**Enforcing the Value of Democracy in EU Law**

Changing a Union Brick-by-Brick

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# 1. Introduction

The EU is founded on the values enshrined in Article 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]](#footnote-1) violating the freedom of academic institutions[[2]](#footnote-2) and public education,[[3]](#footnote-3) harassing and criminalising the homeless[[4]](#footnote-4) and using the Covid-19 pandemic as an excuse to pass a law that makes it impossible for transgenders to change their sex legally.[[5]](#footnote-5) Poland stands accused of restricting 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]](#footnote-6) as well as compromising judicial independence.[[7]](#footnote-7) Both Member States have thus found themselves at the very centre of a conflict with the European Union spanning several years, ultimately culminating 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.[[8]](#footnote-8)

With the Treaty of Lisbon, a specific procedure was introduced to enforce the values of Article 2 TEU. Article 7 TEU allows for the suspension of certain rights from Member States when there is a serious breach of EU values by said Member State. The procedure was first initiated by the European Commission against Poland on 20 December 2017 and against Hungary on 12 September 2018 for their alleged breaches of the rule of law.[[9]](#footnote-9) To this date, neither of these procedures have however led to the suspension of any such rights.[[10]](#footnote-10)

Enshrined in Article 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.[[11]](#footnote-11) 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 democratic deficit within the Union,[[12]](#footnote-12) 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.

The Article 7 procedures against Poland and Hungary, as well as academic reports on breaches of EU values by Member States have been distinctly focused on the rule of law. This is understandable, not only because Poland and Hungary are clearly breaching core aspects of the rule of law, but also because the rule of law is a broad value that encompasses numerous other fundamental values and principles of the EU legal order. Armin von Bogdandy and Michael Ioannidis point out that – even though there is a widespread debate about different understandings of the rule of law,[[13]](#footnote-13) “[i]n any event, under all understandings, the rule of law requires as a minimum that the law actually *rules*”.[[14]](#footnote-14) According to most scholars, however, the requirements of the rule of law go beyond a mere obligation that the law is enforced.[[15]](#footnote-15) While this substantive or “thick” understanding of the rule of law comes in many variants, most scholars agree that it would include respect for the fundamental values and principles upon which the law is based including, especially, democracy.[[16]](#footnote-16) It could therefore be argued that the value of the rule of law essentially encompasses *all the values enshrined in Article 2 TEU*, which would include the value of democracy.[[17]](#footnote-17)

Consequently, a “thick” understanding of the rule of law, which includes the supremacy of all law including the other values in Article 2 TEU,[[18]](#footnote-18) at least partly explains why EU value enforcement has been so focused on the rule of law.[[19]](#footnote-19) Nevertheless, the fact that the rule of law is both itself among the values in Article 2, while it includes at the same time aspects of the other EU values mentioned in Article 2, the excessive focus on rule of law backsliding in Article 7 procedures may make for rather unfocused and more complex enforcement procedures. Furthermore, 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 Article 2. For that reason, this thesis focuses exclusively on the value of democracy.

This thesis is set out to answer the following research question: what is the substantive legal meaning of the value of democracy in EU law and how can it be enforced against EU Member States?

In order to answer this research question, section 2 will explore democracy as an EU value, uncovering its substantive meaning in the Treaties and the European Charter of Fundamental Rights (the Charter). To this end, section 2 first analyses the meaning of the value of democracy as such in EU law on the basis of its origin, the current text of Article 2 and the Copenhagen criteria (sub-sections 2.1 and 2.2). Section 3 will analyse where the value of democracy also occurs in EU law outside of Article 2, and which provisions bear on its content. Section 4 will analyse the possibility of enforcing (aspects of) the value of democracy by other procedures. In order to do so, section 4 starts by recapping the problems arising when attempting to enforce the value of democracy as such through Article 7 TEU (section 4.1). It subsequently distinguishes between centralised enforcement directly before the CJEU, using the procedures laid down in Articles 258–260 and 263 TFEU (section 4.2), and between decentralised enforcement at Member States level based on the doctrines of direct and indirect effect and the preliminary reference procedure (section 4.3). Section 5 concludes.

This thesis uses a legal dogmatic method to analyse the meaning and enforceability of the value of democracy. Its objective is to provide a legal analysis of the value of democracy in 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 thesis 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. Rather, this thesis 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.

# 2. 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.”[[20]](#footnote-20)

There has been little attention to the enforcement of the value of democracy. As noted in the introduction, most discussion regarding democracy centres on the democratic credentials of the EU itself, and the tension between the need to guarantee the full effect of EU law and the fact that this may entail the disapplication of democratically legitimate national laws.[[21]](#footnote-21) While national laws may breach substantive EU law, one might think that insofar as they are democratically enacted on the basis of national constitutional law, there cannot be a breach of the value of democracy in EU law. Laws enacted at Member State level through majority voting are democratic, even if these measures have anti-liberal consequences.

That conclusion is, however, 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,[[22]](#footnote-22) 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”.[[23]](#footnote-23)

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 and the next section will analyse the manner in which the value of democracy has taken shape in EU law. This section will first discuss the development of democracy as a value of EU law, before turning to Article 2 TEU and the elaboration on its content in the Copenhagen Criteria. The role of democracy and its necessary pre-conditions in the remainder of the EU Treaties and the Charter will be discussed in the subsequent section 3.

## 2.1 The development of the value of democracy in the European Union

The EU (then the European Economic Community)[[24]](#footnote-24) 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.[[25]](#footnote-25) The Union’s aim to ensure and maintain peace on the European continent, however, may have been an early sign of the possible existence of a democratic requirement for EU membership.[[26]](#footnote-26)

Still, the first two enlargements of the EU did not know any democratic conditionality.[[27]](#footnote-27) There were simply no economic criteria nor legal and political criteria to join the Union at that time.[[28]](#footnote-28) 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.[[29]](#footnote-29)

The ensuing southern enlargement process offered the EU more of an opportunity to prove its prioritisation of democratisation.[[30]](#footnote-30) 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 Spanish case, for example, shows the EU’s first explicit affirmation of its attachment to democracy.[[31]](#footnote-31) The Greek case showcases a symbolic association between the Union and the principle of democracy.[[32]](#footnote-32) 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.[[33]](#footnote-33)

The democratisation processes and the integration of Greece, Spain and Portugal ultimately worked out.[[34]](#footnote-34) However, due to an increased amount of application requests from northern and eastern European countries, triggered by the collapse of the Soviet Union, the EU decided that its attachment to the principle of democracy was to be enshrined in its constitutional fabric.[[35]](#footnote-35) To that end, the EU began to incorporate the principle of democracy into the political component of the Copenhagen criteria for EU accession.[[36]](#footnote-36)

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. Article 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”. Article J.1 furthermore referred to the development and consolidation of democracy with regard to EU external policy.[[37]](#footnote-37)

The Treaty of Amsterdam has since been replaced with the current Treaty of Lisbon, which decides 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.”

The Treaty of Lisbon seems a step up from the Treaty of Amsterdam and expands more on the common values of the EU. Interesting in this regard is that the Treaty of Amsterdam speaks of ‘principles’, whilst the Treaty of Lisbon introduces ‘values’. Oddly, democracy is still dubbed a ‘principle’ in the preamble of the Charter, as well as in Article 21 TEU.[[38]](#footnote-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]](#footnote-39) Although perhaps not intended, a distinction can still be made between the more indeterminate ‘value’ and the more defined ‘principle’.[[40]](#footnote-40)

It is possible that Member States did not view the change in terminology as pressing or important and accepted it without thinking twice. 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]](#footnote-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]](#footnote-42) The notion of ‘values’ as common ideals, makes sense in that regard. For the sake of this thesis, I will stick to the terminology of ‘value’.

The fact that the value of democracy is not defined anywhere in the Treaties, makes pinpointing the value’s exact substantive meaning a precarious exercise. 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 Article 2 TEU and the Copenhagen Criteria.

## 2.2 The value of democracy in Article 2 TEU and the Copenhagen Criteria

## 2.2.1 Article 2 TEU: an introduction

Article 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. It should be noted that Article 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.[[43]](#footnote-43) 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. Such an assumption is flawed. Although the Charter touches upon certain dimensions of democracy, it does not cover the value in its entirety.[[44]](#footnote-44) Surely then, Article 2 TEU must have something to add – something that is not found anywhere else in EU law. However, whilst Article 2 clarifies the importance of democracy in a community such as the EU, it fails to establish the substantive character of democracy within the Union.

The lack of clarity in Article 2 TEU has shaped the ongoing discussions about the meaning and nature of EU values that has recently taken the forefront of debate among Member States themselves, as well as between Member States and the Union.[[45]](#footnote-45) Vague values may indeed allow for a wider margin of appreciation.[[46]](#footnote-46) Some scholars furthermore allege that the values enshrined in Article 2 were never meant to impose values on Member States. They were rather designed to show off Europe’s great level of sophistication to the rest of the world.[[47]](#footnote-47)

However, even if it is true that Article 2 was not designed with the intention to impose values on Member States, the logical error here is that the meaning of EU principles is prone to change over time. For example, where autonomy was once introduced 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.[[48]](#footnote-48)

The EU values enshrined in Article 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 Treaties.[[49]](#footnote-49) In order to understand the current character and possible enforcement of the value of democracy within the EU, the Treaties, the case law of the CJEU and the Opinions and Communications of other EU institutions must be reviewed.[[50]](#footnote-50)

## 2.2.2 Article 2 TEU and the Copenhagen Criteria

Part of the substantive meaning of democracy in the EU can be inferred from the practical application of Article 2. One of the main applications of Article 2 is found in the assessment procedure for candidate countries. The starting point for accession procedures is formed by Article 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”.

In its Opinions on the accession of several applicant states, the Commission does indeed refer to Article 2 TEU. When contemplating whether Serbia met the preconditions to join the Union, the Commission immediately recalled Article 2 TEU.[[51]](#footnote-51) 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”. In its assessment, the Commission never refers to Article 2 TEU again.[[52]](#footnote-52)

It is obvious that the Commission takes democracy seriously in its accession assessments, but it seems as if it is not Article 2 TEU that the institution relies upon, but rather the Copenhagen criteria.[[53]](#footnote-53) 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.[[54]](#footnote-54)

Due to the Commission’s lack of attention for some of the values enshrined in Article 2, some authors conclude that the Commission mentions the provision, but never actually applies it.[[55]](#footnote-55) The Commission’s mention of Article 2 appears to be almost arbitrary. It is my opinion, however, that the Commission’s approach to democracy in its accession opinions should be interpreted as meaning that democracy in the sense of Article 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 Article 2.[[56]](#footnote-56) Therefore, it is my view that the Commission is implicitly applying Article 2, through the explicit application of the Copenhagen criteria It makes no sense for the Commission to apply Article 2 and the Copenhagen criteria separately. 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 a recent case saw the Court making a connection between Article 2 TEU and the Copenhagen criteria for the first time.[[57]](#footnote-57) The Copenhagen criteria might, therefore, offer a good place to start when uncovering the meaning of Article 2 TEU.

## 2.2.3 Copenhagen criteria: substantive elements

The Copenhagen criteria are conditions set by the Copenhagen European Council in 1993[[58]](#footnote-58) and later confirmed by the Madrid European Council.[[59]](#footnote-59) All candidate countries must satisfy these criteria in order to join the Union.[[60]](#footnote-60) 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.[[61]](#footnote-61) The political criteria – which are of most relevance to this thesis – request a stable institution that guarantees democracy and adherence to the rule of law.[[62]](#footnote-62) In a similar fashion to Article 2 TEU, the Copenhagen criteria as such do not offer any further expansion on thesubstantive elements of democracy. Therefore, in order to understand the substantive meaning of the Copenhagen criteria, their practical application must be assessed.

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. Each time, this paragraph first assesses the basic constitutional framework of each candidate state. Afterwards, the Commission delves into the legal and factual aspects of the respective system, which relate to democracy and that do not meet EU standards. I have divided these aspects over three categories: (i) general constitutional framework; (ii) *trias politica* and checks and balances; and (iii) electoral systems. The following section will briefly discuss each of these aspects and the relevant criteria that follow from the Commission’s Opinions and Communications on the possible accession of candidate states to the Union. Please consider that these aspects are minimum requirements and that they are, therefore, not limitative.

## 2.2.3.1 General constitutional framework

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.[[63]](#footnote-63) This is unsurprising, as the Union considers itself to be a parliamentary democracy in line with Article 10 TEU.[[64]](#footnote-64)

## 2.2.3.2 Trias politica and checks and balances

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 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[[65]](#footnote-65) 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,[[66]](#footnote-66) as well as consultation of stakeholders[[67]](#footnote-67) and capacity for parliamentary oversight.[[68]](#footnote-68) There must furthermore be sufficient governmental policy planning, coordination, and implementation.[[69]](#footnote-69) The exact extent of ‘sufficient’, remains somewhat equivocal. Finally, parliamentary immunity remains a cornerstone when safeguarding the independence of the legislative branch.[[70]](#footnote-70) Although lifting of immunity of members of parliament may be justified, this may only occur in extraordinary situations.[[71]](#footnote-71)

The Commission furthermore underlines the importance of an independent judiciary.[[72]](#footnote-72) This means on a most basic level that the judiciary cannot be politicised.[[73]](#footnote-73) Politicisation may, after all, lead to corruption.[[74]](#footnote-74) Corruption must furthermore be discouraged through an effective system of checks and balances[[75]](#footnote-75) and anti-corruption legislation.[[76]](#footnote-76)

## 2.2.3.3 Electoral systems

Elections play an important role in ensuring democracy within the Union, both at Union level[[77]](#footnote-77) and at Member State level. The Copenhagen criteria focus on elections and referenda at Member State level. The EU 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.[[78]](#footnote-78) However, according to the Commission, the Serbian electoral process was only recently brought in line with EU standards.[[79]](#footnote-79) This essentially means that democracy in the sense of Article 2 TEU requires an electoral process of an even higher standard than what is accepted internationally.

First and foremost, this standard for elections requires proper codification and harmonisation of an electoral regulatory framework in national law.[[80]](#footnote-80) Moreover, this higher standard means that the appointment of MPs must follow the order of the list presented to the voters,[[81]](#footnote-81) 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.[[82]](#footnote-82)

In the context of the electoral system at European level, Regulation 1141/2014 laid down standards on the functioning of political parties and their funding.[[83]](#footnote-83) 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.[[84]](#footnote-84)

## 2.2.4 Applicability of the Copenhagen criteria after EU accession

It is clear that the Copenhagen criteria are not merely an empty shell. Countless 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.[[85]](#footnote-85)

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.[[86]](#footnote-86) Pre-accession democracy conditionality does, therefore, not eliminate the potential for and the reality of post-accession backlash.[[87]](#footnote-87) 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*”.[[88]](#footnote-88)

To this extent, I refer to my analysis under section 2.2. 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 its Member States. The only difference is that candidate countries are liable to comply with Article 2 via Article 49, whilst Member States must answer to Article 2 directly.

I therefore conclude that Member State non-compliance with the Copenhagen criteria is not a problem of law, but a problem of enforcement. The specific way in which certain aspects of the value of democracy, including those relating to the Copenhagen criteria, can be enforced will be analysed in section 4.

# 3. The value of democracy beyond Article 2 TEU

Article 2 TEU and the Copenhagen criteria offer a basic overview of 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 will analyse 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 will furthermore analyse Article 10 TEU, Article 21 TEU, the Charter and the Commission’s European Democracy Action Plan.

## 3.1 Right to vote and to stand as a candidate

Suffrage is, of course, the cornerstone of any democracy. Article 223 TFEU requires that the European Parliament shall be elected by direct universal suffrage. Articles 20(2)(b) TFEU and 39 of the Charter enshrine the right for every citizen of the Union to vote and to stand as a candidate at elections to the European Parliament. Furthermore, Article 20(2)(b) and 22(1) TFEU also 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.[[89]](#footnote-89)

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. As discussed in section 2.2.3.3, however, Member States are 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 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.[[90]](#footnote-90) The electoral area may furthermore be subdivided unless subdivision generally affects the proportional nature of the electoral system.[[91]](#footnote-91)

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”.[[92]](#footnote-92) Article 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 (a) different Member State(s).[[93]](#footnote-93)

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 the package, according to the Commission, is to ensure “free and fair European elections”.[[94]](#footnote-94)

In its Communication, the Commission recognises that European institutions do not run elections. Nevertheless, the Commission asserts that elections still carry an obvious Union dimension.[[95]](#footnote-95) 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 already addresses instances of unlawful use of personal data in the electoral context at Member State level.[[96]](#footnote-96) The Communication furthermore makes recommendations on how risks from disinformation and cyberattacks and the promotion of online transparency and accountability in the EU should be addressed.[[97]](#footnote-97) 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.[[98]](#footnote-98) Lastly, the Communication addresses situations in which political parties or associated foundations may benefit from practices that infringe data protection rules.[[99]](#footnote-99)

Finally, the notion of ‘free and fair elections’ as recited by the Commission in its Communication cannot exist without free media. This means that it is not just the Charter which touches upon the protection of free and fair media, as discussed under section 3.4.2, but also the Treaties themselves.[[100]](#footnote-100) This means that the introduction of another legal framework to protect free media is as complicated as it is potentially unnecessary. Instead, the Commission may launch infringement proceedings to protect free media on the basis of the Treaties.[[101]](#footnote-101)

## 3.2 Article 10 TEU

Article 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, Article 10(2) decides that “Member States are 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”. Article 10(3) furthermore decides that “[e]very citizen shall have the right to participate in the democratic life of the Union”. Finally, Article 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 Article 10 seems rather straightforward and general at first glance, some scholars allege that the provision may have a far more specific meaning. John Cotter, for example, suggests that Article 10 TEU may provide a basis for the exclusion of Hungarian representatives from the European Council and the Council.[[102]](#footnote-102) His argument is largely based on a literal interpretation of the first two paragraphs of Article 10, emphasising Article 10(2) and consists of three basic steps: (i) the Union is founded on a representative democracy; (ii) according to Article 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.[[103]](#footnote-103)

Cotter immediately refutes possible interpretations that diverge from his own. He considers that it could be argued that the text of Article 10(2) merely provides that both institutions must be composed of representatives of all Member States. Cotter subsequently refers to Article 16(2) TEU on the composition of the Council which appears to state exactly that. Cotter’s answer is simple, yet effective: his interpretation of Article 10(2) and Article 16(2) TEU are not mutually exclusive. Both may co-exist.

Such an interpretation of Article 10(2) does, however, come with its pragmatic complications. First, Article 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.[[104]](#footnote-104) According to Cotter, this means that individuals litigating the matter rely on Article 263 TFEU, on the basis of which the CJEU may review the legality of a reviewable act.[[105]](#footnote-105) 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.[[106]](#footnote-106) While such an approach could in theory be effective, it carries 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.[[107]](#footnote-107) 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.[[108]](#footnote-108) On a more legal note, Bradley argues that removing a Member State’s voting rights under Article 10 would “simply airbrush out of the picture [the Member State’s] rights”.[[109]](#footnote-109) It is true that the removal of a Member State’s right to vote is one of the possible outcomes of an Article 7 procedure for which high safeguards exist. Bypassing entirely this system of safeguards would be questionable in terms of legality.

On the other hand, it should be noted that based on Article 19(1) TEU, the CJEU is tasked to ensure that in the interpretation and application of the Treaties, the (European) law is observed. Both Cotter and Bradley mention this fact, reiterating that the Court could potentially interpret Article 10(2) in conjunction with Article 2 TEU, especially when considering that EU institutions such as the Court must aim to promote Union values on the basis of Article 13(1) TEU.[[110]](#footnote-110) However, both fail to mention that interpreting Article 10(2) in conjunction with Article 7 TEU may mean that the Court might decide differently. In this case, the Court may conclude that Article 10 is not a legal basis for the banning of Member States delegations from its institutions. And that is exactly where the second major problem with Cotter’s theory lies.

Assuming that Cotter’s approach would be constitutional, an advantage of his interpretation of Article 10 would be that the provision may allow for Poland and Hungary to be isolated from each other and to be confronted separately via Article 7. This counteracts some of the difficulties that surround Article 7 as described in section 4.1. Even still, Articles 7(2) and 7(3) would be hard to trigger. Cotter’s interpretation of Article 10 would not necessarily instantly turn Article 7 operative again.

But there is more to Article 10 TEU. According to Article 224 TFEU, the European Parliament and the Council may adopt secondary legislation regarding political parties at European level referred to in Article 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.[[111]](#footnote-111) This Regulation was presented and perceived to tackle populist illiberal politics on an EU level.[[112]](#footnote-112) The Regulation, however, does not regulate political parties or the functioning of democracy at Member State level, and may therefore seem of little use in the context of this thesis. To this extent, it should first be noted that political parties active at a European level, are often the same parties that run in national elections.[[113]](#footnote-113) The Regulation may therefore influence political parties at a national level, as they 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 Article 2 TEU. For example, the Regulation aims to enhance transparency and “strengthen the scrutiny and the democratic accountability of European political parties and European political foundations”.[[114]](#footnote-114) While, as noted above,[[115]](#footnote-115) the Regulation 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 Article 10 TEU through Regulation 1141/2014 can be used as interpretative guidance of Article 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 Article 2 TEU interpreted in light of the concrete expression of democracy in EU law.[[116]](#footnote-116) This means that the values introduced by Regulation 1141/2014 could potentially be enforced at Member State level through the application of Article 2 TEU.[[117]](#footnote-117)

## 3.3 Article 21 TEU

Article 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. Article 21 has evolved to be more than merely symbolic. There are several ways in which the EU tries 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.[[118]](#footnote-118) Although considered an improvement on the pre-Lisbon situation, both the Strategic Framework and the Action Plan were all but comprehensive at first.[[119]](#footnote-119) 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.[[120]](#footnote-120)

The EU Annual Report on Human Rights and Democracy in the World is furthermore part of EU external policy.[[121]](#footnote-121) Whilst the better part of the 2020 report focuses on human rights, the report does state that counter terrorism and prevention and countering of violent extremism policy may not be used as a pretext to restrict democracy.[[122]](#footnote-122) The report furthermore 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.[[123]](#footnote-123)

Finally, the value of democracy is prevalent in the European Neighbourhood Policy (ENP).[[124]](#footnote-124) ENP is focused on creating a stable and prosperous neighbourhood in order to secure a safe Union.[[125]](#footnote-125) The Union’s objectives of ensuring stability and prosperity are heavily inspired by the EU’s pre-accession policy.[[126]](#footnote-126) 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.[[127]](#footnote-127) Following the 2011 developments in Arab countries, the EU reviewed its ENP. This led to a strengthened focus on the promotion of deep and sustainable democracy.[[128]](#footnote-128) 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”.[[129]](#footnote-129)

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

## 3.4. The Charter of Fundamental Rights of the EU

As previously discussed, 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 the safeguarding of democracy. The Charter contains several provisions that link either directly or indirectly to this value. Such provisions include, in particular, Article 11 on the freedom of expression and information, Article 10 on the freedom of thought, conscience and religion, and Article 12 on the freedom of assembly and of association.[[130]](#footnote-130) A lack 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 ECtHR is not in fact a 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 Article 52(3) of the Charter refers to the ECHR as a minimum standard.[[131]](#footnote-131) 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.[[132]](#footnote-132)

## 3.4.1 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 will be unable to cast an informed vote in national or local elections.[[133]](#footnote-133) And without informed voting, democracy becomes dysfunctional.

The freedom of expression and information is enshrined in Article 11 of the Charter of Fundamental Rights (hereinafter: Charter) which corresponds with Article 10 of the European Convention on Human Rights (hereinafter: ECHR). The freedom of expression has furthermore been enshrined by the CJEU as a “general principle of law, the observance of which is ensured by the Court”.[[134]](#footnote-134) The provision decides that

“[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without the interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”[[135]](#footnote-135)

Article 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:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”[[136]](#footnote-136)

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.”[[137]](#footnote-137)

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”.[[138]](#footnote-138) This is because, according to the ECtHR, politicians knowingly choose to lay themselves bare to close scrutiny by both journalists and the public.[[139]](#footnote-139) 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.[[140]](#footnote-140)

## 3.4.2 Freedom of thought, conscience and religion

Article 10 of the Charter enshrines the freedom of thought, conscience and religion. It decides that

“1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.  
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

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”.

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 *Kalaç v. Turkey* that an individual may need to take into account his or her specific situation when exercising their freedom to manifest religion.[[141]](#footnote-141)

## 3.4.3 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’”,[[142]](#footnote-142) 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”.[[143]](#footnote-143) 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.[[144]](#footnote-144) 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.[[145]](#footnote-145) Restrictions of content are allowed, but only when such restrictions meet a high threshold.[[146]](#footnote-146) Restrictions should furthermore only be imposed when there is an imminent threat of violence.[[147]](#footnote-147)

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.[[148]](#footnote-148) The right to freedom of association can be enjoyed by a singular individual or by an association itself.[[149]](#footnote-149) The freedom of association applies to every type of association, including political parties.[[150]](#footnote-150) Freedom of association regarding political parties is especially important in relation to democracy. Political parties should therefore only be dissolved in extreme cases.[[151]](#footnote-151) Only political parties with objectives or activities, which are a tangible 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.[[152]](#footnote-152)

## 3.5 The Commission’s European Democracy Action Plan

On 3 December 2020, the Commission published a Communication on the European democracy action plan.[[153]](#footnote-153) It introduces in line with Article 2 TEU that democracy, together with the rule of law, is one of the core values upon which the European Union was built.[[154]](#footnote-154) The Communication furthermore points out that “[d]emocracy allows citizens to shape laws and public policies at European, national, regional and local levels”.

Many of the concepts brought forward in the Commission’s action plan were previously discussed in this thesis. The action plan states, for example, that democracy requires safeguarding mechanisms such as checks and balances and the upholding of pluralistic democratic debate, as well as free and fair elections with strong democratic participation.[[155]](#footnote-155) In order to uphold such open debate, certain human rights must be adhered to. The Commission emphasises specifically the freedom of information and the freedom of expression.[[156]](#footnote-156) Although the Action Plan does not necessarily introduce new aspects of the value of democracy, it most certainly confirms the dimensions of democracy previously discussed in this thesis.

# 4. Enforcing democracy beyond Article 7

Debates on the enforcement of EU values against Member States have focused almost exclusively on Article 7 TEU. Beyond the specific procedure in Article 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 Article 7 TEU. Some of these additional enforcement mechanisms are of a centralised nature and 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 Article 7 TEU, and will subsequently analyse centralised (section 4.2) and decentralised enforcement (section 4.3) of the value of democracy beyond Article 7. Each section will focus on the possibility to enforce the various aspects of the value of democracy – discussed in section 2 – using the available procedures.

## 4.1 Problematising Article 7

The possibility and reality of breaches of EU common values by Member States have grown ever more evident over the past five or six years.[[157]](#footnote-157) Article 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 Article 2.[[158]](#footnote-158) This means that Article 7 TEU is *lex specialis* and therefore that Article 2 TEU as such can only be enforced through the procedures of Article 7. These are:

1. a procedure that allows for the declaration of the existence of a “clear risk of a serious breach” of the common European values and the adoption of recommendations on how to remedy the breach;[[159]](#footnote-159)
2. a procedure that allows for the declaration of a serious and persistent breach of EU values;[[160]](#footnote-160)
3. a mechanism that allows for the sanctioning of a Member State after it seriously and persistently breaches EU values.[[161]](#footnote-161)

Article 7 has, however, proven to be ineffective. Some even go as far as titling the provision a ‘dead letter’.[[162]](#footnote-162) Although Article 7(1)[[163]](#footnote-163) was triggered several times, this has not once led to the triggering of Article 7(3) and thus not once to any sanctions being imposed on a Member State in breach. Why is it that Article 7(1) is seemingly functional, but Article 7(3) is seemingly not?

## 4.1.1 Article 7(1): A clear risk of a serious breach

Article 7(1) initiating the stating of a clear risk of a serious breach of the values enshrined in Article 2 TEU and the addressing of recommendations on how to remedy a breach can be triggered by several actors: by 1/3 of the Member States, by the European Parliament and by the European Commission. Although Article 7(1) is thus easily triggered, the provision is not necessarily designed to lead to the sanctioning of a Member State in breach of EU core values.[[164]](#footnote-164) More so, the essence of the Article is to encourage dialogue between Member States at risk of breaching EU values and the EU itself. The provision was thus designed as a preventative mechanism, rather than a punitive one.

In practice, however, the triggering of Article 7(1) has not once led to constructive dialogue. Instead, Member States that the procedure is addressed to feel victimised and end up rebelling even more.[[165]](#footnote-165)

## 4.1.2 Article 7(2): stating the existence of a serious breach

Stating the existence of a serious breach in the sense of Article 7(2) is a crucial step in the process of sanctioning a Member State for core value breaches, because it is a necessary condition to trigger Article 7(3). In order to trigger Article 7(2), unanimity in the European Council and consent of the European Parliament is required. Unlike Article 7(1), the European Parliament cannot initiate this procedure.[[166]](#footnote-166) Unanimity in the Council may be reached when there is only one Member State that consistently breaches the values enshrined in Article 2. In the case that there are two Member States that consistently breach EU values, unanimity is hard, if not impossible, to reach.

The fact that the bar for triggering Article 7(2) is set much higher can be explained through the seriousness of its implications. It makes sense in that regard that a ‘simple’ breach of Article 2 values is not enough to trigger Article 7(2).[[167]](#footnote-167) And a ‘serious’ breach of common values presumably means a systemic breach.[[168]](#footnote-168) The high requirements that must be met in order to trigger Article 7(2), make the stating of the existence of a serious breach and thus the effectiveness of the provision very difficult procedurally.[[169]](#footnote-169)

## 4.1.3 Article 7(3): sanctioning and suspension of rights

Article 7(3) allows for the suspension of “certain rights [of Member States] deriving from the application of the Treaty” after a serious breach of the values enshrined in Article 2 TEU. The activation of the provision is initiated by the Council and requires reinforced quality majority voting.[[170]](#footnote-170) This comes down to 72% of the vote. This may not necessarily seem like much, but activation of Article 7(3) is only possible when Articles 7(1) and 7(2) have previously been triggered. This ultimately means that for the successful triggering of Article 7(3), the requirements for all three provisions must be met. Ultimately, no Member State has ever had their rights suspended on the basis of Article 7 TEU, due to the fact that Article 7 is notoriously hard to trigger, especially when multiple rebelling Member States protect each other.[[171]](#footnote-171)

The procedural difficulties of triggering Articles 7(2) and 7(3) make the enforcement of EU values through Article 7 insufficiently effective, especially if multiple Member States breach these values and support each other. In order to enforce the value of democracy effectively, a different approach is necessary, in which other enforcement mechanisms are employed as well. These mechanisms and their potential effectiveness will be discussed in subsequent sub-sections.

## 4.2 Centralised enforcement

As noted, the values in Article 2 TEU, as such, can only be enforced through Article 7 TEU. However, this does not mean that certain aspects of the value of democracy cannot be enforced using other enforcement mechanisms. This sub-section will discuss the possibility to enforce the value of democracy and its components through the centralised enforcement mechanisms of EU law: Articles 258–260 TFEU and Article 263 TFEU.

## 4.2.1 Articles 258–260 TFEU

The procedure laid down in Article 258 TFEU is more generally known as the regular infringement procedure and consists of two consequential stages. First, if it is recognised that a member State has failed to fulfil its obligations under the Treaties, the Commission will deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its own observations. If the Member State in question does then not comply with the opinion within the given timeframe, the Commission may bring the dispute before the CJEU.

Article 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 Articles 157 TFEU and 19(1) TEU in conjunction with Article 47 of the Charter.[[172]](#footnote-172) Similarly, the Commission employed Article 258 TFEU in order to tackle certain rule of law breaches in Hungary.[[173]](#footnote-173) Some scholars view the infringement proceedings of Article 258 as ‘far too specific’ and for that reason cumbersome when dealing with situations in which a Member State has gone rogue entirely.[[174]](#footnote-174) Other authors have, however, found a solution in Article 258. Although every specific breach must be painstakingly fought separately under Article 258, these authors allege that the provision is still more effective than Article 7 TEU.[[175]](#footnote-175) 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.[[176]](#footnote-176)

It should be noted, however, that the fact that Article 258 TFEU is not subject to the same extensive procedural requirements as Article 7, could be both its blessing and its curse. Of course, Article 258 TFEU can only be effective without the procedural hurdles of Article 7. At the same time, to prevent circumvention of the procedural safeguards of Article 7, it is necessary to interpret Article 7 as being a *lex specialis*.[[177]](#footnote-177) Interpreting the provision as *lex specialis*, however, means that Article 258 is partly inapplicable to breaches of Article 2 TEU.

This does not necessarily mean that the content of the valuesenshrined in Article 2 TEU cannot be enforced through the application of Article 258 TFEU. Infringement procedures on the basis of Article 258 TFEU can, however, not be based on Article 2 itself. This is, for example, illustrated by the infringement procedure against Poland of July 2017.[[178]](#footnote-178) This procedure surrounded the Polish introduction of provision that entitled the Minister of Justice to prolong the mandates of judges at his discretion. The Commission based its case on Article 19 TEU and not on Article 2 TEU itself. This does not mean that the factual situation of the case was not a breach of the value of democracy in the sense of Article 2 TEU.

An example of the enforcement of Article 2 TEU values through Article 258 TFEU and a foundation for the possibility thereof, is found in the recent *Repubblika v Il-Prim Ministru* case.[[179]](#footnote-179) 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.”[[180]](#footnote-180)

In other words, the Court decided in the context of the rule of law that Member States may not infringe upon the rights enshrined in Article 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 Article 258 TFEU.

Accordingly, insofar as it is not the abstract value of democracy that is enforced, Article 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. As discussed in section 3 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 Article 258 TFEU.

As regards the other components expressed by the Copenhagen Criteria, the applicability of Article 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 Article 19 TEU. As regards the Copenhagen criteria’s requirements of democracy and democratic accountability, a relevant provision is Article 10 TEU, which prescribes that governments of the Member States must be “democratically accountable either to their national Parliaments, or to their citizens”.[[181]](#footnote-181) 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 Article 10 TEU is a concrete manifestation of the value of democracy in Article 2 TEU, it can be enforced through Article 258 TFEU instead of Article 7 TEU. The same goes for the protection of free media by the Treaties. Because democracy cannot exist without free media, the Commission may launch an infringement procedure to protect plurality of and access to media.

Similarly, the standards in Regulation 1141/2014 may 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 Article 258 TFEU as well. A significant problem of this argument, however, is that the standards of Regulation 1141/2014 do not themselves apply to national parliamentary systems. Unlike, for instance, Article 19 TEU, these rules can only be used as an interpretative guide to Article 2 TEU. Such an interpretative guide may not be sufficiently precise for use of Article 258 TFEU.

Article 259 TFEU is similar in nature to Article 258 TFEU in the sense that Article 259 proceedings govern specific breaches, too. Instead of the Commission, however, it is the Member States that may complain under Article 259. A Member State may complain when it is of the opinion that a fellow Member State has failed to fulfil its obligations under the Treaties.

The Article 259 procedure is furthermore used much more sparingly than the one under Article 258, or so it seems. The provision decides that “[b]efore a Member State brings action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission”. This means that there are most likely many cases that are brought before the Commission by Member States and taken up by the Commission from there.[[182]](#footnote-182) Many procedures that start under Article 259, may therefore eventually be decided under Article 258. It is, for that reason, difficult to estimate the percentage of procedures under Article 259 that are successful in one way or another.

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 Article 260 TFEU. In its decision, the Commission will request for the Court to impose a financial penalty. Commission Guidelines on the old Article 228 of the EC Treaty indicate that the Commission will request both a lump sum and a daily penalty in such situations.[[183]](#footnote-183) Consequently, the Court will consider whether the Member State in question has indeed defied its earlier judgment.

The latter part of Article 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 Article 258 TFEU, but only where the case concerns failure to adopt implementing legislation for a Directive within the deadline. This is not necessarily relevant with regard to the current crisis of EU values, unless the EU decides to include the protection of specific democratic values in a Directive.

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 Articles 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 Article 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,[[184]](#footnote-184) financial penalties may be imposed by the Court directly under Article 260(3) TFEU in the Court’s first judgment under Article 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 Article 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.[[185]](#footnote-185) 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”.[[186]](#footnote-186)

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 Article 258 TFEU in combination with an immediate financial penalty under Article 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 Article 2 TEU.[[187]](#footnote-187) This is all the more proof that clauses similar in nature to Article 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 Article 260(3) TFEU is not applicable because, for instance, such safeguards for democracy are not included in a Directive but in a Regulation, Article 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 Article 258 TFEU.

## 4.2.2 Article 263 TFEU

Article 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 Article 263 TFEU cannot be used 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 Article 10 TEU.

As analysed in section 3.2 above, under Cotter’s interpretation of Article 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,[[188]](#footnote-188) it may indeed be invoked in an action for annulment against the relevant EU act.

Individual litigants rarely meet the criteria for standing under Article 263 TFEU, as the act that they want 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*,[[189]](#footnote-189) 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.[[190]](#footnote-190) 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 4.3 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 Article 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 Article 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 Article 10 TEU could put more legal and political pressure on undemocratic Member States to reform their national law.

## 4.3 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.

## 4.3.1 Direct effect

## 4.3.1.1 The principle of direct effect

Direct effect means that a provision of EU law becomes the immediate source of law before a national court.[[191]](#footnote-191) 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; (ii) unconditional and; (iii) the respective Member State failed to implement a directive or failed to implement the directive correctly.[[192]](#footnote-192)

Direct effect has two possible effects in the national legal order. First, direct effect may create a new rule, which did not exist in national law yet. This new rule is then applied in the case at hand.[[193]](#footnote-193) Second, direct effect may exclude the application of an existent national rule when that rule is contrary to the provision of EU law in question.[[194]](#footnote-194)

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. In *Reyners*, the Court held for the first time that a Treaty provision, namely Article 52 of the EEC possessed at least partial direct effect.[[195]](#footnote-195) Similarly, in *Defrenne*, the Court decided that gender discrimination in the workplace was to be gradually abolished in all Member States on the basis of what is now Article 157 TFEU, but that that article could be directly invoked against directly discriminatory national measures.[[196]](#footnote-196)

Meanwhile, the Court extended direct effect to sufficiently clear and unconditional provisions of regulations in *Leonesia*,[[197]](#footnote-197) decisions in *Franz Grad*,[[198]](#footnote-198) and directives in *Van Duyn*.[[199]](#footnote-199) In *Van Duyn*, the Court furthermore loosened the ‘unconditionality’ criterion.According to the Court, the existence of an exception to a rule did not prevent a provision from being unconditional insofar as the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the [national] courts”.[[200]](#footnote-200)

Recent case law has seen the Court extend direct effect to certain Charter provisions. In particular, the Court confirmed direct effect of several Charter provisions, namely Article 21 (various types of prohibition of discrimination),[[201]](#footnote-201) Article 31(2) (right to annual paid leave),[[202]](#footnote-202) Article 47 (right to an effective remedy),[[203]](#footnote-203) or Article 50 (prohibition of *non bis in idem*)[[204]](#footnote-204) all have direct effect.[[205]](#footnote-205)

## 4.3.1.2 Direct effect and Article 2 TEU

I have established by now that for a provision of EU law to have direct effect, it should be sufficiently clear and unconditional. Article 2 TEU likely misses that mark, because it is not sufficiently clear. After all, Article 2 TEU provides a set of abstract values of which the exact content is not immediately clear. For this reason, the values in Article 2 TEU are at such most likely not justiciable.[[206]](#footnote-206)

However, as previously discussed, some of the core aspects of the value of democracy have been concretised by the Copenhagen criteria.[[207]](#footnote-207) Although the Copenhagen criteria do not determine the content of Article 2 TEU, they do provide authoritative guidelines on what constitutes the very essence of democracy.[[208]](#footnote-208) It could therefore be argued that Article 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*, in which the Court held that although Article 157 TFEU as such is not unconditional, it did provide for an unconditional right not to be *directly* discriminated against on the basis of sex.[[209]](#footnote-209)

Applying *Defrenne* by analogy could mean, therefore, that Article 2 TEU is directly effective if it is invoked against a national law that clearly violates the essence of democracy. An example 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 Article 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 Article 2 TEU.[[210]](#footnote-210) In the context of the value of the rule of law, the Court held that this value is given justiciable concrete expression in Article 19 TEU.[[211]](#footnote-211) 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. In such a case, Article 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.[[212]](#footnote-212)

## 4.3.1.3 Direct effect and Article 10 TEU

Whether Article 10 TEU has direct effect is more difficult to establish. On the one hand, Article 10 in the reading of Cotter[[213]](#footnote-213) 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.[[214]](#footnote-214)

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 Article 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 Article 10 TEU is, in Cotter’s reading, sufficiently clear about the requirements of a lawful composition of the European Council and of the Council, Article 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.[[215]](#footnote-215) If a court doubts the validity of the respective EU act, it must refer a preliminary question to the CJEU.[[216]](#footnote-216) This would allow the CJEU to rule on the proper interpretation of Article 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 the allegedly 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 almost 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 4.2.2 above as well, however, even if Cotter’s interpretation of Article 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, Article 10 TEU may also be directly invoked against a Member State whose government is not democratically accountable, as discussed above in the context of Article 258 TFEU. The same approach could possibly be used by individual litigants, who could invoke Article 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.[[217]](#footnote-217) Since Article 10 TEU quite clearly stipulates that the governments of the Member States are democratically accountable, however, it seems that in principle this provision provides a sufficiently clear and unconditional obligation for Member States.

The advantage of this route would be that anynational measure that has been approved or adopted by an undemocratic government of a Member State could be challenged. In the best case, a national court could ask preliminary questions to the CJEU on whether national measures adopted by a government that is not democratically accountable violate Article 10 TEU. Should the CJEU answer this question in the affirmative, all national courts are obliged to disapply national measures adopted by the government of that Member State.

As to Regulation 1141/2014, which has been discussed above as a specific implementation of Article 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.[[218]](#footnote-218) As the Preamble of this Regulation emphasises,

“European political parties and their affiliated European political foundations wishing to obtain recognition as such at Union level by virtue of European legal status and to receive public funding from the general budget of the European Union should respect certain principles and fulfil certain conditions. In particular, it is necessary for European political parties and their affiliated European political foundations to respect the values on which the Union is founded, as expressed in Article 2 TEU”.[[219]](#footnote-219)

## 4.3.1.4 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 Article 27 of the Charter does not have direct effect as it is not considered sufficiently clear and unconditional:

“[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices. Everyone is equal before the law.”

This is largely due to the openness of the provision’s wording: what are ‘appropriate’ levels? and in how much time is ‘in good time’? In *AMS*, the CJEU held that Article 27 “by itself does not suffice to confer on individuals a right which they may invoke as such”.[[220]](#footnote-220)The provisions in the Charter that relate to democracy do not leave as much open for interpretation. For example, Article 11 of the Charter, which secures the freedom of expression and information recites:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

Article 11 does not contain any ambiguous or open-ended norms similar to those we see in Article 27 of the Charter. The provision is clear and precise and much closer in nature to, for example, Article 21, which was previously confirmed by the Court to have direct effect.[[221]](#footnote-221) The wording of Article 21 is as follows:

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”

As we can see, Articles 11 and 21 are absolute in the same manner. Where Article 11 claims that *everyone has the right* to freedom of expression, Article 21 deals with *any discrimination*. Similarly, Article 11 decides that the freedom and pluralism of the media *shall be respected*, whilst Article 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 Article 10, which decides that *everyone has the right* to freedom of thought, conscience and religion, and Article 12 which provides that *everyone has the right* to freedom of peaceful assembly and to freedom of association. Considering the above, Articles 10, 11 and 12 are arguably all sufficiently clear and precise and may therefore have direct effect.

This does, however, not mean that Articles 10, 11 and 12 are always applicable. After all, the Charter only applies to national measures implementing EU law,[[222]](#footnote-222) which means national measures that are within the scope of EU law.[[223]](#footnote-223) This brings with it some inevitable limitations to the applicability of direct effect, ultimately reducing the possibility to enforce the 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[[224]](#footnote-224) or relevant EU harmonisation that regulates the subject-matter of the national measure.[[225]](#footnote-225) 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.[[226]](#footnote-226) Therefore, the Charter is applicable as well. The freedom of expression, the freedom of thought and the freedom of assembly and association could likewise be enforced against all measures which affect any of the fundamental freedoms, also by individual litigants before national courts.

## 4.3.3 Indirect effect

Indirect effect is also known as consistent interpretation and requires that national institutions interpret national law in a manner that is consistent with EU law.[[227]](#footnote-227) Indirect effect may be applicable when there is a norm in the national legal order that is not in line with EU law. In such cases, a national court may interpret national law as if it were in line with EU law. This stands even when the non-conforming national norm was adopted a long time before the relevant EU law came into force.[[228]](#footnote-228) 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.[[229]](#footnote-229)

However, indirect effect is only possible using the interpretative methods recognised by national law.[[230]](#footnote-230) Second, indirect effect may be limited by general principles of law, such as legal certainty, legitimate expectation and non-retroactivity.[[231]](#footnote-231) Such 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.[[232]](#footnote-232) In particular, consistent interpretation may not lead to or increase criminal liability.[[233]](#footnote-233) Third, a provision of national law may not be interpreted *contra legem* or ‘against the law’.[[234]](#footnote-234) 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.[[235]](#footnote-235) This paragraph will analyse the possibility for indirect effect in light of Article 2 TEU, Article 10 TEU and the Charter.

Member States must always consider the values of Article 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.[[236]](#footnote-236) It is difficult to establish whether a Member State acts in compliance with Union law when said Union law – the value of democracy – is vague. However, based on my earlier *Defrenne* analogy,[[237]](#footnote-237) 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.[[238]](#footnote-238) 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.[[239]](#footnote-239) I therefore conclude that Article 2 TEU may 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 could 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 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 could be national laws related to judicial institutional reform, the *trias politica*, and checks and balances.[[240]](#footnote-240) In such a situation, indirect effect of Article 2 TEU could direct national courts to respect the value of democracy as much as possible.

With regard to Cotter’s interpretation of Article 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 Article 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.[[241]](#footnote-241) 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.[[242]](#footnote-242)

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. After all, recalling the words of former Advocate General Sharpston once again, this would constitute “an artificial or strained interpretation of national law”.[[243]](#footnote-243) 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.

## 4.3.4 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 thesis. 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 difference in willingness to apply the value of democracy between Member States and EU institutions.

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.[[244]](#footnote-244) 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, Article 2 TEU or Article 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 Articles 2 and 10 TEU, preliminary reference procedures may be necessary.

This leads into the second pitfall of decentralised enforcement, namely the potential unwillingness of national courts to engage with the CJEU via the preliminary question procedure of Article 267 TFEU. National courts may not be willing to apply European values such as democracy or consider it binding law.[[245]](#footnote-245) Such extreme unwillingness was, for example, portrayed by the Polish constitutional court recently. In its move, the Polish court decided that Poland does not have to follow an interim judgment of the CJEU, because Polish constitutional law has supremacy over European law.[[246]](#footnote-246) Although the CJEU’s case law has been very clear about the supremacy of EU law,[[247]](#footnote-247) when national courts of Member States fail to acknowledge its supremacy, decentralised enforcement will not be effective.

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 Advocate General Bobek, this mirrors exactly the current situation in Poland.[[248]](#footnote-248) 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.[[249]](#footnote-249)

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”.[[250]](#footnote-250) 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.[[251]](#footnote-251) First, the principle of equivalencerequires that procedures involving the rights of individuals provided for by EU law cannot be less favourable than those involving similar procedures involving merely national law.[[252]](#footnote-252) 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.[[253]](#footnote-253) 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 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, which complicates the situation. Centralised enforcement against excessively burdensome procedural rules, using Article 258 or 259 TFEU, can also be burdensome 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 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 getting a preliminary reference.[[254]](#footnote-254)

# 5. Conclusion

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

The core of Article 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 Article 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 thesis 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 different methods of enforcement, a distinction should be made between centralised and decentralised enforcement. The abovementioned ‘core’ or ‘essence’ of Article 2 TEU could have direct effect in the same way that the abolition of discrimination between men and women in Article 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 Articles 258–260 TFEU. As this thesis showed, Article 2 TEU is concretised in several other Treaty provisions, including in particular Article 10 TEU, Article 21 TEU and several Charter provisions. Most of these provisions can be enforced at an EU level. Several of them, 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 Article 10 TEU. These Charter provisions can also be enforced at central level through Articles 258–260 TFEU. The unique nature of Article 10 TEU entails that it may even be enforced by challenging an EU act using the action for annulment in Article 263 TFEU.

Most of these methods of enforcement 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 Article 7 TEU. While enforcing democracy as such is unlikely to be successful due to the procedural difficulties of Article 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 Article 2 TEU, including the rule of law. Two recent examples show that the brick-by-brick approach may well 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 Article 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. Both democracy and the rule of law are not just abstract values enshrined in Article 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 thesis 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 ensure that the value of democracy is upheld within the EU.

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## 6.2.1.1 Court of Justice

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13. 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) 54 *Journal of Common Market Studies* 1050; L Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) *Jean Monnet Working Paper* 04/09; P Craig, ’Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework’ [1997] *Public Law* 467. [↑](#footnote-ref-13)
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15. E.g. ibid; D Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 *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) 97 *Columbia Law Review* 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. [↑](#footnote-ref-15)
16. E.g. Magen, ‘Cracks in the Foundations’ (n 13). 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’ European Commission, ‘Communication: A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final, 4. See also Venice Commission, *Rule of Law Checklist* (Council of Europe, May 2016), 16, available at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\_of\_Law\_Check\_List.pdf. 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) 32 *Law and Philosophy* 793. [↑](#footnote-ref-16)
17. 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* (n 16) 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). [↑](#footnote-ref-17)
18. ibid 16; KL Scheppele, D Kochenov and B Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3. [↑](#footnote-ref-18)
19. See e.g. L Pech and KL Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; K Lenaerts, ‘New Horizons for the Rule of Law within the EU’ (2020) 21 *German Law Journal* 29; D Kochenov and L Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 512. 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* 79/2014. [↑](#footnote-ref-19)
20. *Refah Partisi* *(the Welfare Party) and Others v. Turkey,* app nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003), para. 43. [↑](#footnote-ref-20)
21. 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) 21 *Columbia Journal of European Law* 289. [↑](#footnote-ref-21)
22. J Linz and A Stepan (eds), *The Breakdown of Democratic Regimes* (Johns Hopkins University Press 1978); S Issacharoff, ‘Fragile Democracies’ (2007) 120 *Harvard Law Review* 1405; S Choudhry, ‘Resisting democratic Backsliding: An Essay on Weimar, Self-enforcing Constitutions, and the Frankfurt School’ (2018) 7 *Global Constitutionalism* 54. [↑](#footnote-ref-22)
23. European Commission, ‘Communication: The Rule of Law Situation in the European Union’, COM (2020) 580 final. [↑](#footnote-ref-23)
24. For reasons of simplicity, this thesis refers throughout to ‘the EU’ also in respect of the European Economic Community (EEC) and the European Communities (EC) Treaties. [↑](#footnote-ref-24)
25. Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* (Democratic Progress Institute 2016) 9. [↑](#footnote-ref-25)
26. ibid. [↑](#footnote-ref-26)
27. 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. Article 237 EEC. See also Democratic Progress Institute, *The Role of European Union Accession* (n 25) 11; European Parliamentary Research Service, ‘The European Parliament and Greece’s Accession to the European Community’ (2021) 2. [↑](#footnote-ref-27)
28. Democratic Progress Institute, *The Role of European Union Accession* (n 25) 12. [↑](#footnote-ref-28)
29. ibid. [↑](#footnote-ref-29)
30. See e.g. European Parliamentary Research Service, ‘Greece’s Accession’ (n 27) 5. [↑](#footnote-ref-30)
31. D Kochenov, *2008 EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008). [↑](#footnote-ref-31)
32. European Parliamentary Research Service, ‘Greece’s Accession’ (n 27) 2. [↑](#footnote-ref-32)
33. 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 ‘Interview with Hans-August Lücker: the Association Agreement between Greece and the EEC’ (Bonn, 15 May 2006), available at https://www.cvce.eu/en/obj/interview\_with\_hans\_august\_lucker\_the\_association\_agreement\_between\_greece\_and\_the\_eec\_bonn\_15\_may\_2006-en-c0a40276-36e3-4263-ad73-888578b88254.html. [↑](#footnote-ref-33)
34. Democratic Progress Institute, *The Role of European Union Accession* (n 25) 15. [↑](#footnote-ref-34)
35. ibid. [↑](#footnote-ref-35)
36. 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. For more on the Copenhagen criteria, see sections 2.2.2 and 2.3.4. [↑](#footnote-ref-36)
37. See for more on the role of the value of democracy in EU external policy, section 3.3. [↑](#footnote-ref-37)
38. The preamble of the Charter also refers to the rule of law as a ‘principle’. See also to this extent See also Pech ‘The Rule of Law as a Constitutional Principle’ (n 13) 20. [↑](#footnote-ref-38)
39. ibid. [↑](#footnote-ref-39)
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. [↑](#footnote-ref-40)
41. See also Pech ‘The Rule of Law as a Constitutional Principle’ (n 13) 21. [↑](#footnote-ref-41)
42. ibid. [↑](#footnote-ref-42)
43. Note the manner in which Article 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) 20 *German Law Journal* 1182, 1187. [↑](#footnote-ref-43)
44. ibid 1188. [↑](#footnote-ref-44)
45. For an overview of the debate, see e.g. Scheppele, Kochenov and Grabowska-Moroz, ‘EU Values’ (n 18), with further references. [↑](#footnote-ref-45)
46. See e.g. L Solum, ‘Legal theory Lexicon: Rules, Standards and Principles’ (*Legal Theory Blog*, 29 September 2019); 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 ECJ, and therefore not the Member States, who 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, see ibid. [↑](#footnote-ref-46)
47. See e.g. D Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed’ (2014) 33 *Polish Yearbook of International Law* 145, 149–150; S Lucarelli, ‘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 3.2 for more on the external dimension of democracy. [↑](#footnote-ref-47)
48. This follows from an analysis of CJEU case law, see Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1; Case 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) 38 *Fordham International Law Journal* 955; E Spaventa, ‘A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13’ (2015) 22 *Maastricht Journal of European and Comparative Law* 35. [↑](#footnote-ref-48)
49. See further section 3. [↑](#footnote-ref-49)
50. J Wouters, ‘Revisiting Art. 2 TEU: A True Union of Values?’ (2020) 5 *European Papers* 255, 262. [↑](#footnote-ref-50)
51. European Commission, ‘Opinion on Serbia’s Application for Membership of the European Union’, COM (2011) 668 final, 2. [↑](#footnote-ref-51)
52. ibid 5. [↑](#footnote-ref-52)
53. See for more on the Copenhagen criteria, sections 2.2.2 and 2.2.3. [↑](#footnote-ref-53)
54. European Commission, ‘Communication: EU Enlargement Policy’, COM (2016) 715 final, 17. See furthermore European Commission, ‘Commission Staff Working Document: Turkey 2016 Report’, SWD (2016) 366 final, 7. [↑](#footnote-ref-54)
55. See e.g. J Wouters, ‘Revisiting Art. 2 TEU: A True Union of Values?’ (2020) 5 *European Papers* 255, 264. [↑](#footnote-ref-55)
56. 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 European Commission, ‘Communication: Opinion on Montenegro’s Application for Membership of the European Union’, COM (2010) 670 final, 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 European Commission, ‘Commission Staff Working Document: Albania 2020 Report’, SWD (2020) 354 final, 36. [↑](#footnote-ref-56)
57. Case C‑896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 62. [↑](#footnote-ref-57)
58. European Council, ‘Conclusions of the Presidency’ (Copenhagen, 21–22 June 1993) 13. [↑](#footnote-ref-58)
59. European Council, ‘Presidency Conclusions’ (Madrid, 15–16 December 1995) 18. [↑](#footnote-ref-59)
60. https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\_en. [↑](#footnote-ref-60)
61. European Council, ‘Conclusions’ (n 58) 13. [↑](#footnote-ref-61)
62. As well as respect for human rights and minorities. [↑](#footnote-ref-62)
63. 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 European Commission, ‘Opinion on Serbia’s Application for Membership’ (n 51) 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 European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 5. Note again the inconsistent use of terminology. ‘Principles’ and ‘values’ are used by the Commission interchangeably. [↑](#footnote-ref-63)
64. For more on Article 10 in conjunction with the value of democracy, see section 3.1. [↑](#footnote-ref-64)
65. And, therefore, in the sense of Article 2 TEU. [↑](#footnote-ref-65)
66. European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 5; European Commission, ‘Opinion on Serbia’s Application for Membership’ (n 51) 5. [↑](#footnote-ref-66)
67. ibid 6. [↑](#footnote-ref-67)
68. European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 5. [↑](#footnote-ref-68)
69. European Commission, ‘Opinion on Serbia’s Application for Membership’ (n 51) 6. [↑](#footnote-ref-69)
70. European Commission, ‘EU Enlargement Policy’ (n 54) 5. [↑](#footnote-ref-70)
71. ibid. [↑](#footnote-ref-71)
72. See e.g. European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 5. [↑](#footnote-ref-72)
73. 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 Carter Center, ‘Election Standards’, available at https://eos.cartercenter.org. [↑](#footnote-ref-73)
74. European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 5. [↑](#footnote-ref-74)
75. ibid. [↑](#footnote-ref-75)
76. 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 ibid6. [↑](#footnote-ref-76)
77. See e.g. Article 10(1) and (2) TEU. [↑](#footnote-ref-77)
78. European Commission, ‘Opinion on Serbia’s Application for Membership’ (n 51) 6. [↑](#footnote-ref-78)
79. ibid. [↑](#footnote-ref-79)
80. ibid; European Commission, ‘Opinion on Montenegro’s Application for Membership’ (n 56) 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* (OSCE 2020). [↑](#footnote-ref-80)
81. See European Commission, ‘Opinion on Serbia’s Application for Membership’ (n 51) 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. [↑](#footnote-ref-81)
82. 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 European Commission, ‘Albania 2020 Report’ (n 56) 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* (OSCE 2020). Similar recommendations are found in the OSCE/ODIHR report on the North Macedonian elections, see Office for Democratic Institutions and Human Rights, *North Macedonia Early Parliamentary Elections 15 July 2020* (n 80). [↑](#footnote-ref-82)
83. 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 [2014] OJ L317/1, as amended by Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 [2018] OJ L114I/1. [↑](#footnote-ref-83)
84. For the substantive context of the Regulation, see section 3.1. [↑](#footnote-ref-84)
85. 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 European Commission, ‘Communication: Opinion on Croatia’s Application for Membership of the European union’ COM (2004) 257 final;European Commission, ‘Commission Staff Working Paper: Croatia 2011 Progress Report’, SEC (2011) 1200 final, 5–8. This shows that the substantive elements of the Copenhagen criteria are clear enough to be implemented directly. [↑](#footnote-ref-85)
86. See e.g. Pech and Scheppele, ‘Illiberalism Within’ (n 19). [↑](#footnote-ref-86)
87. 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) 43 *Comparative Political Studies* 457. [↑](#footnote-ref-87)
88. European Commission, ‘Accession criteria’, available at https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\_en, accessed 3 July 2021 (emphasis added). [↑](#footnote-ref-88)
89. 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 [1994] OJ L368/38. [↑](#footnote-ref-89)
90. Article 1 Act concerning the election of the members of the European Parliament by direct suffrage, *OJ* L 278, October 1976. [↑](#footnote-ref-90)
91. Article 2 Act concerning the election of the members of the European Parliament by direct suffrage, *OJ* L 278, October 1976. [↑](#footnote-ref-91)
92. 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. [↑](#footnote-ref-92)
93. Note that Article 14(1) of Directive 93/109/EC restricts this right to some extent. [↑](#footnote-ref-93)
94. European Commission, ‘Communication: Securing Free and Fair European Elections’, COM (2018) 637 final. [↑](#footnote-ref-94)
95. ibid. [↑](#footnote-ref-95)
96. 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 European Commission, ‘Communication: Securing Free and Fair European Elections’, COM (2018) 637 final. [↑](#footnote-ref-96)
97. European Commission, ‘Communication: Securing Free and Fair European Elections’, COM (2018) 637 final. [↑](#footnote-ref-97)
98. ibid. [↑](#footnote-ref-98)
99. ibid. [↑](#footnote-ref-99)
100. 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’ *Politico* (Arlington, 18 May 2021). [↑](#footnote-ref-100)
101. ibid. [↑](#footnote-ref-101)
102. J Cotter, ‘The Last Chance Saloon’ (*Verfassungsblog*, 19 May 2020), available at https://verfassungsblog.de/the-last-chance-saloon/, accessed 28 June 2021. [↑](#footnote-ref-102)
103. ibid. [↑](#footnote-ref-103)
104. ibid. [↑](#footnote-ref-104)
105. ibid. [↑](#footnote-ref-105)
106. ibid. [↑](#footnote-ref-106)
107. K Bradley, ‘Showdown at the Last Chance Saloon’ (*Verfassungsblog*, 23 May 2020), available at https://verfassungsblog.de/showdown-at-the-last-chance-saloon/ , accessed 28 June 2021. [↑](#footnote-ref-107)
108. ibid. [↑](#footnote-ref-108)
109. ibid. [↑](#footnote-ref-109)
110. Cotter, ‘The Last Chance Saloon’ (n 102). [↑](#footnote-ref-110)
111. 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 [2014] OJ L317/1. [↑](#footnote-ref-111)
112. 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) 17 *International Journal of Constitutional Law* 617. See also section 3.3.1-3.3.3 of this thesis for the place of illiberalism in the context of democracy. [↑](#footnote-ref-112)
113. 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’ *Politico* (Arlington, 3 March 2021). [↑](#footnote-ref-113)
114. 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 [2014] OJ L317/1, preamble recital 33. [↑](#footnote-ref-114)
115. See section 2.2.2. [↑](#footnote-ref-115)
116. This is particularly the case, because transparency is a foundational value in EU law, see for instance Article 10(3) TEU, 11(2) TEU, Article 15 TFEU and Article 42 of the Charter. [↑](#footnote-ref-116)
117. For more on the enforcement of Regulation 1141/2014 on Member State level, see section 4.2. [↑](#footnote-ref-117)
118. Pech and Grogan, ‘EU External Human Rights Policy’ (n 47) 344. [↑](#footnote-ref-118)
119. 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. [↑](#footnote-ref-119)
120. Council of the EU, ‘Action Plan on Human Rights and Democracy’ (December 2015) 7. See also Pech and Grogan, ‘EU External Human Rights Policy’ (n 47) 346. [↑](#footnote-ref-120)
121. See also Pech and Grogan, ‘EU External Human Rights Policy’ (n 47) 351. [↑](#footnote-ref-121)
122. EU Annual Report on Human Rights and Democracy in the World 2020 (2021) available at https://eeas.europa.eu/sites/default/files/eeas\_annual\_report\_humanity\_2021\_web.pdf, accessed 1 August 2021, 108. [↑](#footnote-ref-122)
123. ibid 121 [↑](#footnote-ref-123)
124. The ENP applies to Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. See e.g. European Parliament, ‘Factsheet on The European Neighbourhood Policy’ (2021), available at https://www.europarl.europa.eu/factsheets/en/sheet/170/the-european-neighbourhood-policy, accessed 1 August 2021, 1. [↑](#footnote-ref-124)
125. See e.g. also Pech and Grogan, ‘EU External Human Rights Policy’ (n 47) 447. See also N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (Hart Publishing 2014). [↑](#footnote-ref-125)
126. Which in turn heavily relies on the Copenhagen criteria as explored in sections 2.3.2 and 2.3.3. [↑](#footnote-ref-126)
127. European Parliament, ‘Factsheet’ (n 101) 1. [↑](#footnote-ref-127)
128. ibid. [↑](#footnote-ref-128)
129. ibid. [↑](#footnote-ref-129)
130. 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. [↑](#footnote-ref-130)
131. 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. [↑](#footnote-ref-131)
132. Article 52(3) Charter. [↑](#footnote-ref-132)
133. KW Saunders, *Free Expression and Democracy: a Comparative Study* (Cambridge University Press 2017) 1. [↑](#footnote-ref-133)
134. See e.g. Case C-260/89 *lliniki 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. [↑](#footnote-ref-134)
135. Article 11(1) Charter; Article 10(1) ECHR. [↑](#footnote-ref-135)
136. Article 11(2) Charter; Article 10(2) ECHR. [↑](#footnote-ref-136)
137. *Jerusalem v. Austria*, app no 26958/95 (ECtHR, 27 February 2001) para. 36. [↑](#footnote-ref-137)
138. ibid para. 38. [↑](#footnote-ref-138)
139. ibid. [↑](#footnote-ref-139)
140. ibid paras. 38–39. [↑](#footnote-ref-140)
141. *Kalaç v. Turkey,* app no 20704/92 (ECtHR, 1 July 1997)para. 27. [↑](#footnote-ref-141)
142. *United Communist Party of Turkey and Others v. Turkey*, app no 19392/92 (ECtHR, 30 January 1998) para. 45. [↑](#footnote-ref-142)
143. ibid para. 46. [↑](#footnote-ref-143)
144. OSCE/ODIHR, ‘Guidelines on Freedom of Peaceful Assembly’(2nd edn, ODIHR 2010) 15. [↑](#footnote-ref-144)
145. ibid 16. [↑](#footnote-ref-145)
146. ibid 17. [↑](#footnote-ref-146)
147. ibid. [↑](#footnote-ref-147)
148. ODIHR, ‘Guidelines on Freedom of Association’ (ODIHR 2015) 17; *United Communist Party of Turkey and Others v. Turkey*, app no 19392/92 (ECtHR, 30 January 1998); *Refah Partisi* *(the Welfare Party) and Others v. Turkey,* app nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003); *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania,* app no 46626/99(ECtHR, 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. [↑](#footnote-ref-148)
149. ODIHR, ‘Guidelines on Freedom of Association’ (n 125) 17. [↑](#footnote-ref-149)
150. OSCE/ODIHR and Venice Commission, ‘Guidelines on Political Party Regulation’(ODIHR 2011) para. 9. [↑](#footnote-ref-150)
151. ibid 89–96. [↑](#footnote-ref-151)
152. *Refah Partisi* *(the Welfare Party) and Others v. Turkey,* app nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) paras. 126–135; and *Herri Batasuna and Batasuna v. Spain,* appnos 25803/04 and 25817/04 (ECtHR, 30 June 2009). [↑](#footnote-ref-152)
153. European Commission, ‘Communication: European Democracy Action Plan’, COM (2020) 790 final. [↑](#footnote-ref-153)
154. ibid section 1. [↑](#footnote-ref-154)
155. ibid. [↑](#footnote-ref-155)
156. ibid. [↑](#footnote-ref-156)
157. See e.g. L Pech and KL Scheppele, ‘Poland and the European Commission, Part I: A Dialogue of the Deaf?’ (*Verfassungsblog* 3 January 2017), available at https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/, accessed 1 August 2021; L Pech and KL Scheppele, ‘Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law’ (*Verfassungsblog* 6 January 2017), available at https://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/, accessed 1 August 2021; L Pech and KL Scheppele, ‘Poland and the European Commission, Part III: Requiem for the Rule of Law’ (*Verfassungsblog* 3 March 2017), available at https://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/, accessed 1 August 2021; Pech and Scheppele, ‘Illiberalism Within’ (n 19); TT Koncewicz, ‘Of Institutions, Democracy, Constitutional Self-Defence’ (2016) 53 *Common Market Law Review* 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. [↑](#footnote-ref-157)
158. For the exact extent of Article 2 TEU, see section 2.2. [↑](#footnote-ref-158)
159. Article 7(1) TEU. [↑](#footnote-ref-159)
160. Article 7(2) TEU. [↑](#footnote-ref-160)
161. Article 7(3) TEU. See also Kochenov, ‘Busting the Myths Nuclear’ (n 10) 5. [↑](#footnote-ref-161)
162. S Greer, A Williams, ‘Human Rights in the Council of Europe and the EU: Towards “Individual”, “Constitutional” or “Institutional” Justice?’ (2009) 15 *European Law Journal* 462. [↑](#footnote-ref-162)
163. See e.g. European Parliament, ‘Rule of law in Hungary: Parliament calls on the EU to act’ (12 September 2018), available at https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act, accessed 1 August 2021; 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. [↑](#footnote-ref-163)
164. Article 7(3) TEU. See also Kochenov, ‘Busting the Myths Nuclear’ (n 10) 8. [↑](#footnote-ref-164)
165. See e.g. von der Burchard, ‘Hungary and Poland escalate budget fight over rule of law’ (n 8), and the continuous breaches of core values in both Poland and Hungary, for example the recently adopted Hungarian anti-LGBTIQ legislation. [↑](#footnote-ref-165)
166. Although technically, the European Parliament can call on others to act in the context of Article 7(2) TEU. See Rule 83, European Parliament, ‘Rules of Procedure’ (January 2017). See in this context also Kochenov, ‘Busting the Myths Nuclear’ (n 10) 9. [↑](#footnote-ref-166)
167. A breach of Article 2 values should furthermore always be balanced against national identity, see Coli, ‘Article 7 TEU’ (n 10) 280–281. [↑](#footnote-ref-167)
168. von Bogdandy and Ioannidis, ‘Systemic Deficiency’ (n 14). [↑](#footnote-ref-168)
169. See e.g. Kochenov, ‘Busting the Myths Nuclear’ (n 10) 9; Coli, ‘Article 7 TEU’ (n 10) 291. [↑](#footnote-ref-169)
170. This is because Article 354 TFEU refers to the requirements of Article 238(3)(b), see also Kochenov, ‘Busting the Myths Nuclear’ (n 10) 10. [↑](#footnote-ref-170)
171. Some scholars furthermore question the effectiveness of Article 7(3), even if it were triggered. Article 7(3) does not propose specific sanctions, but instead allows the Council to choose sanctions that fit the situation. What is clear from the wording of the provision (“certain rights deriving from […] the Treaty”) is that sanctions may be both economic and non-economic. The requirement that “the possible consequences of such suspension on the rights and obligations of natural and legal persons” must be considered limits possible sanctions. It is incontrovertible that Article 7(3) does, however, not in any case, allow for the expulsion of a Member State. The only way that a Member State can leave the Union is through its own triggering of Article 50 TEU, see also Kochenov, ‘Busting the Myths Nuclear’ (n 10) 9. The effectiveness of the measures imposed if Article 7(3) were to be activated is, however, material for a different paper. [↑](#footnote-ref-171)
172. European Commission, ‘European Commission launches infringement against Poland over measures affecting the judiciary’ (29 July 2017), available at https://ec.europa.eu/commission/presscorner/detail/en/IP\_17\_2205. 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) 55 *Common Market Law Review* 1061, 1062. [↑](#footnote-ref-172)
173. Case C-286/12 *Commission v Hungary,* ECLI:EU:C:2012:687;Schmidt and Bogdanowicz, ‘The Infringement Procedure’ (n 172) 1063. [↑](#footnote-ref-173)
174. See von Bogdandy and Ioannidis, ‘Systemic Deficiency’ (n 14) 61; Schmidt and Bogdanowicz, ‘The Infringement Procedure’ (n 172) 1064. [↑](#footnote-ref-174)
175. Schmidt and Bogdanowicz, ‘The Infringement Procedure’ (n 172) 1064. [↑](#footnote-ref-175)
176. P Nicolaides, ‘“Member State v Member State” and Other Peculiarities of EU Law’ (*Maastricht University blog*, 24 June 2019), available at https://www.maastrichtuniversity.nl/blog/2019/06/“member-state-v-member-state”-and-other-peculiarities-eu-law, accessed 7 July 2021. [↑](#footnote-ref-176)
177. P Jaworek, ‘Upholding the Rule of Law in Times of Crisis: (Ineffective) Procedures Under Article 7 TEU and Possible Solutions’ (*KSLR EU Law Blog*, 16 February 2018), available at https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1230, accessed 9 July 2021. [↑](#footnote-ref-177)
178. European Commission, ‘European Commission launches infringement against Poland over measures affecting the judiciary’ (29 July 2017), available at https://ec.europa.eu/commission/presscorner/detail/en/IP\_17\_2205. [↑](#footnote-ref-178)
179. Case C‑896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311. [↑](#footnote-ref-179)
180. Case C‑896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 63. [↑](#footnote-ref-180)
181. Article 21 TEU, discussed in section 3, 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. [↑](#footnote-ref-181)
182. G Íñiguez, ‘The Enemy Within? Article 259 and the Union’s Intergovernmentalism’ (*The New Federalist*, 12 December 2020), available at https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr, accessed 7 July 2021. [↑](#footnote-ref-182)
183. Article 228 EC Treaty has since been replaced by Article 260 TFEU. [↑](#footnote-ref-183)
184. Hungarian Act no 79/ 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’ (*The Guardian*, 15 June 2021), available at https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lbgt-content-in-schools, accessed 7 July 2021. [↑](#footnote-ref-184)
185. European Commission, ‘EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people’ (15 July 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip\_21\_3668, accessed 31 July 2021. [↑](#footnote-ref-185)
186. Article 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. [↑](#footnote-ref-186)
187. European Commission, ‘EU founding values: Commission starts legal action against Hungary and Poland’ (n 185). [↑](#footnote-ref-187)
188. See further section 3.2 above. [↑](#footnote-ref-188)
189. Case 25/62 *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17. [↑](#footnote-ref-189)
190. 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. Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:197; 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) 29 *Fordham International Law Journal* 655. [↑](#footnote-ref-190)
191. 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). [↑](#footnote-ref-191)
192. Case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1. [↑](#footnote-ref-192)
193. Bobek, ‘The Effects of EU Law’ (n 191) 160. [↑](#footnote-ref-193)
194. ibid. [↑](#footnote-ref-194)
195. Case 2/74 *Jean Reyners v Belgian State*, ECLI:C:1974:68, para. 14. [↑](#footnote-ref-195)
196. Now Article 157 TFEU. Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, ECLI:EU:C:1976, paras. 21–24. 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) 38 *Yearbook of European Law* 18, 22. [↑](#footnote-ref-196)
197. Case 93/71 *Orsolina Leonesio v Ministero dell’agricoltura e foreste*, ECLI:EU:C:1972:39. [↑](#footnote-ref-197)
198. Case 9/70 *Franz Grad v Finanzamt Traunstein,* ECLI:EU:C:1970:78. [↑](#footnote-ref-198)
199. Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, para. 12. [↑](#footnote-ref-199)
200. Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, para. 14. See also for a more comprehensive overview Squintani and Lindeboom, ‘The Normative Impact of Invoking Directives’ (n 171) 22–23. This wide interpretation of the doctrine of direct effect was furthermore reiterated in judgments such as *Becker* and *Kraaijeveld*, which suggest that justiciability is a necessary and sufficient condition for EU law to have direct effect. See Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1981; Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV and Others v Gedeputeerde Staten van Zuid-Holland,* ECLI:EU:C:1996:404. Justiciability means in this context that a provision can be interpreted and applied by (national) courts. See for justiciability P Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (1983) 8 *European Law Review* 155, 176–177. Finally, for a more comprehensive overview, see Squintani and Lindeboom, ‘The Normative Impact of Invoking Directives’ (n 171) 22–24. [↑](#footnote-ref-200)
201. 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. [↑](#footnote-ref-201)
202. See e.g. Case C-619/16 *Kreuziger*, ECLI:EU:C:2018:872; Cases C-596/16 and C-570/16 *Bauer and WIllmeroth*, EU:C:2018:871; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2018:874. [↑](#footnote-ref-202)
203. See e.g. Case C-414/16 *Egenberger,* ECLI:EU:C:2018:257; Case C-556/17 *Torubarov*, ECLI:EU:C:2019:626. [↑](#footnote-ref-203)
204. Case C-537/16 *Garlsson Real Estate and Others*, ECLI:EU:C:2019:193. [↑](#footnote-ref-204)
205. See for a more comprehensive overview Bobek, ‘The Effects of EU Law’ (n 191) 162. [↑](#footnote-ref-205)
206. In the meaning of Pescatore, ‘The Doctrine of “Direct Effect”’ (n 200). See, however, Scheppele, Kochenov and Grabowska-Moroz, ‘EU Values’ (n 18). [↑](#footnote-ref-206)
207. See section 2.2.3. [↑](#footnote-ref-207)
208. See the analysis in sections 2.2.2 and 2.2.3 above. [↑](#footnote-ref-208)
209. Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, ECLI:EU:C:1976:56. [↑](#footnote-ref-209)
210. Case C‑896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 63 [↑](#footnote-ref-210)
211. ibid. [↑](#footnote-ref-211)
212. On such general pitfalls of decentralised enforcement, see section 4.3.4 below. [↑](#footnote-ref-212)
213. Cotter, ‘The Last Chance Saloon’ (n 102). [↑](#footnote-ref-213)
214. See section 3.1. [↑](#footnote-ref-214)
215. Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, paras 15–18. [↑](#footnote-ref-215)
216. ibid. [↑](#footnote-ref-216)
217. On possible problems related to national procedural autonomy, see section 4.3.4 below. [↑](#footnote-ref-217)
218. See for a comprehensive analysis of Regulation 1141/2014 J Morijn, ‘Responding to “Populist” Politics’ (n 112) 617. [↑](#footnote-ref-218)
219. 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 [2014] OJ L317/1, Preamble, recital 12. [↑](#footnote-ref-219)
220. Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2, para. 49. [↑](#footnote-ref-220)
221. 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. [↑](#footnote-ref-221)
222. Article 51(1) Charter. [↑](#footnote-ref-222)
223. Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105; Case C-206/13 *Cruciano Siragusa v Regione Sicilia*, ECLI:EU:C:2014:126. [↑](#footnote-ref-223)
224. 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. [↑](#footnote-ref-224)
225. E.g. Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105. [↑](#footnote-ref-225)
226. European Commission, ‘EU founding values: Commission starts legal action against Hungary and Poland’ (n 185). [↑](#footnote-ref-226)
227. Bobek, ‘The Effects of EU Law’ (n 191) 168. See also Case 14/83 Sabine *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. [↑](#footnote-ref-227)
228. Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, ECLI:EU:C:1990:395. [↑](#footnote-ref-228)
229. 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. [↑](#footnote-ref-229)
230. Bobek, ‘The Effects of EU Law’ (n 191) 172. [↑](#footnote-ref-230)
231. See e.g. Case C-105/14 *Taricco and Others*, ECLI:EU:C:2015:555; Case C-24/17 *Criminal proceedings against M.A.S. and M.B.*, ECLI:EU:C:2017:936. See also for a more detailed analysis the Opinion of Advocate General Bobek in Case C-574/15 *Criminal proceedings against Mauro Scialdone*, ECLI:EU:C:2017:553, paras. 137–181. [↑](#footnote-ref-231)
232. Bobek, ‘The Effects of EU Law’ (n 191) 173. [↑](#footnote-ref-232)
233. Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, ECLI:EU:1987:431. [↑](#footnote-ref-233)
234. See e.g. See e.g. Case C-414/16 *Egenberger,* ECLI:EU:C:2018:257, 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. [↑](#footnote-ref-234)
235. Opinion of Advocate General Sharpston of 30 November 2006 in Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, ECLI:EU:C:2006:755. [↑](#footnote-ref-235)
236. L Azoulai, ‘The “Retained Powers” Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’ (2011) 4 *European Journal of Legal Studies* 192. See also J Lindeboom, ‘Why EU Law Claims Supremacy’ (2018) 38 *Oxford Journal of Legal Studies* 328. [↑](#footnote-ref-236)
237. See section 4.3.1.2. [↑](#footnote-ref-237)
238. Similarly, Article 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) 20 *German Law Journal* 864; K Lenaerts, ‘Limits of Limitations: The Essence of Fundamental Rights in the EU’ (2019) 20 *German Law Journal* 779. [↑](#footnote-ref-238)
239. Lenaerts, ‘Limits of Limitations’ (n 238) 787–788. [↑](#footnote-ref-239)
240. On the relevance of *trias politica* and checks and balances for democracy, see section 2.2.3.2 above. [↑](#footnote-ref-240)
241. Case C-414/16 *Egenberger,* ECLI:EU:C:2018:257, para. 74–76, 79. [↑](#footnote-ref-241)
242. Case C-368/95 *Familiapress v Bauer Verlag*, ECLI:EU:1997:325; Case C-201/15 *AGET Iraklis*, ECLI:EU:C:2016:972. [↑](#footnote-ref-242)
243. Opinion of Advocate General Sharpston of 30 November 2006 in Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, ECLI:EU:C:2006:755. [↑](#footnote-ref-243)
244. This was recently illustrated by the already mentioned Commission’s action against Hungary’s anti-LGBTIQ law, see European Commission, ‘EU founding values: Commission starts legal action against Hungary and Poland’ (n 185). [↑](#footnote-ref-244)
245. For an extensive discussion on whether EU values are binding law, see Scheppele, Kochenov and Grabowska-Moroz, ‘EU Values’ (n 18), with further references. [↑](#footnote-ref-245)
246. S Erlanger and M Pronczuk, ‘Poland Escalates Fight with Europe Over the Rule of Law’ (*The New York Times*, 15 July 2021, updated 20 July 2021), available at https://www.nytimes.com/2021/07/15/world/europe/poland-hungary-europe.html, accessed 21 July 2021. Similar antics were portrayed by Germany 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). [↑](#footnote-ref-246)
247. See e.g. Case 6/64 *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66; Case 11/70 *Internationale Handelsgeschellschaft mbH v Einfuhr- und Vorratsstelle für Getreide hund Futtermittel*, ECLI:EU:C:1970:114; Case 106/77 *Amministrazione delle Finance 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. Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107. [↑](#footnote-ref-247)
248. Opinion of Advocate General Bobek in Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and Others*, ECLI:EU:C:2021:403. [↑](#footnote-ref-248)
249. 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’ (n 217). [↑](#footnote-ref-249)
250. Case 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:1976:188, para. 48. [↑](#footnote-ref-250)
251. Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188. [↑](#footnote-ref-251)
252. ibid. See also Case C-236/96 *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. [↑](#footnote-ref-252)
253. Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188: ‘[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 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, ECLI:EU:C:1983:318, para. 14. [↑](#footnote-ref-253)
254. 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’ (Press release No 39/19, 25 March 2019). [↑](#footnote-ref-254)