungary for rejecting an application by Klubrádió—Hungary's last outspoken opposition channel—to use the national radio spectrum.²⁸ Regrettably, the Commission only relied on the European Electronic Communications Code,²⁹ even though such an action could have equally been based—by expanding the CJEU's combined approach developed in *ASJP*—on the essence of media freedom as protected by Article 11(2) of the Charter and Article 2 TEU.

The combined approach developed in *ASJP* is not restricted to Article 19(1)(2) TEU and the rule of law but could be extended to any other provision that gives expression to a value in Article 2 TEU. In this sense, the Court has already started to establish connections between the value of democracy and specific Charter rights. In *La Quadrature du Net* and *Privacy International*, for instance, it stressed that 'freedom of expression [...] is one of the values on which, under Article 2 TEU, the Union is founded'.³⁰

In taking this Article 2-Charter nexus a step further, the Court could start reviewing violations of the essence of Charter rights, such as media freedom, *even beyond the scope of other EU law*. Certainly, the Charter applies only within the scope of EU law (Article 51(1) CFR). Charter rights need to be triggered by some kind of EU law that applies to the case at hand. How to overcome this obstacle? First, the Court could interpret Article 2 TEU as a triggering rule in the sense of Article 51(1) CFR. Whenever the violation of a Union value is at stake, the Charter's scope would be triggered. Second, one could interpret Article 51(1) CFR restrictively in light of Article 2 TEU as not barring the Charter's application if EU values are at stake.

Ultimately, this is very close to a proposal advanced by András Jakab. He suggested that Article 2 TEU could trigger the scope of EU law and thus the Charter's scope defined in Article 51(1) CFR. This could render EU fundamental rights *generally* applicable in the Member States.³¹ It should be stressed, though, that this cannot lead to an application of the *full* fundamental rights *acquis* beyond the confines of Article 51(1) CFR. The value of 'respect for human rights' in Article 2 TEU can only comprise a qualified part, namely the 'essence' of fundamental rights as protected also by Article 52(1) CFR. Any other reading would severely disregard the Union's federal balance and the decision for a limited application of the Charter. Beyond the Charter's scope, EU fundamental rights could thus apply only as far as their essence protected under Article 2 TEU is concerned.³²

²⁷ European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340, Annex, paras 27–32; Venice Commission, Opinion of Media Legislation of Hungary, No. 798/2015.

²⁸ On the status quo, see European Commission, Press Release, Media freedom: The Commission calls on Hungary to comply with EU electronic communications rules (2 December 2021).

²⁹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

³⁰ See Joined Cases C-511/18, 512/18, and 520/18 *La Quadrature du Net* EU:C:2020:791, para 114; Case C-623/17 *Privacy International* EU:C:2020:790, para 62.

³¹ For a recent version of this argument, see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2023) *Cambridge Yearbook of European Legal Studies* 1.

³² This is explored in detail in Armin von Bogdandy and Luke D. Spieker, 'Protecting Fundamental Rights Beyond the Charter' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 525, 531.

In any case, fundamental rights cannot address all threats to democracy in Hungary. The curtailing of opposition rights, unfair electoral laws, gerrymandering, or party financing and campaigning rules largely escape the Charter's scope. Such practices, however, could be reviewed under Articles 2 and 10 TEU. Indeed, Article 10 TEU (which describes the democratic functioning of the Union) could be interpreted as operationalising the value of democracy in Article 2 TEU. In this spirit, the Court has already noted that the principle of representative democracy in Article 10(1) TEU 'gives concrete form to the value of democracy referred to in Article 2 TEU'.³³

At first sight, Article 10 TEU seems to concern primarily democracy at the EU level. Still, the latter cannot function if democratic decision-making in the Member States falters. Democracy at the EU and the national level are essentially intertwined.³⁴ Elections to the European Parliament are partially governed by national provisions and take place within each domestic public sphere.³⁵ At the same time, the Member State governments represented in the Council derive their legitimacy from the national level. Article 10(2) TEU specifies that they must be 'democratically accountable either to their national Parliaments, or to their citizens'. In consequence, the democratic legitimacy at EU level depends to a great extent on the situation in each Member State.

This logic mirrors the logic underpinning Article 19(1)(2) TEU, which integrates the national judiciaries into the EU system of judicial protection. As it is impossible to separate the 'European' and 'domestic' functions of national courts, the obligations derived from Article 19(1)

(2) TEU in combination with Article 2 TEU apply to the Member State judiciary even in cases not related to EU law. In a very similar way, national democracy is tied into the European one. It is impossible to distinguish between the 'European' and 'national' facets of democracy in the Member States. A government cannot be 'democratically accountable' at the European level if it governs autocratically at home.

Based on these insights, a combined reading of Articles 2 and 10 TEU can result in imposing essential democratic requirements on the Member States.³⁶ This would not be confined to the 'European' dimensions of democracy in the Member States (e.g. the elections to the European Parliament), but would apply to the domestic state of democracy as well.

Eventually, democratic standards could be invoked even by individuals against national measures. Article 10(3) TEU stipulates the citizen's 'right to participate in the democratic life of the Union'. Many understand this as establishing an individual right to democratic participation.³⁷ As such, Article 10(3) TEU fulfils even the most demanding conception of direct effect, which requires a provision to contain a right that can be invoked by an individual before courts.³⁸ Such a right would not only concern democratic standards at the EU but also at the national level. As previously explained, the democratic life *of the Union* presupposes a democratic life *in the Member States*. Therefore, Article 10(3) TEU could become a provision that translates the value of democracy into obligations justiciable by individuals. Since *Van Gend en Loos*, 'the vigilance of the individuals concerned to protect their rights' has been a central

³³ Case C-502/19 *Junqueras Vies* EU:C:2019:1115, para 63. See also Order of the Vice-President of the Court of 24 May 2022, Case C-629/21 P(R) *Puigdemont i Casamajó and Others v Parliament and Spain* EU:C:2022:413, para 250; Case C-207/21 P *Commission v Poland (Protocole n° 36)* EU:C:2022:560, para 81.

³⁴ See Armin von Bogdandy, *The Emergence and Democratization of European Society* (Oxford University Press 2023).

³⁵ Article 8 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5. See also *Junqueras Vies* (n 33) para 69.

³⁶ See also John Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2021) 46 *European Law Review* 69, 77.

³⁷ See, in particular, Matthias Ruffert, 'Art. 10 EUV' in Christian Calliess and Matthias Ruffert (eds) *EUV/AEUV* (C.H. Beck 2022) para 12.

³⁸ See eg Koen Lenaerts and Tim Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law' (2006) 31 *European Law Review* 287, 311.

instrument in assuring that the Member States observe EU law.³⁹ Hence, this proposal follows a well-trodden path of European integration.

Admittedly, reviewing the Member States' internal constitutional structures for their compliance with Article 2 TEU has the potential to severely disrupt the federal balance between the EU and its Member

States. Any further mobilisation of Article 2 TEU will require some reassurance that the Member States' autonomy and diversity will be safeguarded. Article 2 TEU needs to remain an extraordinary tool for extraordinary situations.⁴⁰ One thing, however, seems relatively certain: the current state of Hungarian democracy constitutes such an extraordinary situation. It is therefore high time to make use of this extraordinary tool.

³⁹ Case 26/62, *Van Gend en Loos* EU:C:1963:1. See further Damian Chalmers and Luis Barroso, 'What Van Gend en Loos stands for' (2014) 12 *International Journal of Constitutional Law* 105, 121.

⁴⁰ On judicial strategies to operate Article 2 TEU in a restrained manner, see Spieker (n 8).