ARTICLES

The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis

Yasmine Bouzoraa*

ABSTRACT: This *Article* analyses several ways in which democracy as a core value of the European Union can be enforced against member States violating democratic principles. Following the crisis of democratic backsliding in several Member States, no legal action has been taken on the basis of a breach of democracy or democratic principles. A possible explanation is that violations of art. 2 TEU are subject to a specific enforcement procedure (laid down in art. 7 TEU), which is notoriously hard to trigger. Furthermore, since art. 2 TEU refers to abstract values, it is frequently asserted that values such as "democracy" cannot be legally enforced. This *Article*, however, claims that the value of democracy has a sufficiently clear core legal meaning in EU law to be legally enforceable. Secondly, this *Article* claims that EU law includes numerous other centralized (at EU level) and decentralized (at Member State level) enforcement mechanisms beyond art. 7 TEU that can be used to enforce democratic principles. The current absence of enforcement action against such Member States, therefore, is largely a political choice instead of a legal requirement.

KEYWORDS: EU law – democracy – enforcement – judicial protection – fundamental rights – art. 2 TEU.

* PhD candidate and lecturer in EU law, University of Groningen, y.l.bouzoraa@rug.nl.

The Author thanks John Morijn, Cassandra Emmonds, Justin Lindeboom and Ramses Wessel for their invaluable comments on earlier versions of this *Article*. Earlier versions of this *Article* have furthermore been presented at the 17th Biennial Conference of the European Union Studies Association (Miami, 19-21 May 2022) and the 2022 ICON-S annual conference (Wrocław, 4-6 July 2022). The Author is thankful to the participants of these conferences for their comments and questions. Finally, the Author is thankful for the comments of the anonymous peer reviewers.

ISSN 2499-8249
doi: 10.15166/2499-8249/690

I. Introduction

The EU is founded on the values enshrined in art. 2 TEU. These values include respect for human dignity, freedom, democracy, equality, as well as respect for human rights, including those of persons belonging to minorities. Both Hungary and Poland stand accused of breaching such rights, with Hungary increasingly restricting free media,[1] violating the freedom of academic institutions[2] and public education,[3] harassing and criminalising the homeless[4] and using the Covid-19 pandemic as an excuse to pass a law that makes it impossible for transgender persons to change their sex legally.[5] Poland stands accused of restricting the freedom of expression, media freedom, academic freedom and threatening women's rights by attempting (but failing) to criminalise abortion and restricting access to emergency contraceptive pills,[6] as well as compromising judicial independence.[7] As a result, both Member States have found themselves at the very centre of a conflict with the European Union spanning several years. This conflict has culminated in Poland and Hungary blocking and, according to some, holding hostage the EUR 1.8 trillion budget and Covid-19 recovery fund that included a clause aimed at the protection of the rule of law, leading to the new rule of law conditionality regulation.[8] The Court of Justice of the European Union (CJEU) has since dismissed the subsequent legal actions brought forward by Poland and Hungary against the conditionality mechanism.[9]

Enshrined in art. 2 TEU, and at least as important as the rule of law, is the value of democracy. Several legal reforms in Poland and Hungary have been criticised for violating this value.[10] No legal action has been taken against Poland and Hungary, however, on the basis of a breach of democracy. Furthermore, although much has been written about a potential

[1] European Parliament, 'Briefing: Media Freedom Under Attack in Poland, Hungary and Slovenia' (2021) 2021/2560(RSP).

[2] *Ibid*.

[3] *Ibid*.

[4] *Ibid*.

[5] S Walker, 'Hungary Seeks to End Legal Recognition of Trans People Amid Covid-10 Crisis' (2 April 2020) The Guardian www.theguardian.com.

[6] *Ibid*.

[7] See for example in joined cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and Others* ECLI:EU:C:2021:403, opinion of AG Bobek.

[8] H von der Burchard, 'Hungary and Poland Escalate Budget Fight Over Rule of Law' (26 November 2020) Politico www.politico.eu; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[9] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[10] See *e.g.* A Holesch and A Kyriazi, 'Democratic Backsliding in the European Union: The Role of the Hungarian-Polish Coalition' (2022) Eastern European Politics 1.

democratic deficit within the Union,[11] not much has been said about what democracy means substantively within the framework of European Union law, nor about whether and how it could be enforced against Member States as binding EU law. In this context, this *Article* analyses the substantive content of the value of democracy in EU law and the ways in which this content can be enforced. The rule of law as such remains outside of the scope of this *Article*.

While the rule of law is important, it is in my opinion imperative for the value of democracy to be analysed separately. Although the values of democracy and the rule of law are interlinked, the former does have a separate content and should be analysed as an independent value in art. 2 TEU. Armin von Bogdandy and Michael Ioannidis point out that – even though there is a widespread debate about different understandings of the rule of law,[12] "[i]n any event, under all understandings, the rule of law requires as a minimum that the law actually *rules*".[13] According to most scholars, however, the requirements of the rule of law go beyond a mere obligation that the law is enforced.[14] While this substantive or "thick" understanding of the rule of law comes in many variations, most scholars agree that it would include at least respect for the fundamental values and principles upon which the law is based including, especially, democracy.[15] It could therefore be argued that the value of the rule of law essentially assumes that and depends on respect for all of the other values enshrined in art. 2 TEU, which includes the value of

[11] See *e.g.* J-P Bonde, 'The European Union's Democratic Deficit: How to Fix It' (2011) The Brown Journal of World Affairs 147; P Kratochvíl, 'The End of Democracy in the EU? The Eurozone Crisis and the EU's Democratic Deficit' (2018) Journal of European Integration 169; R Bellamy, 'The Inevitability of a Democratic Deficit' in H Zimmermann and A Dür (eds), *Key Controversies in European Integration* (Palgrave Macmillan 2012).

[12] Various understandings of the Rule of Law are outlined in *e.g.* A Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) JComMarSt 1050; L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Paper 04/09 2009); P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PublL 467.

[13] A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) CMLRev 59.

[14] *E.g. Ibid.*; D Kochenov, 'EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) Yearbook of European Law 74; C Grewe and H Ruiz-Fabri, *Droits constitutionnels européens* (PUF 1995); R Fallon, 'The "Rule of Law" as a Concept in Constitutional Discourse' (1997) ColumLRev 1. Cf. J Raz, 'The Rule of Law and its Virtue' in J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979), who argues against a conflation of the rule of law and the substantive content of the law.

[15] *E.g.* Magen, 'Cracks in the Foundations' cit. Magen also refers to the European Commission, which asserts that the Rule of Law "is intrinsically linked to respect for democracy and for fundamental rights" in Communication COM(2014) 158 final from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU Framework to strengthen the Rule of Law', 4. See also Venice Commission, *Rule of Law Checklist* (Council of Europe 2016) www.venice.coe.int 16. For an overview of different understandings of a "thick" rule of law, see B Tamanaha, 'A Concise Guide to the Rule of Law' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2008); and P Rijpkema, 'The Rule of Law Beyond Thick and Thin' (2013) Law and Philosophy 793.

democracy.[16] Consequently, a "thick" understanding of the rule of law, which includes the supremacy of all law including the other values in art. 2 TEU,[17] at least partly explains why EU value enforcement has been so focused on the rule of law.[18] Nevertheless, the excessive focus on rule of law backsliding in art. 7 procedures may make for rather unfocused and more complex enforcement procedures.

Therefore, the objective of this *Article* is to provide a comprehensive legal analysis of the substantive content of democracy as a of EU law, based on applicable binding law and case law, as well as the objective enforcement actions which may be used to enforce this value. Accordingly, this *Article* does not aim to contribute to the discussion about the political or moral merits of democracy or other values of EU law, nor does it aim to scrutinise whether Member States such as Poland and Hungary have violated the value of democracy. Instead, this *Article* takes the claim that the value of democracy is being breached by certain Member States as a starting point, in order to provide an in-depth analysis of how the value of democracy takes shape in EU law and, if this value is being breached, what enforcement options are available.

Accordingly, section II of this *Article* explores democracy as a value enshrined in art. 2 TEU, uncovering its substantive meaning in the Treaties and the European Charter of Fundamental Rights (the Charter). To this end, section II first analyses the meaning of the value of democracy as such in EU law on the basis of its origin, the current text of art. 2 and the Copenhagen criteria (sub-sections II.1. and II.2.). Section III observes the value of democracy in EU law, but outside of art. 2 TEU. Section IV analyses the possibility of enforcing (aspects of) the value of democracy through different enforcement mechanisms. As such, section IV starts by recapping the problems surrounding the effectiveness of art. 7 TEU (section IV.1.). Subsequently, section IV distinguishes between centralised enforcement directly before the CJEU, using the procedures laid down in arts 258–260 and 263 TFEU (section IV.2.), and decentralised enforcement at Member States level based on the doctrines of direct and indirect effect and the preliminary reference procedure (section IV.3.). Section V concludes.

[16] According to the Venice Commission, the rule of law refers, among others, to the supremacy of the law in general. See Venice Commission, *Rule of Law Checklist* cit. 16. The rule of law furthermore includes, according to the Venice Commission, institutional balance, judicial review, fundamental rights protection and the principles of equality and proportionality (*ibid*.).

[17] *Ibid*. 16; KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3.

[18] See *e.g*. L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) German Law Journal 29; D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) European Constitutional Law Review 512. Some scholars have written about the enforcement of democracy within the EU, but often in conjunction with the rule of law, see *e.g*. B Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LSE 'Europe in Question' Discussion Paper Series 2014.

II. Democracy as a value of EU law

"There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious".[19]

There has been little attention to the enforcement of the value of democracy in EU law. As noted in the introduction of this *Article*, most discussion regarding democracy centres on the democratic credentials of the EU itself, and the tension between the desire to guarantee the full effect of EU law and the fact that this may entail the disapplication of democratically legitimate national laws.[20] While national laws may infringe on substantive EU law, one could be of the opinion that insofar as they are democratically enacted on the basis of national constitutional law, there cannot be a breach of the value of democracy. As a result, laws enacted at Member State level through majority voting are democratic, even if these measures have anti-liberal consequences.

That conclusion, however, would be too simple. Decisions made through majority voting, but in a State that limits democratic debate may not be so democratic after all. And even when a decision was made through majority voting without any limitation of democratic debate, it may still be an undemocratic decision if this decision destroys democracy as such,[21] or violates core aspects of a well-functioning democracy such as a free press. For example, in its 2020 report, the Commission noted "major problems" in some Member States, "when judicial independence is under pressure, when systems have not proven sufficiently resilient to corruption, when threats to media freedom and pluralism endanger democratic accountability, or when there have been challenges to the checks and balances essential to an effective system".[22]

Accordingly, a more substantive understanding of the value of democracy would not only refer to majority voting, but would also include the necessary pre-conditions for a well-functioning democracy. This section will first discuss the development of democracy as a value of EU law, before turning to art. 2 TEU and the substantive content of this provision drawing from the Commission's applications of the Copenhagen Criteria.

[19] ECtHR *Refah Partisi (the Welfare Party) and Others v Turkey* App n. 41340/98, 41342/98, 41343/98 and 41344/98 [13 February 2003] para. 43.

[20] On the tension between the effectiveness of EU internal market law and the democratically legitimate value choices of Member States, see *e.g.* G Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2015) Columbia Journal of European Law 289.

[21] J Linz and A Stepan (eds), *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration. An Introduction* (Johns Hopkins University Press 1978); S Issacharoff, 'Fragile Democracies' (2007) HarvLRev 1405; S Choudhry, 'Resisting Democratic Backsliding: An Essay on Weimar, Self-enforcing Constitutions, and the Frankfurt School' (2018) Global Constitutionalism 54.

[22] Communication COM(2020) 580 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 September 2020, 'Rule of Law Report the Rule of Law situation in the European Union'.

II.1. The development of the value of democracy in the European Union

The EU (then European Economic Community)[23] was not originally established with the intention of forging a European democracy watchdog. At the time of founding, EU goals were more economic than political.[24] However, the Union's aim to ensure and maintain peace on the European continent may have been an early sign of the possible existence of a democratic requirement for EU membership.[25]

Even still, the earliest two enlargements of the EU did not know any democratic conditionality.[26] There were simply no economic, nor legal and political criteria to join the Union at that time.[27] During the first enlargement, which included Denmark, Ireland and the United Kingdom, such criteria were not considered necessary, because the political regimes of these then-newfound Member States – especially with regards to democracy – were similar in nature to those of the founding states.[28]

The ensuing southern enlargement process offered the EU a greater opportunity to prove its prioritisation of democratisation.[29] This enlargement, which included Greece, Spain and Portugal, made for some new developments in the relationship between the principle of democracy and the Union. The case of the Spanish accession, for example, shows the EU's first explicit affirmation of its attachment to democracy.[30] The Greek case showcases a symbolic association between the Union and the principle of democracy.[31] It was in this case that Greek Prime Minister Karamanlis announced his belief that full EU membership would protect the longevity of his country's democratic institutions.[32]

[23] In favour of simplicity, this *Article* refers throughout to "the EU" also in respect of the European Economic Community (EEC) and the European Communities (EC) Treaties.

[24] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* (Democratic Progress Institute 2016) 9.

[25] *Ibid*.

[26] With regard to the accession of new countries, the Rome Treaties merely stated that accession terms were to be negotiated between the Member States and applicant countries, see *e.g*. art. 237 EEC. See also Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 11; European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' (2021) www.europarl.europa.eu 2.

[27] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 12.

[28] *Ibid*.

[29] See *e.g*. European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' cit. 5.

[30] D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

[31] European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' cit. 2.

[32] E Karamouzi, 'The Greek Paradox' in L Brunet (ed.), *The Crisis of EU Enlargement* (LSE Ideas 2013). It is interesting to note that Walter Hallstein, the first President of the Commission was over the moon with the Greeks joining the Union. He stated that "the cradle of European democracy, the Greek spirit that had made Europe great, wanted to come and be a member", see Luxembourg Centre for Contemporary and

The democratisation processes and the integration of Greece, Spain and Portugal within the EU ultimately worked out.[33] However, due to an increased amount of applications to join the Union from northern and eastern European countries, triggered by the collapse of the Soviet Union, the EU found that its attachment to the principle of democracy was to be enshrined in its constitutional fabric.[34] To that end, the EU began to incorporate the principle of democracy into the political component of the Copenhagen criteria for EU accession.[35]

The EU further established its commitment to the adherence of the principle of democracy in 1999 with the entry into force of the Treaty of Amsterdam, which affirmed the European principles upon which the EU was founded. Art. F(1) now decided that the Union was "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles with are common to the Member States". Art. J(1) furthermore referred to the development and consolidation of democracy with regard to EU external policy.[36]

The Treaty of Amsterdam has since been replaced with the current Treaty of Lisbon, which states that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[37]

At first glance, the Treaty of Lisbon seems a step up from the Treaty of Amsterdam as it seems to expand more on the common values of the EU. Interesting in this regard is that the Treaty of Amsterdam speaks of 'principles', which the Treaty of Lisbon replaces with "values". Oddly, democracy is still dubbed a "principle" in both the preamble of the Charter and in art. 21 TEU.[38] According to Laurent Pech, it is doubtful that the ones responsible for the terminological variation between "values" and "principles" intended to weave a type of theoretical distinction into the Treaties.[39] Therefore, the text of the Treaty

Digital History, 'Interview with Hans-August Lücker: The Association Agreement between Greece and the EEC' (15 May 2006) www.cvce.eu.

[33] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 15.

[34] *Ibid*.

[35] The Copenhagen criteria are referred to when evaluating whether a candidate State meets the criteria that must be met in order to become an EU Member State.

[36] See for more on the role of the value of democracy in EU external policy, section III.3.

[37] Art. 2 TEU.

[38] The preamble of the Charter also refers to the rule of law as a "principle". See also to this extent See also L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' cit. 20.

[39] *Ibid*.

of Lisbon did not introduce any major developments regarding the meaning of democracy in the framework of EU law. Although perhaps unintended, a distinction can still be drawn between the more indeterminate "value" and the more defined "principle".[40]

It is possible that Member States did not view the change in terminology as pressing or important and accepted it without much thought. On the other hand, if Member States would consider "principle" and "values" as synonymous, the change in terminology would not have been necessary in the first place.[41] A logical explanation for the variation in terminology might be that the constitutional "principles" of the EU are not defined anywhere in the Treaties.[42] The notion of "values" as common ideals, makes sense in that regard. For the sake of clarity and consistency, this *Article* uses the terminology of "value" throughout.

The fact that the concept of democracy is not properly defined anywhere in the Treaties, makes pinpointing the value's exact substantive meaning a precarious exercise.[43] The meaning of democracy in EU law must be inferred from the Treaty text and the Charter, as well as the relevant case law. The remainder of this section will focus on art. 2 TEU and the related Copenhagen criteria.

II.2. The value of democracy in art. 2 TEU and the Copenhagen criteria

a) Art. 2 TEU: an introduction

Art. 2 TEU prescribes that it is expected and even required for all Member States to nourish and maintain a democratic constitutional system, which abides by the rule of law. Art. 2 enshrines two types of values. On the one hand, the provision seeks to protect institutional and structural values such as democracy and the rule of law. On the other hand, it attempts to safeguard fundamental rights.[44] It is easily assumed that institutional and structural values such as the protection of democracy and the rule of law *are* fundamental rights and that their meaning is therefore to be found in the Charter. This assumption is flawed. Although the Charter touches upon certain dimensions of democracy, it does

[40] See *e.g.* J Daci, 'Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?' (2010) Academicus 109, 114–115. Daci considers that values are universal and that they therefore have the same value in all legal systems. It is possible that this is the reason that the Treaty changed its terminology from "principles" to "values". In my opinion, this seems somewhat at odds with the notion that the EU is an autonomous legal order. This is, however, material for a different paper.

[41] See also L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' cit. 21.

[42] *Ibid*.

[43] It should be noted in this regard that Title II of the TEU discusses certain aspects of democracy, such as that the functioning of the Union is founded on representative democracy, but that the TEU does not properly explain what exactly democracy means in the context of the EU more generally, and more specifically which conditions must be met in order for a Member State to comply with the value of democracy.

[44] Note the manner in which art. 2 TEU is phrased: "democracy, [...] the rule of law *and* respect for human rights" (emphasis added). See also to this regard LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2018) German Law Journal 1182, 1187.

not cover the value in its entirety.[45] Surely then, art. 2 TEU must have something to add – something that is not found anywhere else in EU law. Even still, while art. 2 clarifies the importance of democracy in a community such as the EU, it fails to clearly establish the substantive content of the value of democracy within the Union.

The lack of clarity in art. 2 TEU has shaped ongoing academic discourse about the meaning and nature of EU values.[46] Vague values may indeed allow for a wider margin of appreciation.[47] Some scholars furthermore allege that the values enshrined in art. 2 were never meant to impose values on Member States. These values were rather designed to show off Europe's great level of sophistication to the rest of the world.[48]

However, even if it were true that art. 2 was never intended to impose values on Member States, the logical error here is that the popular interpretation of EU principles is prone to change over time. For example, where autonomy was once introduced as a means to establish the direct effect of Treaty provisions, it now entails that the Court will not allow for any inside or outside scrutiny on matters of EU law.[49]

The EU values enshrined in art. 2 TEU have been clarified by several EU institutions over the years and are now much more than the mere "skeleton" that is found in the

[45] *Ibid*. 1188.

[46] For a comprehensive overview, see *e.g*. KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. 18, with further references.

[47] See *e.g*. L Solum, 'Legal Theory Lexicon: Rules, Standards and Principles' (29 September 2019) Legal Theory Blog lsolum.typepad.com; F Schauer, 'The Convergence of Rules and Standards' (2003) New Zealand Law Review 303, 306. Note, however, that this may not always be the case. Although standards generally offer a wider margin of appreciation, it may be the CJEU, and therefore not the Member States enjoys this wider margin of appreciation. Furthermore, according to Frederick Schauer, due to what he calls the "convergence" of rules and standards, the choice between rules and standards and thus between specific and vague provisions may not make as much of a difference as is generally presumed.

[48] See *e.g*. D Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2014) Polish Yearbook of International Law 145, 149-150; S Lucarelli, 'Introduction: Values, Principles, Identity and European Union Foreign Policy' in S Lucarelli and I Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 1. This argument makes sense when read in conjunction with the European external policy that relates to democracy. The EU for example publishes an annual report on Human Rights and Democracy in the World, in which the Union reports how well third countries are doing with regard to their democratic systems. See e.g. L Pech and J Grogan, 'EU External Human Rights Policy' in RA Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020) 351. See section III.2. of this *Article* for more on the external dimension of democracy.

[49] This follows from an analysis of CJEU case law, see case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1; case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66; case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158. See furthermore Opinion 2/13 *on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454. See for an in-depth analysis *e.g*. P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) FordhamIntLJ 955; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35.

Treaties.[50] In order to understand the current character and possible enforcement of the value of democracy within the EU, a review of the Treaties, the case law of the CJEU and the Opinions and Communications of other EU institutions is necessary.[51]

b) Article 2 TEU and the Copenhagen criteria

Part of the substantive meaning of democracy in the EU can be inferred from practical applications of art. 2 TEU. One of the main applications of art. 2 is found in the assessment procedure for candidate countries, the so-called Copenhagen criteria. The starting point for accession procedures is formed by art. 49 TEU, which claims that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union".[52]

In its Opinions on the accession of several applicant States, the Commission indeed refers to art. 2 TEU. When contemplating whether Serbia met the preconditions to join the Union, the Commission immediately recalled said provision.[53] In the same document, however, the Commission claimed that "[t]he present assessment is based on the Copenhagen criteria relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, as well as on the conditionality of the Stabilisation and Association Process". However, in the rest of its assessment, the Commission never refers to art. 2 TEU again.[54]

It is obvious that the Commission takes democracy seriously in its accession assessments, but it seems as if it is not art. 2 TEU that is generally relied upon, but rather the Copenhagen criteria. A similar structure is found in the 2016 report on Turkey's possible accession to the Union, where the Commission explicitly mentions values such as democracy and the rule of law, but does not make any mention of fundamental rights.[55]

Due to the Commission's lack of attention for some of the values enshrined in art. 2 TEU, some authors conclude that the Commission mentions the provision, but never actually applies it.[56] In a way, the Commission's mention of art. 2 appears to be almost arbitrary. It is my opinion, however, that the Commission's approach to democracy in its

[50] See further section III of this *Article*.

[51] J Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) European Papers www.europeanpapers.eu 255, 262.

[52] Art. 49 TEU.

[53] Communication COM(2011) 668 final from the Commission to the European Parliament and the Council of 12 October 2011, 'Commission Opinion on Serbia's application for membership of the European Union', 2.

[54] *Ibid*. 5.

[55] Communication COM(2016) 715 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2016, '2016 Communication on EU Enlargement Policy', 17. Commission Staff Working Document SWD(2016) 366 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2016, 'Turkey 2016 Report', 7.

[56] See *e.g.* J Wouters, 'Revisiting Art. 2 TEU' cit. 264.

accession opinions should be interpreted as meaning that democracy in the sense of art. 2 and democracy in the sense of the Copenhagen criteria overlap.

Such an interpretation makes sense when reminding oneself that the Copenhagen criteria are in essence an elaboration on art. 2.[57] After all, both test the applicant State's suitability to join the Union on the basis of the value of democracy. This is seemingly recognised by the CJEU, as recent case law saw the Court connecting art. 2 TEU and the Copenhagen criteria for the first time.[58] Therefore, the Copenhagen criteria may offer a good place to start when uncovering the meaning of art. 2 TEU.

c) Copenhagen criteria: substantive elements

The Copenhagen criteria are conditions set by the Copenhagen European Council in 1993[59] and later confirmed by the Madrid European Council.[60] All candidate countries to the EU must satisfy these criteria in order to join the Union.[61] The Copenhagen criteria consist of political criteria, economic criteria and administrative criteria and require of applicant states the institutional capacity to implement effectively the European *acquis* and the ability to take on the obligations that come with EU membership.[62] The political criteria require of candidate countries a stable institution that guarantees democracy and adherence to the rule of law.[63] In a similar fashion to art. 2 TEU, the Copenhagen criteria as such do not offer any further explanation on the substantive elements of democracy. Therefore, in order to understand the substantive meaning of the Copenhagen criteria, their practical application must be assessed.

[57] It should also be noted that the Commission does assess adherence to human rights and respect for and protection of minorities in its Opinion on the accession of Montenegro. The Commission concludes that certain ethnic groups, as well as persons with disabilities and LGBT persons are still subject to discrimination, see Commission Staff Working Document COM(2010) 670 final Analytical Report of 9 November 2010 accompanying the Communication from the Commission to the European Parliament and the Council, 'Opinion on Montenegro's Application for Membership of the European Union', 6. It is therefore a possibility that the Commission did consider human rights adherence in its Opinion on Serbia's application for membership, but that it did not find anything notable and thus decided not to include it. This is also apparent in the Commission's 2020 Albania report where it considers that although Albanian legislation prohibits discrimination against the LGBTI community, the country should still do more to protect LGBTI persons from discrimination, see Commission Staff Working Document SWD(2020) 354 final of 6 October 2020 accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Albania 2020 Report', 36.

[58] Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311 para. 62.

[59] European Council in Copenhagen of 21-22 June 1993, 'Conclusions of the Presidency' www.consilium.europa.eu 13.

[60] European Council in Madrid of 15-16 December 1995, 'Presidency Conclusions' www.europarl.europa.eu 18.

[61] European Commission, *Accession criteria* neighbourhood-enlargement.ec.europa.eu.

[62] European Council in Copenhagen of 21-22 June 1993, 'Conclusions of the Presidency' cit. 13.

[63] As well as respect for human rights and minorities.

All of the Commission Opinions and Communications on the potential accession of new Member States are structured in roughly the same way. Each Opinion presents a paragraph on democracy. Every time, the Commission first assesses the basic constitutional framework of each candidate State. Second, Commission delves into the legal and factual aspects of the respective system, which relate to democracy and that do not meet EU standards. These aspects can be roughly divided into three categories, namely *i)* general constitutional framework; *ii) trias politica* and checks and balances; and *iii)* electoral systems.

When it comes to its assessment of the general constitutional framework of applicant countries, the Commission seems to be most concerned with systems of government. All applicant States considered are parliamentary democracies, which the Commission considers generally in line with European principles and standards.[64] This is unsurprising, as the Union is a parliamentary democracy in line with art. 10 TEU.[65]

In relation to the division of powers and checks and balances in an applicant country, the mere fact that an applicant country can legally be considered a parliamentary democracy does, however, not mean that a prospecting Member State meets the Copenhagen definition criterion of democracy. In its several accession Opinions and Communications, the Commission analyses the manner in which States have organised their democratic institutions, as well as to what extent the powers of those institutions are separated sufficiently in law and in practice. An analysis of the Commission opinions on Serbia and Montenegro shows that democracy in the sense of the Copenhagen criteria[66] requires that the legislative and the executive branch are properly separated. More specifically, proper separation requires at least a legislative process which implements sufficient preparation within the legislative process (such as preparation of draft legislation and amendments),[67] as well as consultation of stakeholders[68] and capacity for parliamentary oversight.[69] Furthermore, there must be sufficient governmental policy planning, coordination, and implementation.[70] The exact extent of "sufficient", remains somewhat equiv-

[64] In its Opinion on the accession of Serbia, the Commission considers what makes up the "democratic fabric" of Serbia, stating that the country is a parliamentary democracy and that "[i]ts constitutional and legislative framework is largely in line with European principles and standards", see Communication COM(2011) 668 final cit. 5. The Commission decides in the same vein in its Opinion on the accession of Montenegro that the institutional framework of the country was mostly in line with European values, see Commission Staff Working Document COM(2010) 670 final cit. 5. Note again the inconsistent use of terminology. "Principles" and "values" are used by the Commission interchangeably.

[65] For more on art. 10 TEU in conjunction with the value of democracy, see section III.1 of this *Article*.

[66] And, therefore, in the sense of art. 2 TEU.

[67] Commission Staff Working Document COM(2010) 670 final cit. 5; Communication COM(2011) 668 final cit. 6. The Commission never properly explains what exactly should be prepared and in what way that should be.

[68] *Ibid*. 6.

[69] Commission Staff Working Document COM(2010) 670 final cit. 5.

[70] Communication COM(2011) 668 final cit. 6.

ocal. Finally, parliamentary immunity remains a cornerstone when safeguarding the independence of the legislative branch.[71] Although lifting of the immunity of members of parliament may be justified, this may only occur in extraordinary situations.[72] The Commission furthermore underlines the importance of an independent judiciary.[73] This means on a most basic level that the judiciary cannot be politicised.[74] Politicisation may, after all, lead to corruption.[75] Corruption must furthermore be discouraged through an effective system of checks and balances[76] and anti-corruption legislation.[77]

When it comes to electoral systems of candidate countries, elections play a vital role in ensuring democracy within the Union, both at Union level[78] and at Member State level. The Copenhagen criteria focus on elections and referenda at Member State level. The EU approach to the safeguarding of fair elections is strict regarding the safeguarding of fair elections. In its Opinion on the accession of Serbia, the Commission for example considers that Serbian elections have been consistently conducted in accordance with international standards ever since 2001.[79] However, according to the Commission, the Serbian electoral process was only recently brought in line with EU standards.[80] This means that democracy in the sense of art. 2 TEU requires of a future Member State an electoral process of an even higher standard than what is generally accepted internationally. First and foremost, this standard for elections requires proper codification and harmonisation of an electoral regulatory framework in national law.[81] Moreover, this higher standard means that the appointment of MPs must follow the order of the list presented to the

[71] Communication COM(2016) 715 final cit. 5.

[72] *Ibid*.

[73] See *e.g*. Commission Staff Working Document COM(2010) 670 final cit. 5.

[74] *Ibid*. International standards have basis in several international (universal and regional) treaties, international customary law, political commitments, and internationally agreed principles of good practice which are adopted by governmental organisations and NGO's. These standards include the right and opportunity to vote, the right and opportunity to participate in public affairs, prevention of corruption, the right and opportunity to be allected and the freedom of assembly and association. See *e.g*. The Charter Center, *Election Standards* eos.cartercenter.org.

[75] Commission Staff Working Document COM(2010) 670 final cit. 5.

[76] *Ibid*.

[77] *Ibid*. Such legislation must be effective on paper, as well as effectively enforced. In the Montenegrin example, this meant that incomplete anti-corruption legislation was to be supplemented and that more authority, legal powers and capacity was to be given to supervisory authorities in order to ensure effective application of the law, see *ibid*. 6.

[78] See *e.g*. art. 10(1) and (2) TEU.

[79] Communication COM(2011) 668 final cit. 6.

[80] *Ibid*.

[81] *Ibid*.; Commission Staff Working Document COM(2010) 670 final cit. 5; Office for Democratic Institutions and Human Rights, 'Republic of North Macedonia Early Parliamentary Elections 15 July 2020: ODIHR Special Election Assessment Mission Final Report' (2020) OSCE www.osce.org.

voters,[82] that an inclusive political dialogue must be ensured, that measures are in place to eliminate the misuse of State resources in election campaigns, that safeguards exist to ensure independence, that there is impartiality of the Central Election Commission and the judiciary and finally, that alleged electoral violations are investigated in a transparent manner.[83]

In the context of the electoral system at European level, Regulation 1141/2014 laid down limited standards on the functioning of political parties and their funding.[84] Although these standards have not been incorporated in the Copenhagen criteria, such incorporation may be possible in the future as to provide even stricter standards for national electoral systems.[85]

d) Applicability of the Copenhagen criteria after EU accession

From the previous, it is clear that the Copenhagen criteria are not merely an empty shell. Numerous Commission Opinions and Communications draw up a whole set of substantive criteria which are much easier to apply than the general value of democracy. This is proven by the fact that many candidate countries have overhauled their institutions in order to meet the Copenhagen criteria and to ultimately be granted EU membership.[86]

Although strictly applied during accession procedures, enforcement of the Copenhagen criteria seems to go out of the window once a Member State has joined the Union.[87]

[82] See Communication COM(2011) 668 final cit. 6. This puts an end to the practice of "blank resignations" by which MPs were tendering resignation letters to their parties at the beginning of their mandate.

[83] In its Opinion on the accession of Albania, the Commission follows mainly some recommendations that were made by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), see Commission Staff Working Document SWD(2020) 354 final cit. 9. See for the original and more extensive OSCE/ODIHR report, Office for Democratic Institutions and Human Rights, 'Montenegro Parliamentary Elections 30 August 2020: ODIHR Limited Election Observation Mission Final Report' (2020) OSCE www.osce.org. Similar recommendations are found in the OSCE/ODIHR report on the North Macedonian elections, see Office for Democratic Institutions and Human Rights, 'Republic of North Macedonia Early Parliamentary Elections 15 July 2020' cit.

[84] Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations, as amended by Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 amending Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations.

[85] For the substantive context of the Regulation, see section III.1 of this *Article*.

[86] See *e.g.* the development of Croatia between 2004 and 2011. Croatia had strengthened, for example, the independence of the judiciary and adopted adequate measures to improve the efficiency of the judiciary. The country furthermore adopted and implemented anti-corruption legislation, see Communication COM(2004) 257 final from the Commission of 20 April 2004, 'Opinion on Croatia's Application for Membership of the European Union'; Commission Staff Working Paper SEC(2011) 1200 final of 12 October 2011, 'Croatia 2011 Progress Report' accompanying the document Communication from the Commission to the European Parliament and the Council 'Enlargement Strategy and Main Challenges 2011-2012', 5-8. This shows that the substantive elements of the Copenhagen criteria are clear enough to be implemented directly.

[87] See *e.g.* L Pech and KL Scheppele, 'Illiberalism Within' cit.

Pre-accession democracy conditionality does, therefore, not eliminate the potential for and the reality of post-accession backlash.[88] An explanation for this phenomenon is easily found in the fact that the Copenhagen criteria are merely accession criteria and, in that sense, simply do no longer apply once a country has joined the Union. Even the website of the Commission notes that "[t]he accession criteria, or Copenhagen criteria [...] are the essential conditions all candidate countries *must satisfy to become a member state*".[89]

Although it is true that the Copenhagen criteria are designed as accession criteria, they also offer an elaboration on the meaning of the value of democracy. What the Commission considers to be criteria for democracy for candidate countries are therefore the same for the Member States. Democracy is democracy after all. The only difference in applicability is, in my opinion, that candidate countries are liable to comply with art. 2 via art. 49, whilst Member States must answer to art. 2 directly.

III. The value of democracy beyond art. 2 TEU

Art. 2 TEU and the Copenhagen criteria offer a basic insight into the value of democracy in EU law. Democracy is, however, woven into the constitutional framework of the Union in many different places. The following section analyses the other provisions of EU law that are relevant to the substance of democracy, starting with the right to vote and to stand as a candidate. This section furthermore discusses art. 10 TEU, art. 21 TEU, the Charter and the Commission's European Democracy Action Plan.[90]

III.1. Right to vote and to stand as a candidate

Suffrage is, of course, the cornerstone of any democracy. Art. 223 TFEU requires that the European Parliament shall be elected by direct universal suffrage. Art. 20(2)(b) TFEU and arts 39 and 40 of the Charter enshrine the right of every citizen of the Union to vote and to stand as a candidate at elections to the European Parliament and at municipal elections. Furthermore, arts 20(2)(b) and 22(1) TFEU grant citizens the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right has been further concretised in Directive 94/80/EC, which provides detailed arrangements.[91]

[88] See *e.g.* P Levitz and G Pop-Eleches, 'Why No Backsliding? The EU's Impact on Democracy and Governance Before and After Accession' (2010) Comparative Political Studies 457.

[89] European Commission, *Accession criteria* cit. (emphasis added).

[90] It should be noted that many more provisions within the Treaties provide some sort of insight into the meaning of the value of democracy under EU law. However, keeping in mind the scope of this *Article* and limitations in terms of word count, I have made a selection of which provisions I believe give most insight into the extent of the value of democracy in EU law. Other provisions remain material for another article.

[91] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

The right to vote or to stand as a candidate can be enjoyed by citizens in the Member State in which they reside, under the same conditions as nationals of that State. This means that, although this right is extended to "every citizen of the Union", the right is still subject to Member State rules. In accordance with my analysis under section II.2., however, Member States are likely at least to some extent subject to EU law with regards to the organisation of regional and national elections. Member State electoral law must therefore be in line with EU standards. The exact extent of these standards in relation to suffrage is, as noted in the previous section, not specified in any of the Commission's reports on the accession of new Member States, although at least some restrictions are clear. These include that the system of choice must be a form of proportional representation, more specifically either the party list or the single transferable vote system.[92] The electoral area may furthermore be subdivided unless subdivision generally affects the proportional nature of the electoral system.[93]

Council Directive 93/109/EC furthermore lays down some "detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals".[94] Art. 5 of the Directive extends the right to vote or to stand for election to citizens that do not have the right to vote or stand for election because they have not resided in their host Member State for long enough, but have spent the required time in one or multiple different Member States.[95]

In 2018, the Commission adopted its Election package, consisting of a Communication and a Recommendation which encourage Member State to set up national election networks that deploy national authorities with competence for electoral matters and authorities to monitor and enforce rules related to online activities relevant to elections. The aim of this package, according to the Commission, is to ensure "free and fair European elections".[96]

In its Communication, the Commission recognises that the European institutions do not run elections. Nevertheless, the Commission asserts that elections still have an obvious EU dimension.[97] The Communication aims to provide specific guidance regarding the processing of personal data in the electoral context. This is an elaboration on the General Data Protection Regulation, which in itself addresses instances of unlawful use of personal data

[92] Art. 1 of the Act concerning the election of the members of the European Parliament by direct suffrage of October 1976.

[93] *Ibid*. art. 2.

[94] Directive 93/109/EC of the Council of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

[95] Note that art. 14(1) of Directive 93/109/EC restricts this right to some extent.

[96] Communication COM(2018) 637 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 September 2018, 'Securing free and fair European Elections'.

[97] *Ibid*.

in the electoral context at Member State level.[98] The Communication furthermore sets recommendations on how risks from disinformation and cyberattacks and the promotion of online transparency and accountability in the EU should be addressed.[99] Recommendations are also made on the enhancement of cooperation between competent authorities, as well as on the tools that allow these authorities to intervene when necessary to safeguard the integrity of the electoral process.[100] Moreover, the Communication addresses situations in which political parties or associated foundations may benefit from practices that infringe data protection rules.[101] Finally, the notion of "free and fair elections" as recited by the Commission in its Communication cannot exist without free media. Accordingly, it is not just the Charter which touches upon the protection of free and fair media, but according to some, also the Treaties themselves.[102] This means that the Commission may launch infringement proceedings to protect free media on the basis of the Treaties.[103]

In 2021, the Commission subsequently launched the European Democracy Action Pack, partly because there was evidence that the rules adopted in the Commission's 2018 Election Package were easily circumvented.[104] One of the three pillars of the newer Democracy Action Pack is the promotion of free and fair elections.[105] In this light, a Regulation on the transparency and targeting of political advertising was proposed,[106] as well as a revision of the Regulation on the funding of European political parties.[107]

III.2. Art. 10 TEU

Art. 10 TEU prescribes that the European Union itself shall be a representative democracy. It provides that citizens are directly represented at Union level in the European Parliament. To ensure another dimension of democracy, art. 10(2) decides that "Member States are

[98] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), preamble, recital 56. See also Communication COM(2018) 637 final cit.

[99] Communication COM(2018) 637 final cit.

[100] *Ibid*.

[101] *Ibid*.

[102] Insofar as unfree and unfair media coincide with unfree and unfair elections, see A Bodnar and J Morijn, 'How Europe Can Protect Independent Media in Hungary and Poland: Press Freedom is a Prerequisite for Free and Fair Elections' (18 May 2021) Politico www.politico.eu. No reference to any Treaty provision is made in this specific article, but the authors likely rely on provisions protecting free and fair elections such as arts 20, 22 and 223 TFEU.

[103] A Bodnar and J Morijn, 'How Europe Can Protect Independent Media in Hungary and Poland' cit.

[104] Communication COM(2020) 790 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 3 December 2020 on the European democracy action plan.

[105] *Ibid*. The other two pillars being strengthening media freedom and countering disinformation.

[106] *Ibid*.

[107] *Ibid*.

represented in the European Council by their Head of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens". Art. 10(3) furthermore decides that "[e]very citizen shall have the right to participate in the democratic life of the Union". Finally, art. 10(4) proclaims that political parties active at European level must contribute to forming European political awareness and to expressing the will of citizens of the Union.

Although art. 10 TEU seems rather straightforward and general at first glance, some scholars allege that this provision may have a far more specific meaning. John Cotter, for example, suggests that art. 10 TEU may provide a basis for the exclusion of Hungarian representatives from the European Council and the Council.[108] His argument is largely based on a literal interpretation of the first two paragraphs of art. 10, emphasising art. 10(2), and consists of three basic steps: *i)* the Union is founded on a representative democracy; *ii)* according to art. 10(2), the organs of the Union must be democratically legitimised; *iii)* governments in the European Council and Council must be democratically legitimised on a national level on a representative basis.[109]

According to Cotter, it could be argued that the text of art. 10(2) merely provides that both institutions must be composed of representatives of all Member States. Cotter subsequently refers to art. 16(2) TEU on the composition of the Council which appears to state exactly that. Cotter's response is simple, yet effective: his interpretation of art. 10(2) and art. 16(2) TEU are not mutually exclusive. Both may co-exist. In *Junqueras Vies*, the CJEU acknowledged that art. 10 TEU gives "concrete form" to the value of democracy as enshrined in art. 2 TEU.[110]

Such an interpretation of art. 10(2) does, however, have its pragmatic complications. First, art. 10 does not present a basis upon which the European Council or Council could decide to exclude government representatives from a Member State which is no longer democratically accountable.[111] According to Cotter, this means that individuals litigating the matter rely on art. 263 TFEU, on the basis of which the CJEU may review the legality of a reviewable act.[112] In such a case, an individual must allege that such a reviewable act was not taken in accordance with EU law, as the government representation of a non-democratic Member State were partaking unlawfully.[113] Alternatively, the same result can

[108] J Cotter, 'The Last Chance Saloon: Hungarian Representatives May be Excluded from the European Council and the Council' (19 May 2020) Verfassungsblog verfassungsblog.de. See similarly D Krappitz and N Kirst, 'Op-Ed: "An Infringement of Democracy in the EU Legal Order"' (29 May 2020) EU Law Live eulawlive.com.

[109] J Cotter, 'The Last Chance Saloon' cit.

[110] Case C-502/19 *Oriol Junqueras Vies* ECLI:EU:C:2019:1115 para. 63.

[111] *Ibid*.

[112] *Ibid*.

[113] *Ibid*.

be achieved through the preliminary ruling procedure.[114] While this approach could in theory be effective, it knows at least two major problems.

The first of those problems is identified by Kieran Bradley. In direct response to Cotter, Bradley argues that there would most likely be no political advantage gained by banning representatives of Member States from the European Council or Council.[115] Bradley argues that a Union functions through its Member States, and that preventing a Member State from voting is the quickest way to ensure that the Member State in question will no longer respect or implement any European Council or Council decisions.[116] On a more legal note, Bradley argues that removing a Member State's voting rights under art. 10 TEU would "simply airbrush out of the picture [the Member State's] rights".[117] It is true that the removal of a Member State's right to vote is one of the possible outcomes of an art. 7 procedure for which high safeguards exist for a reason. Bypassing entirely this system of safeguards is likely to be questionable in terms of legality.

On the other hand, following art. 19(1) TEU, the CJEU is tasked to ensure that in the interpretation and application of the Treaties, the law is observed. Both Cotter and Bradley mention this fact, reiterating that the Court could potentially interpret art. 10(2) in conjunction with art. 2 TEU, especially when considering that EU institutions such as the CJEU must aim to promote Union values.[118] However, both fail to mention that interpreting art. 10(2) in conjunction with art. 7 TEU may potentially lead to the conclusion that art. 10 cannot be considered a legal basis for the banning of Member State delegations from EU institutions. In my opinion, this is a potential second major problem with Cotter's theory. Cotter, however, argues that the automatic exclusion of representatives of a democratically unaccountable Member State from the Council under art. 10(2) TEU cannot be regarded as a sanction, but rather as a natural and automatic effect of the law.[119] As such, there can be no interference of the enforcement of art. 10 TEU with the *lex specialis* nature of art. 7 TEU. While this holds up in theory, the outcome is *de facto* still the same. As such, exclusion of certain Member State representatives from the Council still has a punitive character by effect. Moreover, Cotter argues that art. 7 TEU is not the only provision that

[114] In the sense of art. 267 TFEU.

[115] K Bradley, 'Showdown at the Last Chance Saloon: Why Ostracising the Representatives of a Member State Government is Not the Solution to the Article 7 TEU Impasse' (23 May 2020) Verfassungsblog verfassungsblog.de.

[116] *Ibid*.

[117] *Ibid*.

[118] J Cotter, 'The Last Chance Saloon' cit. In his subsequent journal article on the operability of art. 10 TEU, Cotter furthermore argues that the *lex specialis* reading of art. 7 is inconsistent with the role of the CJEU as laid down in art. 19(1) TEU and with the notion that the EU is built upon the rule of law, see J Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) ELR 69, 79-80. However, I would argue that it is not any more in line with the rule of law to simply bypass a *lex specialis* on mere moral grounds.

[119] J Cotter, 'To Everything There is a Season' cit. 79.

allows for enforcement of the values enshrined in art. 2 TEU. This has been well-established in the case law of the CJEU and, accordingly, in this *Article*. Still, I remain of the opinion that excluding Member State representatives from voting in the Council or the European Council is of a highly political nature and would be better enforced through art. 7 TEU, due to this provision's politicised nature.

Nevertheless, there are definite benefits to an annulment procedure under art. 263 TFEU in conjunction with art. 10 TEU. As Cotter writes, it would be up to the Court to be clear about when exactly the European Council or the Council had stopped acting in compliance with art. 10 TEU. A prerequisite for such a judgment is that the Court describes what democratic accountability in the sense of art. 10 TEU means, and that the Court develops a legal test under which to judge democratic accountability.[120] While it is not within the Court's jurisdiction to indicate which measures should be taken in order for the Council or European Council to comply with its judgment, the Court may still provide guidance on this matter.[121] This guidance would contribute significantly to the finding of a definition of the value of democracy under EU law.

In a similar but different vein, Krappitz and Kirst argue that art. 10 TEU can be operationalised through infringement proceedings.[122] In such a case, there must be a specific breach or multiple specific breaches of art. 10 TEU.[123] While such an approach may help the Commission operationalise art. 10 TEU and, therefore, enforce the value of democracy, some tension with the *lex specialis* nature of art. 7 TEU may still exist.

Finally, according to art. 224 TFEU, the European Parliament and the Council may adopt secondary legislation regarding political parties at European level referred to in art. 10(4) TEU. An example of such legislation is Regulation 1141/2014, which provides rules on the statute and funding of European political parties and European political foundations.[124] This Regulation was presented and perceived to tackle populist illiberal politics on an EU level.[125] Regulation 1141/2014, however, does not regulate political parties or democracy at Member State level, and may therefore seem of little use for this *Article*. To this extent, it should first be noted that political parties that are active on the European

[120] *Ibid*. 75.

[121] *Ibid*. 75; K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 415. See also case T-300/10 *Internationaler Hilfsfonds v Commission* ECLI:EU:T:2012:247 para. 151.

[122] D Krappitz and N Kirst, 'The Primacy of EU Law Does Not Depend on the Existence of a Legislative Competence: Debunking the Flawed Analysis of the Polish Constitutional Court' (20 October 2021) EU Law Live eulawlive.com.

[123] See also section IV.2. of this *Article*.

[124] Regulation No 1141/2014 cit.

[125] For a comprehensive analysis of the Regulation, its development and its application at EU level, see J Morijn, 'Responding to "Populist" Politics at EU Level: Regulation 1141/2014 and Beyond' (2019) ICON 617. See also section III.3. of this *Article* for the place of illiberalism in the context of democracy.

level, are often the same parties that run in national elections.[126] This Regulation could, therefore, influence national political parties as these may not receive funding at a European level so long as they portray seriously illiberal practices.

Furthermore, although not directly addressed at Member States, Regulation 1141/2014 may also be interpreted as to better understand the value of democracy in the sense of art. 2 TEU. For example, Regulation 1141/2014 aims to enhance transparency and "strengthen the scrutiny and the democratic accountability of European political parties and European political foundations".[127] While, as noted above,[128] Regulation 1141/2014 only refers to political parties at European level, it emphasises that, for instance, transparency and scrutiny of funding, as well as democratic accountability, are important aspects of the value of democracy in EU law. The implementation of art. 10 TEU through Regulation 1141/2014 can be used as interpretative guidance of art. 2 TEU as applied to Member States. For example, if the parliamentary system of a Member State fails to comply with the transparency requirements under Regulation 1141/2014, this could be seen as a violation of art. 2 TEU interpreted in light of the concrete expression of democracy in EU law.[129] This means that the values introduced by Regulation 1141/2014 could potentially be enforced at Member State level through the application of art. 2 TEU.[130]

III.3. Art. 21 TEU

Art. 21 TEU decides that the Union's action in the field of external relations shall be guided by the principles that inspired its own creation, including democracy. Art. 21 has evolved to be more than merely symbolic. There are several ways in which the EU aims to promote democracy and human rights that relate to democracy in third countries.

The position of High Representative for Foreign and Security Policy was introduced in the Lisbon Treaty. As part of an early initiative of the High Representative, the EU Strategic Framework and Action Plan on Human Rights and Democracy was introduced.[131] Although considered an improvement on the pre-Lisbon situation, both the Strategic

[126] Albeit in a different formation. For example, Hungarian political party Fidesz took part in European elections as part of the European People's Party (EPP) group, before it resigned membership after the EPP voted for the exclusion of Fidesz from its party. See for example M de la Baume, 'Orbán's Fidesz Quits EPP Group in European Parliament: Move Comes After MEPs Changed Rules to Pave Way for Suspension or Expulsion' (3 March 2021) Politico www.politico.eu.

[127] Regulation (EU, Euratom) No 1141/2014 cit. preamble recital 33.

[128] See section II.2. of this *Article*.

[129] This is particularly the case, because transparency is a foundational value in EU law, see for instance arts 10(3) and 11(2) TEU, art. 15 TFEU and art. 42 of the Charter.

[130] For more on the enforcement of Regulation 1141/2014 cit., see section IV.2. of this *Article*.

[131] L Pech and J Grogan, 'EU External Human Rights Policy' cit. 344.

Framework and the Action Plan were all but comprehensive at first.[132] This improved significantly with the 2015-2019 Action Plan on Human Rights and Democracy, which decided that the EEAS and Council were expected to ensure that human rights and democracy considerations form part of the overall bilateral strategy of the Union.[133]

The EU Annual Report on Human Rights and Democracy in the World is furthermore part of EU external policy.[134] While the better part of the 2020 report focuses on human rights, the report also notes that counter terrorism and prevention and countering of violent extremism policy may not be used as a pretext to restrict democracy.[135] The report also states that in order to tackle democratic backsliding around the world, the EU strives to support independent media and journalists and to strengthen parliaments. The EU furthermore aims to monitor elections around the globe.[136]

Finally, the value of democracy is prevalent in the European Neighbourhood Policy (ENP).[137] ENP is focused on creating a stable and prosperous neighbourhood in order to secure a safe Union.[138] The Union's objectives of ensuring stability and prosperity are heavily inspired by the EU's pre-accession policy.[139] In order to achieve its goal, the EU "offers its neighbours a privileged relationship, building on a mutual commitment to common values" such as democracy.[140] Following the 2011 developments in the Arab world, the EU reviewed its ENP. This led to a strengthened focus on the promotion of deep and sustainable democracy.[141] According to the EP, deep and sustainable democracy includes "in particular free and fair elections, efforts to combat corruption, judicial independence, democratic control over the armed forces and the freedoms of expression, assembly and association".[142]

The relevance of democracy in EU external relations law reiterates, therefore, that the value of democracy in EU law is not limited to democratic elections. It also includes

[132] C Churruca Muguruza, 'Human Rights and Democracy at the Heart of the EU's Foreign Policy? An Assessment of the EU's Comprehensive Approach to Human Rights and Democratization' in F Gómez Isa, C Churruca Muguruza and J Wouters (eds), *EU Human Rights and Democratization Policies: Achievements and Challenges* (Routledge 2018) 60-62.

[133] Council of the EU, 'Action Plan on Human Rights and Democracy' (December 2015) 7. See also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 346.

[134] See also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 351.

[135] 'EU Annual Report on Human Rights and Democracy in the World 2020' (2021) eeas.europa.eu 108.

[136] *Ibid*. 121.

[137] The ENP applies to Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Lybia, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. See *e.g*. European Parliament, 'Factsheet on the European Union: The European Neighbourhood Policy' (2021) www.europarl.europa.eu 1.

[138] See *e.g*. also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 447. See also N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Hart Publishing 2014).

[139] Which in turn heavily relies on the Copenhagen criteria as explored earlier in this *Article*.

[140] European Parliament, 'Factsheet on the European Union' cit. 1.

[141] *Ibid*.

[142] *Ibid*.

respect for certain fundamental rights that are deemed indispensable for a properly functioning democracy, including in particular the freedom of expression, assembly and association. For this reason, the relationship between democracy and the Charter will be discussed in the following section.

III.4. The Charter of fundamental rights of the EU

As previously noted, the preamble of the Charter reiterates that the EU "is based on the principles of democracy and the rule of law". It is, however, not just the Charter's preamble that echoes the importance of democracy. The Charter contains several provisions that link directly to this value. Such provisions include, in particular, art. 11 on the freedom of expression and information, Article 10 on the freedom of thought, conscience and religion, art. 12 on the freedom of assembly and of association and art. 39 on the right to vote and to stand as a candidate for elections to the European Parliament.[143] A lack of protection of these freedoms would prevent open political debate and exclude citizens from the ability to cast an informed vote in elections. The following section will discuss these provisions and their relation to the value of democracy in more detail.

It should be noted that although the European Court of Human Rights (hereinafter ECtHR) is not in fact part of the EU legal order, in explaining the rights enshrined in the Charter and their connection to the value of democracy, I still refer to ECtHR case law. This is because art. 52(3) of the Charter refers to the ECHR as a minimum standard.[144] Therefore, the protection of the provisions of both charters overlaps. The Charter, however, offers extended substantive protection in some regards insofar as the specific case falls within the scope of EU law.[145]

a) Freedom of expression and information

Freedom of expression is an essential component of any democracy. Without the ability to read, hear or otherwise receive the political views of others, citizens are unable to cast an informed vote in national or local elections.[146] Without informed voting, democracy becomes dysfunctional.

The freedom of expression and information is enshrined in art. 11 of the Charter of Fundamental Rights (hereinafter: Charter) which corresponds with art. 10 of the European Convention on Human Rights (hereinafter ECHR). The freedom of expression has

[143] These freedoms are highlighted in the European Neighbourhood Policy as being integral aspects of a functional democracy. This is why I consider these as being the most important Charter provisions in relation to democracy.

[144] It is furthermore reiterated by the Court that the rights contained in the Charter which correspond to rights guaranteed under the ECHR, should be given the same meaning and scope as those laid down by the ECHR. See *e.g.* case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para. 44. See also case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107 para. 50.

[145] Art. 52(3) of the Charter.

[146] KW Saunders, *Free Expression and Democracy: A Comparative Study* (Cambridge University Press 2017) 1.

furthermore been enshrined by the CJEU as a "general principle of law, the observance of which is ensured by the Court".[147] Art. 11(2) of the Charter introduces possible limitations of the freedom of expression insofar as those limitations are prescribed by law and necessary in a democratic society.

A balance must thus be struck between freedom of expression and the rights of other individuals. Each case must therefore be assessed on an individual basis. Freedom of expression of elected politicians is considered especially vital. The ECtHR decided in *Jerusalem v Austria* that "[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. Her or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament [...] call for the closest scrutiny on the part of the Court".[148]

But there are two sides to this coin. The ECtHR proceeds stating that "[t]he limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals".[149] This is because, according to the ECtHR, politicians knowingly choose to lay themselves bare to close scrutiny by both journalists and the public.[150] It should be noted in this regard that both journalists and members of the public are required to display a greater degree of tolerance when active in public debate.[151]

b) Freedom of thought, conscience and religion

Art. 10 of the Charter enshrines the freedom of thought, conscience and religion. The importance of the freedom of thought, conscience and religion in a democratic society is emphasised by the ECtHR in its judgment in the case of *Kokkinakis v Greece*. The Court held that the freedom of thought, conscience and religion

> "is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries, depends on it".[152]

It should be noted that the freedom of thought, conscience and religion rightly does not protect every single act that is carried out in the name of religion. The ECtHR notes in

[147] See *e.g.* case C-260/89 *Iliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* ECLI:EU:C:1991:254 para. 44.

[148] ECtHR *Jerusalem v Austria* App n. 26958/95 [27 February 2001] para. 36.

[149] *Ibid*. para. 38.

[150] *Ibid*.

[151] *Ibid*. paras 38–39.

[152] ECtHR *Kokkinakis v Greece* App n. 14307/88 [25 May 1993] para. 31.

Kalaç v Turkey that an individual may need to take into account his or her specific situation when exercising their freedom to manifest religion.[153]

c) Freedom of assembly and association

The freedom of assembly and of association is important for obvious reasons. In its judgment in *United Communist Party of Turkey*, the ECtHR explains these reasons rather well. After reaffirming that "democracy is without doubt a fundamental feature of the 'European public order'",[154] the Court considered that one of the essential characteristics of democracy is "the possibility it offers of resolving a Country's problems through dialogue, without recourse to violence, even when they are irksome".[155] Such dialogue is provided for particularly by the freedom of assembly and association.

It should be noted that only peaceful assemblies are protected under the freedom of assembly.[156] States must ensure that assemblies are enjoyed by everyone equally. Of course, states may regulate the freedom of assembly to a certain extent, but they must adopt a strict policy of non-discrimination.[157] Restrictions of content are allowed, but only when such restrictions meet a high threshold.[158] Restrictions should furthermore only be imposed when there is an imminent threat of violence.[159]

The most important aspect of the freedom of association on the other hand is that persons are able to "act collectively in pursuit of common interests, which may be those of the members themselves, of the public at large or of certain sectors of the public".[160] The right to freedom of association can be enjoyed by a singular individual or by an association itself.[161] The freedom of association applies to every type of association, including political parties.[162] Freedom of association regarding political parties is especially important in relation to democracy. Political parties should therefore only be dissolved in extreme cases.[163] Only political parties with objectives or activities, which are a tangible

[153] ECtHR *Kalaç v Turkey* App n. 20704/92 [1 July 1997] para. 27.

[154] ECtHR *United Communist Party of Turkey and Others v Turkey* App n. 19392/92 [30 January 1998] para. 45.

[155] *Ibid*. para. 46.

[156] OSCE/ODIHR, 'Guidelines on Freedom of Peaceful Assembly' (2nd edn ODIHR 2010) 15.

[157] *Ibid*. 16.

[158] *Ibid*. 17.

[159] *Ibid*.

[160] ODIHR, 'Guidelines on Freedom of Association' (ODIHR 2015) 17; *United Communist Party of Turkey and Others v Turkey* cit.; *Refah Partisi* cit.; ECtHR *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* App n. 46626/99 [3 February 2005]. See also Council of Europe Recommendation CM/Rec(2007) 14 of the Committee for Ministers to Member States on the Legal Status of Non-Governmental Organisations in Europe, para. 11.

[161] ODIHR, 'Guidelines on Freedom of Association' cit. 17.

[162] OSCE/ODIHR and Venice Commission, 'Guidelines on Political Party Regulation' (ODIHR 2011) para. 9.

[163] *Ibid*. 89-96.

and immediate threat to democracy, have been considered to constitute such an "extreme case" in which the termination of a political party was considered just.[164]

d) Right to vote and to stand as a candidate at elections

Art. 39 of the Charter enshrines the right to vote and to stand as a candidate at elections to the European Parliament. Due to the right to vote appearing in the EU Treaties, suffrage was previously discussed in section III.1. of this *Article*. However, recent case law surrounding art. 39 of the Charter warrant that the right to vote and to stand as a candidate is also discussed in the present section, focusing not on the application of the Treaties, but rather on that of the Charter.

In *Delvigne*, a case concerning a French citizen that was stripped of his voting rights after committing a serious crime, the Court found that the case at hand fell under the scope of EU law on the basis of art. 14(3) TEU read in conjunction with the 1976 Act on the elections to the European Parliament, which require that elections to the European Parliament should be universal and direct.[165] As such, the Court considered that art. 39 of the Charter, read in combination with art. 14(3) TEU, establishes a universal right for EU citizens to vote in elections to the European Parliament. Member States may limit this right, and France did so in an apparently proportionate way.[166] The approach taken by the Court is somewhat similar to that of the ECtHR in the 2005 *Hirst* case.[167] In *Hirst*, the ECtHR found that a complete ban on voting for prisoners was in breach of art. 3 of Protocol 1 of the ECHR. It should be noted, however, that the CJEU does not directly refer to *Hirst* in its judgment. While art. 39 did not help recover Mr Delvigne's right to vote, the *Delvigne* judgment paves the way for art. 39 to be applied in the case similar but less proportionate Member State measures limiting the right to vote.

IV. Enforcing democracy beyond art. 7

Scholarly debate on the enforcement of EU values against Member States has focused heavily on art. 7 TEU. Beyond the specific procedure in art. 7 TEU, however, several enforcement mechanisms exist to ensure that Member States adhere to EU law. These mechanisms can be used to enforce the value of democracy, or certain aspects thereof. These additional enforcement mechanisms are particularly important because of the ineffectiveness of art. 7 TEU. Some of these additional enforcement mechanisms are of a centralised nature and

[164] ECtHR *Refah Partisi (the Welfare Party) and Others v Turkey* App n. 41340/98, 41342/98, 41343/98 and 41344/98 [13 February 2003] paras 126-135; and ECtHR *Herri Batasuna and Batasuna v Spain* App n. 25803/04 and 25817/04 [30 June 2009].

[165] Case C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* ECLI:EU:C:2015:648 paras 32-34. See also S Coutts, 'Case C-650/13 Delvigne – A Political Citizenship?' (21 October 2015) European Law Blog europeanlawblog.eu.

[166] *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* cit. para. 58.

[167] ECtHR *Hirst v United Kingdom* App n. 74025/01 [6 October 2005].

relate to direct proceedings before the CJEU, whilst other mechanisms are decentralised and are enforced at national level together with the preliminary reference procedure.

This section will start with a brief analysis of the deficiencies of art. 7 TEU, and will subsequently analyse centralised (section IV.2.) and decentralised enforcement (section IV.3.) of the value of democracy beyond art. 7. Each section will focus on the possibility to enforce the various aspects of the value of democracy – discussed in section II – using the available procedures.

IV.1. Problematising art. 7

As noted, the possibility and reality of breaches of EU common values by Member States have grown ever more evident over the past seven or eight years.[168] Art. 7 TEU was once designed to counteract such breaches and to recover peace among Member States. The provision establishes three different procedures that may be deployed in order to safeguard the common European values as laid down in art. 2.[169] This means in principle that art. 7 TEU is *lex specialis* and, therefore, that art. 2 TEU as such can only be enforced through the procedures of art. 7. However, recently, the Commission has launched legal action against Hungary and Poland for the infringement of LGBTQ+ rights, using art. 2 TEU as a self-standing provision.[170] This is understandable, as art. 7 TEU has proven to be largely inoperable. Some even go as far as titling the provision a "dead letter".[171] Although art. 7(1)[172] was triggered several times, this has not once led to the triggering of art. 7(3) and thus not once to any sanctions being imposed on a Member State in breach. This is mostly due to the high requirements that must be met in order to trigger art. 7(2),

[168] See *e.g.* L Pech and KL Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (3 January 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law' (6 January 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Poland and the European Commission, Part III: Requiem for the Rule of Law' (3 March 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Illiberalism Within' cit.; TT Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) CMLRev 1753; A Gora and P de Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2020) Journal of European Public Policy 1.

[169] For the exact extent of art. 2 TEU, see section II.2. of this *Article*.

[170] European Commission, 'EU Founding Values: Commission Starts Legal Action Against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People' (15 July 2021) ec.europa.eu.

[171] S Greer and A Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?' (2009) ELJ 462.

[172] See *e.g.* European Parliament, 'Rule of Law in Hungary: Parliament Calls on the EU to Act' (12 September 2018) www.europarl.europa.eu; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

make the stating of the existence of a serious breach and thus the effectiveness of the provision very difficult procedurally.[173]

IV.2. Centralised enforcement

As noted, the values in art. 2 TEU, as such, can, in principle, only be enforced using art. 7 TEU. However, this does not necessarily mean that certain aspects of the value of democracy cannot be enforced using other enforcement mechanisms. This sub-section discusses the possibility for enforcement of the value of democracy and its components through the centralised enforcement mechanisms of EU law: arts 258-260 TFEU and art. 263 TFEU.

a) Arts 258–260 TFEU

The procedure laid down in art. 258 TFEU is more generally known as the regular infringement procedure and consists of two consequential stages. Art. 258 TFEU has already been used in the current backsliding crisis in order to tackle the Polish judiciary reforms, to the extent that they introduce gender discrimination and violate secondary law, as well as arts 157 TFEU and 19(1) TEU in conjunction with art. 47 of the Charter.[174] Similarly, the Commission deployed art. 258 TFEU in order to tackle certain rule of law breaches in Hungary.[175] Some scholars view the infringement proceedings of art. 258 as "far too specific" and for that reason cumbersome when dealing with situations in which a Member State has gone rogue entirely.[176] Other authors have, however, found a solution in art. 258. Although every specific breach must be painstakingly fought separately under art. 258, these authors allege that the provision is still more effective than art. 7 TEU.[177] This is confirmed by the fact that, of the infringement cases brought before the CJEU between 2002 and 2018, 1285 out of 1418 were decided in the Commission's favour.[178] Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz furthermore raise the possibility of bundling a set of specific breaches of EU law into a single general infringement action.[179] This would make, of course, for more efficient enforcement of EU values. As noted, the Commission has recently

[173] See *e.g.* D Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (LAW 2017/10 EUI Working Paper 2017) 9; M Coli, 'Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?' (2018) Perspectives on Federalism 272, 291.

[174] European Commission, 'European Commission Launches Infringement Against Poland over Measures Affecting the Judiciary' (29 July 2017) ec.europa.eu. See also M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) CMLRev 1061, 1062.

[175] Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1063.

[176] See A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law' cit. 61; M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1064.

[177] M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1064.

[178] P Nicolaides, '"Member State v Member State" and Other Peculiarities of EU Law' (24 June 2019) Maastricht University blog www.maastrichtuniversity.nl.

[179] KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit.

brought a claim against Poland and Hungary in an art. 258 TFEU procedure based on art. 2 TEU. In this context, it is clear that the Commission is also of the conviction that art. 258 may be effective in cases surrounding the rule of law and democracy in the EU.[180] Whether the Court will accept this approach is yet to be seen.

Regardless, in order to prevent circumvention of the procedural safeguards of art. 7 TEU by using art. 258 TFEU, it is necessary to interpret art. 7 as being a *lex specialis*.[181] Interpreting the provision as *lex specialis* means that art. 258 is partly inapplicable to breaches of art. 2 TEU.

This does not mean that the content of the values enshrined in art. 2 TEU cannot be enforced through the application of art. 258 TFEU. Infringement procedures on the basis of art. 258 TFEU can, however, not be based on art. 2 itself. This is, for example, illustrated by the infringement procedure against Poland of July 2017.[182] This procedure surrounded the Polish introduction of a provision that entitled the Minister of Justice to prolong the mandates of judges at his discretion. The Commission based its case on art. 19 TEU in conjunction with art. 2 TEU, and not on art. 2 TEU by itself. Again, this does not mean that the factual situation of the case was not a breach of the value of democracy in the sense of art. 2 TEU.

An example of the enforcement of art. 2 TEU values through art. 258 TFEU and a foundation for the possibility thereof, is found in the *Repubblika v Il-Prim Ministru* case.[183] In this case, the Court decided that

> "[i]t follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[184]

In other words, in light of the rule of law, the Court decided that Member States may not infringe upon the rights enshrined in art. 2 TEU, where these rights have been given concrete expression elsewhere. By analogy, where the value of democracy has been given concrete expression elsewhere, the value may be enforced through art. 258 TFEU.

Accordingly, insofar as it is not the abstract value of democracy that is enforced, art. 258 TFEU could still be used to enforce certain aspects that bear on the content of democracy. The fundamental rights enshrined in the Charter, for instance, can all be enforced by the Commission. What is necessary, in this regard, is a more specific manifestation of the value of democracy, especially if the claim of the Commission based on art.

[180] European Commission, 'EU Founding Values' cit.

[181] P Jaworek, 'Upholding the Rule of Law in Times of Crisis: (Ineffective) Procedures Under Article 7 TEU and Possible Solutions' (16 February 2018) KSLR EU Law Blog blogs.kcl.ac.uk.

[182] European Commission, 'European Commission Launches Infringement Against Poland over Measures Affecting the Judiciary' (29 July 2017) ec.europa.eu.

[183] *Repubblika v Il-Prim Ministru* cit.

[184] *Ibid*.

2 as a standalone article is rejected. As discussed in section III above, these manifestations can mainly be found in the Charter. Measures of Member States that encroach upon democracy by interfering with the freedom of expression, the freedom of thought or the freedom of assembly and association can therefore unequivocally be challenged under art. 258 TFEU.

As regards the other components expressed by the Copenhagen criteria, the applicability of art. 258 TFEU is somewhat more difficult because they mostly cannot be linked to specific provisions in the EU Treaties. For example, enforcement of the rule of law can, as noted above, be linked to the obligation for Member States to ensure effective judicial protection in art. 19 TEU. As regards the Copenhagen criteria's requirements of democracy and democratic accountability, a relevant provision is art. 10 TEU, which prescribes that governments of the Member States must be "democratically accountable either to their national Parliaments, or to their citizens".[185] It could be argued that this provides a specific obligation for Member States to have a democratically accountable government and an accompanying electoral system. Since art. 10 TEU is a concrete manifestation of the value of democracy in art. 2 TEU, it can be enforced through art. 258 TFEU instead of art. 7 TEU. The same goes for the protection of free media by the Treaties.

Similarly, the standards enshrined in Regulation 1141/2014 can also be seen as a specific manifestation of the meaning of democracy in EU law which, by analogy, also applies to the manner in which Member States must organise their parliamentary system and the functioning of political parties. This could mean that these standards – as concrete expressions of the value of democracy – could be enforced through art. 258 TFEU. A significant problem with this argument, however, is that the standards of Regulation 1141/2014 do not themselves apply to national parliamentary systems. Unlike, for instance, art. 19 TEU, these rules can only be used as an interpretative guide to art. 2 TEU. Such an interpretative guide may not be sufficiently precise for use of art. 258 TFEU.

If a Member State fails to comply with a judgment of the CJEU, the Commission may take further action against the respective Member State on the basis of art. 260 TFEU. The latter part of art. 260 TFEU has been introduced fairly recently and allows the Commission to request for the Court to impose a financial penalty already in its first judgment under art. 258 TFEU, but only where the case concerns failure to notify implementing legislation for a Directive within the set deadline.

It should be noted in this regard that the EU can only harmonise areas of law in which it has competence. On the basis of arts 2 to 6 TFEU, the Union does not have competences in the area of democracy or human rights. The protection of democratic values could, however, be incorporated into secondary legislation adopted on the basis of another competence, for instance the competence to harmonise the internal market pursuant

[185] Art. 21 TEU, discussed in section III of this *Article*, is relevant for the meaning of the value of democracy in EU law, but it does not provide any specific democratic obligations for Member States.

art. 114 TFEU. For example, if the EU were to adopt harmonisation that includes a prohibition for Member States not to ban LGBT+ content and if Hungary would not change its current legislation,[186] financial penalties may be imposed by the Court directly under art. 260(3) TFEU in the Court's first judgment under art. 258 TFEU.

Examples of harmonisation measures that include specific safeguards for the value of democracy already exist. An example of harmonisation of EU values can be found in art. 9 of the Audiovisual Media Services Directive, on the basis of which the Commission is launching an infringement procedure against Hungary and its recent anti-LGBT legislation.[187] The provision requires of Member States to ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with several requirements. Requirements include *e.g.* that audiovisual commercial communications shall not "include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation".[188]

The introduction of such a clause with a focus on democracy related values such as freedom of speech would, therefore, introduce a possibility for direct enforcement through art. 258 TFEU in combination with an immediate financial penalty under art. 260(3) TFEU. In its announcement of its infringement procedure, the Commission furthermore expressly states it believes that the Hungarian anti-LGBT law does not only infringe upon the right not to be discriminated against, but also upon the freedom of expression and information and art. 2 TEU.[189] This is all the more proof that clauses similar in nature to art. 9(1)(c)(ii) of the Audiovisual Media Services Directive could be an effective remedy to protect against specific breaches of the value of democracy by Member States.

Finally, even if art. 260(3) TFEU is not applicable because, for instance, such safeguards for democracy are not included in a Directive but in a Regulation, art. 260(2) TFEU would still allow for the imposing of financial penalties for violations of EU law. This would, however, be more burdensome because it requires a second procedure to be activated after the Court has established a violation of EU law under art. 258 TFEU.

b) Art. 263 TFEU

Art. 263 TFEU contains the action for annulment, which can be used to challenge the legality of legislative acts and other legal acts of EU institutions. Since art. 263 TFEU cannot be used

[186] Hungarian Act no 79/2021 of 15 June 2021 on Stricter Charges Against Paedophile Criminals and the Modification of Acts on Protection of Children. See also J Rankin, 'Hungary Passes Law Banning LGBT Content in Schools or Kids' TV: New Legislation Outlaws Sharing Information Seen as Promoting Homosexuality with Under-18s' (15 June 2021) The Guardian www.theguardian.com.

[187] European Commission, 'EU Founding Values' cit.

[188] Art. 9(1)(c)(ii) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[189] European Commission, 'EU Founding Values' cit.

to challenge acts of Member States. this procedure seems an unlikely candidate for enforcing the value of democracy against Member States. It is, however, relevant for the purpose of enforcing a specific interpretation of art. 10 TEU. As analysed in section III.2. above, under Cotter's interpretation of art. 10 TEU, acts of EU law that have been adopted with the consent of the European Council or the Council, including the government representative of a non-democratic government, violate EU law. In such a case, the act was adopted by an unlawful composition of the (European) Council. While this interpretation is not unproblematic,[190] it may indeed be invoked in an action for annulment against the relevant EU act.

Individual litigants rarely meet the criteria for starting a procedure under art. 263 TFEU, as the act that they seek to challenge must be of direct and individual concern to them, unless the act is a regulatory act which does not entail implementing measures and which is of direct concern to them. Since *Plaumann*,[191] the CJEU has interpreted the criterion of individual concern very strictly, which makes it almost impossible for individuals to directly challenge generally applicable EU legislation.[192] Individuals could challenge the legality of such acts at national level, however, by challenging a national implementing measure before a national court and asking the national court to refer the matter to the CJEU. This possibility will be discussed further in section IV.3. below.

On the other hand, the Member States, the European Parliament, the Council and the Commission may always bring an action for annulment. The easiest way to test Cotter's interpretation of art. 10 TEU, therefore, would be for the European Parliament, the Commission, or even another Member State to challenge the legality of an act that has been adopted with the consent of the (European) Council, arguing that the (European) Council is not lawfully composed if any of its members represents a non-democratic Member State.

The problem with this procedure, even if Cotter's problematic interpretation of art. 10 TEU is right, is of course that it does not address the undemocratic nature of the Member State concerned, nor can it change any specific violations of the value of democracy by a Member State. In fact, if successful, the procedure could create more chaos by possibly disrupting all legislative and non-legislative decision-making in the (European) Council. At best, the enforcement of art. 10 TEU could put more legal and political pressure on undemocratic Member States to reform their national law.

[190] See further section III.2. of this *Article*.

[191] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[192] Case C-263/02 *Commission of the European Communities v Jégo-Quéré & Cie SA* ECLI:EU:2004:210; case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462. For critical analysis, see *e.g.* in case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:197, Opinion of AG Jacobs; T Tridimas and S Poli, 'Locus Standi of Individuals under Article 230(4): The Return of Euridice?' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2009); LW Gormley, 'Judicial Review: Advice for the Deaf?' (2005) Fordham International Law Journal 655.

IV.3. Decentralised enforcement

Apart from at a centralised level, EU law can furthermore be enforced at a decentralised or national level. The following section will discuss the possibility for enforcement of the value of democracy through direct effect and indirect effect. Finally, this section will discuss the general pitfalls of decentralised enforcement when dealing with undemocratic Member States.

a) Direct effect

Direct effect entails that a provision of EU law becomes the immediate source of law before a national court.[193] As is well-known, the principle of EU law was first introduced in the *Van Gend en Loos* judgment, which decided that Treaty provisions may have direct effect if they are *i)* sufficiently clear and precise; and *ii)* unconditional. In *Marshall*, the CJEU introduced a third criterion, applicable to directives, namely that there can be direct effect if the respective Member State failed to implement a directive or failed to implement the directive correctly.[194] Direct effect may create a new rule, which did not exist in national law yet or, alternatively, exclude the application of an existing national rule.[195] Case law subsequent to *Van Gend en Loos* has expanded the scope of direct effect to other sources of Union law, such as Treaty and Charter provisions.[196] The next sections discuss which substantive parts of the value of democracy may be enforced by national courts through the direct effect of Union law, starting with art. 2 TEU.

[193] M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 157; B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn Oxford University Press 2011); R Schütze, 'Direct Effects and Indirect Effects of Union Law' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (Oxford University Press 2018).

[194] Case C-26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1; case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* ECLI:EU:C:1986:84.

[195] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 160.

[196] See *e.g.* case C-2/74 *Jean Reyners v Belgian State* ECLI:C:1974:68 para. 14; case C-43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* ECLI:EU:C:1976:56 paras 21-24; case C-93/71 *Orsolina Leonesio v Ministero dell'agricoltura e foreste* ECLI:EU:C:1972:39; case C-9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78; case C-41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133 para. 12; see *e.g.* case C-414/16 *Egenberger* ECLI:EU:C:2018:257; case C-68/17 *IR* ECLI:EU:C:2018:696; case C-193/17 *Cresco Investigation* ECLI:EU:C:2019:43; case C-537/16 *Garlsson Real Estate and Others* ECLI:EU:C:2019:193. See also L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions' (2019) Yearbook of European Law 18, 22.

b) Direct effect of Article 2 TEU

At face value, art. 2 TEU does not appear to be sufficiently clear. After all, art. 2 TEU provides a set of abstract values of which the exact content is not immediately clear. For this reason, the values in art. 2 TEU are as such most likely not justiciable.[197]

However, as previously discussed, some of the core aspects of the value of democracy are concretised in the Copenhagen criteria.[198] Although the Copenhagen criteria do not determine the content of art. 2 TEU, they do provide authoritative guidelines on what constitutes the essence of democracy.[199] In this light, it can be argued that art. 2 TEU is sufficiently clear and unconditional when it comes to the *essence* of democracy, such as the existence of fair elections. This is similar to the Court's approach in *Defrenne*, where the Court held that although art. 157 TFEU as such is not unconditional, it did provide for an unconditional and justiciable right not to be *directly* discriminated against on the basis of sex.[200]

Therefore, applying *Defrenne* by analogy would mean that art. 2 TEU is directly effective if it is invoked against a national law that clearly violates the essence of democracy. An example of a violation of the essence of democracy could be a clear violation of the key aspects of the Copenhagen criteria, such as the *trias politica* and a democratic electoral system. One might imagine that abolishing or indefinitely postponing parliamentary elections, or obstructing elections by gerrymandering, is such a clear violation of the essence of democracy that art. 2 TEU could be invoked directly against this violation. As the Court held in *Repubblika v Il-Prim Ministru*, Member States have a legal obligation not to reduce the protection of the values of art. 2 TEU.[201] In the context of the value of the rule of law, the Court held that this value is given justiciable concrete expression in art. 19 TEU.[202] Insofar as there is a concrete essence of the value of democracy, such as parliamentary elections, one could argue that this concrete essence can also be directly enforced against Member States at national level. It can be argued in this context that art. 2 TEU does not necessarily engender a subjective right to democracy for individuals. However, in case law surrounding mainly environmental law, this requirement has taken a back seat.[203] As such, I argue that this requirement does not stand in the way of the direct effect of art. 2 TEU.

[197] In the meaning of P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (2015) ELR 135. This is a republication, as the piece was originally published in (1983) 8 ELR 155. See, however, KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit.

[198] See section II.2. of this *Article*.

[199] See the analysis in sections II.2. of this *Article*.

[200] *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* cit.

[201] *Repubblika v Il-Prim Ministru* cit. para. 63.

[202] *Ibid*.

[203] See *e.g.* case C-72/95 *Kraaijeveld and Others* ECLI:EU:C:1996:404; case C-244/12 *Salzburger Flughafen* ECLI:EU:C:2013:203; case C-51/76 *VNO* ECLI:EU:C:1977:12.

In such a case, art. 2 TEU will require the national court to disapply the relevant national law or decision. It is of course somewhat doubtful whether a Member State in which parliamentary elections are abolished, or the essence of democracy is otherwise violated, would still have a sufficiently independent judiciary that would be willing to disapply such acts.

c) Direct effect of art.10 TEU

Whether art. 10 TEU has direct effect is more difficult to establish. On the one hand, art. 10 in the reading of Cotter[204] is rather clear and unconditional: governments representing a Member State in the European Council and Council must be democratically legitimised based on a national level on a representative basis for acts adopted by these institutions to be valid.[205]

As discussed above, this interpretation would allow for an action for annulment against any EU act that has been adopted with the consent of the European Council or the Council. In light of the *Plaumann* criteria related to individual concern, individual litigants are unlikely to have standing under art. 263 TFEU. These individuals could, however, challenge the legality of the EU act by challenging a national implementing act before a national court. This does require the existence of an implementing act that can in fact be challenged under national administrative or private law.

Since art. 10 TEU is, in Cotter's reading, sufficiently clear about the requirements of a lawful composition of the European Council and of the Council, art. 10 TEU could then be directly relied upon in a challenge against a national implementing act. National courts are, however, not allowed to declare EU acts invalid.[206] If a court doubts the validity of the respective EU act, it must refer a preliminary question to the CJEU.[207] This would allow the CJEU to rule on the proper interpretation of art. 10 TEU and whether the EU act concerned is invalid.

An advantage of this decentralised route is that it is not required that the EU act is challenged in an undemocratic Member State. Any individual in any Member State could challenge the validity of national measures implementing the EU act adopted with the consent of the (European) Council, creating virtually unlimited opportunities to address the undemocratic nature of a Member State through its representation in the European Council or the Council. As noted in section IV.2. above as well, however, even if Cotter's interpretation of art. 10 TEU will prove to be correct, this will not directly address a violation of the value of democracy. It will merely put additional pressure on the Member State concerned by effectively blocking all EU action that requires the consent of the European Council or the Council.

Furthermore, art. 10 TEU may also be directly invoked against a Member State whose government is not democratically accountable, as discussed above in the context of art. 258 TFEU. The same approach could possibly be used by individual litigants, who could

[204] J Cotter, 'The Last Chance Saloon' cit.
[205] See section III.1 of this *Article*.
[206] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452 paras 15-18.
[207] *Ibid*.

invoke art. 10 TEU directly before a national court against any measure of an allegedly non-democratically accountable government. This would however require a possibility under national procedural law to challenge such a measure.[208] Since art. 10 TEU quite clearly stipulates that the governments of the Member States are democratically accountable, however, it seems that this provision provides a sufficiently clear and unconditional obligation for Member States.

As to Regulation 1141/2014, which has been discussed above as a specific implementation of art. 10(4) TEU, this Regulation is directly applicable in the Member States. It can therefore be directly invoked against national political parties – including majority parties associated with undemocratic or illiberal governments – which want to be active in European Parliamentary elections and which violate any of the provisions of Regulation 1141/2014.[209]

d) Direct effect and democracy in the Charter

As discussed above, applicable rights in the Charter may have direct effect when they are sufficiently clear and unconditional. Assessing whether a right is sufficiently clear and unconditional should be done on a right-by-right basis. We know that art. 27 of the Charter does not have direct effect as it is not considered sufficiently clear and unconditional. In *AMS*, the CJEU held that art. 27 "by itself does not suffice to confer on individuals a right which they may invoke as such".[210] Ultimately, the Court rules that for art. 27 of the Charter to have full effect, it must be given more specific expression in EU or national law.[211]

The provisions in the Charter that relate to democracy do not leave as much open for interpretation. For example, art. 11 on the freedom of expression and information does not contain any ambiguous or open-ended norms similar to those we see in art. 27 of the Charter. The provision is clear and precise and much closer in nature to, for example, art. 21, which was previously confirmed by the Court to have direct effect.[212] After all, arts 11 and 21 are absolute in the same manner. Where art. 11 claims that *everyone has the right* to freedom of expression, art. 21 deals with *any discrimination*. Similarly, art. 11 decides that the freedom and pluralism of the media *shall be respected*, whilst art. 21 reiterates that any discrimination on grounds of nationality *shall be prohibited*. Neither of the aforementioned provisions make mention of any "appropriate level" or some indistinct time constraint.

The same is applicable to art. 10, which decides that *everyone has the right* to freedom of thought, conscience and religion, and art. 12 which provides that *everyone has the right* to freedom of peaceful assembly and to freedom of association. Considering the above, arts 10, 11 and 12 are arguably all sufficiently clear and precise and therefore have direct effect.

[208] On possible problems related to national procedural autonomy, see section IV.3.f below.

[209] See for a comprehensive analysis of Regulation 1141/2014 J Morijn, 'Responding to "Populist" Politics' cit. 617. See also Regulation No 1141/2014 cit. Preamble, recital 12.

[210] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2 para. 49 (*AMS* hereafter).

[211] *Ibid*. cit.

[212] See *e.g*. *Egenberger* cit.; *IR* cit.; *Cresco Investigation* cit.

This does, however, not mean that arts 10, 11 and 12 are always applicable. After all, the Charter only applies to national measures implementing EU law,[213] which means national measures that are within the scope of EU law.[214] This brings with it some inevitable limitations to the applicability of direct effect, ultimately reducing the possibility to enforce Charter provisions that are associated with the value of democracy. For a national measure to fall within the scope of EU law, required is either a cross-border effect[215] or relevant EU harmonisation that regulates the subject-matter of the national measure.[216] For instance, the recent Hungarian anti-LGBTIQ law, according to the Commission, falls within the scope of EU law because it affects the free movement of goods and services.[217] Therefore, the Charter is applicable. The freedom of expression, the freedom of thought and the freedom of assembly and association could likewise be enforced against all measures which hinder any of the fundamental freedoms, also by individual litigants before national courts.

e) Indirect effect

Apart from direct effect, indirect effect may also be effective for enforcing EU law. This section analyses the possibility for indirect effect in light of art. 2 TEU, art. 10 TEU and the Charter. Indirect effect or consistent interpretation requires that national institutions interpret national law in a manner that is consistent with EU law.[218] This stands even when the non-conforming national norm was adopted a long time before the relevant EU law came into force.[219] Indirect effect is mostly known and used in the context of directives, but applies to all EU law: national courts are obliged to interpret all of their national law, as much as possible, in conformity with all of EU law.[220]

However, indirect effect is only possible within the scope of the interpretative methods recognised by national law.[221] Second, indirect effect may be limited by general principles of law, such as legal certainty, legitimate expectation and non-retroactivity.[222] Such

[213] Art. 51(1) of the Charter.

[214] *Åklagaren v Hans Åkerberg Fransson* cit.; case C-206/13 *Cruciano Siragusa v Regione Sicilia*, ECLI:EU:C:2014:126.

[215] *E.g.* case C-368/95 *Familiapress v Bauer Verlag* ECLI:EU:1997:325; case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

[216] *E.g. Åklagaren v Hans Åkerberg Fransson* cit.

[217] European Commission, 'EU Founding Values' cit.

[218] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 168. See also case C-14/83 *von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153, for the first application of indirect effect in the case law of the CJEU.

[219] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* ECLI:EU:C:1990:395.

[220] Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* ECLI:EU:C:2004:584 para. 114.

[221] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 172.

[222] See *e.g.* case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555; case C-42/17 *Criminal proceedings against M.A.S. and M.B.* ECLI:EU:C:2017:936. See also for a more detailed analysis see case C-574/15 *Criminal proceedings against Mauro Scialdone* ECLI:EU:C:2017:553, opinion of AG Bobek, paras 137–181.

principles may weigh heavily in cases in which consistent interpretation would be to the detriment of an individual in horizontal relationships, as well as in reverse vertical relationships.[223] In particular, consistent interpretation may not lead to or increase criminal liability.[224] Third, a provision of national law may not be interpreted *contra legem* or "against the law".[225] This means that national law may not be bend and twisted into something that it is clearly not. In the words of former Advocate General Sharpston, "an artificial or strained interpretation of national law" is to be avoided."[226]

Member States must always consider the values of art. 2 TEU. This is drawn from the "retained powers formula", which holds that whilst the Union may not infringe upon the competences of the Member States, Member States must exercise their powers in compliance with EU law.[227] It is difficult to establish whether a Member State acts in compliance with Union law when said provision of Union law is vague. However, based on my earlier *Defrenne* analogy, the value of democracy may have a core or an "essence" that can and should be taken into account by national courts in their interpretation of national laws.[228] Current president of the CJEU Koen Lenaerts takes it even further, alleging that national courts should apply a "respect-for-the-essence test" before carrying out a proportionality assessment.[229]

Art. 2 TEU may therefore be relevant through indirect effect, insofar as national courts are obliged to interpret all their national laws as much as possible in light of the value of democracy. Since it is mainly the "core" or "essence" of democracy that would be sufficiently clear to be of interpretive guidance to national courts, it is however doubtful whether, in practice, indirect effect can remedy violations of democracy. If the essence of democracy is harmed, it is quite likely that an attempt to interpret national law in conformity with the value of democracy leads to a *contra legem* interpretation. However, it

[223] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 173.

[224] Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* ECLI:EU:1987:431.

[225] See *e.g. Egenberger* cit. para. 73. An example of *contra legem* interpretation can be found in the *Impact* case. In this case, an Irish law could be interpreted to be in conformity with EU law if applicated retrospectively. A different Irish law, however, precluded the retrospective application of legislation unless there was a clear and unambiguous indication to the contrary, see case C-268/06 *Impact v Minister for Agriculture and Food and Others* ECLI:EU:C:2008:223 para. 103.

[226] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* ECLI:EU:C:2006:755, opinion of AG Sharpston.

[227] L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) European Journal of Legal Studies 192. See also J Lindeboom, 'Why EU Law Claims Supremacy' (2018) Oxford Journal of Legal Studies 328.

[228] Similarly, art. 52(1) of the Charter prescribes for fundamental rights to have an "essence" that cannot be derived from. See to this extent *e.g.* M Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) German Law Journal 864; K Lenaerts, 'Limits of Limitations: The Essence of Fundamental Rights in the EU' (2019) German Law Journal 779.

[229] K Lenaerts, 'Limits of Limitations' cit. 787-788.

cannot be excluded that national measures that possibly create a tension with the value of democracy could be interpreted in such a way that this tension is minimised. An example can be found in national laws related to judicial institutional reform, the *trias politica*, and checks and balances.[230] In such a situation, indirect effect of art. 2 TEU could direct national courts to respect the value of democracy as much as possible.

With regard to Cotter's interpretation of art. 10 TEU, on the other hand, no possibility for indirect effect exists. This is due to the fact that a decision made by the Council, or the European Council are EU decisions. In Cotter's interpretation of art. 10, a decision of the Council or the European Council in which a non-democratic national government took part, and which is therefore not democratically legitimised, would be invalid. No national act that can be contested in front of a national court therefore exists which makes indirect effect impossible.

Finally, the Charter may have indirect effect. The CJEU decided in *Egenberger* that national courts must interpret national law, as much as possible, in conformity with the Charter.[231] Still, for the possible applicability of indirect effect, the specific case must fall within the scope of EU law. As mentioned above, such a situation may present itself when there is applicable harmonisation which relates to the Charter. Additionally, the Charter applies when a Member State introduces a measure that derogates from the fundamental freedoms. For example, when a Member State introduces a measure that infringes upon the freedom of services and said Member State would want to justify said measure, said measure must be in in line with the Charter, as well as interpreted and applied in conformity with the Charter.[232]

A further challenge is posed by the limit of *contra legem* interpretation. National courts may be able to "interpret away" minor infringements of the value of democracy, for instance national laws that could encroach upon the freedom of expression if they are too broadly interpreted. It is unlikely, however, that national courts could interpret serious infringements in such a way that they are in line with Union law. Clear and serious violations of the value of democracy, including serious infringements of the Charter, can therefore unlikely be remedied using the doctrine of indirect effect. Direct effect of the relevant Charter provision would then be the only viable option.

f) General pitfalls of decentralised enforcement

Decentralised enforcement inevitably comes with its pitfalls. The first difficulty, especially with regard to direct effect, is the vagueness of the content of the value of democracy. This argument seems counterintuitive when read in conjunction with the rest of this *Article*. I have, after all, previously demonstrated that the value of democracy has been elaborated upon and pinpointed in a plethora of Treaty provisions, Charter provisions and official documents. There is, however, a somewhat unavoidable difference in willingness to apply the value of democracy between Member States and EU institutions.

[230] On the relevance of *trias politica* and checks and balances for democracy, see section II.2. of this *Article*.
[231] *Egenberger* cit. paras 74-76, 79.
[232] *Familiapress v Bauer Verlag* cit.; *AGET Iraklis* cit.

EU institutions, such as the Commission, ultimately want to protect fundamental values such as democracy. For them, appreciating that the value of democracy is much clearer than it has been given credit for is something positive and they will want to employ the value of democracy in their battle against breaches of fundamental values by Member States.[233] It is therefore likely that the clear aspects of the value of democracy will be used in centralised enforcement. Member States which fail to comply with the value of democracy, on the other hand, will not be keen to adhere to all of the aspects of democracy that I have previously detailed. These Member States will most likely allege that the value of democracy is too vague to have direct effect. Since direct effect is only relevant to decentralised enforcement before national courts, this may be problematic. Individual litigants will have to demonstrate that the provision(s) they are invoking have direct effect or that national courts should interpret their national laws in conformity with these provisions through the doctrine of indirect effect. It may be that national courts remain unconvinced that, for example, art. 2 TEU or art. 10 TEU are directly effective, or that they provide interpretive guidance which national courts must take into account in their interpretation of national law. Since there is no case law on the (in)direct effect of arts 2 and 10 TEU, preliminary reference procedures may be necessary.

This leads to the second pitfall of decentralised enforcement, namely the potential unwillingness of national courts to engage with the CJEU via the preliminary question procedure of art. 267 TFEU. National courts may not be willing to apply European values such as democracy or consider it binding law.[234] Such extreme unwillingness was, for example, portrayed in the Polish constitutional court's decision to disapply EU law, because allegedly Polish constitutional law has supremacy over European law.[235] Although the CJEU's case law has been very clear about the supremacy of EU law,[236] when national courts of Member States fail to acknowledge EU law supremacy, decentralised enforcement will be ineffective.

[233] This was recently illustrated by the already mentioned Commission's action against Hungary's anti-LGBTIQ law, see European Commission, 'EU Founding Values' cit.

[234] For an extensive discussion on whether EU values are binding law, see KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. with further references.

[235] See Polish Constitutional Tribunal No K 3/21. The German *Bundesverfassungsgericht* decided similarly in the 1986 *Solange II* case, see BVerfGE 73, 339 [1987] 3 CMLR 225. However, it must be noted that the German court in the Solange II case ruled in favour of fundamental rights protection, whilst the Polish court effectively ruled against. The Polish case is therefore even more problematic compared to the Solange II case, which was already considered problematic at the time and not in line with the European legal order. This is emphasised by the Commission's response to the decision by the Polish constitutional court, see European Commission, 'Statement by the European Commission on the Decision of the Polish Constitutional Tribunal of 14 July' (STATEMENT/21/3726).

[236] See *e.g. Costa v ENEL* cit.; case C-11/70 *Internationale Handelsgeschellschaft mbH v Einfuhr- und Vorratsstelle für Getreide hund Futtermittel* ECLI:EU:C:1970:114; case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49; case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* ECLI:EU:C:1990:257. For a more recent example, see *e.g. Stefano Melloni v Ministerio Fiscal* cit.

This is further accentuated by the lack of judicial independence in certain Member States, especially in combination with the doctrine of national procedural autonomy. When a government requires of judges to always rule in its favour, an environment is created in which judicial independence is no longer ensured. According to AG Bobek, this mirrors the current situation in Poland.[237] When there is no judicial independence and therefore no proper separation of powers, it is highly unlikely that breaches of the value of democracy by the government will be corrected by the judiciary.[238]

These challenges to the decentralised enforcement of the value of democracy are further reinforced by the doctrine of national procedural autonomy. The principle of procedural autonomy was first introduced the case of *Rewe-Zentralfinanz* and entails that Member States themselves have the autonomy to "determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law".[239] Therefore, the effectivity of decentralised enforcement depends on the procedural rules of individual Member States. Stricter procedural rules make it harder for citizens to appear in front of national courts and to demand their rights derived from the (in)direct effect of Union law to be respected.

Nonetheless, there are limits to Member State procedural autonomy in the form of two principles, already preluded in the *Rewe-Zentralfinanz* judgment.[240] First, the principle of equivalence requires that procedures involving the rights of individuals provided for by EU law cannot be less favourable than those involving similar procedures based merely on national law.[241] Second, the principle of effectiveness demands that the conditions laid down by domestic rules may not make it impossible in practice for individuals to have their rights derived from EU law protected before national courts.[242] The principles of equivalence and effectiveness could, in theory, address the problem of procedural hurdles preventing the effective enforcement of EU values. If the limits to procedural autonomy are invoked by individuals challenging national legislation, this still requires the national court

[237] *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and Others*, opinion of AG Bobek cit.

[238] This is, once again, portrayed by the Polish constitutional course in its recent judgment on the supremacy of Polish constitutional law, see Erlanger and M Pronczuk, 'Poland Escalates Fight with Europe Over the Rule of Law: Hungary and Poland are Fighting with Brussels over Values and Rule of Law. So, After a Fashion, is Germany' (15 July 2021) The New York Times www.nytimes.com.

[239] Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188. See for a more recent example of the same doctrine, case C-3/16 *Lucio Cesare Aquino v Belgische Staat* ECLI:EU:C:2017:209 para. 48.

[240] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* cit.

[241] *Ibid*. See also case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* ECLI:EU:C:1998:577 para. 39-41. Note, however, para. 42, which states that the principle of equivalence may not be interpreted as an obligation for Member States to extend their most favourable national procedural rules to all actions based on EU law.

[242] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* cit.: "[t]he position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect". See also case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* ECLI:EU:C:1983:318 para. 14.

to disapply the procedural rules in question, or at least refer preliminary questions on this matter to the CJEU. As can be seen in Poland, however, judges can be actively discouraged from referring preliminary questions. Centralised enforcement against excessively burdensome procedural rules, using art. 258 or 259 TFEU, can also be cumbersome and time-consuming. Moreover, even if successful, such enforcement by itself does not address violations of the value of democracy. At best, it would lower the procedural hurdles to the enforcement the value of democracy at the national level.

Finally, there are some pitfalls even when a national court is willing and able to protect the value of democracy in a specific case in the form of longwinded procedures due to the necessity of a preliminary reference.[243]

V. Conclusion

It is difficult to enforce art. 2 TEU as such, given the fact that art. 7, *lex specialis* in respect of enforcement of art. 2, is notoriously hard to trigger. Furthermore, since art. 2 TEU refers to abstract values, it is unclear what these values mean exactly. This means that values such as "democracy" may not be justiciable as such.

The core of art. 2 TEU has, however, been further concretised in the Copenhagen criteria. It is often thought that the Copenhagen criteria cannot be enforced against States once they have joined the Union. It is true that the Copenhagen criteria cannot be directly imposed. However, due to the nature of the Copenhagen criteria as an explanation of the principle of democracy in EU law, the Copenhagen criteria may be imposed on Member States through art. 2 TEU. This means that the "core" content of the value of democracy could be identified and includes in particular the existence of a parliamentary democracy, checks and balances, and a robust electoral system. This *Article* has demonstrated that the Copenhagen criteria have clarified the content of the value of democracy to a significant extent, which helps to identify possible ways to enforce democracy.

With regard to enforcement, a distinction should be made between centralised and decentralised enforcement. The abovementioned "core" or "essence" of art. 2 TEU could have direct effect in the same way that the abolition of discrimination between men and women in art. 157 TFEU has an essence that can be directly enforced. Thus, applying *Defrenne* by analogy, the core of the value of democracy could possibly be enforced at a national level. Certain core aspects of the value of democracy, especially if they have been concretised in other Treaty provisions or secondary legislation, could also be enforced through arts 258–260 TFEU. As this *Article* showed, art. 2 TEU is concretised in several other Treaty provisions, including in particular art. 10 TEU, art. 21 TEU and several Charter provisions. Most of these provisions can be enforced at an EU level. Several of them,

[243] In 2018, the average duration of a preliminary reference procedure was 16 months. See CJEU, 'Judicial Statistics 2018: the Court of Justice and the General Court Establish Record Productivity with 1,769 Cases Completed' (25 March 2019) curia.europa.eu.

moreover, are sufficiently precise and unconditional so that they may be enforced at national level, as well. This applies in any case to the freedom of expression, freedom of thought and the freedom of assembly and association, and perhaps also to the core of art. 10 TEU. These Charter provisions can also be enforced at central level through arts 258–260 TFEU. The unique nature of art. 10 TEU entails that it may even be enforced by challenging an EU act using the action for annulment in art. 263 TFEU.

Most of enforcement mechanism apply to specific manifestations of the value of democracy or the "core" of that value as identified by the Copenhagen criteria. The value of democracy as such remains subject to the specific procedure in art. 7 TEU. While enforcing democracy as such is unlikely to be successful due to the procedural difficulties of art. 7 TEU, multiple centralised and decentralised options remain available. Ultimately, enforcement of the principle of democracy within the EU requires a brick-by-brick approach, through which the value of democracy is enforced using small steps and in a variety of ways. This may not immediately solve the problem of undemocratic Member States, but it will ensure that Member States remain under pressure to adhere to the democratic obligations of EU membership.

This brick-by-brick approach to the enforcement of the value of democracy also applies to the enforcement of the other values of art. 2 TEU, including the rule of law. Two recent examples show that the brick-by-brick approach may be effective. The first example is the fact that the Commission in its enforcement of the rule of law against Poland not only triggered Article 7 TEU, but also started infringement proceedings on the basis of art. 19 TEU. The second example is the recent action of the Commission against the anti-LGBTIQ+ legislation in Hungary, which relied on democracy related aspects of the audiovisual media services Directive. Democracy and the rule of law are no longer merely abstract values enshrined in art. 2 TEU; they also appear at several other instances in the Treaties and are concretised in primary law, secondary legislation, and case law. As this *Article* has attempted to show, enforcement of all the aspects of the value of democracy is neither quick nor easy. Effective enforcement is, however, nonetheless necessary to uphold the value of democracy in the EU.