

## Chapter 12

### OPERATIONALISING THE TREATIES TO PROTECT DEMOCRACY IN TIMES OF EMERGENCY

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#### 1. Introduction - a battle for EU values in the Member States<sup>1</sup>

The current pandemic in Europe and beyond has challenged the essence of democratic orders. In many EU Member States a state of emergency was introduced.<sup>2</sup> These states of emergency come in certain cases with a far-reaching curtailment of fundamental liberties, the free press and civil society, and even basic democratic functions.<sup>3</sup> While a temporary state of emergency can be justified amid the COVID-19 pandemic, some governments - at least temporarily - undermined the values of democracy.<sup>4</sup> This Chapter explores to what extent the EU can operationalise the value of democracy enshrined in Article 2 TEU and protect it within the Member States.<sup>5</sup>

The autocratic tendencies of certain Member States' governments have, over the last few years, led to an open conflict with the European Commission.<sup>6</sup> The Commission, as guardian of the Treaties (Article 17(1) TEU), must protect the values of the EU which are enshrined in Article 2 TEU. Changes to the judiciary, a curtailment of civil society, and non-implementation

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<sup>1</sup> This contribution reflects the authors' views only.

<sup>2</sup> Karolina Zbytniewska, 'Coronavirus: Which European countries introduced the state of emergency?', *Euractiv*, 6 May 2020.

<sup>3</sup> Edit Zgut, 'Authoritarian Regime Durability. The Bread and Butter of Hungarian and Polish Backsliding during COVID-19', *Visegrad Insight*, 7 May 2020; Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers', *Verfassungsblog*, 6 April 2020.

<sup>4</sup> Laura Livingston, 'Understanding Hungary's Authoritarian Response to the Pandemic', *Lawfare*, 14 April 2020.

<sup>5</sup> For further reflection on this topic, see Chapter 7 of this book by Ulla Neergard & Sybe de Vries, and Chapter 33 by José Igreja Matos.

<sup>6</sup> Giulio Preti, 'The Commission fights Poland all the way over the rule of law', *KSLR EU Law Blog*, 1 April 2020.

of Council Decisions<sup>7</sup> openly violate some of the values enshrined in Article 2 TEU. These developments have been dubbed as a ‘rule of law crisis’ in the EU. The current circumstances lead us to ask if we are now facing a ‘democracy crisis’ in the EU.

The COVID-19 pandemic seems to be the next chapter in this ongoing ‘value crisis’ in the EU. While the Polish Government initially avoided enacting the state of emergency to ensure the re-election of the incumbent Polish President,<sup>8</sup> the Hungarian Government has enacted an emergency law with wide-ranging powers for the government.<sup>9</sup> The situation in both Member States rapidly changed in the first weeks of the pandemic.<sup>10</sup> These cases demonstrate that thought must be given to whether the EU can ensure democratic functioning in the Member States. This Chapter aims to initiate a debate about whether the principle of democracy in the EU legal order can be the subject of legal proceedings.

## 2. The Commission’s approach to safeguarding the values of Article 2 TEU

The Commission moved from a hesitant stance in 2012 to an active stance with regard to value enforcement in 2020. The original tool enshrined in the Treaties to protect the values of Article 2 TEU is the Article 7 TEU procedure. Having said that, this political process to counteract infringements upon the values of Article 2 TEU has been described as dead by scholars.<sup>11</sup> In particular, the requirement of unanimity voting under Article 7(2) TEU seems politically unachievable at this point. Similarly, the so-called rule of law framework, initiated by the Commission in 2014, has not yielded any substantive results despite an exchange of letters sent in vain.<sup>12</sup> Not until recently has the Commission started to use the infringement procedure under Article 258 TFEU to litigate value infringements committed by the Member States. This procedure allows the Commission to sue Member States if they fail to comply with EU law. Initially a purely legal tool, it has yielded substantial results and led to several judgments in which the Court of Justice declared large parts of the Polish reform of the judiciary as incompatible with

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<sup>7</sup> Niels Kirst, ‘Protecting the Formal Rule of Law in the EU’s Asylum Policy: The CJEU’s Judgment in C-757/17 (The Asylum Relocation Mechanism)’, *Bridge Network EU*, 19 May 2020.

<sup>8</sup> Aleksandra Kustra-Rogatka, ‘The Constitution as a Bargaining Chip. COVID-19, Presidential elections in Poland and a Constitutional Amendment Bill under Consideration’, *Verfassungsblog*, 21 April 2020. In the meantime, the Polish Government decided to postpone the election to a later date: see Marcin Zaborowski, ‘The Cancelled Election: How Law and Justice is Breaking Democracy in Poland’, *Visegrad Insight*, 11 May 2020.

<sup>9</sup> Specifically, the emergency law allows the executive to rule by decree, prescribes imprisonment for the dissemination of ‘fake news’ and it lacks a sunset clause. See Gábor Halmai and Kim Lane Scheppelle, ‘Don’t Be Fooled by Autocrats! Why Hungary’s Emergency Violates Rule of Law’, *Verfassungsblog*, 22 April 2020. An English version of the Hungarian emergency law is available here at < <https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/> >.

<sup>10</sup> Marcin Zaborowski, ‘The Cancelled Election: How Law and Justice is Breaking Democracy in Poland’, cit.; ‘Orban gibt Sondervollmachten zurück’, *DW*, 15 May 2020.

<sup>11</sup> Dimitry Kochenov, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’, 38 *Polish Yearbook of International Law*, 2018, pp. 166-187.

<sup>12</sup> Molly O’Neal, ‘The European Commission’s Enhanced Rule of Law Mechanism’, SWP Comment 2019/C 48, December 2019.

the value of the rule of law in the EU legal order.<sup>13</sup> Scholars and commentators have lauded this new line of case law of the Court of Justice and have urged the Commission to intensify the use of Article 258 TFEU to protect the values of Article 2 TEU.<sup>14</sup> As infringement proceedings under Article 258 TFEU have proven to be a valid tool to protect the rule of law in the Member States, does Article 258 TFEU have the same prospects with regard to the protection of democracy in the Member States?

### 3. Safeguarding EU values in the Member States via the Court of Justice

#### 3.1. Rule of Law

In 2018, the Court of Justice provided a potential remedy to the ongoing rule of law crisis in certain Member States. In the seminal *ASJP* judgment,<sup>15</sup> which concerned a lowering of the salary of Portuguese judges, the Court found that the value of the rule of law enshrined in Article 2 TEU can be operationalised via Article 19 TEU.<sup>16</sup> This was a ground-breaking development in EU law. The case established the competence of the Court to assess and protect the independence of the judiciary in the Member States.

Subsequently, the Court used this new competence to declare that the Polish judiciary reform would infringe the principle of effective judicial protection in EU law in *Commission v Poland*.<sup>17</sup> This was the first fully-fledged occasion on which the Court applied Article 19 TEU to protect the value of the rule of law in the Member States.

The Court found that Article 19(1), second subparagraph, TEU requires Member States to provide effective legal protection in areas covered by EU law. As Member States' courts may apply EU law, they fall within the *ratione materiae*, and therefore, Member States' governments have to ensure that they provide for an independent judiciary. Thus, Article 19 TEU operationalised the value of the rule of law (through an independent judiciary) enshrined in Article 2 TEU.

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<sup>13</sup> See for example the Court of Justice's Press Release No. 81/19 of 24 June 2019 (available at < <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190081en.pdf> >) concerning the Judgment of the Court of Justice in *Commission v Poland* (C-619/18, EU:C:2019:531).

<sup>14</sup> Olivier De Schutter, 'Infringement proceedings as a tool for the enforcement of fundamental rights in the European Union', *Open Society European Policy Institute*, October 2017.

<sup>15</sup> Judgment of the Court of Justice, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (C-64/16, EU:C:2018:117).

<sup>16</sup> Laurent Pech and Sébastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*', *EU Law Analysis*, 13 March 2018.

<sup>17</sup> Judgment of the Court of Justice, *Commission v Poland* (C-619/18, EU:C:2019:531). On this, see Jakub Jaraczewski, 'Age is the limit? Background of the CJEU case C-619/18 *Commission v Poland*', *Verfassungsblog*, 28 May 2019.

### 3.2. Democracy

The methodology established by the Court of Justice in *ASJP* to protect the value of the rule of law in the Member States could serve as a blueprint to protect the value of democracy. Where the value of the rule of law finds specific expression in Article 19 TEU, the same is true for the value of democracy and Article 10 TEU. This was affirmed by the Court in *Junqueras*:

‘[...] Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy which gives concrete form to the value of democracy referred to in Article 2 TEU [...].’<sup>18</sup>

Does this imply that Article 10 TEU, like Article 19(1), second subparagraph, TEU, contains normative substance which would render it applicable to the democratic functioning of the Member States?

Article 10(1) TEU states that the functioning ‘of the Union’ shall be founded on representative democracy. It appears that this paragraph refers solely to the EU as a legal entity which is distinct from its Member States. The Member States, in turn, are more immediately addressed in Article 10(2), second subparagraph, TEU which states that:

‘Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.’

Can this subparagraph serve as a legal ground for the protection of the value of democracy in the Member States?

#### 4. The content of Article 10(2) TEU: descriptive or normative?

To apply Article 10(2), second subparagraph, TEU, it is necessary to define the normative content of that Article. Looking at the wording of Article 10(2), second subparagraph, TEU, it might appear to be purely descriptive. However, there are clear indications as to its normative value.<sup>19</sup>

Article 10(2) TEU specifies the principle of representative democracy laid down in Article 10(1) TEU. The approach that Article 10(2) TEU follows is referred to as a dual concept of democratic legitimacy.<sup>20</sup> According to this concept, the EU draws its democratic legitimacy via two strands: first, from its citizens through the election of the European Parliament, and second, from national governments represented in the European Council and Council of Ministers. The

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<sup>18</sup> Judgment of the Court of Justice, *Criminal proceedings against Oriol Junqueras Vies* (C-502/19, EU:C:2019:1115), paragraph 63.

<sup>19</sup> For a similar approach, see John Cotter, ‘The Last Chance Saloon. Hungarian Representatives may be Excluded from the European Council and the Council’, *Verfassungsblog*, 19 May 2020.

<sup>20</sup> Cf. Armin von Bogdandy and Jürgen Bast, *Europäisches Verfassungsrecht*, Springer, 2009, p. 9.

latter are ‘themselves democratically accountable either to their national Parliaments, or to their citizens’. The Article thus follows the concept of input legitimacy.

Member States form one strand of democratic (input) legitimacy to the EU. They fulfil a function, foreseen by the Treaty, to provide the EU with democratic legitimacy (legitimising function). The EU, in turn, can only draw democratic legitimacy from the Member States insofar as their governments can be held democratically accountable. Decisions of a government that cannot be held democratically accountable suffer from a lack of democratic legitimacy; a democratically unaccountable government cannot provide input legitimacy to the decision-making process of the EU. Subsequently, it fails to fulfil its legitimising function under Article 10(2), second subparagraph, TEU. This constitutes a deviation from Article 10(2), second subparagraph, TEU that cannot be deemed acceptable to the drafters of the Treaties.

Article 10(2), second subparagraph, TEU must, therefore, be read as placing upon Member States the obligation to ensure a democratically accountable government in order to guarantee democratic legitimacy. As a corollary, Member States are subject to a legal obligation to fulfil their legitimising function for the EU to meet the principle of representative democracy as a whole.<sup>21</sup>

### 5. All governmental activity or EU activity only?

Having identified that Article 10(2), second subparagraph, TEU contains normative value, it is, however, unclear whether this normative value stretches over all activities of Member States’ governments or is limited to government activity in the European Council and the Council of the European Union. The contributions of some scholars can be read as sympathising with the latter view.<sup>22</sup>

The counterfactual however is two-fold: First, is democratic accountability of only EU-related governmental activity sufficient to satisfy the legitimising function? Secondly, is EU-related governmental activity at all separable from other governmental activity from a legitimacy point of view?

Whereas the first question might well allow for a positive answer, an affirmation of the latter must be clearly rejected. In a representative democracy, individual decisions are not legitimised (as is possible in plebiscite decision-making); officials are elected (and thereby legitimised) to take decisions. Subjects of legitimisation are thus elected officials, not individual decisions. Legitimation is therefore not limited to governmental activity in the EU context only or particularly, but to these elected governmental officials for a predefined period of time and thus to any decision that they take in that capacity.

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<sup>21</sup> Cf. Martin Nettesheim, ‘Article 10’, in Eberhard Grabitz, Meinhard Hilf, and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, C.H. Beck, 2020, paragraphs 65, 74.

<sup>22</sup> *Ibid.*, paragraph 74.

Trying to isolate the EU activity of a government from its other activities is not possible from the aspect of democratic legitimacy. Article 10(2), second subparagraph, TEU thus requires systemic democratic structures in the Member States.<sup>23</sup> This Chapter continues by looking at the requirements that national governments must meet with regard to democratic legitimacy.

## 6. An approximation of the normative content of Article 10(2) TEU

Which elements of democracy can be identified that must be met by Member States in order to meet the requirement under Article 10(2), second subparagraph, TEU? As an exhaustive definition of the normative content of democracy would go beyond this Chapter, we will limit our approach to an approximation of the content of Article 10(2), second subparagraph, TEU.

To start with the negative side of the approximation: A ‘fully harmonised’ understanding of democratic accountability in the EU seems neither possible nor desirable. In many Member States, the understanding of democracy and its institutional setup is deeply rooted in their individual history and must be considered an aspect of national identity according to Article 4(2) TEU.<sup>24</sup>

Turning to the positive side of approximating the normative content, the Copenhagen criteria for the accession to the EU could in theory provide a common European understanding of democracy. However, they lack the detail to substantiate the concept of democracy under Article 10(2) TEU.

This section thus follows a teleological approach in interpreting Article 10(2) TEU. The core functional aspect of Article 10(2) TEU is that Member States provide input legitimacy to the EU. Input legitimacy is provided, in parliamentary systems, through an expression of political will, usually by way of election of parliamentarians and is, via a so-called chain of legitimacy (*Legitimationskette*), passed on to the government. Unlike the wording of Article 10(2), second subparagraph, TEU, this might imply for parliamentary systems that the chain of legitimacy must not only exist between a parliament and its government but the parliament itself must receive its legitimacy from the people by way of election. There must be an uninterrupted chain of democratic legitimacy between the people, exercising their democratic rights in an election, via their national Parliament through to the national government.<sup>25</sup> In presidential systems, the legitimacy is directly provided by the people to the president without the parliament as intermediary.

The requirements that elections must fulfil are further defined by Article 3 of the First Protocol to the ECHR (ECHR-P1) and the ECtHR’s case law. According to Article 6(3) TEU,

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<sup>23</sup> Cf. Marcel Haag, ‘Article 10’, in Hans von der Groeben, Jürgen Schwarze, and Armin Hatje (eds), *Europäisches Unionsrecht*, Nomos, 2015, paragraph 6.

<sup>24</sup> Cf. Sébastien Platon, ‘The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union’, 3 *European Papers* 3, 2020, p. 384.

<sup>25</sup> *Ibid.*, paragraph 10.

the rights in the European Convention on Human Rights constitute general principles of EU law: it is therefore reasonable to look at Article 3 ECHR-P1 to define the EU's standard of democratic elections.

According to Article 3 ECHR-P1, elections shall be free, take place at reasonable intervals, by secret ballot, and under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. This standard is equally to be met for the election of the European Parliament under Articles 14(3) TEU and 39(2) of the Charter (see Article 53 of the Charter). Thus, it must be recognised as an established EU standard for democratic elections that must be met in order to ensure the democratic accountability of national governments under Article 10(2), second subparagraph, TEU.

Drawing from Article 3 ECHR-P1, an election that ensures 'the free expression of the opinion' requires that voters can inform themselves freely, that candidates (especially opposition candidates) can conduct an unobstructed election campaign, that public media reports in an unbiased way and that private media can report without state interference. Some of these elements are protected by the 'political' fundamental rights that are enshrined in the Charter, such as freedom of expression (Article 11(1)), freedom of information (Article 11(1)), freedom of the media (Article 11(2)), freedom of association (Article 12(1)) and freedom of assembly (Article 12(1)). All these fundamental rights can be found both in the ECHR and the Charter and were historically considered general principles of EU law based on the common constitutional traditions of the Member States.

Besides accountability via elections, national parliaments must have ongoing minimum rights of control over the government (as exemplified in *Cherry/Miller No. 2* by the UK Supreme Court<sup>26</sup>). These rights include, *inter alia*, information rights, effective possibility to engage the public (for example via independent media), but also inter-institutional rights such as the right to vote the government out of office (for example by a vote of no confidence).

In conclusion, Article 10(2), second subparagraph, TEU contains legal obligations, directed at the Member States, to ensure democratic accountability of their governments. These obligations can be broken down, in particular, to electoral rights of voters and candidates, rights of the media and rights of the parliament in controlling the government. Thus, the Article to protect democracy in the Member States is present in the Treaties and the Commission should carefully consider its application in the ongoing value crisis.

## 7. Conclusion

The actions of the respective governments in Hungary and Poland during the COVID-19 pandemic demonstrated that democracy is a fragile commodity in the Member States. How to address this curtailment of democratic principles in the Member States lies at the heart of the

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<sup>26</sup> Judgment of the UK Supreme Court, *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* (UKSC 2019/0193, [2019] UKSC 41). On this, see Joelle Grogan, 'The Rule of Law, not the Rule of Politics. Commentary on the Cherry/Miller No. 2 Judgment', *Verfassungsblog*, 1 October 2019.

democratic functioning of the EU. This Chapter aimed to explore possible pathways for the Commission to bring infringement proceedings against a Member State which curtails democratic principles. We have demonstrated that Article 10(2) TEU contains legal obligations that may serve as substantial basis for infringement proceedings against Member States with autocratic tendencies. We argue that the Commission should break new ground by operationalising further Articles of the Treaties as this approach has proven successful in the rule of law crisis.

Our approach is a first attempt to operationalise Article 10(2) TEU for the effective legal protection of the value of democracy enshrined in Article 2 TEU. While this Chapter does not exhaustively define the content of Article 10(2) TEU, our intention is to start a discussion on the operability of that Article and on its content. In conclusion, we argue that the Commission should seriously consider bringing infringement proceedings based on Article 10(2), second subparagraph, TEU if further instances of attacks on the principle of representative democracy occur in the Member States.