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ARTICLE

National Party Bans Under EU Law

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Abstract

Scholars have increasingly discussed the concept of European Militant Democracy, that is, the EU's defense of Article 2 TEU values against defiant Member States. But does EU law have anything to say about national militant democracy, specifically on measures such as bans of political parties? The possible role that EU law has to play in this area has so far been overlooked. Using the proposed ban of the AfD as an example, this Article discusses whether and under what circumstances EU law is applicable to national party bans. Arguing that national political parties fulfill an essential function for representative democracy in the EU, the Article finds that EU law is applicable to national party bans both within the context of elections to the European Parliament as well as in purely internal situations. Arguing that the concept of democracy in Article 2 TEU nevertheless allows for militant democratic measures such as party bans, this Article then carves out specific standards that national party bans must comply with as a matter of EU Law.

Keywords: Article 2 TEU; Article 10 TEU; party bans; European militant democracy; values

A. Introduction

Since investigative reports have shed light on possible plans to "re-migrate" German citizens,[1] Germany has increasingly debated whether the right-wing Alternative für Deutschland (AfD) should be banned,[2] culminating in a proposal of 113 members of the German parliament to start proceedings to ban the AfD in late 2024.[3] While party ban proceedings against the AfD have not been initiated, a ban is made possible by Article 21(2) of the German Basic Law which allows for the dissolution of political parties that seek to undermine or abolish the free democratic basic order—a clear expression of the concept of militant democracy enshrined into the German constitution.

[1] *See* Marcus Bensmann, Justus von Daniels, Anette Dowideit, Jean Peters & Gabriela Keller, *Secret Plan Against Germany*, CORRECTIV (Jan. 15, 2024), https://correctiv.org/en/top-stories/2024/01/15/secret-plan-against-germany/.

[2] *See, e.g.*, Andreas Fischer-Lescano, *AfD-Verbotsverfahren als Demokratische Pflicht* [*An AfD Ban Proceeding as a Democratic Obligation*], VERFASSUNGSBLOG (Jan. 18, 2024), https://verfassungsblog.de/afd-verbotsverfahren-als-demokratische-pflicht/; Kolja Eigler & Timo Sewtz, *Viel zu Verlieren: Die Grundrechtsverwirkung nach Art. 18 GG* [*Much to Lose: The Forfeiture of Fundamental Rights under Article 18 of the Basic Law*], VERFASSUNGSBLOG (Jan. 25, 2024), https://verfassungsblog.de/viel-zu-verlieren/; Friedhelm Hufen, *Keine wirkliche Gefahr für die Verfassung* [*No Real Danger to the Constitution*], FRANKFURTER ALLGEMEINE (Jan. 24, 2024), https://www.faz.net/einspruch/keine-wirkliche-gefahr-fuer-die-verfassung-19471243.html; Mathias Hong, *Grundrechtsverwirkung und Parteiverbote Gegen Radikale AfD-Landesverbände (Teil III)* [*Forfeiture of Fundamental Rights and Party Bans against Radical AfD State Chapters (Part III)*], VERFASSUNGSBLOG (Feb. 8, 2024), https://verfassungsblog.de/grundrechtsverwirkung-und-parteiverbote-gegen-radikale-afd-landesverbande-iii/.

[3] Antrag auf Entscheidung [Application for Decision], Deutscher Bundestag: Drucksachen[BT] 20/13750, https://dserver.bundestag.de/btd/20/137/2013750.pdf (Ger).

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This concept of militant democracy goes back to Karl Loewenstein, who famously described it as fighting fire with fire.[4] He pointed out that democracies are at risk of being abolished because they cannot, without self-abnegation, "forbid the enemies of [their] very existence the use of democratic instrumentalities."[5] Militant Democracy thus legally restricts democratic freedoms such as the rights of political parties "for the purpose of insulating democratic regimes from the threat of being overthrown by legal means."[6] By allowing the German Constitutional Court to ban political parties that seek to undermine the free democratic basic order, Article 21 of the German Basic Law thus seeks to protect democracy.

But who oversees whether party bans in the Member States are implemented in such a way as to protect democracy? Over the past years, many scholars have argued that the European Union (EU or Union) should have a role to play in counteracting anti-democratic and illiberal tendencies in its Member States,[7] and recently, the European Commission has started to enforce the value of democracy against Member States.[8] Yet, when it comes to the discussion of party bans on the member-state level, such as in Germany, any relevance of EU law seems to be overlooked.[9]

This might be due to an earlier decision of the German Federal Constitutional Court (FCC) which has denied any applicability of EU law to national party ban proceedings. In particular, the German FCC first stated that the Union does not have the competence to regulate national political parties.[10] Second, the FCC held that although national political parties compete in elections to the European Parliament, and although the ban of a national political party is capable of affecting the composition of the European Parliament, the Member States are not implementing Union Law when banning a political party.[11] "[R]egardless of reflexive effects on the composition of the European Parliament," the banning of political parties is carried out exclusively in accordance with national law.[12] Given that national party bans fall outside the scope of application of the Charter of Fundamental Rights (CFR), and in the absence of specific rules on political parties, the FCC then further stated that general provisions of EU Law, such as the principles of the rule of law and democracy enshrined in Article 2 TEU, do not apply.[13] Rather, the FCC submitted that "[t]he applicability of these principles presupposes that either the Community itself or a Member State acts within the scope of application of Community law. The Member States are not generally bound by the constitutional provisions of Union and Community law."[14]

[4]Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 Amer. Pol. Sci. Rev. 638, 656 (1937).

[5]Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 Amer. Pol. Sci. Rev. 417, 424 (1937).

[6]Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?*, 65 Pol. Stud. 182, 182 (2017).

[7]*See generally* Reinforcing Rule of Law Oversight in the European Union (Carlos Closa & Dimitry Kochenov eds., 2016); The Enforcement of EU Law and Values: Ensuring Member States' Compliance (András Jakab & Dimitry Kochenov eds., 2017); Jan-Werner Müller, *Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order*, Transatlantic Acad. Paper Series, Feb. 2013, no. 3.

[8]*See*, *e.g.*, European Commission Press Release IP/23/3134, Rule of Law: Commission Launches Infringement Procedure against POLAND for Violating EU Law with the New Law Establishing a Special Committee (June 7, 2023) [hereinafter Poland Infringement Decision]; European Commission Infringement Decision INF/24/301, Rule of Law: Commission Decides to Launch Infringement Procedure Against HUNGARY for Violating EU Law on the Defence of Sovereignty (Feb. 6, 2024) [hereinafter Hungary Infringement Decision].

[9]*See*, *e.g.*, Andreas Gutmann & Nils Kohlmeier, *Transnational-wehrhafte Demokratie*, Verfassungsblog (Dec. 5, 2024), https://verfassungsblog.de/transnational-wehrhafte-demokratie/ (arguing that national party bans cannot be measured against EU law).

[10]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 17, 2017, 144 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 20, para. 629.

[11]*Id.* at para. 630.

[12]*Id.* (translation by author).

[13]*Id.* (referencing the FCC's previous decision, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 22, 2001, 104 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214, para. 19, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html).

[14]104 BVerfGE 214, para. 19 (translation by author).

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But is what the FCC concluded still convincing today after recent developments in the case law of the Court of Justice of the European Union (CJEU or Court)? The CJEU has held, on the one hand, that Member States are implementing Union law when they are making provisions to exclude certain Union citizens from the electoral roll.[15] The Court has also confirmed, on the other hand, that political parties are an essential element of the system of representative democracy, fulfilling an essential function in expressing the will of the citizens.[16] At the same time, EU law recognizes that the right to freedom of association "constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life."[17] As such, "European citizens should be enabled to use those rights in order to participate fully in the democratic life of the Union."[18]

If political parties are so essential for the system of representative democracy that the functioning of the Union is founded upon,[19] and if they contribute so significantly to the effective exercise of the right to vote in elections to the European Parliament, a right guaranteed by EU law, can we really conclude that national party bans do not fall within the remit of EU law? After all, the AfD has gained 15.9% of the votes in the elections to the European Parliament in Germany and is now represented with 15 seats.[20] Even more so, any party ban under Article 21 of the German Basic Law would not only have the consequence that citizens can no longer be members of or vote for the AfD, it would equally result in all members of the prohibited party losing their seat in the European Parliament.[21]

This Article first argues that EU law is applicable to national party bans insofar as they affect a national political party participating in European elections. This is because national party bans not only have a direct impact upon the composition of the European Parliament, but on the existence of free and democratic elections to the European Parliament more generally. By carrying out national party bans, Member States are thus implementing the requirement for European elections to be free and democratic, as set out in Articles 10(1) and 14(3) TEU. As a result, the provisions of the Charter become applicable and national party bans must be reviewed under Article 12 CFR.

The Article then explores whether EU law equally applies to party bans of political parties that purely partake in the national political process. To answer this question, the Article develops the Member States' democratic obligations under Articles 10 and 2 TEU. The Article finds that Member States are under an obligation to protect political parties and that the scope of this obligation extends to any party potentially contributing to the democratic life of the Union. It will be shown that any political party, whether it participates in European elections or not, potentially contributes to the democratic life of the Union and hence falls within the scope of Articles 10 and 2 TEU. Although Articles 10 and 2 TEU apply to all party bans, only bans that are sufficiently

[15]*See* ECJ, Case C-650/13, Delvigne v. Commune de Lesparre-Médoc & Préfet de la Gironde, ECLI:EU:C:2015:648 (Oct. 6, 2015),

[16]ECJ, Case C-808/21, Commission v. Czech Republic, ECLI:EU:C:2024:962 (Nov. 19, 2024), paras. 120–21, https://curia.europa.eu/juris/liste.jsf?num=C-808/21; ECJ, Case C-814/21, Commission v. Poland, ECLI:EU:C:2024:963 (Nov. 19, 2024), paras. 118–19, https://curia.europa.eu/juris/liste.jsf?num=C-814/21 (concerning, in each case, the active right to vote—that is, the right to stand for elections).

[17]ECJ, Case C-78/18, Commission v. Hungary, ECLI:EU:C:2020:476 (Jan. 14, 2020), para. 112, https://curia.europa.eu/juris/liste.jsf?num=C-78/18; Commission Recommendation on Promoting the Engagement and Effective Participation of Citizens and Civil Society Organisations in Public Policy-Making Processes, recital 2, 2023 O.J. C(2023) 8627 (EC).

[18]Parliament and Council Regulation 1141/2014, recital 3, 2014 O.J. (L 317) 1; see also Parliament and Council Regulation 2025/2445, recital 6, 2025 O.J. (L 2025/2445).

[19]Consolidated Version of the Treaty on European Union, art. 10(1), June 7, 2016, 2016 O.J. (C 202) 20 [hereinafter TEU].

[20]*Europawahl 2024*, Die Bundeswahlleiterin, https://www.bundeswahlleiterin.de/europawahlen/2024/ergebnisse/bund-99.html (last visited Apr. 28, 2026).

[21]Europawahlgesetz [EuWG] [European Elections Act], § 22(2), no 5.

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serious and systemic to call into question a Member State's commitment to democratic pluralism can violate the standards set out in these articles.

When exploring these questions, this Article will not address whether the AfD should be banned and whether such a ban would comply with EU law. Rather, this Article takes the German discussion as a starting point to unpack the relationship between the Union's and Member States' conception(s) of democracy, specifically asking whether EU law allows for, warrants, or limits Member States in the prohibition of political parties. Whereas party bans are usually understood broadly as "all juridical forms that effectively prevent the founding and continued operation of political parties, whether in the form of dissolution, substantive registration requirements, temporary suspension, or prohibition of and prosecution for party formation,"[22] this Article will take a narrower approach and focus solely on such party bans where the founding or continued operation of a party is prevented due to the political party's being deemed a risk to the values enshrined in Article 2 TEU.

B. National Party Bans as an Implementation of EU Law?

When asked about the refusal to register the Communist Party in Romania on the list of national political parties,[23] the European Commission reiterated that "[t]he integrity of democratic processes and elections is part of our common democratic values" so that even though "[t]he organization of free and fair elections, including registration of national political parties," is a responsibility of the Member States, it requires the full respect of EU law which the Commission is monitoring.[24] But which provisions of the Treaties do apply to national party bans?

The Court has already recognized that in the system of representative democracy under Article 10(1) TEU, political parties play a fundamental role "in expressing the will of EU citizens" and hence fulfill an "essential function."[25] This is especially so given that political parties "field candidates in elections" and thus contribute "significantly to the effective exercise of the right to stand for election" in European elections governed by Article 14(3) TEU.[26] The role of political parties at European level is further expressly recognized in Articles 10(4) TEU and 12(2) CFR and concretized by Regulation 2025/2445 which lays down the conditions governing the statute and funding of political parties at European level (European Political Parties).

There are thus three possible links between national party bans and EU law. First, national party bans could conflict with Regulation 2025/2445, which establishes rules for an EU party ban. Second, national party bans could constitute an implementation of Union law as they potentially affect the free and democratic character of elections to the European Parliament under Article 14(3) TEU. Third, a national party ban could negate a Member State's adherence to the democratic values of Article 2 TEU, which are given concrete expression in Article 10 TEU.

I. National Party Bans under Regulation 2025/2445

Regulation 2025/2445 governs the statute and funding of political parties at the European level. At its core, the Regulation makes the registration of European Political Parties subject to their respect of the values enshrined in Article 2 TEU,[27] and provides for the de-registration of a European

[22]Peter Niesen, *Banning the Former Ruling Party*, 19 CONSTELLATIONS 540, 541 (2012).

[23]*Question for Written Answer to the European Commission by Kostas Papadakis, E-000302/2022*, EUROPEAN PARLIAMENT (2022), https://www.europarl.europa.eu/doceo/document/E-9-2022-000302_EN.html.

[24]*Answer Given by Mr. Reynders on Behalf of the European Commission, E-000302/2022(ASW)*, EUROPEAN PARLIAMENT (2022), https://www.europarl.europa.eu/doceo/document/E-9-2022-000302-ASW_EN.html.

[25]*Czech Republic*, Case C-808/21 at paras. 120–21; *Poland*, Case C-814/21 at paras. 118–19.

[26]*Czech Republic*, Case C-808/21 at paras. 121-22; *Poland*, Case C-814/21 at paras. 119–20.

[27]Parliament and Council Regulation 2025/2445, *supra* note 18, art. 3(1)(d) and art. 3(1)(e).

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Political Party in case of a manifest and serious breach of Article 2 TEU.[28] Whereas European Political Parties consist of several national member parties, which must represent at least seven different Member States,[29] the Regulation does not contain any rules on national political parties.

However, Reinke observes that a national party ban can result in the de facto banning of a European Political Party.[30] This is the case if the banning of a national party causes a European Political Party to lose representation in seven Member States. If that is the case, the European Political Party of which the banned national party was a member no longer meets the representation criteria set out in Article 3(1)(b)(i) of Regulation 2025/2445. This results in its de-registration under Article 21(1)(a)(i) and Article 12 of Regulation 2025/2445. On this basis, Reinke proposes that the Regulation

> not only restricts the Member States' competence in banning national parties if such a measure leads to a de facto termination of a European Political Party, but furthermore explicitly opens up a scope for the deliberative and interpretative authority of a number of key EU institutions over the qualitative exegesis of democratic core values, that is, over the very grounds upon which national party ban proceedings tend to rest.[31]

In other words, if a national party ban leads to the de-registration of a European Political Party, it falls within the scope of application of Regulation 2025/2445.

Yet Reinke overlooked that Regulation 2025/2445, makes a key distinction between two grounds for de-registration: On the one hand, European Political Parties can be de-registered for formal reasons, such as no longer meeting the representation criteria.[32] On the other hand, European Political Parties can be de-registered for no longer respecting Article 2 TEU.[33] The two grounds for de-registration have separate procedural requirements. De-registration in the former case is a simple numerical decision which does not require a political assessment and thus can be initiated by the authority itself. De-registration in the latter case, however, is politically salient and thus follows the specific procedure laid down in Article 13. This procedure can only be initiated if requested by the European Parliament, the Council or the Commission. To be successful, it requires not a simple breach of requirements but rather a serious and manifest breach of Article 2 TEU values. Any removal of the European Political Party from the register must take into account the opinion of the committee of independent eminent persons consisting of members appointed by the European Parliament, the Council and the Commission, and must not be objected by the European Parliament and the Council.

By banning a national legal party, a Member State does not make any judgment as to whether a European Political Party respects Article 2 TEU. It might indicate that a European Political Party has failed to ensure that—as required by Article 3(1)(e) of the Regulation—its national member parties observe the values set out in Article 2 TEU. While potentially indicative, the decision to ban a national political party has no direct or de facto bearing on the procedure set out in Article 13 of the Regulation. Rather, in Reinke's example, the termination of the European Political Party's legal

[28]*Id.* arts. 21(1)(b), 13.

[29]*Id.* art. 3(1)(b)(i), (stating that a European Political Party's member parties must be "represented by, in at least one quarter of the Member States, members of the European parliament, of national parliaments, of regional parliaments or of regional assemblies.").

[30]Benedikt Reinke, *When a Right-Wing Extremist Political Party Appeals to European Integration and a Constitutional Court Takes the National Perspective … A Comment on the Nationaldemokratische Partei Deutschlands Judgment BVerfG, 2 BvB 1/13*, 25 MAASTRICHT J. EUR. & COMPAR. L. 388, 405 (2018) (providing that Reinke's contribution focuses on Regulation 2014/1141 which was repealed by Regulation 2025/2445. Substantively the rules on the de-registration of a European Poltical Party remain very similar).

[31]*Id.* at 407.

[32]Parliament and Council Regulation 2025/2445, *supra* note 18, arts. 21(1)(a), art. 12.

[33]*Id.* arts. 21(1)(b), 13.

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personality would still be due to a failure to comply with minimum representation requirements and follow the procedure set out in Article 12. Even if we follow Reinke's argument, a national party ban thus is not a de facto ban of a European Political Party due to its no longer respecting the democratic values of Article 2 TEU. As such, a Member State's decision to ban a national party neither directly nor indirectly interferes with the EU institution's "deliberative and interpretative authority"[34] over democratic values.

More importantly, the solution proposed by Reinke is neither supported by the competence norms in the Treaties nor by the Regulation itself. Rather, Reinke disregards the merely supplementary structure of the Regulation. The Regulation strictly separates the supranational European Political Party and the national member parties. For example, there is no rule providing that if a European Political Party is de-registered due to a breach of Article 2 TEU values, the national member parties also shall be dissolved. Equally, Article 21(4) of the Regulation provides that a de-registered European Political Party which lost European legal personality does—subject to the applicable national law—acquire national legal personality. This demonstrates that decisions on the de-registration of European Political Parties under the Regulation do not have any impact on the competence or discretion of Member States to ban national political parties. To the contrary, the Regulation makes clear that once a party has national legal personality—as opposed the European legal personality acquired by a European Political Party—it is solely governed by national rules. Conversely, national party bans do not fall within the scope of Regulation 2025/2445.

It is for these reasons that a Member State retains the competence to ban political parties, even in cases where this has the effect of a European Political Party's losing legal status. However, matters of positive competence have to be distinguished from matters of negative competence. Whereas Member States retain the right to regulate national political parties and retain the competence to ban them, the next section will argue that they are bound to respect EU law when exercising that competence.

II. National Party Bans Under Article 14(3) TEU

The German FCC held that although national party bans affect the composition of the European Parliament, they are governed solely by national law.[35] In light of the Court's judgment in *Delvigne v. Commune de Lesparre-Médoc & Préfet de la Gironde* (*Delvigne* or the *Delvigne* case), this section will question the FCC's conclusion. It will be argued that when carrying out national party bans, Member States are implementing the requirement that under Article 14(3) TEU and 10(1) TEU elections to the European Parliament must be free and democratic. As a result, a national party ban falls within the scope of Union law, so that the provisions of the Charter become applicable. National party bans thus need to comply with Article 12 CFR and can, under certain circumstances, constitute a violation of EU law.

1. National Party Bans as an Implementation of Article 14(3) TEU

Per Article 14(3) TEU, elections to the European Parliament must be free and secret. As such, Article 14(3) TEU implements the principle of representative democracy[36] which requires that "the composition of the Parliament [reflect] faithfully and completely the free expression of choices made by the citizens of the European Union."[37] Even though elections to the European

[34]Reinke, *supra* note 30, at 407.

[35]144 BVerfGE 20, para. 630.

[36]ECJ, Case C-629/21, Puigdemont v. Parliament, ECLI:EU:C:2022:413 (May 24, 2022), para. 250, https://curia.europa.eu/juris/liste.jsf?num=C-629/21; ECJ, Case C-502/19, Junqueras Vies, ECLI:EU:C:2019:1115 (Dec. 19, 2019), para. 64, https://curia.europa.eu/juris/liste.jsf?num=C-502/19.

[37]*Puigdemont*, Case C-629/21 at para. 252. *See also Junqueras Vies*, Case C-502/19 at para. 83.

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Parliament are organized by the Member States, the Court's judgment in *Delvigne* has underlined that Member States are under an obligation to ensure that the requirements of Article 14(3) TEU are complied with.[38]

The subject of the *Delvigne* case was a French Law which provided that the sentence for a serious criminal offence entailed the loss of the right to vote and stand for election, including elections to the European Parliament.[39] Mister Delvigne, who as a result of that law was removed from the electoral roll, argued inter alia that the French Law infringes upon his right to vote in elections to the European Parliament.[40] In response, the Court clarified that although the electoral procedure for elections to the European Parliament shall be governed in each Member State by its national provisions, the Member States must "ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret."[41] In other words, Member States are implementing EU law, so that the provisions of the Charter are applicable.[42]

The *Delvigne* case has thus established that EU law exercises "control over limitations of civic rights imposed on Union citizens—as long as these limitations also affect their right to participate in the European elections."[43] As argued by Lenaerts and Gutiérrez-Fons, the *Delvigne* case has clarified that Member States are under an obligation to ensure that European elections take place in accordance with Article 14(3) TEU, meaning that "[t]hose provisions impose on the Member States obligations whose objective is to ensure that the basic principles inherent in a democratic electoral system are applied at EU level."[44] As a result, Platon thinks it possible that "the Court will probably, on the basis of the requirement that the elections be 'free and secret,' be able to fully assess whether the Member States meet fundamental democratic standards."[45]

Against this backdrop, it is necessary to consider whether Member States are implementing Union law when they ban a political party participating in European elections. It follows from the *Delvigne* case that Member States, when exercising their retained competences, must "ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret."[46] The Court has held that Article 14(3), read in light of the principle of representative democracy, requires that "the composition of the Parliament reflects faithfully and completely the free expression of choices made by the citizens of the European Union."[47] "Free" elections in particular require that "citizens should be free to participate and exercise their right to vote as they wish."[48] According to the European Court of Human Rights (ECHR), which cannot render an authoritative interpretation of EU law but nonetheless can provide guidance on the interpretation of common principles, "the words 'free expression of the opinion of the people' mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another" so

[38]*See Delvigne*, Case C-650/13 at paras. 31–32; Koen Lenaerts & José A. Gutiérrez-Fons, *Epilogue on EU Citizenship: Hopes and Fears*, *in* EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS 751, 779 (Dimitry Kochenov ed., 2017); Sébastien Platon, *The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union*, 3 EUR. PAPERS 1245, 1259 (2018).

[39]*Delvigne*, Case C-650/13 at para. 15.

[40]*Id.* at paras. 18-20.

[41]*Id.* at paras. 31–32.

[42]*Id.* at para. 33.

[43]Platon, *supra* note 38, at 1259.

[44]Lenaerts & Gutiérrez-Fons, *supra* note 38, at 779.

[45]Platon, *supra* note 38, at 1259.

[46]*Delvigne*, Case C-650/13 at para. 32.

[47]*Puigdemont*, Case C-629/21 at para. 252. *See also* Junqueras Vies, Case C-502/19 at paras. 250–52.

[48]EUROPEAN LAW INSTITUTE, CHARTER OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES OF A EUROPEAN DEMOCRACY 30 (2024), https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf. *See also* Andreas Haratsch, *Democracy – A Value Common to the Member States of the European Union*, *in* LIABILITY OF MEMBER STATES FOR THE VIOLATION OF FUNDAMENTAL VALUES OF THE EUROPEAN UNION 73, 78 (Armin Hatje & Luboš Tichý eds., 2018).

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that "no form of compulsion must be brought to bear on voters as regards their choice of candidates or parties."[49]

When Member States ban national political parties competing in European elections, they directly make decisions as to whether the European Parliament reflects faithfully and completely the free choices made by the citizens of the Union. Every ban of a political party limits the EU citizens' choices of candidates or parties during elections to the European Parliament. Although it is true that it falls within the Member State's competence to decide which parties may participate in the European elections,[50] the Member States are implementing the requirements of a "free" election under Article 14(3) TEU when making such a decision. Nothing else follows from the *Delvigne* case where a Member State was found to implement the requirement of "universal" suffrage under Article 14(3) TEU when determining whether criminals convicted of a serious crime retain their right to vote in EU elections.[51]

However, reflecting upon the German FCC's finding that party bans merely have "reflexive effects on the composition of the European Parliament,"[52] one could wonder whether the link between the banning of a political party and the organization of free elections to the European Parliament is too thin. After all, some limit the scope of application of this principle "to the period prior to an election and to the voting procedure itself."[53] As long as the banning of a political party is not carried out within the direct context of elections to the European Parliament, or with the intention to remove a political party from the ballot, one could thus follow the FCC's argument and conclude that the reflexive effect of party bans on free elections and the composition of the European Parliament is too remote to bring them within the scope of application of EU law.

Such a reading of Article 14(3) TEU would however ignore the broader context and the objective of elections to the European Parliament. As we have seen above, Article 14(3) implements the principle of representative democracy laid down in Article 10(1) TEU.[54] Further, it follows from Article 10(2) TEU that elections to the European Parliament supplement the European Union with democratic legitimacy.[55] Elections to the European Parliament must thus not only be free and secret. Rather, Article 14(3) TEU, read in light of Articles 10(1) and 10(2) TEU, also requires elections to the European Parliament to be democratic. Applying the Delvigne judgment by analogy, Member States are thus not only under an obligation to "ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret,"[56] but also to ensure that these elections are democratic. Democratic elections, however, are rendered meaningless if a Member State has dismantled the very core components of liberal democracy such as the civil and political rights intrinsic to a democratic process.[57] The Court has held that the freedom of expression enshrined in Article 11 CFR is "one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded."[58] Further, the CJEU and Commission both confirmed that "the right

[49]Yumak & Sadak v. Turkey, App. No. 10226/03, para. 108 (July 8, 2008), https://hudoc.echr.coe.int/?i=001-87363.

[50]104 BVerfGE 214 at para. 18; 144 BVerfGE 20 at para. 629.

[51]*Delvigne*, Case C-650/13 at para. 33.

[52]144 BVerfGE 20 at para. 629.

[53]Haratsch, *supra* note 48, at 78. *See also* Venice Commission of the Council of Europe, Code of Good Practice in Electoral Matters 26–31 (2002), https://www.venice.coe.int/files/Code%20de%20conduite_GBR%202025_WEB_A5.pdf.

[54]*See Puigdemont*, Case C-629/21 at para. 250. *See also Junqueras Vies*, Case C-502/19 at para. 64.

[55]Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 Eur. J. Int'l L. 315, 322 (2012); Armin von Bogdandy, *European Democracy: A Reconstruction through Dismantling Misconceptions*, 2022 ELTE L.J. 5, 7 (2022).

[56]*Delvigne*, Case C-650/13 at paras. 31–32.

[57]Venice Commission, *supra* note 53, at 14; Richard Bellamy & Sandra Kröger, *Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and 'Value' Differentiated Integration*, 27 Swiss Pol. Sci. Rev. 619, 622 (2021).

[58]ECJ, Case C-203/15, Tele2 Sverige AB v. Post-och telestyrelsen, ECLI:EU:C:2016:970 (Dec. 21, 2016), para. 93, https://curia.europa.eu/juris/liste.jsf?num=C-203/15; *See also* ECJ, Case C-163/10, Patricello, ECLI:EU:C:2011:543 (Sep. 6, 2011), para. 31, https://curia.europa.eu/juris/liste.jsf?num=C-163/10;

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to freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life."[59] More precisely, the CJEU has recognized the essential role that political parties play in a system of representative democracy under Articles 14(3) and 10(1) TEU. The Court has held that membership of a political party "contributes significantly to the effective exercise of the right to stand for election"[60] and that political parties generally perform "an essential function in the system of representative democracy."[61] The Court thus seems to prescribe to the position put forward in scholarly literature and the case law of the European Court of Human Rights (ECtHR) that representative democracy "requires a competitive multi-party system"[62] where the freedom of political parties is guaranteed because "[e]xpression of the opinion of the people is inconceivable without the assistance of a plurality of political parties representing the currents of opinion flowing through a country's population."[63]

The banning of a political party constitutes a restriction of the freedom of association,[64] and is at least potentially able to affect the democratic character of elections to the European Parliament. After all, party bans enable those in power "to make the relevant decisions to arbitrarily exclude an indeterminately expansive range of political competitors from the democratic game, thereby restricting the democratic nature of the regime."[65] When carrying out national party bans, Member States are thus implementing Article 14(3), read in light of Article 10(1) TEU, insofar as they are implementing the requirement of "democratic" elections to the European Parliament.

Admittedly, this represents a far-reaching reading of Article 14(3). However, this reading is further supported by the provisions of the 1976 European Electoral Act: Although Article 13(3) of the European Electoral Act acknowledges the possibility that the mandate of a member of the European Parliament is withdrawn pursuant to national law, Article 13(2) foresees that the vacant seats are filled according to appropriate procedures. By contrast, a national party ban—at least in Germany—causes all the seats belonging to the banned party to remain vacant.[66] On a granular level, this shows that at the very least, a national party ban is implementing Article 13(2) of the European Electoral Act.[67] From a broader perspective, this however confirms that "[i]f MEPs are not elected freely and fairly in all Member States, or are removed from office unduly, the EU might face a legitimacy problem."[68] Therefore, the broader democratic standards that lead to the election or the loss of a mandate "should be a concern to the EU as a whole in order to keep up with the democratic promise of Article 2 TEU."[69]

As a result, it seems at least arguable that the ban of a national political party competing in elections to the European Parliament falls within the scope of Article 14(3) TEU. This means not only that EU law is applicable to such party bans but also that they fall within the scope of application of the Charter under Article 51(1) CFR.[70]

[59]*Hungary*, Case C-78/18 at para. 112; European Commission Recommendation, *supra* note 17, recital 2.
[60]*Czech Republic*, Case C-808/21 at para. 122; *Poland*, Case C-814/21 at para. 120.
[61]*Czech Republic*, Case C-808/21 at para. 121; *Poland*, C-814/21 at para. 119.
[62]Haratsch, *supra* note 48, at 80.
[63]*Yumak & Sadak*, App. No. 10226/03 at para. 108.
[64]Refah Partisi v. Turkey, App. No. 41340/98 (Feb. 13, 2003), https://hudoc.echr.coe.int/eng?i=001-60936.
[65]Accetti & Zuckerman, *supra* note 6, at 183.
[66]Europawahlgesetz [EuWG] [European Elections Act], § 22(4).
[67]Franz Mayer, *Das Bundesverfassungsgericht Und Die Verpflichtung Zur Vorlage an Den Europäischen Gerichtshof Zugleich Anmerkung Zum Beschluss Vom 22. November 2001 - 2 BvB 1-3/01 (NPD-Verbot)*, 37 EuR 236, 244 (2002).
[68]Dániel G. Szabó & Beáta Bakó, *Removal of Hungarian MEPs Threatens EU Democracy*, Eur. L. Blog (2025), https://www.europeanlawblog.eu/pub/kzoio9uw/release/1.
[69]*Id.*
[70]*Delvigne*, Case C-650/13 at para. 33.

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2. National Party Bans as a Violation of Article 12 CFR

As the CFR is applicable, national party bans must be compatible with the freedom of association under Article 12 CFR. The freedom of association under Article 12 CFR corresponds to Article 11 ECHR and hence enables us to draw from the ECtHR's case law[71] on party bans. Given that the ECHR standards cannot prevent the Union from providing a more extensive protection than the ECHR, further guidelines can also be derived from Regulation 2025/2445 setting rules on the de-registration of European Political Parties. Although the Regulation is not directly applicable to national party bans, it nevertheless provides interpretative guidelines to determine in what circumstances the Union deems the banning of political parties necessary.[72]

Under the case law of the ECtHR, ex ante[73] as well as ex post[74] party bans can be legitimate. However, it becomes clear from Regulation 2025/2445 that ex ante party bans are subject to stricter conditions than ex post party bans. Whereas Regulation 2025/2445 makes the respect of Article 2 TEU values a necessary condition for party registration, Article 3(1)(d) and (e) of Regulation 2025/2445 makes clear that value compliance is to be presumed as long as the political party signs a declaration stating the respect for Article 2 TEU values. While these rules cannot apply by analogy to national party ban proceedings, they make clear that a refusal to register a political party—an ex ante ban—can only be legitimate if it is clear from the outset that a political party will not comply with liberal democratic values. In this respect, one could for example think of Portuguese[75] and Austrian[76] rules prohibiting the founding of a fascist or national-socialist organization of political parties.

When it comes to ex post bans of political parties, the ECtHR as well as Regulation 2025/2445 permits the banning of a political party in a relatively wide number of cases. As such, the ECtHR has held—contrary to an Opinion of the Venice Commission which deemed the dissolution of a political party admissible only if it used or advocated for violence[77]—that the dissolution of a political party can be justified on the basis of their ideology or actions. As such, the dissolution of a political party can be justified if it "fails to respect democracy or ... is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in a democracy."[78]

Regulation 2025/2445 can be used to further fill in when a political party can be considered to flout the rights and freedoms recognized in a democracy. This is because the Regulation allows for dissolution in case of a manifest and serious breach of any Article 2 TEU value.[79] This is an important clarification and add-on to the ECtHR standards, as Article 2 TEU protects specific and core elements of liberal democracy. As such, the Regulation underlines that parties advocating for

[71]Charter of Fundamental Rights of the European Union art. 52(3), Dec. 18, 2000, 2000 O.J. (C 364) 21 [hereinafter CFR]; Matthias Ruffert & Christian Calliess in: EUV/AEUV : das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta [TEU/TFEU: The Constitutional Law of the European Union with the Charter of Fundamental Rights of the European Union], 6th ed. 2011, Art. 12 CFR, para. 8 (Ger.).

[72]Yasmine Bouzoraa, *The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis*, 8 Eur. Papers 809, 838 (2023).

[73]*See*, *e.g.*, Committee for the Organisation & Registration of the Romanian Communist Party v. Romania, App. No 20401/15 (Nov. 30, 2021), https://hudoc.echr.coe.int/fre?i=001-214690.

[74]*See*, *e.g.*, *Refah Partisi*, App. No. 41340/98.

[75]Constituçăo da República Portuguesa [C.R.P.], art. 46, no. 4, English translation available at https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf.

[76]Verbotgesetz 1947, [National Socialism Prohibition Act 1947] Staatsgesetzblatt [StGBl] No. 13/1945, as amended, § 1, https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=89007a1f-4477-4949-8474-85ca40e6beb3&Position=1&SkipToDocumentPage=True&Abfrage=Erv&Titel=&Quelle=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=prohibition+act&Dokumentnummer=ERV_1945_13 (Austria) [hereinafter VerbotsG].

[77]European Commission for Democracy Through Law (Venice Commission), Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures 1, 4 (2000), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e.

[78]*Refah Partisi*, App. No. 41340/98 at para. 98.

[79]Parliament and Council Regulation 2025/2445, *supra* note 18, recital 17, arts. 21(1)(b), 13(7).

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illiberal democracy could potentially be subject to a party ban. Importantly though, mere EU-skepticism or a hostile stance on EU integration does not constitute a legitimate reason for banning a political party.[80]

Moreover, the ECtHR has clarified that whereas states cannot be "required to wait, before intervening, until a political party has seized power and begun to take concrete steps," a party ban can however only be justified where the danger for democracy is sufficiently imminent.[81] In light of Regulation 2025/2445, which requires a "manifest and serious"[82] breach of Article 2 TEU values, an imminent danger for democracy could be judged not by the size of the party and its potential to seize power[83] but by the seriousness of its attack on Article 2 TEU values. In light of this, party ban proceedings are not in principle subsidiary to other, less restrictive measures, nor do they require that a party yield specific governing or voting power. Rather, the danger for democracy can be considered sufficiently imminent if the breach of Article 2 TEU principles is grave in its substance.

3. The Limits of EU Oversight Under Article 14(3) TEU

If a Member State decides to ban a political party which competes in elections to the European Parliament, the party ban can thus be measured by the standards of Article 12 CFR. As such, a party ban is only compliant with EU law if the political party "fails to respect democracy or ... is aimed at the destruction of democracy and the flouting of the rights and freedoms"[84] recognized in a constitutional democracy based upon Article 2 TEU.

However, as we have seen above, the applicability of the Charter hinges upon the Member States' implementing Union law within the meaning of Article 51(1) CFR. In the present case, it has been argued that Member States implement Article 14(3) TEU, or more specifically the requirement of free and democratic elections to the European Parliament. As a result, Article 12 CFR is only applicable if the political party subject to the ban participates in elections to the European Parliament. But does that mean that Member States could avoid any EU oversight or control as long as they enabled the banned parties to continue to participate in elections to the European Parliament? Or does the EU law requirement for Member States to be democratic mean that EU law applies to national party bans even in purely internal situations, where a national political party exclusively competes in national elections?

III. National Party Bans Under Articles 10 and 2 TEU

Article 2 TEU defines the values that the Union is founded on and that are, at the same time, common to the Member States. Amongst those values figures the principle of democracy, which is given concrete expression in Article 10 TEU.[85] This section will first demonstrate that Articles 10 and 2 TEU impose upon Member States a justiciable legal obligation to protect political parties, so that national party bans fall within the subject matter of Articles 10 and 2 TEU. This Member State obligation to protect political parties applies whenever political parties potentially contribute to the democratic life of the Union. As such, any ban of a national political party, even if it only operates on the national level, falls within the scope of Articles 10 and 2 TEU. However, Articles

[80]Ruth Weber, *Ansätze eines Parteiverbotsverfahrens auf EU-Ebene*, 80 JURISTEN ZEITUNG 333, 337 (2025).

[81]*Refah Partisi*, App. No. 41340/98 at para. 102.

[82]Parliament and Council Regulation 2025/2445, *supra* note 18, recital 17, arts. 21(1)(b), 13(7).

[83]144 BVERFGE 20 at para. 585 (introducing this criteria).

[84]*Refah Partisi*, App. No. 41340/98 at para. 98.

[85]*Junqueras Vies*, Case C-502/19 at para. 63; ECJ, Case C-418/18 P, Puppinck et al. v. Commission, ECLI:EU:C:2019:1113 (Dec. 19, 2019), para. 64, https://curia.europa.eu/juris/liste.jsf?num=C-418/18; *Czech Republic*, Case C-808/21 at para. 114; Case C-814/21, *Poland*, Case C-814/21 at para. 112; ECJ, Case C-181/23, *Commission v. Malta*, ECLI:EU:C:2025:283 (Apr. 29, 2025), para. 89, https://curia.europa.eu/juris/liste.jsf?num=C-181/23.

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10 and 2 TEU are not automatically triggered by national party bans. Rather, the threshold of these provisions is activated only if the national party ban constitutes a serious and systemic violation of democratic standards.

1. The Member State Obligation to Guarantee a Pluralistic Multi-party System

In *Portuguese Judges*, the Court established that Member State courts must comply with standards of judicial independence stemming from Article 19(1)(2) TEU and Article 2 TEU.[86] These provisions were found to be applicable due to the vital role national courts play in guaranteeing effective judicial protection in the EU legal space.[87] Because national courts ensure "that in the interpretation and application of the Treaties the law is observed," they share the responsibility to ensure judicial review in the EU legal system with the CJEU.[88] As such, national courts are an institutional structure fulfilling both national and EU functions; a structure where national and EU systems of governance interlock.[89] It is this very function that results in national courts being protected as a matter of EU law, by standards emanating from Articles 19(1)(2) and 2 TEU. This then leads to the question:

> [I]f there now exist[] other institutional structures in relation to which the interlocking of EU and national systems of governance is so strong, that the relevant national organs ought to comply with the values enshrined in Article 2 TEU, in similar ways as Articles 2 and 19 TEU interact in the "EU shared judicial space?"[90]

Several authors have now pointed towards a democratic space shared amongst the Member States and the Union,[91] which is given concrete expression by Article 10 TEU.[92]

Specifically, this intertwinement between Union and Member State democracy finds expression in Article 10(2) TEU which recognizes that the Union's democratic legitimacy rests on a dual basis:[93] Input legitimacy is derived directly from elections to the European Parliament by the European citizens[94] and indirectly through the representation of the peoples of the Member States in the European Council and Council.[95] The European Council's and Council's legitimacy hence flows from the Member State's representatives,[96] who in turn, as stated by Article 10(2) subparagraph 2 TEU, must be legitimated and accountable in a democratic way at the national level in order to supply these European institutions with the legitimacy derived by the peoples of

[86]ECJ, Case C-64/16, Associacão Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-64/16.

[87]*Id.* at para. 32.

[88]*Id.* at para. 33.

[89]Elise Muir, Piet Van Nuffel & Geert De Baere, *The EU as a Guardian of the Rule of Law Within Its Member States*, 29 COLUM. J. EUR. L. 1, 19 (2023).

[90]*Id.*

[91]*See, e.g.*, Armin von Bogdandy & Luke Dimitrios Spieker, *Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions*, 29 COLUM. J. EUR. L. 65 (2023); Thomas Verellen, *Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable*, VERFASSUNGSBLOG (Apr. 8, 2022), https://verfassungsblog.de/hungarys-lesson-for-europe/; 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*, 47 EUR. L. REV. 69 (2022).

[92]*Junqueras Vies*, Case C-502/19 at para. 63; *Puppinck*, Case C-418/18 P at para. 64; *Czech Republic*, Case C-808/21 at para. 114; *Poland*, Case C-814/21 at para. 112; *Malta*, Case C-181/23 at para. 89.

[93]von Bogdandy, *The European Lesson for International Democracy*, *supra* note 55, at 322; von Bogdandy, *European Democracy: A Reconstruction Through Dismantling Misconceptions*, *supra* note 55, at 7.

[94]TEU, *supra* note 19, art. 14.

[95]von Bogdandy, *The European Lesson for International Democracy*, *supra* note 55, at 325.

[96]TEU, *supra* note 19, art. 15 (2) (providing the European Council consists, amongst others, of the Heads of State or Government of the Member States), art. 16 (2) (providing that the Council is formed by a representative of each Member State at ministerial level).

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the Member States.[97] It follows from this dual structure of democratic legitimation that "[t]he European Union can only be democratic if its Member States are."[98]

But is this sufficient to derive from Articles 10 and 2 TEU a Member State obligation to adhere to democratic standards? Whereas the wording of Article 19(1)(2) TEU, which the Court operationalized in the *Portuguese Judges* case to enforce the rule of law, clearly stipulates a legal obligation, namely that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law,"[99] Article 10 TEU is not explicitly phrased as an obligation. However, the Court's recent judgments on party membership and the ability to stand for election have shed further light on the provision.[100] In these judgments, the Court has held the following:

> **[U]nder Article 10(1) TEU**, the functioning of the European Union is to be founded on **representative democracy**, which gives **concrete expression to democracy as a value**. Democracy is, under Article 2 TEU, one of the values on which the European Union is founded .... **Article 10(2) and (3) TEU confers on EU citizens the right to be** directly **represented** in the European Parliament **and to participate in the democratic life of the European Union.**[101]

In its judgments, the Court clearly connects the citizens' right to democratic participation enshrined in Article 10(3) TEU with the Union's system of representative democracy outlined in Articles 10(1) and 10(2) TEU. In other words, the citizen has the right to participate in the democratic life of the Union, and that democratic life must meet the requirements of Article 10(1)–(2) TEU. It thus appears as though the CJEU uses the citizens' right directly enshrined in Article 10(3) TEU to transform Article 10(1) and (2) TEU into legal obligations.

Whereas the democratic life of the Union takes place on both Union and Member State level,[102] the Court has only explicitly recognized the citizens' right to be directly represented in the European Parliament.[103] This then leads to the following question: If the Court has already recognized the right of EU citizens to participate in the democratic life of the Union by being directly represented in the European Parliament, why shouldn't there also be a right of the Union citizen to participate in the democratic life of the Union by being represented in the European Council and Council?

Just as Article 10(2)(1) TEU determines that citizens are directly represented in the European Parliament, Article 10(2)(2) TEU states that the Member States are "represented" in the European Council and Council.[104] Although Article 10(2)(2) TEU does not directly refer to the citizens of a Member State but rather to the Member State as such, it is clear that it is the nationals of a Member State who must be represented. This is because Article 10(2)(2) TEU clarifies that the Member State representatives in the European Council and Council must be democratically accountable either to their national parliaments or their citizens. As such, Article 10(2)(2) TEU necessitates "an uninterrupted chain of democratic legitimacy between the people"[105] of a Member State and the

[97] *See, e.g.*, 89 BVERFGE 155, paras. 89, 155, 187. *See also* Haratsch, *supra* note 48, at 75.

[98] Haratsch, *supra* note 48, at 75.

[99] TEU, *supra* note 19, art. 19(1)(2).

[100] *See* Miriam Schuler, *Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court's Judgments in Cases C-808/21 Commission v Czechia and C-814/21 Commission v Poland*, EUR. L. BLOG (Nov. 20, 2024), https://www.europeanlawblog.eu/pub/fsca541k/release/2.

[101] *Czech Republic*, Case C-808/21 at paras. 114–21; *Poland*, Case C-814/21 at paras. 112–19 (emphasis added).

[102] TEU, *supra* note 19, art. 10(2).

[103] *Czech Republic*, Case C-808/21 at para. 115; *Poland*, Case C-814/21 at para. 113.

[104] TEU, *supra* note 19, art. 10(2).

[105] David Krappitz & Niels Kirst, *An Infringement of Democracy in the EU Legal Order*, EU LAW LIVE (May 29, 2020), https://eulawlive-com.libproxy.kcl.ac.uk/op-ed-an-infringement-of-democracy-in-the-eu-legal-order-by-david-krappitz-and-niels-kirst/.

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European Council and Council, thus clarifying that the citizens of a Member State are being represented in these bodies.

The representative function of the European Parliament, on the one hand, and the European Council and Council, on the other hand, has been emphasized by the Court:

> Secondly, Article 10(1) TEU states that "the functioning of the Union shall be founded on representative democracy." Paragraph 2 of that article states, first, that citizens are to be directly represented, at EU level, in the Parliament and, secondly, that the Member States are to be represented in the European Council by their Head of State or Government and in the Council by their governments, who are themselves democratically accountable, either to their national parliaments or to their citizens. However, that article does not confer a democratic representation function on the [European Economic and Social Committee (EESC)] and the [European Committee of the Regions (CoR)].[106]

By stating that the EESC and the CoR do not fulfil a representative function, the Court also conversely recognizes that the Council and the European Council do fulfil a representative function. Consequently, the principle of representative democracy in Article 10(1) TEU applies to both the European Parliament and the European Council and Council.

According to the Court, the principle of representative democracy requires that "the composition of the Parliament reflects faithfully and completely the free expression of choices made by the citizens of the European Union."[107] It has further emphasized the European Parliament's function of serving as an "intermediary" between the people and the exercise of power.[108] As such, democratic representation "places emphasis on the need for institutions to channel the popular will"[109] and requires that institutions be composed in a way to reflect the free choices made by citizens.

Applied to the European Council and Council, the principle of representative democracy must then equally demand that the government representatives in the European Council and Council effectively represent the people of the Member States and be appointed in a process that reflects faithfully and completely the free expression of choices made by the people of a Member State. Just as European citizens have a right under Article 10(2) and (3) TEU to be directly represented in the European Parliament,[110] the citizens of a Member State have the right to be effectively and adequately represented in the European Council and Council.

However, the representative of a Member State in the Council and European Council is representative of the governing majority of that Member State but cannot represent the pluralism of different views and opinions present in a Member State. This is why Article 10(2)(2) TEU adds the requirement of democratic accountability. The Member State representatives in the Council and European Council can be considered representative of the citizens of a Member State, because the citizens of a given Member State have options to hold their government accountable. As such, Article 10(2)(2) TEU adds on to the rights of EU citizens under Articles 10(1) and (3). Following the Court's approach in judgments C-808/21 and C-814/21, one could argue that the citizen's right to participation in the democratic life of the Union anchored in Article 10(3) TEU is only effectively fulfilled if Member States guarantee the democratic accountability of their government representatives in the Council and European Council.

[106]ECJ, Joined Cases C-541 & C-555/20, Lithuania et al. v. European Parliament and Council, ECLI:EU:C:2024:818 (2024), para. 905, https://curia.europa.eu/juris/liste.jsf?num=C-541/20.

[107]*Puigdemont*, Case C-629/21 at paras. 250–52; *Junqueras Vies*, Case C-502/19 at para. 83.

[108]ECJ, Case C-138/79, Roquette Frères v. Council, ECLI:EU:C:1980:249 (Oct. 29, 1980), para. 33, https://curia.europa.eu/juris/liste.jsf?num=C-138/79.

[109]Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today's Political-Party Threats to Democratic Rule*, 18 Int'l J. Const. L. 509, 512 (2020).

[110]*Czech Republic*, Case C-808/21 at para. 115; *Poland*, Case C-814/21 at para. 113.

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Indeed, scholars have argued that Article 10(2)(2) TEU obliges Member States to guarantee "a democratically accountable government in order to guarantee democratic legitimacy."[111] According to the Union's "dual structure of democratic legitimation,"[112] input legitimacy is derived directly from elections to the European Parliament by the European citizens[113] and indirectly through the representation of the peoples of the Member States in the European Council and Council.[114] The European Council's and Council's legitimacy hence flows from the Member State's representatives, who in turn, must be legitimated and accountable in a democratic way, at the national level, in order to supply these European institutions with the legitimacy derived by the peoples of the Member States.[115] This means "[t]here must be an uninterrupted chain of democratic legitimacy between the people, exercising their democratic rights in an election, via their national Parliament through to the national government; in presidential systems, the legitimacy is directly provided by the people to the president."[116]

As such, two concrete legal obligations giving effect to the value of democracy can be identified on the part of the Member States: Under Article 10(1), they must ensure effective representation, and under Article 10(2), they must ensure that their government is democratically accountable.

More precisely, citizens can only effectively exercise their right to participate in the democratic life of the European Union if they are represented in the institutions that shape this democratic life in the name of the citizens. These institutions are, according to Article 10(2) TEU, the European Parliament as well as the European Council and Council.[117] There is thus an obligation not just of the European Parliament to be representative of the European citizens as a whole, but also an obligation of the Member State representatives in the Council to be representative of the citizens of a Member State.

In addition to representation, Article 10(2)(2) TEU adds the requirement of democratic accountability. Adding on to the idea of citizens having to be represented in the European institutions, Article 10(2)(2) TEU, read in light of Article 10(3) TEU, requires that for citizens to be effectively represented in the Council, they must be able to hold their Member State's government accountable.

The Member State obligations under Articles 10 and 2 TEU must be interpreted in the context of the second sentence of Article 2 TEU[118] as well as the Copenhagen Declaration of Democracy[119] which both emphasize that Member States need to be pluralist democracies. Because political parties play a fundamental role "in expressing the will of EU citizens" and fulfill an essential function in the system of representative democracy,[120] the "pluralism of political parties"[121] contributes to democratic representation and accountability in pluralist democracies. The effective fulfillment of Member State obligations under Articles 10 and 2 TEU—that is to guarantee democratic representation and accountability—thus presupposes that Member States actively guarantee the freedom of political parties and the pluralism of their party system.

[111]Krappitz & Kirst, *supra* note 105.

[112]von Bogdandy, *The European Lesson for International Democracy*, *supra* note 55, at 322; von Bogdandy, *European Democracy: A Reconstruction Through Dismantling Misconceptions*, *supra* note 55, at 7.

[113]TEU, *supra* note 19, art. 15.

[114]von Bogdandy, *The European Lesson for International Democracy*, *supra* note 55, at 325.

[115]*See, e.g.*, 89 BVerfGE paras. 89, 155, 187. *See also* Haratsch, *supra* note 48, at 75.

[116]*See generally* Krappitz & Kirst, *supra* note 105.

[117]TEU, *supra* note 19, art. 10(2).

[118]Jürgen Bast, Unionsverfassungsrecht: Eine Neubestimmung Anhand der Grundlagen im EU-Vertrag 130 (2025); Armin von Bogdandy, The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach 89 (Naomi Shulman trans., Theodor Shulman ed., 2024).

[119]European Council, Conclusions of the Presidency (Apr. 20, 1978), https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf.

[120]*Czech Republic*, Case C-808/21 at paras. 120–21; *Poland*, Case C-814/21 at paras. 118–19.

[121]*See e.g.*, Parliament and Council Regulation 2025/2445, *supra* note 18, arts. 8(2), 16(3)(b).

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This is because national political parties help to form opinions and lead discourse not just on national matters but also on matters falling within the fields of Union law. They are the main vehicle for enabling political participation and representation in the Member States as well as in the Union. In many Member States, internal processes within national parties determine either the running order on party lists or even the individual candidate who gets to stand for election in a particular constituency.[122] As such, political parties play a main role in filtering through potential candidates who will get to represent their people and citizens in municipal and national but also European institutions. As seen above, this role is so vital that even the Court has recognized that "membership of a political party contributes significantly to the effective exercise of the right to stand for election."[123]

Further, political "parties provide important venues for popular discussion of political issues and the formation of public opinion, as well as structures through which the politically engaged citizenry can communicate effectively with their elected representatives."[124] Either as members of the government or as part of the opposition, national political parties control their governments' actions in the Council and European Council, serving as an important check on and venue for discussion on European policies and legislation.[125]

Moreover, one could argue that the more political parties exist and stand for elections, the more options there are to accurately represent the different opinions in society and transpose them into politics.[126] This means that in a Member State different political groups must compete in and outside of elections and must be allowed to function as an intermediary[127] between the views of the people and the views represented in parliament. In other words, "[a] functioning democracy presupposes that no political party, by law, is given the power to monopolise Government."[128] "This, in turn, entails the freedom to form political parties and the freedom of those parties to carry out their activities."[129]

The Court has already stated that the freedom of association allows citizens to act "collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life."[130] It follows from this that "[i]n order for citizens of the Union to be able to participate fully in the democratic life of the Union, measures should be taken to ensure that they are able to use those rights."[131] As emphasized by AG Ćapeta, Member State obligations under Article 2 TEU imply that Member States "maintain and ... promote actively the values enumerated in Article 2 TEU"[132] and "take the necessary measures to remove any existing obstacles impeding the full respect of those values in their societies."[133] Just as Member States are under a positive obligation under Articles 19(1)(2), 4(3), and 2 TEU to protect the independence of national courts, Articles 10, 4(3), and 2 TEU oblige Member States to actively guarantee the freedom of political parties and a pluralistic party system.[134] National party bans thus fall within the subject matter of Articles 10 and 2 TEU—but do they equally fall within the scope of these provisions?

[122]Tobias Lock, *Article 10 TEU*, *in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 138, 141, para. 11 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2d ed. 2024).

[123]*Czech Republic*, Case C-808/21 at paras. 121–22; *Poland*, Case C-814/21 at paras. 119–20.

[124]Richard S. Katz, *Democracy and the Legal Regulation of Political Parties*, *in* REGULATING POLITICAL PARTIES: EUROPEAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE 17, 18–19 (Ingrid Van Biezen & Hans-Martien Ten Napel eds., 2014).

[125]Armin Hatje, *Parteiverbote Und Europarecht*, 120 DAS DEUTSCHE VERWALTUNGSBLATT (DVBL) 261, 261 (2005).

[126]*Id.* at 265.

[127]Katz, *supra* note 124, at 18.

[128]EUROPEAN LAW INSTITUTE, *supra* note 48, at 34.

[129]*Id.*

[130]*Hungary*, Case C-78/18 at para. 112; Commission Recommendation on Promoting the Engagement and Effective Participation of Citizens and Civil Society Organisations in Public Policy-Making Processes, *supra* note 17, recital 2.

[131]Parliament and Council Regulation 2025/2445, *supra* note 18, recital 6.

[132]ECJ, Opinion of Advocate General Ćapeta at para. 186, Case C-769/22, Commission v. Hungary (Jun. 5, 2025).

[133]*Id.* at para. 184.

[134]*See e.g.*, Weber, *supra* note 80, at 334 (providing that other authors find the freedom of political parties guaranteed by Article 10(4) TEU read in conjunction with Article 12(2) CFR).

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2. Scope of Application: The Democratic Life of the Union and its Limitations

To recall, the German FCC held that the applicability of the principle of democracy presupposes that the Member States act within the scope of Union law.[135] Article 10(3) stipulates that European citizens have a right to participate in the democratic life of the Union.[136] As such, Article 10(3) TEU seems to determine the scope of the Member State obligations under Article 10 TEU.[137] It is thus necessary to determine whether a national party ban only falls within the scope of Articles 10 and 2 TEU once it affects the democratic life of the Union, and when such an effect on the democratic life of the Union can be found.

2.1. A Direct and Causal Impact on the Citizen Right to Participate at Union Level

Ceurremans and David submit that for a measure to fall within the scope of Article 10 TEU, there must be a "sufficiently direct causal relation" between the breach of democratic requirements and "the impact on citizens' rights to democratic participation at Union level."[138] They contend that "not every national situation of democratic backsliding has a bearing on the right of EU citizens to participate in the 'Union's democratic life.'"[139] This raises the question how far the democratic life of the Union, and with it the citizens' right to participate, goes.

Interpreted extremely narrowly, one could maintain that the citizens' political rights to participate in the democratic life of the Union are exclusively defined in Articles 11, 22, and 24 TFEU and Articles 10–13 and 39–40 CFR. On this basis, one could argue that Article 10 TEU applies only if these rights to participate in the democratic life of the Union are impacted. Then, however, the independent meaning of Article 10 TEU would be hollowed out. The Court has clarified in the Golden Passports judgment that Articles 20, 22, and 24 TFEU merely give concrete expression to the political rights referred to in Articles 10 and 11 TEU.[140] This means that the political rights under Article 10 TEU are not exhaustively defined by Articles 20, 22, and 24 TFEU which more concretely spell out citizen rights in cross-border situations. If Article 10(3) TEU does indeed have a separate and independent meaning, its scope cannot be reduced to other Treaty provisions.

Interpreted more narrowly still, one could contend that according to Article 10(2) TEU the democratic life of the Union happens in two arenas: the European Parliament, on the one hand, and the European Council and Council, on the other hand. For the ban of a political party to fall within the scope of Article 10(3) TEU, one could consequently demand that a national measure must in some way have a direct and causal impact on the citizens' right to be represented in the European Parliament and Council. The requirement of a direct and causal impact on Union-level democracy, however, seems to be at odds with the *Portuguese Judges* case where the potential of courts to come within the fields of Union law was deemed sufficient for Article 19(1)(2) TEU to apply.

2.2. A Potential Impact on the Citizen Right to Participate at Union Level

The Court has held in *Portuguese Judges* that any Member State court potentially applying EU law must meet the standards of judicial independence under Article 19(1)(2) TEU.[141] This is an "extremely far-reaching" interpretation of the scope of Article 19(1)(2) TEU "because most

[135]144 BVerfGE 20 paras. 629-632; 104 BVERFGE 214, para. 19.

[136]TEU, *supra* note 19, art. 10(3).

[137]Timothée Ceurremans & Elisabeth David, *Countering Democratic Backsliding in (Future) EU Member States: Article 10(3) TEU Unlocked*, 30 EUR. L. J. 515, 525 (2024).

[138]*Id.* at 526.

[139]*Id.* at 527.

[140]*Malta*, Case C-181/23 at para. 88.

[141]ECJ, Case C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2017:395 (May 18, 2017), paras. 37–40, https://curia.europa.eu/juris/liste.jsf?num=C-64/16.

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courts, if not all, may rule ... on questions concerning the application or interpretation of EU law."[142]

Does it follow from this that Member State courts are bound by EU standards of judicial independence at all times?[143] The Court specified that Member State Courts are bound by EU standards of independence under Article 19(1)(2) TEU only "to the extent" that they may rule on questions concerning the application of EU law.[144] However, the obligation laid down in Article 19(1)(2) TEU is "area-based, not case-dependent."[145] Because it is area based, and applies to all fields covered by Union law, and because the fields of Union law are far-reaching, it is in practice impossible to distinguish between Member State courts potentially applying Union law and Member State courts potentially not applying Union law.[146] Pech and Platon point out that, even if Member States tried "to limit the independence of judges only when they rule on questions which do not concern the application or interpretation of EU law," "it would be a hard task to pinpoint exactly which areas of national law are unaffected by EU law."[147] Rather, "it is often impossible to identify, at the beginning of a procedure, whether or not a provision or principle of EU law may turn out to be applicable in the course of a given procedure."[148]

The fact that virtually all Member State courts are bound by EU standards of judicial independence at all times is thus due to two factors: Article 19(1)(2) TEU applies in all fields covered by Union law and Union law is so extensive and far-reaching that it is nearly impossible to identify if and when it will become relevant. Because of this, the activity of Member State courts cannot be separated into two clear spheres—there is simply no "judicial independence within the scope of EU law" as opposed to "judicial independence in purely national cases."[149] It is due to this inseparability that "a minimum of guarantees of judicial independence must be ensured, as a matter of principle, for all courts and as regards all their activities."[150]

Applying the potentiality criterion to Article 10 TEU equally suggests that Member States are obliged to comply with the democratic standards derived from Article 10 TEU at all times. This is because a citizen—or a political party—can potentially use their political rights to contribute to the democratic life of the Union at all times; any opinion or assembly can potentially relate to matters of Union law and EU democracy at all times. Equally, potentially any parliamentary debate can touch upon matters of EU law and democracy. Just as "it is often impossible to identify, at the beginning of a procedure, whether or not a provision or principle of EU law may turn out to be applicable in the course of a given procedure,"[151] it is impossible to identify whether a democratic debate—whether between individuals, within political parties, or in the course of a parliamentary debate—will bring up matters of EU law and politics, thus contributing to the democratic life of the Union.

Especially with regards to the principle of democracy, the application of the potentiality criterion is justified. After all, democracy specifically is about protecting potential future majorities, that is to say democracy is about guaranteeing a present minority the options and

[142]Sébastien Platon & Laurent Pech, *Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case*, 55 Common Mkt L. Rev. 1827, 1840 (2020).

[143]*See* Miriam Schuler, *Op-Ed: "What's in a Value? AG Ćapeta's Opinion in Commission v. Hungary (C-769/22),"* EU L. Live (June 10, 2025), https://eulawlive.com/op-ed-whats-in-a-value-ag-capetas-opinion-in-commission-v-hungary-c-769-22/.

[144]*Associação Sindical dos Juízes Portugueses*, Case C-64/16 at para. 40.

[145]ECJ, Opinion of AG Bobek, Joined Cases C-748 to C-754/19, Prokuratura Rejonowa w Mińsku Mazowieckim, ECLI:EU:C:2021:403 (May 20, 2021), para. 135, https://curia.europa.eu/juris/liste.jsf?num=C-748/19.

[146]*See* Schuler, *supra* note 143.

[147]Platon & Pech, *supra* note 142, at 841.

[148]Opinion of AG Bobek, Prokuratura Rejonowa w Mińsku Mazowieckim, Cases C-748 to C-754/19 at para. 137.

[149]*Id.* at para. 136.

[150]*Id.*

[151]*Id.* at para. 137.

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opportunities to become a majority in the future.[152] This is probably best explained with an example: Imagine a Member State decides to prohibit any new political party that forms on the national level in order to avoid that any such party ever threatens the power of the established parties. Imagine a Member State decides to ban a political party that has gained political momentum and has become the main opposition power. Admittedly, by doing so, that Member State wouldn't ban a party that is governing the Member State and that hence has the power to send government representatives to the European Council and Council. Yet by doing so, the Member State restricts which opinions are represented internally and used to hold the government accountable. By doing so, the Member State also effectively limits which opinions can gain governing power in the future and, as a result, which opinions can at one point be represented as government positions at the EU level.

As aptly described by Article 10(2) TEU, "the democratic life of the Union presupposes" democracy in the Member States.[153] Broadly conceived, the democratic life of the Union in Article 10 TEU thus governs not only situations at the EU level but also at the Member State level.[154] As such, one can envisage Article 10 TEU applying at all times, including to situations that fall beyond the scope of EU law—also referred to as purely internal situations.[155] Contrary to the German FCC's finding, the Member States are thus generally bound by the constitutional provisions of Union law. As such, any ban of a national political party, no matter how small, has a potential effect on the democratic life in the Union and falls within the scope of Article 10(1) and (2).

3. Threshold of Activation: Systemic and Serious Deficiencies

While the democratic standards under Articles 10 and 2 TEU have an unlimited scope of application, not every ban of a political party constitutes a violation of Articles 10 and 2 TEU. Articles 10 and 2 TEU contain merely structural minimum standards, so that only serious and systemic breaches of the Member States' democratic obligations constitute a violation. These two criteria allow one to take into account the Member State's reasons for banning a party as well as the effects of the party ban on the pluralism of political parties in the Member State.

3.1. Articles 10 and 2 TEU Contain Merely Structural Minimum Standards

The key to understanding the high threshold of Articles 10 and 2 TEU is to understand them as norms that merely impose structural minimum standards.[156]

This follows from their interplay with Article 4(2) TEU, the provision protecting national identity. While a Member State's national identity does not exempt a Member State from complying with the obligations arising from Articles 10 and 2 TEU,[157] Article 4(2) TEU protects the Member States' fundamental constitutional and political structures and as such guarantees a diversity of constitutional models amongst the Member States. As such, the democratic standards under EU law must be an umbrella model for a plethora of different constitutional models in the Member States ranging from constitutional democracies over presidential democracies to

[152]Christoph Möllers & Linda Schneider, Demokratiesicherung in Der Europäischen Union [Safeguarding Democracy in the EU] 10 (2018).

[153]Bogdandy & Spieker, *supra* note 91, at 19.

[154]*Id.*

[155]Ceurremans & David, *supra* note 137, at 15.

[156]For the threshold of Article 2 ETU, see Luke Dimitrios Spieker, *Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision*, *in* Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions 237, 257 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Mathias Schmidt eds., 2021); Bast, *supra* note 118, at 152; Miriam Schuler & Darren Harvey, *A New Approach to Constitutional Crisis Prevention?: Article 2 TEU as an Obligation to Take Preventive Action*, 17 European J. Risk Regul. 56, 71 (2026).

[157]*Czech Republic*, Case C-808/21 at para. 158.

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constitutional monarchies. Accordingly, to guarantee diversity amongst the Member States and respect their national identities, the standards under Articles 10 and 2 TEU can only be minimum structural standards broad enough to govern 27 different constitutional models.[158] Consequently, the Court has classified Member State obligations under Articles 2 TEU as obligations as to the result to be achieved.[159] While both the Union and the Member States must respect Article 2 TEU, they can choose the form and the method to achieve the level of protection required by Article 2 TEU.[160]

The same applies to Article 10 TEU. On the one hand, this is because the democratic standards under Article 10 TEU give concrete expression to Article 2 TEU, thus having to respect the nature of these standards as merely structural. On the other hand, Article 10 TEU is of structural nature itself. While other provisions contain more specific descriptions of the Union's institutions, Article 10 TEU outlines only the most basic democratic structure of the Union. Its objective is to ensure the EU's democratic legitimacy through the system of dual legitimation.[161] As such, Article 10 TEU describes democracy from a systemic and structural point of view.

Because the standards are merely structural, a situation only triggers Articles 10 and 2 TEU if it constitutes a systemic and generalized deficiency. This is because only systemic deficiencies are capable of breaching structural standards, whereas individual violations leave the structural standards—that is, the state system guaranteeing the principle of democracy in law and in society—untouched. This is best demonstrated by way of an example: If a Member State decides to prohibit a specific public protest, it potentially breaches the freedom of assembly, but still generally adheres to democratic principles. If, however, a Member State decides to ban all public protests or to specifically target public protests of the opposition, then the issue transcends from an issue of individual fundamental rights to a systemic issue of adherence to democratic principles.

Support for this can be found in Article 7(2) TEU, which requires a "serious and persistent breach" of Article 2 TEU and where "[t]he breach identified must … go beyond specific situations and concern a more systematic problem."[162] Given the Article 7 TEU procedure is the only explicit mechanism for the enforcement of Article 2 TEU, it provides important insight and orientation as to what can constitute a breach of the standards contained in Article 2 TEU and given expression to in other Treaty provisions.[163]

This is further confirmed by a closer look at the Court's judgment in *Repubblika*, which established the principle of non-regression, prohibiting any reduction in the protection of Article 2 TEU values.[164] "Value regression, however, implies that the situation in question is of sufficient gravity, or of a systemic nature, to lead to a regression in the protection of Article 2 TEU values."[165]

The high threshold also finds normative support in the fact that Article 2 TEU "is not only a duty of each Member State towards the Union and the other EU countries, it is also a duty towards the EU citizens and all other individuals falling in the scope of EU law"[166] so that the principle of

[158]Spieker, *supra* note 156, at 258.

[159]ECJ, C-Case 156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97 (Feb. 16, 2022), para. 233, https://curia.europa.eu/juris/liste.jsf?num=C-156/21; ECJ, C-204/21, Commission v. Poland, ECLI:EU:C:2023:442 (Jun. 5, 2023), para. 73, https://curia.europa.eu/juris/liste.jsf?num=C-204/21.

[160]Luke Dimitrios Spieker, EU Values Before the Court of Justice: Foundations, Potential, Risks 278 (2023).

[161]*See* TEU, *supra* note 19, art. 10.

[162]*Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union — Respect for and Promotion of the Values on Which the Union is Based*, at 1.4.1, COM (2003) 606 final (Oct. 10, 2003).

[163]Bast, *supra* note 118, at 152.

[164]ECJ, Case C-896/19, Repubblika v. Il-Prim Ministru, ECLI:EU:C:2021:311 (Apr. 20, 2021), para. 48, https://curia.europa.eu/juris/liste.jsf?num=C-896/19.

[165]Schuler & Harvey, supra note 156, at 71; Lucia Serena Rossi, *'Concretised', 'Flanked', or 'Standalone'? Some Reflections on the Application of Article 2 TEU*, 10 Eur. Papers 1, 6 (2025).

[166]*Id.* at 11. Miriam Schuler, *Why the EU Should Care About National Elections*, Eur. L. Blog (Oct. 16, 2023), https://www.europeanlawblog.eu/pub/why-the-eu-should-care-about-national-elections/release/1.

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democracy must be concretely implemented in Member State society.[167] This, however, also suggests that to establish a breach of the principle of democracy the effects of the breach must go beyond the individual and must have an effect on society[168]—in other words, be systemic and affect not only an individual case.

3.2. National Party Bans as a Serious and Systemic Deficiency?

As seen above, only sufficiently serious and systemic breaches of democratic principles amount to a violation of Articles 10 and 2 TEU. On the one hand, a situation in a Member State can be considered systemic when individual breaches "either occur on a regular basis, are widespread or deep-rooted, or can be traced back to high authorities that use them to express a political stance."[199] As such, a systemic deficiency appears not as an "isolated case[], but rather as [a] characteristic[] of a system."[170] What differentiates a systemic deficiency from a normal one is the fact that it cannot "be processed as a matter of routine."[171] Rather, systemic deficiencies are "challenges to an existing order without a safe remedy"[172]—that is, situations where the national system does not offer "sufficient structural guarantees to self-correct the problem once identified."[173] The seriousness of a breach, on the other hand, is determined considering a variety of criteria, "including the purpose and the result of the breach."[174]

In light of AG Ćapeta's recent opinion on Article 2 TEU, one might first wonder whether a national party ban must have an effect on the functioning of the EU legal order for it to be considered a serious violation of Articles 10 and 2 TEU.[175] This is because, when finding that Hungary had deviated from the values of Article 2 TEU, AG Ćapeta specified that "[t]he effect of deviation from values is not internal to a Member State, but affects the functioning of the EU legal order."[176] According to her, "[t]his justifies the Court's intervention through infringement proceedings."[177] Other authors, however, do not seem to support such a strict requirement of effects on the functioning of the EU legal order. Spieker, for example, proposes a sliding scale: "The more the situation departs from the scope of Union law and comes solely under Article 2 TEU, the greater is the need for a violation to reach the substantive thresholds of Article 7 TEU."[178] Under such a sliding scale, the need for an effect on the functioning of the EU legal order seems to be replaced by the high threshold of activation, demanding serious and systemic deficiencies.

In the case of party bans, the above question can be left open. This is because a party ban, if it constitutes a serious and systemic violation of Articles 10 and 2 TEU, also has an effect on the functioning of the EU legal order. This is because Article 10 TEU gives concrete expression to the Article 2 TEU value of democracy.[179] The values and principles enshrined in Article 2 TEU "legitimize the EU, simplify coordination between its members, and safeguard the Union's

[167]Rossi, *supra* note 165, at 12.

[168]*Id.*

[169]Armin von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57 COMMON MKT. L. REV. 705, 718 (2020).

[170]*Id.*

[171]*Id.*

[172]*Id.*

[173]Opinion of AG Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim*, Cases C-748 to C-754/19 at para. 150.

[174]*Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and Promotion of the Values on Which the Union is Based*, *supra* note 162, at 1.4.3.

[175]Schuler, *supra* note 143. *See* Ceurremans & David, *supra* note 137, at 526 (advocating for the necessity of an impact on the citizens' right to participate in the democratic life of the Union).

[176]ECJ, Opinion of Advocate General Ćapeta at para. 242, Case C-769/22, Commission v. Hungary (Jun. 5, 2025).

[177]*Id.*

[178]SPIEKER, *supra* note 160, at 279.

[179]*Junqueras Vies*, Case C-502/19 at para. 63; *Puppinck*, Case C-418/18 P at para. 64; *Czech Republic*, Case C-808/21 at para. 114; *Poland*, Case C-814/21 at para. 112.

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effective functioning."[180] The principle of democracy specifically plays a great role in legitimizing the EU's action and, although according to Article 10(2) TEU democratic legitimacy in the Union rests on two strands,[181] "[b]oth ... eventually lead to the individual[—in other words,] the citizen of the Union and simultaneously of one or several Member States."[182] That individual, however, does not exist within a sphere of EU law and outside a sphere of EU law. Although the Treaties do differentiate between the Union citizens and the citizens of a Member State, such a differentiation is practically impossible: A Union citizen is a citizen of a Member State and vice versa. Only if that citizen lives in a democracy can the EU can be properly supplied with legitimacy. Arguably, this input legitimacy is not only needed for the exercise of the Union's current competences. Rather, if Member States transfer more of their competences to the Union, such a transfer of competences must be legitimized by a democratic process in the Member State. Conversely then, for any future transfer of power to the Union level to be democratically legitimate, democracy in the Member States must exist at all times. Otherwise, any potential transfer of powers to the European Union by the Member States would not be legitimized by a democratic discourse in the Member States. By the same token, the Court has held in *Wightman and Others* that the principle of democracy means that the people of a Member State cannot be forced to withdraw from the Union if they decide "to revoke the notification of that intention through a democratic process."[183] If the revocation of withdrawal requires a democratic process, then conversely the people of a Member State can only be forced to be a member of the Union if there is a democratic process that continues to support this membership. If a party ban puts the Member States' adherence to core democratic principles into question, it thus also affects the functioning of the EU legal order. This is because the EU legal order is dependent on legitimacy derived from democracy on the Member State level.

At the same time, this answers the question of when a party ban can be considered sufficiently serious and systemic to constitute a violation of Articles 10 and 2 TEU. The seriousness of a violation[184] enables us to take into account the goal a Member State pursues when banning a party. The systemic character of a violation permits us to look at the effects the banning of a political party has on the pluralistic multi-party system in a Member State.

Member State approaches to political party bans vary from controls before acquiring legal status or being registered—ex ante mechanisms[185]—to restrictions once political parties violate democratic or constitutional requirements—ex post mechanisms.[186] Equally, Member State approaches vary from Weimar-style party bans, where parties are prohibited because they "seek to abolish democracy wholesale,"[187] to "legitimacy"[188] party bans, where prohibitions are founded on the fact that parties "threaten certain elements within the liberal constitutional order, such as the

[180]Tom L. Boekestein, *Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values*, 23 GERMAN L.J. 431, 433 (2022).

[181]*von Bogdandy, The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, *supra* note 55, at 322; von Bogdandy, *European Democracy: A Reconstruction through Dismantling Misconceptions*, *supra* note 55, at 7.

[182]Armin von Bogdandy, Matthias Kottman, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei & Maja Smrkolj, *Reverse Solange: Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L. REV. 489, 495 (2012).

[183]ECJ, Case C-621/18, Wightman and Others, ECLI:EU:C:2018:999 (Dec. 10, 2018), para. 67, https://curia.europa.eu/juris/liste.jsf?num=C-621/18.

[184]*Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and Promotion of the Values on Which the Union is Based*, *supra* note 162, at 1.4.3.

[185]Catarina Santos Botelho & Nuno Garoupa, *Regulating Parties by Constitutional Rules in Liberal Democracies*, 24 GERMAN L.J. 1648, 1659 (2023).

[186]*Id.*

[187]Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANSNAT'L L. 1321, 1326 (2021).

[188]*Id.* at 1345.

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commitment to equality and nondiscrimination, the absolute commitment to a nonviolent resolution of disputes, or secularism."[189] Without engaging in a detailed analysis of the respective Member State law, all these approaches seem to serve the protection of Article 2 TEU and hence present themselves as being compatible with EU law.[190] In other words, if a Member State bans a political party for the very reason of preventing the values of Article 2 TEU from being abolished, the purpose of the party ban does not constitute a serious threat to democratic values and does not fall within the threshold of Articles 10 and 2 TEU.

This, however, does not mean that party bans at the Member State level can never trigger Articles 10 and 2 TEU. Rather, the danger inherent in the banning of political parties is that those in power are provided with a means "to make the relevant decisions to arbitrarily exclude an indeterminately expansive range of political competitors from the democratic game, thereby restricting the democratic nature of the regime."[191]

National party bans can thus violate Articles 10 and 2 TEU where they are used as a means to suppress the voices of the opposition or of political competitors and when these competitors themselves respect the values of Article 2 TEU. As such, a single party ban can violate Articles 10 and 2 TEU if it is serious enough to put into question the pluralism of the party system in a Member State. This can be the case if the governing party bans its main competitor or all opposition parties.

C. Conclusion

Although the European Union has recently started to enforce the principle of democracy against Member States, its significance is still mainly overlooked. If the principle of democracy can be applied against a national committee investigating any activities influencing democratic debate,[192] if it can be applied against a national commission with the power of barring public officials found to be under Russian influence from holding public office,[193] and if it can be applied against national rules that bar mobile EU citizens from joining political parties,[194] why should it not be applicable to national party bans?

Whereas the German FCC concluded that national party bans fall outside the scope of EU law, this Article has evaluated the FCC's perspective in light of recent developments and has presented arguments as to why the FCC's view might have to be reconsidered. In light of *Delvigne*, it is possible to view national party bans as an implementation of the requirement under Articles 14(3) and 10(1) TEU that elections to the European Parliament must be free and democratic. On the basis of the growing literature and case law pertaining to Articles 10 and 2 TEU, it is equally possible to conclude that national party bans fall within the scope of these provisions.

The ban of a national political party is thus illustrative for the questions surrounding the application and enforcement of democratic standards against the Member States and for the interplay of different democratic standards with each other. On the one hand, Article 14(3) TEU, which triggers the application of the Charter, is only applicable to European elections and hence only provides for EU oversight if a political party participates in EU elections. On the other hand, the standards of Articles 10 and 2 TEU apply at virtually all times—that is, whenever a national

[189] *Id.*

[190] Hatje, *supra* note 125, at 266.

[191] Accetti & Zuckerman, *supra* note 6, at 183.

[192] Hungary Infringement Decision, *supra* note 8; Schuler, *supra* note 143.

[193] Poland Infrignement Decision, *supra* note 8; Miriam Schuler, *Taking Democracy Seriously: The Commission's Infringement Action Against Poland for Violating EU Law with the New Law in Poland on the State Committee for the Examination of Russian Influence*, EUR. L. BLOG (Jun. 16, 2023), https://europeanlawblog.eu/2023/06/16/taking-democracy-seriously-the-commissions-infringement-action-against-poland-for-violating-eu-law-with-the-new-law-in-poland-on-the-state-committee-for-the-examination-of-russian-influence/.

[194] *See e.g.*, *Czech Republic*, Case C-808/21; *Poland*, Case C-814/21.

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political party potentially contributes to the democratic life of the Union. While the Charter allows for a full review of national party bans and their justifications, national party bans only trigger the threshold of Articles 10 and 2 TEU if they represent a serious and systemic case.

The picture that emerges is thus similar to the sliding scale[195] proposed by Spieker: When there is a clear link between a national party ban and EU law through the participation of the political party in EU elections, any individual party ban can be reviewed according to the standards of Article 12 CFR. When there is no clear link between a national party ban and EU law because the national party does not compete in EU elections, the intensity of the review is reduced: Articles 10 and 2 TEU are only triggered in exceptional cases which are serious and systemic.

While the intensity of review fluctuates depending on the party ban's link to EU law, this Article has also aimed to show that national party bans do not generally escape the scope of EU law. Rather, the fundamental democratic principles to which the Member States are bound under Articles 10 and 2 TEU apply to party bans at all times and in all circumstances.

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[195] SPIEKER, *supra* note 160, at 279.

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