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DEMOCRACY BEFORE THE COURT: DEMOCRACY AS A JUSTICIABLE CONCEPT IN THE EU

ABSTRACT
Democracy is a justiciable concept under EU law. Beyond identifying the EU as being a representative democracy, the EU treaties provide relatively little guidance of what democracy entails. The context is the contestedness of the concept of democracy, especially across 27 polities of the Member States of the EU, and the potentially extensive review of national constitutional orders that could result from the jurisdiction of the Court of Justice of the EU regarding Article 2 TEU (Treaty on European Union) as a statement of foundational values of the EU. This paper considers, in particular, how the concept of democracy interacts with the other values in Article 2, principally, the rule of law and respect for human rights. The jurisdiction of the Court of Justice under Article 2 highlights the problem of determining the relative importance and interaction of the fundamental values of the EU given their relative incommensurability, including the problems of i. relating democracy at national and supranational levels in the EU and of ii. the limits of democratic authority. It is argued that Article 2 should be understood as presenting a complex problem of the inter-relationship of values for which a method of reflective equilibrium and a threshold test are essential for their application as justiciable concepts. Applying this framework or approach, the final part considers some examples of national practices relating to democracy that could be considered contrary to the values of democracy in EU law and subject to jurisdiction under Articles 2 and 7 TEU: the lengthening of parliamentary terms, recall procedures, and militant democracy.

KEYWORDS
Democracy, justiciability, Court of Justice, human rights, rule of law, values, conflict of norms, conflict of values

Introduction

Although originally conceived in largely technocratic terms and subsequently subject to a critique for its own democratic deficit, the EU in more recent Treaty reforms has much more strongly articulated EU values in Article 2 TEU, including that of democracy, while introducing a new enforcement mechanism in Article 7 TEU. However, both democracy and the rule of law (Collier et al

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2006), two of the key values in Article 2, are to some extent contested concepts (Gallie 1956, Gray 1977, Swanton 1986, Beck 2008), a point illustrated in the EU by a continuing critique of its democratic deficit (notwithstanding defences of the EU on the grounds, for example, of output legitimacy) (e.g. Malinov 2021). This article considers how the Court of Justice of the EU or European Court of Justice (ECJ, "Court of Justice, or "the Court") should treat democracy as a justiciable concept in the context of its contestedness as a value. First, the article briefly considers the jurisdiction of the Court, to indicate its potentially considerable scope, including regarding the legal systems of the Member States themselves under Article 2 TEU. Given the limited guidance in the Treaties and in ECJ case law to date on the general meaning of democracy, the next part of this article first considers different theoretical conceptions, relatively abstract, of democracy (e.g. Held 2006). It is argued that defining democracy in a systematic way is necessary to understand, in particular, how the concept interacts with the other values in Article 2. Article 2 should be understood as presenting a complex problem of a conflict of values for which a method of reflective equilibrium is essential for applying these values as justiciable concepts.

Democracy and the Jurisdiction of the ECJ

It is important to distinguish two contexts of the exercise by the ECJ of its jurisdiction regarding democracy: (i) in an action *against an EU institution or body*, (ii) a case *against a Member State* relating to Article 2 TEU. In neither type of case has the Court engaged much with democracy in a general way to date. Article 2 TEU should first be identified as a statement of the foundational values of the EU. As such, it is one of the most important provisions of the EU Treaties. Article 2 states:

> The 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.

Article 7 TEU provides for a sanctioning procedure to be exercised ultimately through the European Council for violations by a Member State of EU values as set out in Article 2 TEU. Much more controversial would be the exercise of jurisdiction regarding Article 2 against the Member States, for example, under Articles 258-259 TFEU (Treaty on the Functioning of the European Union), under which the Commission brings an enforcement action against a Member State, or to the extent (which may be debated) that the Court of Justice has jurisdiction under Article 269 TEU on procedural grounds.[1] Limitations of space

1 Article 269 TFEU provides that the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU solely at the request of the Member State concerned by a

mean the issue of jurisdiction cannot be considered in detail here, but this article is mainly concerned with the context of jurisdiction against the Member States, rather than jurisdiction against an EU institution or body.

Conceptions or Models and Cultures of Democracy

While the democratic principle has been widely accepted, different understandings of democracy are possible and are reflected in political practice (Held 2006). It may be helpful to distinguish between formal constitutional models of democratic government and 'cultures' of democracy. Democratic government can take several constitutional forms: republics, constitutional monarchies, mixed systems of direct and indirect democracy (such as Switzerland), presidential and parliamentary systems, systems based on parliamentary sovereignty versus systems of constitutional review. Direct methods of democracy emphasise direct participation of citizens in government versus reliance on representatives to act on citizens' behalf. Earlier in the 20th century, Loewenstein identified militant democracy as a dimension of democracy that may be necessary to defend the democratic principle, whereby the normal rights and freedom of participation in the democratic process are suspended for those who seek to use democratic means to undermine or suppress democracy itself (Loewenstein 1937). A consociationalist model has been developed for divided societies, whereby the majoritarian principle is substantially restricted to protect identified minorities (Lijphart 1979: 500–501). Within these constitutional forms, different emphasis can be placed on individual rights or autonomy. Liberal democracy is defined by the protection of individual rights and autonomy (or 'equal liberty') through the rule of law and often constitutional review, emphasising the idea of a limited State. A republican tradition of self-government did not recognise the notion of minority and individual rights against majority will (Held 2006: 55–56) that later emerged in liberal democracy. Socialist and corporatist models emphasise collective organisation through the State. Democracy can be more or less participatory and be seen in more technocratic (generally, Held 2006: 159–169; regarding the EU, e.g. Moravscik 2002, Scharpf 1999) and élitist terms (Schumpeter 1976). Participation and élitism are partly at least less relatable to formal structures and more relatable to the idea of democratic culture, i.e. the way in which citizens relate to democracy, or in other words, democratic behaviour. Recent thinking on democracy has emphasised the concept of deliberation for democracy to fulfil its function and potential, marked by the public contestation and justification of political views and reason as a fundamental to legitimate democratic discourse (e.g. Pettit 2001; Cohen 1989: 21–26; Gutmann, Thompson 1999: 167–169; Held 2006: 253; Chambers 2021: 107–108). Deliberative and procedural theories of democracy overlap substantially and both fall under liberal democracy, but procedural democracy

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determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

adopts a less ideal understanding of democratic decision-making and does not subject it to a principle of rationale discourse (Saffon, Urbinati 2013: 444). In contrast, epistemic accounts of democracy emphasise less its connection with rights and more its capacity to render decisions that are more truthful or accurate due to the large range of input in democratic process (e.g. Estlund 2008; and see Saffon, Urbinati 2013: 445–450).

This brief overview of a variety of approaches shows that an abstract notion of democracy is open to a wide range of interpretations and emphases, a point directly relevant to defining democracy in EU law.

Interpreting the term 'Democracy' as used in the Treaties

Democracy as a Principle of the Treaty

Understanding the meaning of democracy in EU law is firstly a matter of Treaty interpretation. While the Court of Justice has at times placed less emphasis on the need for explicit textual interpretation than is typical of international courts and has adopted a 'meta-teleological' (Lasser 2003: 46) or broadly purposive method that favours integration, the text of the EU Treaties says relatively little about democracy to facilitate a straightforward reading. The term has not been extensively interpreted in ECJ case law, though it has arisen in particular contexts, generally regarding its operation at EU level, and not concerning its practice at national level (Lenaerts 2014; Spieker 2023: 29-35). Article 2 TEU, which sets out the foundational values of the EU, does not refer to the value of integration, nor does it define democracy. To a greater or lesser extent, all of the values identified in the first sentence of Article 2 TEU fall within Gallie's category of essentially contested concepts. Such concepts are appraisive and are disputed in at least some aspects of their core meaning, while not being without any definable meaning or incapable of 'anchoring' to at least some degree. The question then is how to anchor democracy into EU law.

The first sentence of Article 2 is qualified by the next sentence in Article 2 itself, which states that "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". This sentence seems to suggest that the results or consequences of these values being shared are pluralism, non-discrimination, tolerance, justice, solidarity and gender equality – rather than the latter being additional values. To some extent, they repeat what is inherent in the EU Charter of Fundamental Rights, e.g. on equality and equal treatment. It may not seem obvious that they provide much of an interpretative gloss on the rest of the provision, but the first-listed of them can be understood as both an expression of the context of the EU as a union of diverse nations, as well as an indication of avoiding any absolutist interpretation of one or more elements of the first sentence in a way that would step outside of a shared core understanding of constitutional values in the EU. Article 2 must then also be related to other provisions of the Treaty. In particular, as a provision

that seemingly is meant to characterise the EU and the Treaties overall, it is necessary to relate Article 2 to the objectives of the EU and the question of teleological or meta-teleological interpretation. Larik has suggested that the development of the EU beyond the initial treaties signals a move beyond any applicable notion of speciality in understanding the EU:

> Given that 'the new list focuses on non-economic goals to a far greater extent than the EC Treaty', a turn from predominantly economic goals to an overarching range of objectives is undeniable. In other words, there is no 'speciality' to the EU anymore according to its highest laws. This general set of goals continues to be complemented by numerous objectives related to specific policy areas and even sub-areas. These include, for example, the particular aims of environmental (Article 191(1) TFEU), energy (Article 194(1) TFEU) and foreign policy (Article 21 TEU). The latter is even further subdivided into different fields of external action with their own objectives, such as trade policy (Article 206 TFEU) or development cooperation (Article 208 TFEU).(references omitted) (Larik 2014: 945-946)

Here, speciality is used in the sense sometimes applied in international law to indicate the limited powers being granted to international organisations; it is important to note that this use of the term speciality is somewhat different or more particular to the more general role it plays in legal reasoning as a tool of reasoning mediating between more specific and more general provisions (Conway 212: 153–158). For Larik, given the thickening of the nature of the EU as a polity with the enlargement of its objectives and role and the development of constitutional features of which fundamental rights and the statement of values in Article 2 are of particular importance, the EU lacks speciality in the sense of limited or particular objectives associated with other international organisations, even if the EU is not either a State. It does not seem that this changes the role of teleological interpretation in Larik's view, albeit he does indicate that it should now be a basis for only a marginal extension of EU powers (Larik 2014: 938). However, Larik sees still a broader significance of the expression of values in Article 2:

> As observed earlier, after Lisbon, the values of the Union are also now placed before the objectives of the Union. The order of provisions, of course, has no bearing as such on their legal weight. Nonetheless, it symbolizes a paradigm shift from a legal entity that, in the first place, exists to strive for certain goals to one which, above all, expounds what it stands for. (Larik 2014: 951)

These values might then be understood as something already in place, rather than being open questions akin to the question of the *finalité* of integration. This understanding indicates why Article 2 cannot be readily related to a pro-integration teleology: they are not there to enhance something else, rather they exist in themselves.

An initial point to note is that Article 2 in referring to democracy could be considered a global provision: that it is meant to inform the entirety of EU

law, both democracy at EU level and at national level. A particular feature of Article 2 is that it is about the only provision of EU law that applies outside of EU competences. An important indication as to what democracy should be understood to mean is given in Article 2 itself. Article 2 states that the EU values it identifies are 'common to the Member States'. This has been understood as a 'homogeneity clause' articulating a 'commonality of values, the very essence of which is to be protected' (Besselink 2017: 129; also, Mangiameli 2014). This counts against an understanding of democracy in the EU that is different from that in the Member States generally. In other words, it points against a *sui generis* characterisation sometimes used to distinguish the EU from other international law organisations, being applied in the context of interpreting Article 2 values. This is not to say that democracy at EU level has no specific features compared to democracy at national level, rather it suggests that there is a shared, *core* concept of democracy. As Von Bogdandy notes, homogeneity here should not be understood as a homogeneity clause similar to Article 28 German Basic Law or Article IV Sec. 4 and Articles XIII to XV of the US Constitution to force the constitutional autonomy of the Member States "into a far too narrow corridor, thereby contravening European constitutional pluralism" (Von Bogdandy 2020: 732).[2]

Other provisions of the Treaty, which are mainly concerned with democracy at the EU rather than at the national level, can then be understood as elaborating on this core idea of democracy. Article 10 TEU is the most important provision in that it defines the EU as being a 'representative democracy.' This term is not explicitly defined, but is widely understood in political thought to be distinguishable from direct democracy – or government primarily by referenda or direct consultation with the people or electorate, and this is indicated in the very next sentence stating that citizens are directly represented in the European Parliament. Representatives 'stand for' those who elect them (Pitkin 1977; Plotke 1997). To what extent representatives act as delegates or trustees is one of the unresolved or variable features of democracy (Pitkin 1977: 146–167) and one that reflects democratic culture much more than the framework of legal regulation. [3]

Article 11 TEU is on participatory democracy. The relationship between Articles 10 and 11 could be seen as unclear in that the extent of citizen participation is not really specified (Kutay 2015: 804–804), but Article 11 seems to supplement the fundamental principle of democracy *at EU level* as representation with practices of ongoing citizen participation in the political process (and e.g. not just voting for representatives in elections). At the national level,

2 Article 28 of the German Basic Law or *Grundgesetz* states that the constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of the Basic Law, meaning the *Länder* are subject to the constitutional framework of the federal Constitution. Amendments XIII-XV of the US Constitution set limits to the power of the individual States.
3 Often related to Edmund Burke's concept of parliamentarians as a kind of trustee of the electorate in his speech to the electors of Bristol, 3rd November 1774.

for the Member States, the Treaties themselves say very little about democracy. The main provision is the first paragraph of Article 10 TEU and the concept of 'representative democracy', which applies on its face to both national and EU levels. Article 10(2) is the other main provision on democracy at national level. It 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. This implies necessarily a recognition of national democracies as polities in their own right and not simply as subsumed within a European polity, i.e. it seems to implicitly recognise a national *demos*. EU law thus requires that national governments be democratically accountable either to their national Parliaments or to their citizens, but it does not specify any form of relationship between the executive and parliament, for example. At a minimum, and as a matter of understanding the competences of the EU in the matter, this only seems to require at national level that regular elections be free and fair (and therefore secret) and entail universal suffrage, terminology often used in this context and perhaps surprisingly that has not been used in the Treaties regarding democracy at national level.[4]

Accountability is a broad concept, but in Article 10 TEU seems clearly related to the electoral process. It is not obvious from the text that concepts such as freedom of speech or expression and of assembly are directly engaged by democracy as a term in the Treaties, even though these rights are widely seen as essential to effective democracy. As a matter of Treaty interpretation, it seems more appropriate to subsume them under the phrase 'respect for human rights' in Article 2: while they are essential for effective democracy, they have a wider scope and significance also. Sadurski observes that "[r]epresentative democracy, at its best, offers scope and opportunities for representatives of the people to listen carefully to each other, and allows them to be convinced by an argument employed by their adversaries" (Sadurski 2021: p. 197). Sadurski well describes the outline institutional conditions of a well-functioning representative democracy as follows:

> At the deliberation stage, we need to have institutions in place which assure true freedom of expression, of assembly, of association, etc. These rights and freedoms are necessary for deliberation to be truly authentic, unconstrained, and unaffected (or at least not affected too dramatically) by the disparities in resources of social power. Not just the absence of censorship or prior restraint (in other words, not just the Hyde Park model of freedom of speech), but also forms of equalising access to public media may be considered as essential. There should also be precautions against the various forms of silencing dissident,

4 Article 14(3) TEU states that the members of the European Parliament shall be elected every five years by direct universal suffrage in a free and secret ballot. Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) states: 'Everyone has the right to elect the government of his/her country by secret vote. Without this right there can be no free and fair elections.' See also Article 223 TFEU. On universal and secret suffrage, see Kelsen 1951:5.

> unpopular, or minoritarian points of view. If some people are too harassed or intimidated to make their viewpoints known in public, deliberation is reduced, and so is equality of political opportunities.(Sadurski 2021: 196)[5]

Even more broadly, it might be said that the conditions under which democratic accountability can be exercised well range from good education to the psychological well-being of society in being able to exercise freedom to vote in a careful and reflective way: the justiciability before courts of democracy cannot extend to all its enabling conditions, since these reflect the conditions of society overall. Rather, the justiciability of the concept of democracy specifically relates to the immediate procedures of democracy: the procedures of citizens' voting and the conditions and procedures under which representatives exercise their representative function. Centrally, it also includes respect for minority rights, as Sadurski depicted above and which reflects a concept of liberal democracy. Even on the view that courts can enhance representation in the democratic process (Ely 1980), they can do relatively little to address the quality of the process and of democratic participation after the point at which representation is legally instituted. The culture of a democracy cannot be reduced to legal rules and made justiciable.

Democracy and Other Values

Introductory Comments

Whether or not Article 2 is justiciable by itself or in conjunction only with other Treaty provisions,[6] the concept of democracy in Article 2 and the Treaties generally cannot be understood purely in isolation from the other values in Article 2. Democracy itself attains its constitutional status through legal recognition (Gutmann & Thompson 2002: 156; Nyirkos 2018: 9, 18). Laws in general are subject to majority approval, a procedure that must be regulated. The limits on fundamental rights are partly determined with reference to the needs of a democratic society. The rule of law is concerned with restricting arbitrary power (Krygier: 407), whether this power is democratically grounded or not (Krygier: 413-414). It is today quite commonplace to view democracy, the rule of law and human rights as necessarily interlinked. This is the view

5 This could be considered as a statement of deliberative democracy. Sadurski emphasises, in intrinsic terms, equality of opportunity.

6 The Court has generally applied it in conjunction with other Treaty provisions giving it specific expression: see, e.g. "According to the principle of representative democracy enshrined in Article 10(1) TEU—'which gives concrete form to the value of democracy referred to in Article 2 TEU'…—the European Parliament's composition must 'reflect faithfully and completely the free expression of choices made by the citizens'", in Case C-502/19 *Junqueras Vies*, para 83; and on the rule of law, Case C-157/21, *Poland v. Parliament and Council*, para. 197, where it applied Article 2 in conjunction with Article 19(1)(itself a quite general provision on the role of the ECJ to ensure the law is observed and effective remedies at national level).

adopted by the EU legislature, which also observes that there is no hierarchy between them, or at least that this is so in Article 2 TEU.[7] Although Article 2 is silent on the question of hierarchy or priority between values, the relationship between these values matters because it points to a central problem of democratic theory: the limits on majority power. One of the central rationales for the rule of law and respect for human rights, in conjunction with democracy, can be understood as a type of regulation of majority power.

The draft Treaty Establishing a Constitution for Europe quoted Thucydides that 'Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.'[8] More can and should be said about democracy, however, than that it is about majority rule. Perhaps the most fundamental interpretative challenge posed by Articles 2 TEU is how to relate the values in Article 2 to each other. Article 2 can be seen as a classic problem of a potential conflict of norms; rather than more prosaic norms, it is a conflict of norms of constitutional standing. Several features of this clause generate indeterminacy and the potential for norm conflict: the concepts referred to are all abstract or equally general (or none are more specific than the other), they are comprehensive in that they purport to apply across the full range of EU law and not in mutually exclusive areas, and no priority of importance is identified between them. The problem of incommensurability in legal reasoning (Sunstein 1994: 851–853; Aarnio, Peczenik 1996: 324) is found to a high degree in Article 2. An effect of the first of these two features is that no rule of prince of *lex specialis* can resolve problems of conflicts between them; an effect of the third feature is that *lex superior* is not a solution, but part of the problem to be addressed. In addition, they are all enacted simultaneously, meaning that a simple rule of *lex posterior* is of no use to resolving conflicts between them.

Of the six concepts or values referred to in Article 2, democracy, equality, the rule of law and respect for human rights seem the most justiciable.[9] Equality, however, is inherent in the rule of law and respect for human rights (especially given the importance of non-discrimination in the CFR) and so does not seem to have self-evident justiciable content separately to them, rather it can be seen as an underpinning normative aspiration. Similarly, dignity and solidarity as general values do not seem to have an evident independent justiciable content under Article 2 TEU. Dignity is reflected in the values of democracy, the rule of law, and human rights. Similarly, solidarity has importance as an ideal, as

7 The EU legislature has adopted this view. Recital 6 of Regulation (EU, Euratom) 2020/2092: "While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights."

8 Pericles' Funeral Oration, Thucydides II, 37.

9 Given the reference to minority rights in Article 2, the relationship between individual and minority rights also falls within its justiciable scope, but this is beyond the scope of the present discussion. On minority rights, see generally, e.g. Benvenisti (1999); Hadden (2000); Dothan (2018: 402–204 and further references therein).

a general or transversal value, but is not easily translatable itself as a justiciable norm, although it is referred to in other parts of the Treaty where it may have more specific content (such as a duty to take into account the interests of other Member States or to take preventive measures).[10] Relative to democracy, solidarity has an important normative implication, in that it points to the avoidance of democracy being dominated by individual or factional self-interest (Held 2006: 82–86), instead pointing to the need for a civic or political culture alert to the broader social and political good: but this neither seems readily translatable as a legal norm separately to democracy itself. Thus, the key elements of Article 2 – from the perspective of justiciability – seem to be democracy, the rule of law, and respect for human rights.

Their interrelationship raises some of the most intractable challenges of political philosophy. As Habermas expressed it:

> To be sure, political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the "freedom of the ancients" and the "freedom of the moderns." The political autonomy of citizens is supposed to be embodied in the self-organization of a community that gives itself its laws through the sovereign will of the people. The private autonomy of citizens, on the other hand, is supposed to take the form of basic rights that guarantee the anonymous rule of law. Once the issue is set up in this way, either idea can be upheld only at the expense of the other. The intuitively plausible co-originality of both ideas falls by the wayside. (Habermas 2006: 258)

The conceptual problem is how to conceive of the relationship between democracy and other fundamental – constitutional – values of the EU. Spieker observes that while the elements of Article 2 TEU can be regrouped under the banners of democracy, the rule of law, and fundamental rights, there are no abstract hierarchies between them, and they are, in the words of Jürgen Habermas, 'co-original' (Spieker 2023: 251, citing Habermas 1995: 12).

This suggests that all of the values Article 2 expresses have the same normative standing. To use Alexy's terminology, they are all to be 'optimised' given the range of factual possibilities (Alexy 2010). The classic problem of modern political philosophy highlighted by Habermas above could be taken to be answered by *the conjunction of values* in the text: Article 2 entrenches the EU as a liberal democracy that respects both the rule of law and fundamental rights, as the latter are elaborated in the EU Charter of Fundamental Rights (2001). The theoretical question of which comes first, or grounds the other, is avoided by their simultaneous recognition in Article 2. In saying that democracy and rights are co-original, Habermas resists the notion that rights are external restraints on the democratic process, while at the same time suggesting that democracy can only take effect through the medium of law:

10 See, e.g. Articles 60 (policies on border checks, asylum and immigration), 122 (on economic difficulties), 194 TFEU (on energy), 222 ('solidarity clause' on a terrorist attack or the victim of a natural or man-made disaster).

> However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (pre-existing) moral facts that one merely needs to enact as positive law. At the same time, one must also not forget that when citizens occupy the role of co-legislators they are no longer free to choose the medium in which alone they can realize their autonomy. They participate in legislation only as legal subjects; it is no longer in their power to decide which language they will make use of. The democratic idea of self-legislation must acquire its validity in the medium of law itself. (Habermas 2006: 260)

The limitations Habermas sees (on democracy) in this passage are not that these or such rights pre-exist the legislature, but that when recognising rights, the legislature is constrained itself by the requirement to act through law. In other words, the rule of law constrains or conditions democracy. This condition may not fully reflect implicit constitutional practice in countries that adopt 'eternal guarantee' clauses that restrict what even future majorities will do. Eternal guarantee clauses engage the claim of co-originality of rights and democracy and the question of what the majority can do in defining rights. Article 79(3) of the German Basic Law is an example: it states amendments to the Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. Article 1 refers to human dignity, human rights and the legally binding force of basic rights. By restricting what future majorities can do, an eternal guarantee clause does not conceive of the substantive principles it protects as co-original with the democratic power of the people; the substantive principles protected logically must have some prior and higher normative standing.[11]

The EU Treaties have no equivalent 'eternal guarantee'. However, different understandings are possible of the relationship between democracy and other constitutional values, left open by Article 2 TEU. One perspective is that democracy itself inheres in it certain values beyond a basic principle of procedural or aggregative majoritarianism. While it is now widely accepted that democracy takes effect by means of the rule of law, history tends to demonstrate that the mere mechanism of legality does not necessarily protect minority rights (while it does ensure a minimal requirement of consistency or equality before the law[12]). Habermas depicts the relationship between democracy and the rule of law in the following:

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11 Article 146 of the Basic Law provides that the German people may replace it through a freely adopted constitution, though it is not clear to what extent this envisages replacing the content of Article 79 (1).

12 Gutmann and Thompson (1999: 158–160, 174) emphasise reciprocity as a core principle of democracy as being both procedural and substantive. The substantive dimension to it can be understood as entailing equality.

> According to this demand, positively enacted law should guarantee the autonomy of all legal persons equally; and the democratic procedure of legislation should in turn satisfy this demand. In this way, an internal relation is established between the coercibility and changeability of positive law on the one hand, and a mode of lawmaking that engenders legitimacy on the other. Hence, from a normative perspective there is a conceptual or internal relation – and not simply a historically accidental relation – between law and democracy, between legal theory and democratic theory. (2006: 254)[13]

Habermas's substantive understanding of the rule of law sees it as necessarily securing individual autonomy and therefore rights (a 'thick' conception of the rule of law[14]). Another view is that it is conceptually clearer to distinguish the minimum or core content of the rule of law from a substantive account of rights, though Habermas' depiction of it captures that it has become closely associated in Western thought and practice with the liberal democratic State. In the context of Article 2, the concept of individual rights is already accommodated by reference to respect for human rights. Whether one considers such rights as best understood as a category of themselves in Article 2, or as inherent in the rule of law, as per Habermas, it might be considered that the acknowledgment of rights in Article 2 is an answer to the age-old problem of the tyranny of the majority: not only must democracy be effective through legal rules, but these rules have specific substantive content, it might be thought, in the form of the highly enumerated catalogue of rights in the EU Charter of Rights. However, rights are considerably less determined in their scope than popular discourse may suggest: they are necessarily general in their formulation, are subject to equally general derogation clauses, and frequently conflict with each other in ways that Bills of Rights texts in themselves do not resolve (Fiss 1982; Hadden 2000; Frändberg 2018: 195–199). It is true that the EU Charter is relatively enumerated compared to other Bills of Rights, such as the ECHR, and its interpretation is supported by the explanations of the signatory States appended to it at its adoption and referred to in Article 6 TEU as an interpretative guide, but even this does not resolve the tension over the definition of rights and majority preference. This general question was well captured by Kelsen in the following:

> To be sure, the modern concept of democracy prevailing in Western civilization is not quite identical with the original, the antique, concept, insofar as the latter has been modified by political liberalism, the tendency of which is to restrict the power of government in the interest of the freedom of the individual. ... It is of importance to be aware that the principle of democracy and that of liberalism are not identical, that there exists even a certain antagonism

13 Recently, Landwehr, and Schäfer (2010) relate democracy, beyond its procedural character, to the values of individual (and collective) liberty, equality of citizens, and rationality.

14 Conceiving of a thick or substantive form of the rule of law, see Tamanaha (2004: 114–122).

> between them. For according to the principle of democracy the power of the people is unrestricted, or as the French Declaration of the Rights of Men and Citizens formulates it: "The principle of all sovereignty resides essentially in the nation." This is the idea of the sovereignty of the people. Liberalism, however, means restriction of governmental power, whatever form the government may assume. It means also restriction of democratic power. Hence, democracy is essentially a government by the people. The procedural element remains in the foreground, the liberal element – as a particular content of the social order – being of secondary importance. (Kelsen 1955: 3–4)

In the EU, democracy co-exists with fundamental rights, and it thus does reflect the concept of liberal democracy and does not seem to place the liberal element in second place as Kelsen suggests in the above quote. The 'tyranny of the majority' problem in the modern era has been most directly addressed by the notion of a constitutional State that entrenches constitutional rights against the vicissitudes of temporary majorities, of which Article 2 might be considered an example. However, this does not fully resolve the question of the majoritarian limits of rights in a democracy, a point discussed next.

Majoritarian Limitations on Rights

What are the limits to what the majority can impose on the minority? In itself, a constitutional conjunction of democracy, rights, and the rule of law arguably does not necessarily answer this question. Habermas proposed theoretical path out of this problem is that of a discourse principle or proceduralist conception of law:

> According to this conception, the democratic process must secure private and public autonomy at the same time: the individual rights that are meant to guarantee to women the autonomy to pursue their lives in the private sphere cannot even be adequately formulated unless the affected persons themselves first articulate and justify in public debate those aspects that are relevant to equal or unequal treatment in typical cases. The private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy. (Habermas 2006: 264)

This suggests that acceptance of democracy supports acceptance of related rights. Applied to Article 2 TEU, this approach would suggest that only those rights inherent in the democratic process itself, a narrower category than the catalogue in the Charter, are guaranteed in any democracy on the basis that every citizen must enjoy them as inherent in the democratic principle. But while this seems to elaborate on premises of democracy that a mere reference to the majority view fails to articulate, it does not seem to resolve the problem of the ultimate source of normative value in politics that underpins the discourse principle (that is, the normative status of participants in democratic discourse seems to have to exist prior to the institution of democracy) and what implications this has for other rights beyond those inherent in democratic

procedure.[15] This is central to the problem of the limits of majority rule in a democracy: it points to a limit to what the majority can do to violate the autonomy of individuals or minorities, including in defining the limits in law to rights. But what are these limits, and how can the Court of Justice adjudicate on them regarding Article 2? To what extent or in what way can democracy and the rule of law in Article 2 be seen as values that tilt the balance in favour of majoritarianism and legality, i.e. the legal enactment of majoritarian views, against any competing rights claim that might be arguable also under Article 2?

Neither the ECHR nor the EU Charter fully address this question. Many of the formulations of rights in the ECHR invoke democracy by stating that one of the requirements of legitimate limitations on rights includes what is necessary in a democracy. In so far as democracy itself is conceived as a right,[16] majority rule versus minority rights is itself a clash of rights, a problem that cannot be resolved based on Article 2 alone. The general requirement in Article 52 of the Charter[17] that limitations on rights be proportionate to legitimate objectives is itself a very open-ended formulation susceptible to different

15 Some theorists argue that democracy needs to be understood in both substantive and proceduralist terms, though without necessarily supposing substantive rights are prior to democracy: Gutmann, Thompson 1998; Gutmann, Thompson 2002; Saffon, Urbinati 2013; Chambers 2021: 111–112. A normative position on the status of people seems supposed in the democratic method of according equal weight to each person's vote (even in a restrictive or non-universal suffrage), and even on normatively thinner accounts of democracy that do not link it to rights (for example, Schumpeter or Estlund). Popular discourse in the West tends to assume democracy is a right, but there is less support for this view than might be thought in academic discussion, and at least democracy might not be considered amongst the most basic or fundamental of rights. However, if democracy is not understood as a right, it is still widely associated with certain normative interests, principally equality and autonomy. Bobbio appeared to consider that democracy necessarily implied a framework of related rights protection: I do not think it is possible for a non-liberal democracy to exist next to a liberal one. Due to the intrinsic connection that I see between liberty as absence of impediments and liberty as autonomy, whenever I mention 'liberal democracy' I mean to refer to what I see as the only possible form of democracy. Unqualified democracy, especially when it is meant as 'non-liberal democracy', is only nominally a democracy, in my view. (Bobbio 1955: 177–178, quoted in Rgazonni 2022: 287).

This question is raised also in the 'Böckenförde Paradox', namely that the liberal, secularized state lives on the basis of assumptions that it itself cannot guarantee in that i liberal state it can endure only if the freedom it bestows on its citizens is supported by an interior moral regulation and a certain homogeneity of society at large (Böckenförde 2020: 152–167). However, Böckenförde's formulation of a necessary link between liberal constitutionalism and values appears to be cast in essentially empirical rather than normative terms.

16 Ibid.

17 Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

interpretations as to how far limitations can go. It is more broadly framed than the standard derogation clauses in the ECHR. For example, Article 10(2) ECHR on freedom of expression states:

> 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.[18]

This is more specific than Article 52 of the Charter in enumerating grounds of restriction, including 'as necessary in a democratic society'[19] being applicable to any restriction, which is omitted in the CFR. The CFR addresses this indirectly, by incorporating the ECHR approach, in its accompanying Explanations: 'the legislator, in laying down limitations to those rights [in the Charter], must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR'. This indirect formulation in the EU Charter may have served to avoid the issue of having to distinguish between democracy at Member State level and EU level, side-stepping the difficult questions of how to define an EU-wide *demos* (Weiler 1995) and to what extent democracy here admits autonomous democratic decisions at national level. In addition, the formulation in the EU Charter extends the list of grounds of restriction to a vague criterion of what is considered 'in the general interest'. In other words, EU law is arguably (even) more ambivalent or silent on the problem of majoritarian overreach than is the ECHR.

As the general clause on limiting the Charter rights, Article 52 provides that limitations are 'subject to the principle of proportionality'. Proportionality has been widely adopted as a standard of rights adjudication, but it has also been widely critiqued as indeterminate to the extent it purports to be a means to resolve conflict between incommensurable values, even by those who favour its use in adjudication (Letsas 2006: 714; Möller 2012; Huscroft et al. 2014). The public wearing or expression of religious symbols is an example that shows clear differences across European countries. In particular, the prohibition in France on wearing certain traditional Islamic dress-types is not found in other countries. How far can such a prohibition be extended to other types of public religious expression? Is this solely to be determined by majority decision? The French approach can be placed in context of a country that generally accepts

18 The European Court of Human Rights has referred to pluralism, tolerance and broadmindedness as being inherent in a democratic society, in the context of Article 10 ECHR, but these terms are hardly less abstract or more specific than the term democracy itself. See, e.g. *Handyside*, para. 49.

19 There is no further explanation in the text of what 'necessary in a democratic society' may involve (Hadden 2000: 79).

and protects religious freedom; it is a grounding of the principle of *laïcité* within a general context of rights recognition.

Reflective Equilibrium in Value Application

These unresolved tensions in Article 2 and in the framework of EU law point to the need for a method of reflective equilibrium, a term first used by Rawls, in determining majoritarian limits on rights under Article TEU and Article 52 CFR. This method avoids the unrooted or dis-moored abstraction of Article 2 (even taken with the Charter) when disconnected from the constitutional practice and norms of the EU Member States as a plurality of constitutional orders. Rawls' account of political liberalism seeks to explain in effect a constitutional framework of a liberal State given the characteristic pluralism of modern society, a pluralism acknowledged in Article 2 TEU. His method itself indicates that simple majoritarianism is not the measure of justice, while equally he did not claim to offer a purely abstract conception of politics, but acknowledged that it was grounded also in the background experience of Western practice in the construction of limited government that acknowledged individual rights and freedoms. This is best reflected in his articulation of the concept of reflective equilibrium (Rawls 2010: 19-21, 49), his rejection of purely an *a priori* theorisation of fairness in politics or a predominant empiricism. General statements of principle are to inform practice, but practice must then be related back to general principle and both adjusted or reconciled in the process of reaching a stable ethical conclusion.[20] Applied to Article 2, it means that abstract statements of the implications of those values, and especially of their abstractly worded exceptions and grounds for derogation, must be related to and specified by reference to the shared or common traditions and practices of them in the Member States: those practices and traditions set the boundaries to the very abstract text of Article 2. An implication is that a considered expression of the scope of values under Article 2 will not be a marked deviation[21] from the everyday practice in the Member States.

Taking the example of religious dress, the general value of freedom of expression can be related to this specific context of practice to give concrete scope of the rights to freedom of religious belief and expression. This can be understood as an example of reflective equilibrium being applied to ground the definition of rights and values at European level in the practice of the Member States. This approach can also be applied to the definition of democracy

20 For recent discussion, see, e.g. Follesdal (2017); Rechnitzer (2022); Moreso Valentini (2023: 553–558).

21 Daniels (1979: 25) also distinguished wide and narrow equilibrium, referring to narrow equilibrium as relating to the best fit of judgments with given principles: in this context, the values in Article 2 are arguably given, and what is to be done is to relate them to each other. Rawls had made the distinction between wide and narrow reflective equilibrium quite briefly in a separate article to *A Theory of Justice* (1974: 8); and see Moreso, Valetini (2021: 555–556).

in Article 2. Apart from Article 10 TEU on representative democracy, there is very little else in the Treaties that can be applied directly to democracy at the national level. Reference in the Treaty to universal suffrage applied, textually, only to the European Parliament. That universal suffrage can be applied under Article 2 can be better grounded by its widespread acceptance in European practice. This is one relatively clear example where the EU could be un-controversially justified in invoking democracy under Article 2 TEU in the context of Article 7 TEU, i.e. where a Member State departed from the principle of universal suffrage of citizens in national elections.

In the Explanations accompanying the EU Charter of Fundamental Rights, the lowest common denominator is stated not to be a limit in relying on the constitutional traditions of the Member States in interpreting Charter rights. By analogy, it might be argued that the same applies under Article 2. However, it is arguable that a common core should be more of a guide under Article 2. Firstly, the reference to respect for human rights in Article 2 seems narrower and related to the most fundamental rights (Spieker 2023: 275) (otherwise, why would Article 2 not have referred to the Charter?). Secondly, given how little is said about democracy in the Treaties, it would be difficult to set clear lines to the meaning of the concept of democracy if it is to be taken abstractly. It would also permit the EU and Court of Justice to engage in a review of the mechanisms of democracy at national level other than its essential components. That is an approach that is difficult to square with the continuing constitutional autonomy of the Member States. This can be related to the more general problem – and ambiguity in EU law – of defining democracy to exist at national level or EU level, the problem of defining *demos*. If the existence of a distinct *demos* is not acknowledged at national level, i.e. for each Member State (as it arguably is in Article 10(2) TEU), then the risk exists that a uniform conception of any of the values in Article 2 could be imposed through Article 2 review on the basis of EU-*demos* (the existence of which at present tends to be disputed).

This is especially so if the ECJ were to take what might be described as a 'meta-axiological' approach to Article 2, i.e. an expansive approach[22] to the content of the values without any sense of hierarchy or priority between them, or the opposite, the suppression of marginalisation of one value based on another value. This could push towards instrumentalising the priority or hierarchy of values in Article 2 by increasing or decreasing their relative importance to achieve other goals; a variation of interpretative teleology along these lines would not be compatible with the fundamental and objective character of the content of the values. Although guarding also against a homogenous or uniform approach, Von Bogdandy advocates an 'interpretative generality' towards

22 Spieker refers to "… a new kind of meta-teleological interpretation—not in light of the Union's objectives, but in light of its common values: An axiological interpretation": Spieker 2019: 1209. In his 2023 book, Spieker however, advocates for interpretative caution in that Article 2 should be understood as protecting the essence of the values: 252.

Article 2. He does so on the grounds that this could avoid encroaching upon the Member States' constitutional autonomy. The logic of red lines explains this reasoning: "While the lack of interpretive development limits the decisions' persuasive power, their restraint avoids interpretative standards that would considerably limit the Member States' constitutional autonomy" (references omitted) (Von Bogdandy 2020: 733).

One difficulty with this approach is that very general interpretations can go either way in their impact on Member State autonomy; they do not represent a methodological restraint on the Court. It can also be argued that the general approach Von Bogdandy favours – Article 2 understood as setting red lines of what cannot be tolerated, rather than setting out a prescriptive constitutional framework to be uniformly imposed on the Member States – could be better achieved by more specific guidance from the ECJ setting out the core and essential requirements of the values in Article 2, including indicating more than its case law has done to date how the values relate to each other.

Invoking the idea of a core of constitutional content to which interpretation by the ECJ of values under Article 2 TEU should extend could be related to the concept of a margin of appreciation, as developed in the case law of the European Court of Human Rights, *Handyside* often been cited as a foundational case for the doctrine.[23] The margin of appreciation reflects firstly the relative abstraction or generality of much of the rights in the ECHR and, therefore, the scope for differing interpretations of them. The scope of derogations, grounds for which are usually set out in the second paragraph of ECHR articles (the first paragraph setting out a statement of the rights in question), for example, can vary significantly in how States invoke them. Different State signatories to the ECHR may provide different levels of protection to privacy or freedom of expression (or defence rights at trial), or to derogations from them on grounds such as public morals, and the margin of appreciation doctrine indicates that some degree of variation is acceptable:

> [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them ... Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. [para. 48, concerning Article 10 ECHR]

Different State signatories to the ECHR may provide different levels of protection to privacy or freedom of expression or defence rights at trial, and the margin of appreciation doctrine indicates that some degree of variation is acceptable. It can be understood as kind of deference grounded in a sense of

23 An earlier reference to it is *De Wilde, Ooms and Versyp v Belgium No 1* 1971, 1 EHRR 373, para. 93 (referring to "a power of appreciation"). See Brems 1996: 242–243.

legitimacy of intervention in domestic regulatory autonomy (Letsas 2006: 720-724; Dothan 2018: 145-146). The ban in France on the wearing of religious veils in public is another example of a practice divergent across State signatories. This can be related to the idea of the ECHR containing a minimum or core of rights protection, or an equivalent concept in EU law, the 'essence of rights'. How wide is the margin of appreciation, i.e. how much scope for differing levels of protection of rights (and conversely the scope of the core or essence), is variable under the approach of the Strasbourg Court relative to different provisions of the ECHR (Brems 1996). Article 1 of Protocol 1 on the protection of property is subject to a wide margin of appreciation, whereas little margin is left to rights that are deemed especially important under Articles 2 and 3 ECHR (Brems 1996: 248-250, 264). The margin of appreciation is an acknowledgment of at least some degree of relativism in rights protection (Benvenisti 1999: 844; Hadden 2000: 80), at least in the margin beyond the core of the right. As a concept, however, the margin of appreciation does not provide itself a method for determining how widely to interpret the core[24] relative to the margin, or vice versa. It is a pragmatic tool (Macdonald 1993: 123; Carozza 1998: 1227-1228; Letsas (2006); Dothan 2018a: 145) or device that allows the Court to be sensitive to cultural or political backlash against, or acceptance of, possible broad interpretations of Convention rights. A related doctrine of an emerging consensus amongst signatory States provides a basis for the Court to be more assertive in setting the core or boundary of minimum rights protection (Benvenisti 1999: 851; Dothan 2018b). These are functionally different concepts to reflective equilibrium, which is concerned with the adjustment of abstract principles or norms in light of actual experience or judgments of their application and with consistency between the identification of a general or abstract norm and its practice. Wider or narrower approaches to a margin of appreciation can both satisfy the test of reflective equilibrium. Practice under the ECHR does not lead to the amendment of its rights provisions in order to further specify or clarify their application (as applying reflective equilibrium might suggest), although the Strasbourg Court does elaborate in doctrine to in effect gloss the basic rights provisions in the Convention text. However, reflective equilibrium can be related to the concept of an emerging consensus if the latter provides a principled ground for determining the core of a right and is not simply the most common denominator in practice.[25] Related to the question of how to

24 Regarding the essence of rights doctrine in EU law, Tridimas and Gentile (2019: 804) note that the trouble is that the core element of the right is difficult to determine and that it could be defined subjectively—from the point of view of the right holder—or objectively—from the point of view of the function of rights within the constitutional polity.

25 Treating consensus as resulting or as evidenced solely from the similar content of legislation ignores the reasons why legislation has been adopted. See Carozza (1998: 1228) for criticism of a misuse of comparative law to assume a majority practice is normatively valid. For discussion of determining consensus relative to the different interests in the background of codified national laws, see Dothan (2018b: 414–418). See also Tripkovic (2022: 232) (while accepting an anti-foundationalist account of rights).

identify the core of values under Article 2, the margin of appreciation or essence of rights doctrines can draw attention more to the problem of differing interpretations of those values and to a greater acceptance of such differences as legitimate and therefore not readily calling for an interventionist approach from the EU or ECJ, i.e. a focus on a core of protection.

A Threshold of Systemic or Generalised Deficiency

Once the core meaning of a value under Article 2 is identified, it then arises how substantial breach is needed to plausibly engage it, especially under Article 7 TEU. Both the EU institutions and academic commentators have invoked or applied the notion of systemic breaches as a threshold criterion for EU intervention under Article 7 TEU or analogous situations. If Article 2 is to serve the residual role it is attributed with under Article 7 TEU as a kind of final resort under the existing system of State liability (Conway 2002; Simma & Pulkowski 2006: 516-519), then a threshold must be identified in EU institutional practice so that it is not invoked in routine cases. The ECJ applied this threshold approach as a ground justifying refusal of surrender pursuant to a European Arrest Warrant in *Aranyosi*. This test refers to

> ... objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.(Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi*, para. 105)[26]

Von Bogdandy proposes the following approach:

> In everyday language, systemic means concerning an entire organism. Antonyms are isolated, single or local. Consequently, the legal term should denote phenomena of illegality that either occur on a regular basis, are widespread or deep-rooted, or can be traced back to high authorities that use them to express a political stance. Phenomena of this kind do not appear as isolated cases, but rather as characteristics of a system. ... Yet an isolated phenomenon, such as breaking a taboo with a single case of torture, can indicate a systemic deficiency, especially when it is not met with an adequate institutional reaction. Here, too, a system failure looms large. (2020: 719)

As Von Bogdandy noted, the EU Commission's 2018 Regulation proposal on the rule of law referred to "'generalised deficiency as regards the rule of law' means a widespread or recurrent practice, or omission, or measure by public authorities which affects the rule of law" (European Commission 2018).

All of the above tests seek to set a threshold of seriousness before a Member State is considered to have violated a fundamental requirement of EU law, in

26 *Aranyosi* also requires an individualised assessment of risk. The approach of the Court of Justice to applying this test in the context of judicial independence has been described as contextual (Leloup 2023: 1000–1002).

this case, the values Article 2. The threshold criterion does offer the possibility of a methodological constraint. In the first two tests set out above, an attempt is made to set a threshold of seriousness focused on systemic or generalised failings at Member State level, but with the possibility of Article 2 being engaged in less generalised but especially serious cases. The question presents itself then about how such a threshold approach could apply to democratic failings particularly. Combining these suggested tests leads to three criteria, slightly modified as discussed below:

(i) A systemic or generalised failing, or a particularly serious more isolated incident evidencing deliberate violation where this is the result of action or inaction
(ii) Exercised by public authorities at a high level *of central government*
(iii) Based on objective, reliable, specific and properly updated evidence

Von Bogdandy's reference to authorities 'at a high level' is an important qualification, as it would avoid a Member State generally being attributed with what may be the fault of particular or lower authorities. Scheppele (2013) was amongst the first to propose a systemic approach, stating that in the case of a series or range of infringements the whole can be greater than the sum of the parts and should be considered to present a systemic challenge that could be reflected in an enforcement action under Article 258 TFEU based on Article 2 TEU. The question then is what threshold should justify this systemic approach, what makes the whole greater? For an Article 2 value to be at stake in some general way, the threshold should arguably require a government policy plainly contrary to EU law, and not, for example, regarding a series of disputable or arguable points of EU law (which be the subject of a reference under Article 267 TFEU because of an element of uncertainty about the state of EU law).

The above test extends more clearly to individual or less generalised cases. In these cases, the seriousness requirement should also be understood to entail *deliberate* action or inaction by Member State authorities. An isolated example could justifiably be ground for invoking Article 2 because of the chilling effect it could have, and be intended to have, on the system overall. In other words, its effect could be systemic. Action that is not deliberate cannot plausibly be said to represent a breach in a fundamental sense of values. Inaction may be culpable where a Member State central government could but fails to prevent serious or threshold breaches, especially when such failure reflects an aberration of normal practice. As Besselink noted, Article 2 reflects foundational values which are at the basis of the exercise of all public authority both by the Union and by the Member States (Besselink 2017: 141). A breach of Article 2 should, therefore, be understood as violating the legitimate exercise of public authority of the Member State itself, and only intentional and deliberate actions could be said to do this. Von Bogdandy's proposal of fault at a high level could be further specified to refer to *central government*, since it is central government that is answerable to the EU for failure to implement EU law. It is important to clarify

also that the three criteria are cumulative, all must be present to plausibly attribute the breach of a fundamental value to the Member State collectively so as to trigger the stigmatic and punitive effects on a Member State.

Bearing in mind both the conceptual and objective limits that the interaction of values can be taken to suggest when defined in core terms as well as the above proposed threshold test, the next section considers how particular types of problems with the democratic process might be adjudicated by the ECJ.

Examples of Justiciability

EU law sets some basic principles of the electoral system of the European Parliament in the Electoral Act 1976, but says nothing regarding this at national level. While variations exist in the practices of democracy at national level, e.g. regarding the use of referendum (a kind of direct democracy), EU law at a minimum does require a parliamentary system. It seems from the text of Article 10(1)-(2) TEU that any attempt to abolish a parliamentary system, even if it was replaced with extensive direct democracy, would violate democracy under Article 2 TEU. Another clear example of a violation of Article 2 would be attempts to interfere with the regular election process through plainly unlawful means. Neither of these clear cases seems very likely in practice in the EU. Other examples, however, are more borderline or plausible and are considered in this section.

– *Lengthening of the parliamentary term:*

Considerable variations have exist on democratic term limits across the EU Member States. For example, 7-year parliaments used to be the norm in the UK, and the term of the French President was also 7 years until the presidential election of 2002 (UK, Parliament Act 1911; France, *Loi constitutionnelle no* 2000-964 du 2 Octobre 2000 and Article 6 of the Constitution). What might pose a threat to normal democratic process would be the repeated lengthening by short periods of parliamentary or presidential terms, if such a mechanism existed at national level.[27] Repeated lengthening would clearly fall outside democratic norms shared across the Member States. It would satisfy the threshold test proposed above if there was evidence of a deliberate use of such postponements to frustrate the normal democratic process, even if targeted in some way, e.g. at a particular electoral district. The effects could be systemic directly or indirectly.

– *Recall procedures:*

Systems of recall as a type of discipline for elected representatives are not that common, but some countries do have them (Bhanu 2007: 21-22; Venice Commission 2009; Twomey 2011: 45-55; Giba & Bujňák 2021: 40-41; Johnston &

27 For example, the London mayoral election was delayed from 2021 to 2022 due to the Covid-19 pandemic.

Kelly 2024).[28] A 'lowest common denominator' approach to interpreting Article 2, whereby Article 2 was used to standardise democratic procedures (rather than ensuring some minimum or core requirements) might exclude such mechanisms because they are somewhat unusual, but that would suggest a general EU competence to regulate democracy at national level, which clearly does not exist. In principle, there seems no reason any recall mechanisms should necessarily be evaluated negatively. They can be seen as enhancing the representative aspect of legislatures, so long as the procedure is not such as to allow the targeting of representatives to de-stabilise their mandate. The latter could occur systematically or in a more individual or isolated case. For example, if only a small number of constituents could trigger a recall following certification by an official whose appointment was in the gift of the governing party and on the basis of very broad recall criteria and perhaps done repeatedly, the process could become unfairly politicised, especially in narrowly-won constituencies (Twomey 2011: 47-50, 60-61). The procedure might also be used to target poorly resourced representatives who might lack funds or constituency organisation to stage an unexpected electoral campaign. In other words, rather than being praiseworthy as an example of direct democracy, such a procedure could be used to engage in 'destructive harassment by outside pressure groups, extremist forces and opposing political parties' (Crisp 1978: 213; cited in Twomey 2011: 43), that could substantially undermine the regular functioning of a representative government (Bhanu 2007: 22). Such use of recalls could affect the stability of a government (Twomey 2011: 67-68). The threshold proposed above for Article 2 TEU could be reached in this scenario if a recall power was used in such a way to undermine the tenure of elected representatives.

– *Militant democracy:*

Lowenstein (1937) first identified the concept of militant democracy, whereby the normal rights and freedoms of democratic process are denied to those who would seek to subvert democracy itself, in protecting democracy. Examples of such measures have been upheld under the European Convention on Human Rights (ECHR), for example, restrictions on the broadcasting of political figures associated with paramilitary groups were upheld in *Purcell & Ors v. Ireland*, with the Commission observing:

> In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult

28 For example, in the UK, the Recall of MPs Act 2015. Apart from the UK, the main other European example is Switzerland. Some countries permit referenda by citizen's initiative to mandate an early election or collective recall, e.g. Latvia (Article 14 of the Constitution, but this provision prohibits individual recall) and Liechtenstein (Article 48 of the Constitution, similarly not permitting individual recall) (Giba, Bujňák 2021: 40–51). In Slovakia, citizens' initiatives have been used to request a referendum on an early election (Giba, Bujňák 2021).

> to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.

Measures like this call for a careful judgment that should not ordinarily engage Article 7 TEU sanctioning on the grounds of a violation of Article 2 TEU. However, restrictions on freedom of expression that extend beyond a narrow category of subversive speech and that are prohibited on grounds of contributing to civil strife, i.e. on the grounds of being offensive only, illustrate the problem discussed earlier about a majoritarian definition of the limits of rights that impact unfairly on minorities and could be used to restrict electoral debate. This example illustrates the limits of the rule of law as a requirement of democratic government: broadly framed legal provisions on offensive speech may satisfy the requirements of legality, in being applied on their face to all citizens to the same extent, but could be used to target minority views and to inhibit public debate necessary for the practice of free elections. A majority might be quite willing to impose a restriction on the minority that the majority itself is willing to be subject to also, simply because it disagrees with the minority view. This example shows the need for a substantive concept of rights, including minority rights, to inform the principles of democracy and the rule of law – specifically here, a substantive concept[29] of freedom of expression must exist prior to a democratic procedure, implying a normative priority that Article 2 TEU or the EU Charter do not express. The formulations of freedom of expression as a right in the ECHR and CFR are unclear about this exact question of how far a majority can go in derogating through law from freedom of expression for minority viewpoints. An example that could meet the threshold requirement proposed above, in a more isolated or individual way, would be an inconsistent application by government authority of the concept of offensive speech to target a small group or particular viewpoint. In this situation, a method of reflective equilibrium is important to relate practice back to principle and to determine a consistent application of an abstract norm of freedom of expression, but neither does reflective equilibrium itself – as a requirement of consistency between abstract norm and judgment in practice – provide a content-based limit on lawful derogations from freedom of expression.

29 This view might be thought to be within a Lockean tradition of natural rights antecedent to the State; more recent academic wiring has sought to ground a limit to democratic authority in substantive moral commitments without invoking explicitly any natural law commitment: e.g. Christiano (2008), grounded an argument about equality on the dignity of the person; Viehoff (2014: 371–374), arguing that legitimate democratic authority must be genuinely exercised in the interests of all.

Conclusion

The justiciability of Article 2 TEU has only started to be addressed in the case law of the Court of Justice, but its potential is considerable in setting essential constitutional parameters for the Member States and for the EU, including on the meaning of democracy. The ultimate relationship of the values in Article 2 TEU to each other raises profound questions of legal and political theory; this article has sought to identify this context more fully and to suggest some practical methodological steps for the Court of Justice as the ultimate arbiter within EU law of the scope of Article 2 in interpreting the concept of democracy. The EU Treaties only thinly define the concept of democracy as 'representative', in Article 10 TEU, which leaves much unsaid about the actual practice of democracy, including how it relates to the rule of law and, especially, rights. Moreover, the relationship between democracy and the other values in Article 2 is not specified in any way in Article 2 itself, which establishes no priority between them.[30] The concept of democracy can be defined in more abstract versus more procedural or concrete terms, the latter focused on the more immediate question of electoral mechanisms, rather than a broader question of the culture of democracy. The placing of democracy within a broader statement of values places the EU, on the face of it, within the tradition of a liberal State, where the autonomy of the individual is secured through both democratic government and the protection of individual rights and freedoms under the rule of law. This understanding is secured if the Court of Justice and EU institutions cautiously interpret democracy in a manner compatible with the constitutional traditions and core understanding of democracy across the Member States, including how it relates to the other values in Article 2 TEU. This approach reflects a method of reflective equilibrium in drawing out the meaning of the very abstract statement of values within Article 2. This is to be preferred to an approach of 'meta-axiological' interpretation that could allow the expansion of one or other of the fundamental values of the EU at the expense of other values (even if this were done with some degree of deference to Member State autonomy being reflected in fact sensitivity rather than a prior definition of value). This latter approach would leave too much to be determined by EU institutional practice, rather than being grounded more concretely in the multiple *demoi* that exist in the Member States relative to the more diffuse *demos* that may be thought to now exist at European level.

30 This is a challenge not specific to the EU, but could be considered a more widespread question in Western political practice – and theory. See, e.g. Lovett (2004: 100).

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Džerard Konvej

Demokratija pred sudom: Demokratija kao pravno primenjiv koncept u EU

Apstrakt:

Demokratija je pravno primenljiv (justiciabilan) koncept u okviru prava Evropske unije. Iako se EU identifikuje kao predstavnička demokratija, ugovori EU pružaju relativno malo smernica o tome šta demokratija zapravo podrazumeva. Kontekst ovog pitanja je u tome što je sam pojam demokratije predmet sporenja, naročito među 27 političkih sistema država članica EU, kao i u potencijalno širokom preispitivanju nacionalnih ustavnih poredaka koje bi moglo proisteći iz nadležnosti Suda pravde EU u vezi sa članom 2 Ugovora o Evropskoj uniji (TEU), koji predstavlja izjavu o osnovnim vrednostima EU.

Ovaj rad se posebno bavi time kako se koncept demokratije prepliće sa ostalim vrednostima iz člana 2, pre svega sa vladavinom prava i poštovanjem ljudskih prava. Nadležnost Suda pravde prema članu 2 naglašava problem određivanja relativne važnosti i međusobne interakcije osnovnih vrednosti EU, imajući u vidu njihovu relativnu neuporedivost. To uključuje i probleme: i. povezivanja demokratije na nacionalnom i nadnacionalnom nivou u EU, i ii. određivanja granica demokratskog autoriteta.

U radu se tvrdi da član 2 treba shvatiti kao predstavljanje složenog problema međusobnog odnosa vrednosti, za koji su neophodni metoda reflektivne ravnoteže i test praga kako bi se ti koncepti mogli pravno primeniti.

Na osnovu ovog okvira, završni deo rada razmatra neke primere nacionalne prakse u vezi sa demokratijom koje bi se mogle smatrati suprotnim vrednostima demokratije prema pravu EU i koje bi mogle potpasti pod nadležnost prema članovima 2 i 7 TEU-a: produžavanje trajanja mandata parlamenata, postupci opoziva (recall procedures), i koncept “borbene demokratije” (militant democracy).

Ključne reči: demokratija, pravna primenjivost, Sud pravde, ljudska prava, vladavina prava, vrednosti, sukob normi, sukob vrednosti