RIGA GRADUATE SCHOOL OF LAW

The values required to join the European Union – an attempt to explain what democracy and the rule of law are by legal means

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

NOTTENKÄMPER

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ABSTRACT

Art. 49 TEU and Art. 2 TEU lay down the conditions for accession to the European Union, but they contain very vague and historicaly loaded legal terms. Therefore, candidate states often have problems determining what to focus on when fullfilling the accession criteria. The aim of this paper is to identify the EU-specific understanding of democracy and the rule of law in order to provide guidance for understanding the criteria. As a result of this paper, two lists have emerged that contain the elements of democracy and the rule of law in the sense of Art. 49 TEU read with Art. 2 TEU. Democracy includes, inter alia, the sovereignty of the people, free and fair elections, transparency and the protection of minorities. Further, the rule of law comprises, inter alia, a basic level of justice, legal certainty, a functioning justice system, and fight against corruption.

Democracy, the rule of law, Art. 49 TEU, Copenhagen Criteria, Art. 2 TEU

SUMMARY

In 2022 and 2023, the war in Ukraine caused the issue of EU enlargement in the East/South-East to take on a new urgency. The most fascinating prerequisites for accession from a legal point of view are regulated in Art. 49 TEU, Art. 2 TEU and the Copenhagen Criteria. Problems for the accession candidates can originate from the high degree of indeterminacy of the terms used. The two central concepts of democracy and the rule of law have already been used in many eras and contexts. And at the moment they are again and again a central part of the political and legal debate in the European Union. The problem now is to determinate the genuinely EU-specific understanding of these terms.

This paper aims to contribute to the elaboration of this EU-specific understanding. The two research questions are therefore: What is the meaning of democracy regarding Art. 49, Art. 2 TEU? And: What is the meaning of the rule of law regarding Art. 49, Art. 2 TEU? To answer these questions, the following hypothesis is put forward: There is a supranational concept of democracy and the rule of law which exists on the level of the European Union.
Chapter 1 begins by describing the necessary basics. This includes explaining the role of Art. 49 TEU as the norm prescribing the procedure. For the substantive requirements, Art. 49 TEU uses a reference technique to the basic norm of Art. 2 TEU and the Copenhagen Criteria, which are then explained. The use of democracy and the rule of law in the Treaties is briefly discussed afterwards. The basis for an in-depth examination of the content of these two concepts is then laid by presenting the idiological origins.

Overall, the thesis represents a interpretation project. It is therefore necessary to answer a few preliminary questions. First, the concept of autonomous interpretation of EU law is explained. Next, the tension between the law and politics and the corresponding approaches are examined. In doing so, it is shown that, although many politicians are at work, the methods of legal science must be applied in the end. In the course of this argumentation, it also becomes clear that this question of interpretation cannot be decided by the CJEU in the proceedings of Art. 49 TEU, but that the CJEU deals with these two concepts in other proceedings. Thirdly, the methods of interpretation are explained: grammatical interpretation, systematic interpretation, historical interpretation, teleological interpretation and comparative interpretation. It is also explained what effet utile is and why the Vienna Convention is not helpful for this question.

Building on these foundations, Chapter 3.1 identifies the European understanding of democracy. In contrast to the usual publications in this field, this work is more strictly

oriented towards the methods of interpretation. Starting with the Greek words that form the basis of "democracy", the grammatical interpretation begins. This is followed by the systematical interpretation. The other methods of interpretation do not produce the necessary results individually, so they have to be considered together. The special feature of this work is that a great focus is placed on the views of the institutions that make the decisions in practice. On this basis, the content of democracy is determined with the help of the literature and the courts. Subsequently, the views of politicians and political scientists are briefly examined. The result is that no significant deviations in content can be found from the results of the jurisprudential study. The result is this: The EU-specific understanding of democracy includes: 1. The people is the sovereign, 2. Elections are the basic tool of influencing for the people, 3. Universal suffrage for national citizens plus extra rights for EU-citizens, 4. Elections musst be free, and the act of voting must be secret, 5. Each vote has to be counted equally, 6. As a basic principle each vote has to contribute to the outcome in the same way, 7. In elections everybody needs to have the same fair choice. This includes the following points: The prohibition of creating electoral constituencies in such a way as to give one party an advantage (“Gerrymandering”), protection of minorities, transparency of government and parliament (democratic accountability), pluralism, with the meaning of having freedom of expression and the duty for the state to protect an independent press against possible attacks, the duty of neutrality for state organs when they act in their capacity as state organs, 8. Chains of legitimacy are permissible for giving/transferring legitimacy, 9. Elements of representative democracy and elements of direct democracy, 10. The independent mandate of elected representatives, 11. The possibility to actively participate in the political process outside of elections. In particular, it must be possible to form a will through parties from the bottom up, 12. Essential decisions have to be taken by parliament (or other elected representatives).

In parallel, Chapter 3.2 identifies the content of the rule of law. The same methodological approach, as for democracy, is used. The outcome is that the EU-specific understanding of the rule of law includes: 1. Justice, 2. A legislative process that is transparent, open/inclusive, accountable and pluralistic, 3. Legal certainty, including easily acessible and clear written laws, the prohibition of retroactive laws and the enforceability of final judgements, 4. The prohibition of arbitrainess, 5. A functioning justice system, including independent judges, autonomy of the prosecution services, the right to an effective remedy, acess to courts and a fair and public trail, financial help for the defence and an acceptable length of the procedings, 6. Judicial review of executive measures, 7. The right to good administration, 8. Seperation of powers, 9. Non-discrimination and equality before the law, 10. The fight against corruption, 11. Laws have to be effecitve, 12. The supremacy of law, 13.

The primacy of EU law, 14. The respect and application of international law. The conclusion further encourages extensive comparative law research.

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INTRODUCTION

After the Russian invasion of Ukraine in 2022 the question of enlargement of the EU and NATO in the east of Europe gained new momentum.[1] In February 2022, Ukraine formally applied to join the European Union and was granted EU candidate status in June 2022.[2] Similarly, Moldova was granted EU candidate status in June 2022 after having applied in March 2022.[3]

At the political level, Ukraine received a lot of support from people like Olaf Scholz and other important politicians. They publicly supported Ukraine's accession efforts, although it is unclear whether these statements were completely serious or only intended to send a political message to Russia. In the broader public, the positions were much more differentiated: there was a lot of talk about corruption in Ukraine and that this would stand in the way of accession. Some media[4] even started to explain terms like the Copenhagen criteria. These new discussions also brought the slowed down accession negotiations with the western Balkan states back into the public consciousness and as a consequence, by the end of 2022 Bosnia and Herzegovina became an EU candidate state.[5]

In and after all these discussions, which were mainly held at the political level, I became aware that many actors are unaware of the requirements for EU accession. Therefore, many lines of argumentation rather missed the point when they only demanded that Ukraine should join the EU and did not think if Ukraine is in a suitable state to join the EU. Sometimes these demands showed that the authors did not understand what the EU is exactly and what its essential contents are.

Therefore, I believe that it is important that both the decision-makers in the EU and the member states, as well as the EU citizen at large, are more aware of what is expected of an EU member state, so that the quality of the public debate inside the EU increases. This knowledge is particularly important for potential accession candidates, who themselves have

[1] In 2022 alone three countries gained the candidate status, with two states negotiations were started and two more states applied to join the European Union.
[2] Council of the European Union, Ukraine. Available on: https://www.consilium.europa.eu/en/policies/enlargement/ukraine/. Accessed February 21, 2023.
[3] Council of the European Union, Moldova. Available on: https://www.consilium.europa.eu/en/policies/enlargement/moldova/. Accessed February 21, 2023.
[4] *See* for example TLDR News EU with the video title: "Could Ukraine actually join the EU?" on September 21, 2022. Available on: https://www.youtube.com/watch?v=-sxpxqWrAJM&t=147s. Accessed April 28, 2023.
[5] European Council, European Council 15 December 2022. available on: https://www.consilium.europa.eu/en/meetings/european-council/2022/12/15/. Accessed February 21, 2023.

great difficulties in finding out how exactly they must or should adapt their country to which requirements.[6]

However, these demands on the member states are very confusing and contain many indeterminate legal terms.[7] Accession to the EU is mainly determined by Art. 49 TEU and Art. 2 TEU.[8] Some of the necessary information can be found relatively easily, e.g., how the formal procedure for EU accession is structured. However, it is much more difficult to find out what the values referred to in Art. 2 TEU mean.[9] On one hand, there is a large number of values and, on the other, there is no simple and unambiguous definition for almost all of these terms.[10] At least none that provide a real gain in knowledge through unambiguous definitions. In addition to these undefined legal terms, all 24 EU languages are binding,[11] there are different traditions in the member states and these terms have also been shaped by institutions outside the EU (such as the World Bank).[12] The attempt to know what criteria must be fulfilled is made even more complicated with the use of the term "Copenhagen Criteria"[13] which is used next to Art. 49 TEU, which partly overlaps with it but partly is different.

Therefore, there is a need for an explanation of what the values of Art. 2 TEU mean in relation to Art. 49 TEU.[14] The problem with most publications in this respect is that they do

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[6] European Commission, *Enhancing the accession process - A credible EU perspective for the Western Balkans*, COM (2020) 57 final, February 5, 2020, Brussels, p. 5.

[7] For example, the rule of law. European Commission for democracy through law (Venice Commission), *Report on the rule of law*. Available on: https://rm.coe.int/1680700a61. Accessed May 05, 2023. p. 3; Thure Hanssen, *Rechtsstaatlichkeit in der EU*, (Hamburg: Europa Union Hamburg, 2022). Available at: https://europa-union-hamburg.de/de/articles/rechtsstaatlichkeit-in-der-eu. Accessed March 20, 2023.

[8] With Art. 6 § 1 TEU also playing its role in setting the standards.

[9] Just about the meaning of one the terms there exist whole scientific papers, for example: Werner Schroeder, "The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?," in *Defending Checks and Balances in EU Member States*, ed. von Bogdandy et al. (Berlin: Springer-Verlag, 2021), 105-126; Tom Boekestein, "Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values," *German Law Journal* 23 (2022): p. 1; European Commission for democracy through law, *rule of law checklist*. Available on: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf. Accessed May 05, 2023. p. 5.

[10] Tom Boekestein, *supra* note 9.

[11] Art. 53 § 1 TEU. European Commission, Directorate-General for Communication, available on: https://european-union.europa.eu/principles-countries-history/languages_en#:~:text=The%20EU%20has%2024%20official,%2C%20Slovenian%2C%20Spanish%20and%20Swedish. Accessed April 29, 2023.

[12] *See* chapter 2.3.2 Origins of the rule of law for that.

[13] Bruno de Witte, "Fundamental values," in *The enlargement of the European Union*, ed. Marise Cremona, (Oxford: Oxford University Press, 2003), p. 229.

[14] European Commission, *supra* note 6; Elena Basheska, "EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia," *Hague Journal on the Rule of Law* 14 (2022): chapter 2; European Commission for democracy through law, *supra* note 7; Thure Hanssen, *supra* note 7; Dimitry V. Kochenov, *How to turn Article 2 TEU into a down-to-Earth provision?*, Available on: https://verfassungsblog.de/how-to-turn-article-2-teu-into-a-down-to-earth-provision/. Accessed April 29, 2023; Petra Bard et al., *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights Annex II - Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights* (Brussels: European Parliamentary Research Service, 2016) p. 79.

not deal with the terms in relation to the EU but explain what these values mean in a particular state or in development aid or in another international organisation. Also, legal texts (such as judgments in particular) are largely concerned with whether a particular practice is compatible with the rule of law, rather than which elements are all part of the rule of law.

But why giving an explanation that focuses on the legal perspective and not one that focuses on the political point of view? The reason is that although we are dealing with values, these values originate from the legal environment and use of language.[15] Even if someone only looks at the matter from the political sphere, they are aware that the legal use of language has a decisive influence on the meaning of the words. Moreover, Art. 2 and 49 TEU are legally binding norms that originate from a treaty (as a legal instrument), with Art. 49 TEU concretising the meta norm of Art. 2 TEU in the case of potential accession. These words were therefore deliberately chosen by the signatories of the Treaties as a legally binding rule. To sum up: the legal problem is that the most people don't know what the legal requirements for joining the European Union mean in detail. I would like to try to provide this explanation.

The purpose of my thesis is to reduce some of this existing uncertainty.[16] Therefore, my research question is as follows: What is the meaning of democracy and the rule of law regarding Art. 49, Art. 2 TEU?

This thesis focuses on democracy and the rule of law because they are the most indeterminate terms. It is not possible to analyse more than two of the values from Art. 2 TEU in approx. 20,000 words. At least not if one wants to achieve a certain depth of detail. The two chosen concepts are not only very vague but belong to the most commonly used and most important[17] terms of Art. 2 TEU. A good illustration for this is the words of Frans Timmermans, Vice-President of the Commission, who said: "The rule of law is part of Europe's DNA, it's part of where we come from and where we need to go."[18] My thesis will first deal with democracy and only then with the rule of law, because in the understanding of

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[15] *See* for the details chapter 2.2.

[16] Elena Basheska, *supra* note 14; Christoph Bleiker and Marc Krupanski, *The Rule of Law and Security Sector Reform: Conceptualising a Complex Relationship*, (London: Ubiquity Press, 2012), p. 21.

[17] Olteanu, Camelia, "History, Present and Perspectives in Democracy Proceedings of the 1st LSO Conference," *Contemporary Readings in Law and Social Justice* 4 (2011), p. 519; Dimitry V. Kochenov, *supra* note 14; Thure Hanssen, *supra* note 7; Generaldirektion Forschung und Innovation, *Werte für die Zukunft: Die Rolle der Ethik in der europäischen und globalen Ordnungspolitik* (Brüssel, 2021), p. 3; James Kloppenberg, *Toward Democracy* (Oxford: Oxford University Press, 2016), p. 1; European Commission, *2022 Rule of Law Report*. P. 1. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1658828718680&uri=CELEX%3A52022DC0500. Accessed May 03, 2023; Shannon C. Stimson, "Constitutionalism and the rule of law," in *The Oxford Handbook of Political Theory*, ed. John Dryzek et al. (Oxford University Press: Oxford, 2006), p. 317.

[18] Frans Timmermans, *The European Union and the Rule of Law*, Keynote Speech at Conference on the Rule of Law (Tilburg University: 2015).

the EU, laws created according to the rule of law only make sense if the people have an influence on the future laws at the next election.[19]

Regarding the methodology: For answering the research question I will start with the doctrinal approach and will analyse how legal scholars define democracy and the rule of law and which concepts are included in their opinion. The structure of this section will follow the methods of interpretation. Starting with the literal interpretation and the systematic interpretation. This is followed by the other methods of interpretation. These are split up in the first part with the views of the EU institutions (which will decide in practice) and the general discussion which features the opinions of scholars and courts. After that, I will try (shortly) to find out if politicians or political scholars mean something different if they use these terms. I have chosen this traditional approach because it has been very neglected in the literature so far. I am trying to reduce this gap.

It is important to note that the focus is only on Art. 2/49 TEU. For example, it is not entirely clear whether the rule of law in Art. 21 TEU (which refers to the EU's external action) has the same content.[20]

This paper consists of four chapters. The first chapter deals with the enlargement criteria and how these terms are used in the Treaties and the ideological origins of these values. The second chapter is concerned with the fundamental questions of determining the content of legal concepts at the level of the EU and who decides on the content of the values named in Art. 49 TEU. The third chapter then discusses the question of which elements are contained in the European understanding of democracy and the rule of law through using the findings of the previous chapters. Finally, the conclusion will be round of the research.

To find an answer to the research question, the author puts forward the following hypothesis: There is a supranational concept of democracy and the rule of law which exists on the level of the European Union.

[19] Petra, Bard, "Scrutiny over the Rule of Law in the European Union," *Polish Yearbook of International Law* 36 (2016): p. 190.
[20] Stefan Martini and Francis G. Jacobs, "The Sovereignty of Law. The European Way. Erik O. Wennerström, The Rule of Law and the European Union," European Journal of International Law 21, Issue 1 (2010): p. 272; Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union* (New York: Jean Monnet Working Paper, 2009), p. 67.

1. ORIGINS OF THE ENLARGEMENT CRITERIA

1.1 What are Art. 49 TEU and the Copenhagen Criteria? What is their purpose?

Art. 49 TEU and the Copenhagen Criteria are the criteria that must be met in order to join the EU.[21] Article 49 TEU is the starting point for all considerations on the accession of further states to the EU. This norm had no direct predecessor in the Treaty on the European Economic Community and has been in force since the 1st of November 1993. It describes the basic rules of the accession procedure, which, however, are not relevant to the question of this thesis. The material prerequisites for accession are not fully specified in Art. 49 TEU but are integrated by two references. Art. 49 § 1 Sentence 1 itself only requires that the values be respected, and that the MS be committed to promoting them. The values to which this must apply are introduced by a reference to Art. 2 TEU. The values mentioned in Art. 2 TEU are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,[22] including the rights of persons belonging to minorities". There is some disagreement about the meaning of the values mentioned in Art. 2 sentence 2.[23] In any case, this second sentence has no real effect on the question of this work. The reference to Art. 2 TEU is relatively new and was only introduced by the Treaty of Amsterdam in 1997 but the practice existed before the codification.[24]

Furthermore, Art. 49 § 1 Sentence 3 contains a reference to "the conditions of eligibility agreed upon by the European Council". These conditions are called the "Copenhagen Criteria"[25] because they were established by the European Council in Copenhagen in June 1993.[26] The legal form of this decision is a conclusion of the presidency.

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[21] Rezler Paulina, "The Copenhagen Criteria: Are They Helping or Hurting the European Union," Touro International Law Review Volume 14 (2011): pp. 390, 391.
[22] These human rights also include, via Art. 6 § 1 TEU, the Charter of Fundamental Rights.
[23] Marcus Klamert and Dimitry Kochenov, "Art. 2 TEU," in *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, ed. Manuel Kellerbauer et al. (Oxford: Oxford University Press, 2019), Art. 2 B.
[24] De Witte, *supra* note 13; Friedrich Erlbacher, "Art. 49 TEU," in *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, ed. Manuel Kellerbauer et al. (Oxford: Oxford University Press, 2019), Art. 49 C.
[25] De Witte, *supra* note 13; Friedrich Erlbacher, *supra* note 24, Art. 49 C.; Koen Lenaerts et al., "Accession to and Withdrawal from the European Union", in *EU Constitutional Law* (Oxford: Oxford University Press, 2021), Chapter 4.010.
[26] The Presidency of the European Council. *Conclusions of the Copenhagen European Council of 21/22 June 1993*, page 13. Available on: https://www.europarl.europa.eu/summits/copenhagen/co_en.pdf.htm. Accessed May 08, 2023; Petra Bard, *supra* note 19, p. 188; European Commission, Directorate-General for Neighbourhood and Enlargement Negotiations, available on: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en#:~:text=The%20accession%20criteria%2C%20or%20Copenhagen,to%20become%20a%20member%20state. Accessed May 02, 2023.

This is not in itself a legally binding legal form, cf. Art. 288 TFEU. In 1995 there was a revision of the memberships criteria by the European Council in Madrid: the idea was to require the necessary adjustments of their legislative structures to be able to implement "the acquis" effectively.[27]

The political background to these two decisions was that it became obvious that many of the states of the former Eastern Bloc would want to apply for EU membership in the long run.[28] The fundamental decision in Copenhagen was also taken shortly before the accession of Sweden, Austria and Finland (for all of whom the new criteria did not pose any problems), which shows the motivation to take the fundamental, trend-setting decisions before more countries join.

In terms of content, the Copenhagen Criteria deal with three major topics: The first thematic area deals with the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.[29] These requirements are very similar to the values listed in Art. 2 TEU. The difference is that here human dignity and equality are not named (maybe they are seen as part of human rights) and democracy is framed in a different way, so that is covers a little bit less. But in practice is doesn't matter because always the broader set of conditions will be used. The second area deals with economic preconditions and requires a functioning market economy and the ability to cope with competitive pressure and market forces within the EU.[30] The last category demands the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the "acquis"), and adherence to the aims of political, economic and monetary union.[31]

Art. 49 and the Copenhagen Criteria together have the function that they contain a list that is publicly accessible and on which every potential member state can orientate itself. This makes the work easier for the potential member state and for the European institutions because they have a basis on which they can base decisions to reject or approve. Through that the list gives guidance to the political process. It also streamlines the discussion and decision process inside the EU because the working question is simplified: instead of asking "can

[27] European Commission, *Opinion on the EU membership application by Ukraine*. Available on: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3802. Accessed May 01, 2023; Rezler Paulina, *supra* note 21, p. 392.
[28] De Witte, *supra* note 13; Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 A.
[29] Publications Office of the European Union, *Accession criteria*. Available on: https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html. Accessed February 11, 2023; Friedrich Erlbacher, *supra* note 24.
[30] Publications Office of the European Union, *supra* note 29.
[31] Friedrich Erlbacher, supra note 24; Publications Office of the European Union, *supra* note 29.

Serbia join the EU? The question is if Serbia respects the rights of minorities. Besides that, it increases transparency, which facilitates the control function of the media in particular.

Thus, to summarize the relationship between Art. 49 TEU and the Copenhagen Criteria: Art. 49 TEU legally describes the requirements for accession. There is a reference to "the Council XY", which means the Copenhagen Criteria. Therefore, the CC are part of the legal requirements for accession. However, the Copenhagen Criteria are more than that. They describe a larger phenomenon, namely they are also the political criteria that must be met for a country to join the EU. One can see this in the fact that the Copenhagen Criteria already existed before they were used as a legal criterion. The Copenhagen Criteria therefore have a double role: on the one hand, they concretise the requirements of Art. 49 TEU as a legal instrument and, on the other hand, they set the political direction for EU accession.

1.2 The use of democracy and the rule of law in the Treaties

In the TEU preamble, the words democracy and democratic are used three times to describe the basic ideas behind the founding of the EU, including the aim of improving the democratic functioning of the institutions. In § 3 of the preamble, democracy is described as a cultural heritage of Europe that has developed into a universal value.

The next mention of democracy is in the already mentioned Art. 2 and in extension thereby also in Art. 49 TEU. This is followed by Title II which entails “provisions on democratic principles”. Art. 10 TEU gives more direct insights into the European union understanding of democracy through its mentioning of “representative democracy”[32], “democratically accountable”[33] and that “every citizen shall have the right to participate in the democratic life”.[34] Other useful articles for the content determinations can also be Art. 9, 11, 12 TEU which do not explicitly speak of democracy, but shape the democracy of the EU. Art. 21 § 1, § 2 TEU name democracy as one of the Unions principles for external action, which it seeks so advance in the wilder world.[35] In the TFEU and its protocols, the term is used five times, of which four mentions are of no use for determining the content of the term in question. Only the mention in the first sentence of Protocol 29 on the system of public broadcasting in the member states is useful because it describes the need to preserve media pluralism as a democratic need.

[32] Art. 10 § 1.
[33] Art. 10 § 2.
[34] Art. 10 § 3.
[35] Elena Basheska, *supra* note 14, p. 2; Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 A.

For the rule of law, it is similar but more reduced: In the preamble, the rule of law is mentioned twice and again it is called a universal value originating from humanist cultural heritage of Europe. The next mention is again in Art. 2 and thus also in Art. 49. But unlike democracy, there is no separate section on rule of law principles, but it continues in Art. 21 TEU. There, the rule of law is described as principle which has inspired the creation of the European Union and a guideline for the external actions of the Union. The TFEU does not entail any mention of the rule of law but only of "rule of law", for example in Art. 263 § 2 TEU, for which I will show later that it is something different.[36]

This current version of primary law is in stark contrast to the original founding treaties from March 1957 in Rome, which did not include the terms democracy and rule of law at all.[37] The Maastricht Treaty (1992)[38], on the other hand, shows the gradual development. In this treaty, the words democracy or democratic are used five times and at somewhat less prominent positions in comparison to the current primary law. For the rule of law, the same effect occurs with three mentioning's.

1.3 Ideological origins

1.3.1 Origins of democracy

The term democracy comes from the Greek word dēmokratia, which is derived from the words for people (dēmos) and rule (kratos).[39] This term originated in the middle of the 5th century BCE and described a political system in some of the Greek city-states.[40] But what did democracy mean back then? Democracy as a system was the alternative to oligarchy. Democracy meant the rule of the people as opposed to the rule of the few.[41] Therefore, a Polis

[36] *See* for the difference between the rule of law and rule of law Chapter 3.2.2.1.
[37] Due to the lack of an English binding version of this treaty it can only be referenced in German, Italian, French or Dutch. Here the German version of the treaty was tested with the terms "*Demokratie*" and "*Rechtsstaat*". This version is available at https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT&from=DE. Thure Hanssen, *supra* note 7.
[38] Treaty on European Union, Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11992M/TXT&from=DE, Accessed May 01, 2023; Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 A.
[39] Robert A. Dahl, *democracy*. Available on: https://www.britannica.com/topic/democracy. Accessed March 01, 2023; Olteanu, Camelia, *supra* note 17, p. 520.
[40] Robert A. Dahl, *supra* note 39; Maria Diaz Crego et al., *Protecting EU common values within the Member States An overview of monitoring, prevention and enforcement mechanisms at EU level*, European Parliamentary Research Service, PE 652.088, 2020, Available on: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU(2020)652088_EN.pdf, p.12.
[41] James Kloppenberg, *supra* note 17, p. 3.

"was a democracy if city affairs were subject to an Assembly; to which all male citizens belonged."[42] In addition, decisions had to be taken by simple majority to be a democracy.[43] An important thinker, also in relation to democracy, was Aristotle and his considerations received much attention in ancient and modern state theory.[44] He particularly emphasises the freedom of the individual.[45] This is a basic assumption that we still understand today as the basis for our democracy.[46] Already back then, there was the understanding that citizens may vote and be elected, i.e. only citizens may participate in democracy and yet decisions may nonetheless be made about non-citizens.[47]

Until the late 18th century, the concept of democracy was still understood primarily as its original meaning, i.e., as a community that governs itself with the involvement of a large part of the population. This understanding was still associated with chaos and demagogy.[48] It was not until around 1780-1800 that the modern common meaning of the word developed, and it came into general use as a political term, and it was contested for a long time what it means.[49]

Since that time, the term has come to denote many completely different forms of rule and there was also a problem with the distinction with "republic".[50] Many definitions of democracy have appeared over the centuries. For the purpose of this work, it is necessary to systematise and narrow down the scope. Roughly speaking four directions can be identified:[51] democracy can be a 1. a political system, 2. an ideal of collective self-government, 3. a precondition for legitimacy or a requirement for justice as normative principles, 4. a way of life based on mutual respect and a self-commitment to peaceful cooperation, or the ethos that prevails in an egalitarian society. Some scholars see modern democracy emerging with the

[42] Jim Kilcullen, *Defining democracy*. Available on: https://www.moadoph.gov.au/democracy/defining-democracy/#, Accessed May 02, 2023.
[43] Ibid.
[44] Aristotle's understanding of democracy, however, must be read in the context of his understanding of Politie. Arthur Rosenberg, „Aristoteles über Diktatur und Demokratie (Politik Buch III)," *Rheinisches Museum für Philologie Neue Folg*e 82.4 (1933): p. 339; Michael Gerke, *Antike Demokratietheorie* (2006). Available on: http://www.polit-bits.de/Lernzone/Antike%20Demokratietheorie.pdf. Accessed May 03, 2023. p. 22.
[45] Michael Gerke, *supra* note 44, p. 24.
[46] The Museum of Australian Democracy, *Defining Democracy*. Available on: https://www.moadoph.gov.au/democracy/defining-democracy/#. Accessed 06 March 2023.
[47] Michael Gerke, supra note 44, p. 24; Robert A. Dahl, *democratic institutions*. Available on: https://www.britannica.com/topic/democracy/Democratic-institutions. Accessed May 02, 2023.
[48] James Kloppenberg, *supra* note 17.
[49] Hans Maier, „Demokratie," in *Historisches Wörterbuch der Philosophie. Band 2,* ed. Joachim Ritter, (Basel: Schwabe, 1972), pp. 51–54.
[50] Robert A. Dahl, *supra* note 39.
[51] Ludvik Bergman, „Democracy," in *Oxford Research Encyclopedia of Politics*, ed. William R. Thompson (Oxford: Oxford University Press, 2021), p. 1; Olteanu, Camelia, *supra* note 17.

birth of the USA or in the aftermath of the French Revolution.[52] More useful, however, is the approach of Schmidt[53] that, all concepts written before the 20th century are only precursors of the current understanding. Because when one works with the concepts of the 20th century, it still contains the idea of the late 18th century.

Modern scholars mostly focus on the exercise of sovereignty by the people through universal, free and equal suffrage and on the existence of a legislative frame which was adopted by a representative collective that contains fundamental rules that deal with the organisation and the limits of the state (which mostly is the constitution).[54] Often legitimacy is dealt with in this context as well.[55] The relationship between democracy and respect for human rights is also an important point in today's understanding of democracy, as these reflect the protection of minorities, which is precisely in contrast to the rule of the majority.[56] In this context, a development of the understanding of democracy can be seen.[57] For modern democracies, a link with the rule of law is imperative, because the laws created by the people will only govern successfully if the basic elements of the rule of law are complied with.[58] This modern understanding comes in many philosophical, economical and ideological varieties. And different ways of thinking have also developed in different nations. However, free elections by free people and chains of legitimacy always form the basis of these considerations. A summary of the understanding that everyone can agree on and that can serve as a basis for further examination is given, for example, by the Oxford English Dictionary:[59] A democracy is a political system, or a system of decision-making within an institution, organization, or state, in which all members have an equal share of power.

For a long time, utilitarian arguments were used to justify the establishment of democratic orders, but in 1971 John Rawls tried a non-utilitarian approach, because the utilitarian idea makes it easy to justify the rule of the majority by suppressing the interests of minorities.[60] With the idea of the social contract and a thought experiment in which no one knew his own characteristics (as part of the majority or part of the minority), he came to the

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[52] Sherie Berman, "Institutions and the Consolidation of Democracy in Western Europe," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos et al. (Oxford: Oxford University Press, 2016), p. 404.
[53] Manfred G. Schmidt, *Demokratietheorien. Eine Einführung* (Wiesbaden: Springer VS, 2010), p. 151.
[54] Olteanu, Camelia, *supra* note 17, p. 522; Christopher Hobson, The rise of democracy revolution, war and transformations in international politics since 1776 (Edinburgh: Edinburgh University Press, 2015), p. 202.
[55] Olteanu, Camelia, *supra* note 17, p. 525; Christopher Hobson, *supra* note 54, S. 203.
[56] Olteanu, Camelia, *supra* note 17, p. 523.
[57] Olteanu, Camelia, *supra* note 17, p. 524.
[58] Sergio Carrera et al., *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU Towards an EU Copenhagen Mechanism* (Brussels: Centre for European Policy Studies, 2013), p. 20.
[59] The editors of Oxford English Dictionary, "democracy*," Oxford English Dictionary*, (Oxford: Oxford University Press) Available on: https://www.oed.com/oed2/00060572. Accessed May 03, 2023.
[60] Robert A. Dahl, *supra* note 39.

following conclusions with the logic of self-interest:[61] 1. everyone should have a maximum and equal degree of liberty, including all the liberties traditionally associated with democracy; 2. everyone should have an equal opportunity to seek offices and positions that offer greater rewards of wealth, power, status, or other social goods; 3. the distribution of wealth in society should be such that those who are least well-off are better off than they would be under any other distribution, whether equal or unequal.

It can already be seen in these political conceptions that they attempt to establish rules for living together. Thus, a legal classification of democracy and its elements has developed from the political understanding. An example of this is women's right to vote: first there was no women's right to vote,[62] then women's right to vote was seen in political writings as part of democracy[63] and then it was enacted in a legally binding way by the legislator or constitutional legislator.[64] The tracing of the single lines of development of the individual elements will then take place in Part D. These individual elements of democracy are each further developments of the political ideas described and show the EU as a constitutional liberal democracy.

1.3.2 Origins of the rule of law

The rule of law is a difficult concept to grasp because, on the one hand, it is "the self-constituted legal order of society"[65] but on the other hand it is the "symbolic order constituting the meaningful rule of polity".[66] Some would say that it is an "instrument and symbol of power".[67] The purpose of the rule of law is the legitimation of power.[68] The advantage is that one does not have to resort to transcendent approaches to argumentation, but can arrive at legitimacy from within society through the medium of legality.[69]

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[61] Richard Arneson, "Justice after Rawls," in *The Oxford Handbook of Political Theory*, ed. by. John Dryzek et al. (Oxford: University Press, 2006) p. 46.
[62] The Editors of Encyclopaedia Britannica, *women's suffrage*. Available on: https://www.britannica.com/topic/woman-suffrage. Accessed 07 March.
[63] Mary Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects* (Boston: 1792); Hedwig Richter and Kerstin Wolf, *Frauenwahlrecht Demokratisierung der Demokratie in Deutschland und Europa (*Bonn: Bundeszentrale für politische Bildung, 2019), p. 10.
[64] E.g., 1918 in Germany by the Council of People's Deputies (Rat der Volksbeauftragten). Deutscher Bundestag. Available on: https://www.bundestag.de/dokumente/textarchiv/2019/kw47-frauenwahlrecht-669048. Accessed 07 March 2023.
[65] Jiří Přibáň, "Imaginary of the rule of law as a force of societal transition," in *Rule of Law in Crisis: Constitutionalism in a State of Flux*, ed. Martin Belov (London: Routledge, 2022), p. 67.
[66] Jiří Přibáň, *supra* note 65; Maria L. F. Esteban, *The rule of law in the European constitution* (London: Kluwer Law international, 1999), p. 65.
[67] Jiří Přibáň, *supra* note 65.
[68] Jiří Přibáň, *supra* note 65, p. 71; Generaldirektion Forschung und Innovation, *supra* note 17; Whereby some doubt whether a restriction of the ruling class is even possible. Douglas Hay, *E.P. Thompson and the rule of law: Qualifying the unqualified good* (York: Osgoode Digital Commons, 2020), p. 17.
[69] Jiří Přibáň, *supra* note 65, p. 71.

The roots of the rule of law can be traced back to ancient Greece.[70] For example, in the work Politics by Aristotle, where he asks whether it is better to be governed by the best leader or by the best laws.[71] The next relevant stage of development, which also helped the concept to become more popular, took place in Great Britain from the 16th century onwards.[72] Until then, the concept of the divine monarch had prevailed, with the effect that the king was above the law. The new idea was that the king (and thus everyone) was also subject to the law.[73]
A good example for the development is the idea of A.V. Dicey, who proposed three principles of the rule of law in 1885:[74] First, he speaks of the absolute supremacy of law and equality before law. Then he adds the predominance of legal spirits.[75] Many features of the rule of law can then be derived from these three basic assumptions but the main idea was that the rule of law acts as a constraint of the power of the state over the individual.[76]

When considering the idea of the rule of law, one must always be aware that although there are great similarities to the *Rechtsstaat*,[77] the differences are of a fundamental nature. The two concepts are based on a different understanding of law/*Recht* and state/*Staat*.[78] This is well demonstrated by the fact that the rule of law originates in court rooms and the *Rechtsstaat* has found its way into reality through written constitutions.[79] The idea of *Rechtsstaat* emerged around 1800 in the German-speaking world and has taken on a development of its own.[80] Although German is only one of the 24 languages of the EU, the long-standing relevance of the German language in European academic discourse has left a large footprint in other European countries as well.[81] Due to the similar understanding of Recht and droit, the German *Rechtsstaat* and the French État de droit have a great similarities

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[70] Provincial Court of British Columbia, *What is the Rule of Law - and why does it matter?* Available on: https://www.provincialcourt.bc.ca/enews/enews-04-11-2020. Accessed May 03, 2023; Christoph Bleiker and Marc Krupanski, *supra* note 16.
[71] National Geographic Society, *Rule of Law.* Available on: https://education.nationalgeographic.org/resource/rule-law/. Accessed May 03, 2023; Aristotle, *Politics*, 3.16.
[72] Preethi Ramanujam, *Development of the Rule of Law*, Available on: https://www.legalserviceindia.com/legal/article-85-development-of-the-rule-of-law.html. Accessed May 03, 2023.
[73] Ibid.
[74] European Commission for democracy through law, *supra* note 7; Maria L. F. Esteban, *supra* note 66*,* p. 72; Preeti Ramanujam, *supra* note 72.
[75] To understand the third point, it is important to remember that Britain does not have a written constitution, so legal spirits are an important source of law. See in this regard: Preeti Ramanujam, *supra* note 72.
[76] European Commission for democracy through law, *supra* note 7; Maria L. F. Esteban, *supra* note 66, p. 73.
[77] European Commission for democracy through law, *supra* note 7; Maria L. F. Esteban, *supra* note 66*,* p. 66.
[78] Martin Loughlin, "Rechtsstaat, Rule of Law, l'Etat de droit," in *Foundations of Public Law* (Oxford: Oxford University Press, 2010), p. 312; European Commission for democracy through law, *supra* note 7, p. 4; Maria L. F. Esteban, *supra* note 66*,* p. 75.
[79] European Commission for democracy through law, *supra* note 7, p. 4.
[80] Daniel Suanzes-Carpegna and Joaquin Varela, "Constitutional History: Some Methodological Reflections," *Historia Constitucional* 15 (2014): p. 537; Pavle B. Jovanovic, "Welfare State and Sozialer Rechtstaat," *Zbornik Radova* 19 (1985), p. 9; Maria L. F. Esteban, *supra* note 66*,* p. 75.
[81] Maria L. F. Esteban, *supra* note 66*,* p. 75; Martin Loughlin, *supra* note 78; Laurent Pech, *supra* note 20, p. 35.

in terms of content.[82] For "de *rechtsstaat*" (Dutch)[83], *právní stát* (Czech)[84], *Stato di diritto* (Italian),[85] and some others the same is true. Therefore, the background of the European understanding of the rule of law is not only the Anglo-American tradition, but also the continental European tradition (most prominently represented by the *Rechtsstaat*). It is particularly worth noting that the rule of law developed from the rather "thin" idea in the 19th century to the rather "thick" idea of the rule of law after 1949.[86]

The rule of law took on an additional role starting in the 1960s and especially in the 1970s.[87] It was increasingly used in the international context, especially when it came to setting conditions for aid to countries in crisis.[88] A new understanding of the rule of law developed, which can be seen most clearly in the work of the International Monetary Fund and the World Bank. The strong focus on property and the protection of investors is particularly striking. However, it is rather doubtful whether this definition of content is helpful for the European understanding, because the International Monetary Fund and the World Bank were both very much influenced by the American understanding of the rule of law and additionally pursued economic goals under the guise of development aid.[89] But the EU also began to incorporate the rule of law into its work and treaties in the 1990s, after the term became popular as a positive, desirable value and more helpful for self-identification.[90] The rule of law always had this function[91] but from that time onwards there was a much greater focus on it.[92] This can be seen in the fact that in 1978, at a meeting of the European Council, only democracy and respect for human rights were mentioned as criteria for joining the European Community, but not the rule of law.[93]

Different sources (judgments, textbooks, articles) give different definitions of the rule of law. In essence, the rule of law is a collection of ideas "that govern[s] how we all relate to

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[82] European Commission for democracy through law, *supra* note 7; Maria L. F. Esteban, *supra* note 66*,* p. 75; Martin Loughlin, *supra* note 78.
[83] De Nederlandse Grondwet, *Rechtsstaat*. Available on: https://www.denederlandsegrondwet.nl/id/vi7hh3726wvo/rechtsstaat. Accessed May 03, 2023.
[84] Daniel Sapák, *Formální právní stát jako justiciabilní koncept: rozbor judikatury Ústavního soudu ČR* (Brno: 2016), p. 18. Available on: https://is.muni.cz/th/a8z3h/Formalni_pravni_stat_jako_justiciabilni_koncept_-_analyza_judikatury_Ustavniho_soudu_diplomova_prace.pdf. Accessed April 20, 2023.
[85] Laurent Pech, *supra* note 20, p. 36.
[86] Laurent Pech, *supra* note 20, p. 32.
[87] Christoph Bleiker and Marc Krupanski, *supra* note 16.
[88] Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 23.
[89] Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 24.
[90] Jiří Přibáň, *supra* note 65, p. 67; Shannon C. Stimson, *supra* note 17.
[91] Jiří Přibáň, *supra* note 65, p. 67.
[92] Council of Europe, *Rule of Law.* Available on: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=DE. Accessed May 03, 2023; Christoph Bleiker and Marc Krupanski, *supra* note 16, pp. 20, 22.
[93] The Commission also used this wording during this period. De Witte, *supra* note 13.

each other"[94] with a strong focus on the capacity of the law to limit power and to protect against it.[95] The core ideas are:[96] 1. the government enacts law in an open and transparent manner.[97] 2. the law is clear and known, and it is applied equally to everyone. 3. the law will govern the actions of both government and private persons, and their relationship to each other. 4. the courts will apply the law independently of political or outside influence.[98] Here, again, it can be seen that the philosophical beginnings have been given an increasingly juridical framework. The exact definition of the content will again take place in chapter 4.2.

2. PRELIMINARY QUESTIONS

2.1 The same term, different meanings?

In the legal world it is accepted that a term can have different meanings.[99] The TEU and TFEU, as international treaties, are legal documents. The same word can have different meanings because the wording allows for more than one interpretation and the legislator respectively the contracting party has different regulatory objectives in different situations. This phenomenon exists between legal systems (murder in Germany describes something different than murder in the United States), and within the same legal system.[100]

In the intermediate area between a national system and different systems, there is the relationship of EU law to national law. But here, too, it is unquestionable that the concept of autonomous interpretation exists.[101] This means that a term from Union law is not defined in

[94] Provincial Court of British Columbia, *supra* note 70.
[95] Jiří Přibáň, *supra* note 65, p. 69.
[96] UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, (S/2004/616, August 23, 2004), p. 1. Accessed May 03, 2023; Provincial Court of British Columbia, *supra* note 70.
[97] European Commission for democracy through law, *supra* note 7.
[98] Provincial Court of British Columbia, *supra* note 70; Preeti Ramanujam, *supra* note 72; Theo J. Angelis and Jonathan H. Harrison, *History and Importance of the Rule of Law* (Washington D. C., World Justice Project, 2003), p. 2.
[99] Jacques Ziller, "Multilingualism and its Consequences in European Union Law," in *Common European Legal Thinking – Essays in honour of Albrecht Weber*, ed. Hermann-Josef Blanke et al., (Cham: Springer Cham, 2015), p. 448; Christian Calliess, "EU-Vertrag (Lissabon) Art. 2," in *Calliess/Ruffert, EUV/AEUV* (München: C. H. Beck, 2022), III. c); Koen Lenaerts, "the principle of democracy in the case law of the European court of justice," *The International and Comparative Law Quarterly* 62 (2013): p. 312.
[100] For example, "Sache" (thing) in German property law (§ 985 BGB) means something different from "Sache" in German law for contesting declarations of intent (§ 142 BGB).
[101] Bernhard W. Wegener, "EU-Vertrag (Lissabon) Art. 19," in *Calliess/Ruffert, EUV/AEUV (München: C. H. Beck, 2022),* C. II.; Margot Horspool, "The Importance and Impact of the Language Regime of the European Union on its Law," in *Common European Legal Thinking – Essays in honour of Albrecht Weber*, ed. Hermann-Josef Blanke et al., (Cham: Springer Cham, 2015), p. 418; Jacques Ziller, *supra* note 99; Jens Rinze, "Methods of Interpretation in EC-Law," *Bracton Law Journal* 26 (1994): p. 59.

accordance with one or more legal systems[102] but is guided by the language used in the Treaties.[103] The need to use such autonomous terms arises from the desire to achieve the Treaties objectives as effectively as possible. Therefore, if there are several possible interpretations, the one most suitable for functionally ensuring the achievement of the EU's objectives must be applied.[104] A strong orientation towards the law of the member states often stands in the way of this, because otherwise they could influence the applicability of EU law by changing the definitions in national law.[105] The result is that a term has a meaning in one place in EU law and it is not harmful (from the legal point of view) if national legal systems understand it differently. Nevertheless, the national understandings often guide the understanding of an EU legal term.[106]

The legal systems of the states in the EU have influenced each other in their development but have all developed their own peculiarities.[107] It is therefore hardly surprising that there is no uniform EU-wide understanding of democracy and the rule of law.[108] To answer the hypothesis, it is now necessary to establish how these two EU-autonomous concepts are determined.

2.2 Who is allowed to interpret/decide? Politicians or courts?

To understand who decides what belongs to democracy and the rule of law, one must understand where in practice these decisions are made. Art. 49 TEU refers to the accession of new member states. In the accession procedure, there are several actors who take decisions. First, the accession negotiations have to be opened and the state gets the status as a candidate for accession.[109] For that a unanimous[110] decision by the Council of the European Union in its composition as General Affairs Council, assisted by the working party on enlargement and countries negotiating accession to the EU (COELA)[111] is needed. The Council can only take a

[102] ECJ, C-64/81, January 14, 1982, *Cormann*, para. 8; Jacques Ziller, *supra* note 99.
[103] ECJ, C-43/75, April 08, 1976, *Defrenne*, para. 28.
[104] Vladimir Yaroshevskiy, „Die Auslegungsmethoden des EuGH (the methods of interpretation of the CJEU)," *Berliner Online-Beiträge zum Europarecht* 59 (2010): p. 7.
[105] Ibid.
[106] Laurent Pech, *supra* note 20, p. 6.
[107] Margot Horspool, *supra* note 101, p. 416; Christian Calliess, *supra* note 99.
[108] Tom Boekestein, *supra* note 9; Roman Petrov and Päivi Leino, "Between 'Common Values' and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy," *European Law Journal* 15 (2009): p. 654.
[109] Savina Mihaylova-Goleminova, "Accession Negotiation Challenges Facing Candidate Countries in the Field of Taxation," *Collection of Papers Faculty of Law, Nis* 79 (2018): p. 115; Friedrich Erlbacher, *supra* note 24.
[110] Council of the European Union, *Unanimity*. Available on: https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/. Accessed May 04, 2023.
[111] General Secretariat of the Council, *Working Party on Enlargement and Countries Negotiating Accession to the EU*. Available on: https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-enlargement-countries-negotiating-accession-eu/. Accessed January 10, 2023.

positive decision if it has consulted with the European Commission and received the consent of the European Parliament.[112] These three institutions all check that the Copenhagen Criteria are met before taking a positive decision.[113] And it is only possible to decide whether a country complies with the Copenhagen Criteria if one knows or decides what democracy and the rule of law mean in detail.

In the next step, the Commission, in the person of the Commissioner for Enlargement and European Neighbourhood, negotiates with the candidate country. The negotiation of each cluster is based on a decision of the Council for General Affairs.[114] After successful negotiations, the Commission and the acceding state prepare the accession treaty. This treaty is then first approved by the European Parliament and then by the Council. Finally, the treaty is signed and ratified by all current member states and the acceding state, c. f. Art. 49 § 2 TEU.

All these decisions are made by members of the European Parliament, the Commission, the national ministers in the Council, the national governments/heads of state, who are all full-time politicians. The process regarding ratification in the member states, is relatively confusing as there are very different procedures. From parliamentary decisions (Germany)[115] to referenda (France)[116], everything is covered.

In summary, it can be said that the decision as to whether a state corresponds to democratic principles and the rule of law in the sense of Art. 49, and thus what democracy and the rule of law are, is made at many points. And (almost) all these positions are filled with people who are politicians.

In addition, there is no way to get a decision about the question of what the terms in Art. 49 TEU means from CJEU.[117] For the court to have jurisdiction, there needs to be a norm of jurisdiction. For this, one could first think of Art. 258 TFEU. This norm requires that there is

[112] Art. 49 § 1 TEU.
[113] Friedrich Erlbacher, *supra* note 24; ECJ, T-288/15, September 27, 2018, *Ezz and Others v Council*, para. 57-78; Directorate-General for Neighbourhood and Enlargement Negotiations, *Candidate countries*. Available on: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/candidate-countries_en. Accessed January 08, 2023; Koen Lenaerts et al, *supra* note 25; but these institutions will also keep in mind what the majority will thinks is included: Douglas Hay, *supra* note 68, p 17.
[114] Directorate-General for Neighbourhood and Enlargement Negotiations, *Steps towards joining.* Available on: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/steps-towards-joining_en. Accessed January 08, 2023; Friedrich Erlbacher, *supra* note 24.
[115] Art. 59 I, II Grundgesetz. *See* for an explanation: Deutscher Bundestag, https://www.bundestag.de/services/glossar/glossar/R/ratifizierung-245516. Accessed February 22, 2023.
[116] Art. 88 § 5 of the French Constitution.
[117] Philipp B. Donath, „Die Voraussetzungen für die Aufnahme neuer Mitgliedstaaten in die Europäische Union unter besonderer Berücksichtigung des Merkmals „Europäischer Staat“,“ *Studentische Zeitschrift für Rechtswissenschaft Heidelberg* 2/2008 (2008): p. 258; Hans-Joachim Cremer, “EU-Vertrag (Lissabon) Art. 49,” in *Calliess/Ruffert, EUV/AEUV* (München: C. H. Beck, 2022), para. 13; Laurent Pech, *supra* note 20, p. 66.

misconduct of member states. They would have to fail to fulfil an obligation under the Treaties. However, Art. 49 TEU does not give the state wishing to accede any legal right to accede, even if it should meet all the requirements.[118] Then one could try to construct an obligation for the member state to abide by the Treaties. But already the wording "agreement" speaks against Art. 49 TEU containing a duty to admit a new state. Also, with regard to the *telos* of the norm, the protection of national sovereignty, such an obligation cannot have been intended when Art. 49 TEU was created. There is therefore already no obligation that could be violated. Therefore, Art. 258 TFEU does not establish jurisdiction for the CJEU.

Art. 263 I TFEU gives the jurisdiction to review the legality and in the most far-reaching case, the court could say that a decision was unlawful and not valid. However, in the absence of a right to admission, no institution/member state can be ordered to agree to the accession and thus such a procedure would never really make sense, so it would not be pursued. Especially because the accused party will usually refer to actual circumstances in the accession country and not to a different definition of fundamental values.

Art. 267 gives jurisdiction to interpret the Treaties but only in preliminary rulings. In the matters of enlargement there is no way how to ask (reasonable) for a preliminary ruling on this question. Since there is no right of accession, the interpretation of democracy and the rule of law within the meaning of Art. 49 TEU will never become decisive for a legal claim, so that the CJEU will not rule on it in the procedure following Art. 267 TEU.[119]

It is of course possible that the CJEU will decide in other proceedings what the terms democracy or the rule of law mean.[120] However, this does not change the fact that the CJEU will never decide on the interpretation of the terms in proceedings under Art. 49 TEU and is thus not the institution that decides on the definition. Still, the CJEU's comments are useful for the further course of this work because it is very likely that the decision-makers will nevertheless be guided by the CJEU's reasoning.[121]

The question, however, is what standards a politician uses to make a decision on the question what democracy and the rule of law are. Politicians will also base their decisions on legal standards.[122] One reason for this is that many politicians either studied law or were at least

[118] Philipp B. Donath, supra note 117; Friedrich Erlbacher, *supra* note 24. With the opposite opinion: Juli Zeh, *Recht auf Beitritt?, Ansprüche von Kandidatenstaaten gegen die Europäische Union* (Baden-Baden: Nomos Verlag, 2002).
[119] With the same result: Hans-Joachim Cremer, *supra* note 117.
[120] As an example: ECJ, C-64/16, February 27, 2018, *Associação Sindical dos Juízes Portugueses*, para. 36.
[121] But alone the work of the CJEU is not enough because it lacks the necessary depth. For further details on that *see* Pech. Laurent Pech, *supra* note 20, p. 48.
[122] Donald Bello Hutt, "Rule of Law and Political Representation," *Hague Journal on the Rule of Law* 14 (2022): Chapter 2; Philipp B. Donath, *supra* note 117, p. 239.

partly socialised in the legal way of thinking through their studies or their previous work as politicians.[123]

But also on the substantive level, politicians have no choice but to work in a legal way. The preconditions for accession were laid down in a treaty and at this point the question is how the treaty is to be interpreted. Politicians are bound by the law[124] therefore they must work inside the legal framework (i.e., what democracy and the rule of law mean in this treaty).[125] Treaties between 27 parties that do not include compulsory measures for this point have to be interpreted objectively, otherwise this type of treaty does not work.[126] And for the interpretation of treaties (a legal instrument), legal methods of interpretation are the relevant tool. The fact that these are actually legal issues can also be seen in the fact that there is explicit criticism that the process of EU accession is becoming too politicised.[127]

Even if it were inconvenient in some situations for politicians to proceed in this way and with no real way to have a judicial review of their decision, they are forced to do so. As politicians, they are under pressure to justify their decisions continuously. They have to give reasons, and the legal method of argumentation is eminently suitable for this. Just as the legal method enables the judge to make a convincing and understandable decision.

Politically, it is partly accepted to say that a country should not join the EU for political reasons, but it is not accepted to alter the definition of democracy or of the rule of law for purely political purposes[128] This pressure to justify their actions towards other politicians and towards the public thus prevents politicians from making arbitrary decisions and thus forces them to use classical legal argumentation patterns for defining democracy and the rule of law.

Although the concept of democracy as a political system in particular has been shaped by political discussions, both concepts have also been part of constitutional theory discussion for a very long time. The understanding of these terms has therefore long been shaped by legal considerations[129] and the rule of law became popular as a tool[130] precisely because it difficult for politicians to say that they do not want the rule of law. In the public

[123] Jiří Přibáň, *supra* note 65, p. 69.
[124] That politicians are bound by the law is already and element of the rule of law. Miro Cerar, "The Relationship Between Law and Politics", *Annual Survey of International & Comparative Law* 15 (2009): p. 38; Massimo Tommasoli, "Rule of Law and Democracy: Addressing the Gap Between Policies and Practices," UN Chronicle 49 (2013), p. 30; Maria Diaz Crego et al., *supra* note 40, p. 2.
[125] Werner Schroeder, *supra* note 9, p. 110.
[126] So also, Basheska who argues that "overpoliticisation of the enlargement process at the sacrifice of law" hinders the enlargement process. Elena Basheska, *supra* note 14, introduction; Maria Diaz Crego et al., *supra* note 40, p. 12.
[127] Elena Basheska, *supra* note 14.
[128] *See* for example Miro Cerar *supra* note 124, p. 19; Elena Basheska, *supra* note 14.
[129] This is especially true for the rule of law in continental Europa where the legal concept is "separated" from methodologies of social sciences. Jiří Přibáň, *supra* note 65, p. 69.
[130] Council of Europe, *supra* note 92; Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 22.

understanding, therefore, these are legal terms, so that a legal understanding is required. This finding is reinforced by the fact that the interpretation of constitutions is indisputably a legal task and, in purely factual terms, the TEU (as part of the primary law) has the same functions as a constitution.[131] Therefore, it is fair to say that politicians use the legal method at this point of decision making.

2.3 Methods of interpretation

There are a few recognised methods for interpreting laws: the basic ones are grammatical interpretation, historical interpretation, systematic interpretation, and teleological interpretation.[132] The starting point must always be the grammatical interpretation and all interpretation results must be within the limits of the wording.[133] For the interpretation of EU law, however, a few peculiarities arise. First, it must be kept in mind that all 24 official languages of the Union are binding[134] and it is therefore not possible to base the interpretation on the wording of only one language.[135] But that doesn't mean one can't use individual language versions to support one's legal argument.[136] However, the different languages make it possible to exclude some interpretation results because one result, for example, only makes sense in two of the 24 languages.[137] But for the interpretation of the Fundamental Principles of the Treaties relevant here, the importance of the wording must not be overestimated. This part of the treaties is more of a framework than a classical, well-defined rule. The treaties are full of "purpose-driven functionalism"[138] because this "provisions provide the link between the objectives pursued by the EU and the means to attain them."[139] In summary, the TEU's

[131] Laurent Pech, *supra* note 20, p. 3. The primary law has primacy over other EU law; the EU-institutions are bound but the primary law and the primary law can only be amended under a more difficult procedure.
[132] Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law", *Juridica International* 11 (2006): p. 61; Jens Rinze, *supra* note 101, pp. 57, 58.
[133] ECJ, C-582/08, July 15, 2010, *European Commission* v *United Kingdom of Great Britain and Northern Ireland*, para. 51; Koen Lenaerts and José A. Gutiérrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," *European University Institute Working Paper AEL* 2013/9 (2013): p. 7.
[134] Directorate-General for Communication, *Languages*. Available on: https://european-union.europa.eu/principles-countries-history/languages_en#:~:text=The%20EU%20has%2024%20official,%2C%20Slovenian%2C%20Spanish%20and%20Swedish. Accessed May 04, 2023. Art. 53 § 1 TEU
[135] This is sometimes called „linguistic equality". Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 9; Jacques Ziller, *supra* note 99, p. 444.
[136] Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 11.
[137] ECJ, Joined Cases C-283/94, C-291/94 and C-292/94, October 17, 1996, *Denkavit Internationaal and Others* v *Bundesamt für Finanzen*, para. 25. Jacques Ziller, *supra* note 99, p. 445.
[138] Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 13.
[139] Ibid.

open formulations reduce the possibilities for literal interpretation but open the door for a generous teleological interpretation.[140]

Historical interpretation is characterised by the fact that in order to find the meaning of the individual legal clause, the idea, the will and the motives of the legislator are to be ascertained and the discussions that took place during the legislation are taken into account.[141] Applied to this work, this means: What were the member states thinking when they adopted Art. 2, 49 TEU? Because it is the member states that are responsible for the norms of the TEU. Three points in time must be considered: First, the introduction of Art. 2 TEU in 1992, the introduction of the reference to Art. 2 TEU in Art. 49 TEU in 1997 and the adoption of the Copenhagen Criteria in 1993.

Systematic interpretation looks at the normative system of the law in order to determine the exact meaning of the legal phrase.[142] A comparison is made with other norms or with other paragraphs. But even within a legal sentence, the individual sections can provide clues for interpretation. Likewise, the headings and titles of the individual sections of the law being applied can indicate the more detailed meaning of the legal text to be interpreted.[143] The fact that the important situations in which the TEU and TFEU use these two terms form the basis of the EU legal system means that not many insights can be gained from the systematic interpretation. The content of an element that forms the basis of a system cannot be determined by interpreting the system. This is particularly the case for the primary law of the EU, because there the more general norm is usually written first, followed by the norm that specifies it. In this context, each concretising norm is to be interpreted in the light of the regulation which it is intended to specify (and not the other way round).[144]

The telos is the purpose of a norm. Thus, teleological interpretation attempts to concretise the content of the norm according to the purpose pursued by the legislator. In contrast to historical interpretation, however, interpretation according to meaning and purpose is based on purely objective criteria.[145] The starting point of the train of thought should in principle be the conflict which the legislator intended to resolve with the respective norm. However, it should always be borne in mind that it is not the interests of the parties as such, but their assessment and weighting by the legislator that must be decisive. The purpose of the norm is the legislator's - possibly political - decision to resolve the conflict of interests, which

[140] Anthony Arnull, *The European Union and Its Court of Justice* (Oxford: Oxford University Press, 2006), p. 612.
[141] Jens Rinze, *supra* note 101; Vladimir Yaroshevskiy, *supra* note 104, p. 11.
[142] Ivan L. Padjen, "Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use," *International Journal for the Semiotics of Law* 32 (2019): p. 192.
[143] Jens Rinze, *supra* note 101, p. 60.
[144] Vladimir Yaroshevskiy, *supra* note 104, p. 9.
[145] Vladimir Yaroshevskiy, *supra* note 104, p. 12.

is not to be questioned by the interpreting instance.[146] Rather, the telos of the norm is to be seen as a value decision, which is to be applied to cases, irrespective of whether the legislator had precisely their respective constellations in mind when drafting the norm. Furthermore, the fact that it is not a subjective consideration must be taken into account by determining the values on the basis of the current state of development of the law.[147] In EU law, teleological interpretation is of particular importance.[148] In a judgment, the ECJ even mentions the teleological interpretation before the systematics and the wording.[149]

In addition to this classical canon of interpretation, there are two special features under European law: European law is strongly influenced by the Member States and their legal traditions.[150] This circumstance suggests that conclusions about the meaning of certain norms of European law are possible from the legal systems of the Member States. Therefore, the prevailing view in the literature recognises comparative law interpretation as an independent method of interpretation in European law.[151] In addition, the CJEU also demonstrates such an understanding.[152] This is especially true for the rule of law.[153]

In practice, the CJEU compares similar regulations of the member states in order to find out the content of a European law norm, insofar as there is a need and possibility to do so. However, it should be noted that the legal systems of the member states have developed in completely different ways and therefore comparability as such is often limited. In order to do justice to this, the CJEU introduces an evaluation element into the comparison. This requires the solution found to be able to be placed in the overall system of objectives and structures of European law.[154] This means that the CJEU combines comparative interpretation with teleological interpretation.[155]

When applying this approach, the more similar the legal systems of the member states are in this respect, the greater the impact of the comparative law approach on the result of the

[146] Vladimir Yaroshevskiy, *supra* note 104, p. 13.
[147] Ibid.
[148] Margot Horspool, *supra* note 101; Jens Rinze, *supra* note 101, p. 58.
[149] ECJ, C-26/62, February 05, 1963, *van Gend & Loos*, para, 27.
[150] Thure Hanssen, *supra* note 7; Maria L. F. Esteban, *supra* note 66*,* p. 65; Rafał Mańko, *The EU as a community of law Overview of the role of law in the Union*, (Brussels: European Parliamentary Research Service, 2017), p. 2.
[151] Jacques Ziller, *supra* note 99; Jens Rinze, *supra* note 101; Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, pp. 35, 38; Thure Hanssen, *supra* note 7.
[152] ECJ, Joined Cases C-46/93 and C-48/93, March 05, 1996, *Brasserie du Pêcheur and Factortame*, para. 27; Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 35.
[153] Thure Hanssen, *supra* note 7; Maria L. F. Esteban, *supra* note 66*,* p. 65.
[154] Christian Calliess, „Rechtsfortbildung und Richterrecht in der EU," *Berliner Online-Beiträge zum Europarecht* 28 (2017): p. 15; Werner Schroeder, „Auslegung des EU-Rechts," *Die Juristische Schulung* (2004): p. 184.
[155] Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 40.

interpretation is.[156] At the same time, differences in the national legal systems are not in themselves a reason to exclude a potential interpretation result.[157] In addition, it must also be noted that the comparative interpretation is not limited to the lowest "common denominator"[158] but one must take from each member states system the elements that best serve the objectives of the Treaties.[159]

In addition, there is also the "effet utile" in European law. It is disputed how exactly this figure is to be classified dogmatically: in part it is regarded as part of teleological interpretation, in part as judicial development of the law and in part as an independent method of interpretation.[160] It is undisputed that effet utile is to be used within the framework of the interpretation of primary law, regardless of which dogmatic justification is followed in detail.[161] In the further course of this work, effet utile will be treated as a separate method of interpretation. In terms of content, this method states that the interpretation that best allows the effectiveness of a provision to unfold is to be chosen.[162]

The methods of interpreting international treaties, in particular Art. 31-33 of the Vienna Convention, are not applicable to the European treaties because they "constitute a new and distinct legal order."[163]

3. THE INDIVIDUAL VALUES

3.1 What does democracy mean for the EU?

3.1.1 Preliminary considerations in regard to democracy

Democracy is not just an ordinary legal term, but a value.[164] In other words, it is one of the foundations and of the ideas of the legal order of the European Union.[165] This particularity also leads to particularities in its interpretation. The best interpretation is to strictly follow the classical criteria of interpretation that have just been outlined. It is also common and accepted

[156] Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 39.
[157] Ibid.
[158] Maurice Lagrange, *Opinion of Mr Advocate General Lagrange delivered on 4 June 1962*, in C-14/61, *Hoogovens* v High *Authority*, Part I.
[159] Koen Lenaerts and José A. Gutiérrez-Fons, *supra* note 133, p. 39.
[160] Vladimir Yaroshevskiy, *supra* note 104, p. 17; Jens Rinze, *supra* note 101, p. 60.
[161] Vladimir Yaroshevskiy, *supra* note 104, p. 17.
[162] Ulrich Soltész, "Effet Utile Taken to Extremes: Does an Opening Decision Already Trigger the "Stand-Still Obligation"?," *European State Aid Law Quarterly* 12 (2013): p. 644.
[163] Jens Rinze, *supra* note 101.
[164] Art. 2 TEU.
[165] Armin von Bogdandy, "Founding Principles of EU Law A Theoretical and Doctrinal Sketch," *Journal for constitutional theory and philosophy of law* 12 (2010): para. 31, 32.

that not every method of interpretation will produce productive results. However, this approach cannot be fully followed in the case of democracy as a value. The interpretation of the wording is still the imperative starting point. Next in line is the systematic interpretation.

After that, one would like to continue with the historical interpretation, the teleological interpretation and the use of effet utile. However, in this case one cannot strictly separate these, because this does not lead to meaningful results here. The historical interpretation in itself does not lead to useful results[166] because the authors of the primary law did not have to think very much about the meaning of the word democracy at that time. The concept of democracy is generally recognised as something positive, so real opposition and thus discussion were politically not possible.[167] No one wanted to publicly advocate that democracy should not be included in primary law. The problems for historical interpretation are exacerbated by the fact that the negotiation protocols, e.g., on the Copenhagen declaration or on the founding treaties, were never published[168] and thus the thought processes of the legislators (here the member states) cannot be reasonably understood. There was probably no uniform will of all member states as to what democracy should mean either. The member states had different understandings of democracy[169] and therefore certainly disagreed on many points as to what should be meant by the word in primary law. This was precisely the political strength of this formulation, because it enabled the contracting parties not to have to agree, but to be able to use this ambiguous but recognised term.[170] To summarise the historical interpretation, it can be said that there was probably never a uniform will of the legislator and it is certainly not possible to find out what that will was.

A similar uselessness arises in the teleological interpretation. It is true that the several objectives of democracy can be identified. Nevertheless, in the case of democracy, these purposes are very broad and not clearly delimited, so that no concrete interpretative results can be obtained from teleological interpretation alone. A very broad objective could theoretically justify very many and far-reaching interpretative results, so one must use the results in conjunction with other interpretative methods. The specific objectives behind the Copenhagen Criteria also do not help. First of all, it was recognised that the control of the democratic preconditions for admission to the Council of Europe were not really strict and that in retrospect it turned out to be difficult to enforce these criteria after admission.[171] So the

[166] This is a general problem for EU (primary) law. Vladimir Yaroshevskiy, *supra* note 104, p. 11.
Jens Rinze, *supra* note 101, pp. 60, 61.
[167] Laurent Pech, *supra* note 20, p. 3.
[168] Vladimir Yaroshevskiy, *supra* note 104, p. 11.
[169] Laurent Pech, *supra* note 20, p. 27.
[170] Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 25.
[171] De Witte, *supra* note 13.

purpose was to effectively establish the common values in the states of Eastern and Central Europe.[172] The second idea was to make the Union's actions generally conditional.[173] Neither line of thought helps in arriving at results through teleological interpretation alone.

It seems that most other people who have dealt with the determination of the content of democracy have seen it similarly and therefore no authors can be found who determine the content strictly according to the classical methods of interpretation. Nevertheless, other authors have made meaningful contributions that must necessarily be analysed and evaluated for a content determination. Even though most authors do not specify their choice of interpretative methods, in terms of content almost all their contributions can be classified as a combination of historical and teleological interpretation and/or the use of effet utile. My elaborations on this are divided into two sections. First, the views of the EU institutions will be analysed because their institutional position gives them a special importance as decision-makers and as forerunners of content determination.[174] The subsequent discussion will then include contributions from academics and the courts.

For such a broad and historically shaped term that needs to combine several ideas, it will not be possible to find a definition that is only one concise sentence and yet helpful for understanding.[175] Since the aim is to understand the content of the term democracy in Art. 49 § 1 TEU in conjunction with Art. 2 TEU, it is more useful to identify the core elements of democracy.[176]

3.1.2 Doctrinal research

3.1.2.1 literal interpretation

The interpretation of the wording is still the starting point for such an old and historically significant term. However, this term has already been used in so many different contexts and settings that the function of the wording as a boundary contributes only to a very limited extent to the definition of the term.[177] Many ideas have been sold as part of democracy. But the wording can still provide orientation.

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[172] Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 A.
[173] De Witte, supra note 13, p. 230.
[174] *See* for example the European Commission with its yearly rule of law report.
[175] Petra Bard et al., *supra* note 14; Maria Diaz Crego et al., *supra* note 40; Rod Hague et al., *Comparative Government and Politics* (London: Red Globe Press, 2019), p. 70.
[176] With the same reasoning, the Venice Convention arrives at the same approach (but in relation to the rule of law) Council of Europe, *Rule of Law.* Available on: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=DE. Accessed May 03, 2023; Likewise: Stefan Martini and Francis G. Jacobs, *supra* note 20.
[177] Rod Hague et al., *supra* note 175.

This notion of EU law requires, as explained before, a look at a variety of languages. With democracy, this is easy because almost all language versions can be traced back to the two Greek words dēmos and kratos: Democracy in English, Demokratie in German, demokrātija in Latvian, demokrati in Danish, democrație in Rumanian. Even in Hungarian, which is otherwise very unusual for Europe in terms of language, people use demokrácia. This list could include many more EU languages and would yield similar results.

Dēmos means people and kratos means rule. Kratos as a word includes the notion that democracy is concerned with some kind of ruling system. This gives us an indication that this concept can probably contain a whole system for people to live together. This is also confirmed by a comparison with words such as aristocracy and oligarchy. These terms, which end with "cracy", also contain systems of rule.[178] This comparison also works in the Greek and German language.[179]

Dēmos (people) then describes the system of rule in more detail. The people are to be seen precisely in distinction to the other actors. It is not a sole king, it is not God, it is not only a few people, but it is the people. The reference to demos specifies the participation of the general public as the goal of the system. Technically, however, this is a complex process, because it is precisely many people and not just a few who have to be reached, so that a quota of 100% is probably utopian. Another aspect of the word demos is that the people do not necessarily include all the people in that territory. At the beginning in Athens, for example, metics (people who did not really belong to the polis) were not included in the rights of democracy. Even today, it is still the standard that only the citizens of a country may vote in elections. But there are already exceptions to this in the European Union, in that EU citizens are allowed to be active in municipal elections and all EU citizens vote together for the European Parliament. Age limits also restrict who the people are. For more on these limitations, see chapter 3.1.2.4.

The findings of the interpretation of the wording are thus: Democracy is not just a small peripheral area, but a whole system of governance. Therefore, it must unite many aspects within itself. A large number of people are to be involved in the exercise of power and the rule of individuals or a few is to be prevented. However, not all people belong to the people entitled to vote, but a delimitation will have to be made.

[178] The editors of Encyclopaedia Britannica, *Aristocracy*. Available on: https://www.britannica.com/topic/aristocracy. Accessed May 04, 2023.
[179] Gerd Schneider and Christiane Toyka-Seid, „Aristokratie," in *Das junge Politik-Lexikon von www.hanisauland.d*e (Bonn: Bundeszentrale für politische Bildung, 2023).

3.1.2.2 Systematic interpretation

In the case of democracy within the meaning of Art 2 TEU, the other values from Art 2 TEU and the Copenhagen Criteria are the obvious starting points for a systematic interpretation.
As already shown above, these overlap to a large extent. The rule of law, human rights, human dignity, freedom and equality are all positive concepts. From this and the fact that they are the cornerstones of the European Union, however, it can only be concluded that it is a positive concept.

The most promising starting point for systematic interpretation is Title II which is called "provisions on democratic principles".
Art. 9 TEU gives a few indications of the understanding of democracy in primary law. Art. 9 sentence 1 explicitly mentions the principle of equality and declares it to be binding on the Union. Due to its position in Title II (provisions on democratic principles), one could think that it is a democratic principle. However, one must also consider the arrangement in Art. 2 TEU. There, equality is explicitly listed alongside democracy, so it must be something other than democracy.[180] It makes no systematic sense to list something next to democracy that is already part of democracy.

As already indicated, in most systems there is a limitation of democratic rights to certain parts of the population.[181] This element seems to be present in the EU as well, otherwise Art. 9 sentences 2 and 3 would not make sense. This fact alone does not lead to the conclusion that European democracy is to be understood in such a way that only national citizens/EU citizens participate in it, but it is a very strong indication.
Art. 10 § 1 TEU explicitly states that the Union shall fundamentally function as a representative democracy.[182] But "shall be founded" is a formulation that also allows for elements of direct democracy.

In Art. 10 § 2 TEU and Art. 12 TEU one can see that the idea of chains of legitimacy is also central to democracy in the European Union. Primary law deals with the establishment of legitimacy and tries to strengthen it through a chain also via the national governments (and head of states) and the national elections and parliaments. This paragraph shows, on the one hand, that elections are an important element of democracy and that in this form of democratic legitimacy can also be transferred from one institution to another. Not every institution has to be directly elected by the people.

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[180] Klamert and Kochenov see it as another form of not discrimination. Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 C.
[181] The most important example are age requirements. *See* for example for Germany Art. 38 (2) Grundgesetz.
[182] European Parliament, *Vertrag von Lissabon*. Available on: https://www.europarl.europa.eu/factsheets/de/sheet/5/vertrag-von-lissabon. Accessed May 04, 2023.

Art. 10 § 4 TEU shows that democracy is thought of as a party system. It is important to note that parties are referred to in the plural and not just one party. The core element of parties, i.e., the formation and expression of the will, is also taken into account in the text of the law.

In addition, primary law requires that citizens be able to participate[183] in public debate and that all groups with an interest be involved in decision-making. Furthermore, institutions must act transparently. These democratic principles are explicitly stated in Art. 10 § 3 and Art. 11 § 1-4 TEU und concretise the understanding of democracy. Art. 11 § 4 TEU shows that democratic principles may also be subject to some practical requirements. For example, not everyone may invite the Commission, but there must be at least one million citizens from a significant number of member states.

As already explained,[184] the benefit of systematic interpretation for the values of the European Union is only minor. However, it can be taken away that democracy is something positive and that equality is not part of democracy in sense of Art. 2 TEU. The systematic interpretation suggests that democratic rights are only available to national (and European) citizens. Furthermore, that democracy is to be understood as representative democracy in its basic approach. Additionally, chains of legitimacy are an important element in conveying legitimacy. Alongside this, great importance is attached to transparency and active participation of the interested public. This is particularly evident in the description of the political parties, which are presupposed for this understanding of democracy and are considered an integral part.

3.1.2.3 Viewpoint of the EU institutions

As already described earlier, successful accession to the European Union requires the support of the European Parliament, the Council of the European Union and the European Commission. There is no way around these three institutions for membership. Although they are not courts of law, so that it would be wrong to call them the courts of last resort, the effect is similar. If one of these three institutions determines that an element belongs to democracy, then that element belongs to democracy.[185] A state that sees it differently will otherwise receive a negative decision.

First, the discussion on equality as part of democracy must be revisited. As shown in the previous chapter, the systematic interpretation speaks against equality as part of

[183] Ibid.
[184] *See* chapter 2.3, methods of interpretation.
[185] Carolyn Moser and Steven Blockmans, *The extent of the European Parliament's competence in Common Security and Defence Policy* (Brussels: European Parliament, 2022), p 25.

democracy. However, the European Parliament sees it differently and sees the Treaty of Lisbon as expressing the principle of "democratic equality".[186] In another place, the European Parliament again mentions the preservation of equal opportunities as necessary for the democratic character of an election.[187] The European Commission also follows this line.[188] As explained in the previous paragraph, the European Institution´s view on a positive list creates facts. Therefore, the principle of democratic equality is part of democracy in the context of Art. 49 § 1 TEU in conjunction with Art. 2 TEU.

This is a good transition to the next topic. Elections are the central element of democracy in Europe (for direct democracy and the requirements for elections, see below). This is how the European Commission sees it[189] including the right to vote and the right to stand as a candidate. These elections have to be fair and free.[190] The European Parliament also sees it this way but especially empathises the freeness of the elections in regards to fair election campaigns.[191]

Parliament does not see the elements of direct democracy as a problem in relation to Art. 2 TEU.[192]

The European Parliament refers to the democratic principles of transparency and participation of civil society already mentioned in Art. 10, 11 TEU. It sees the lack information as a basis for an informed choice and the lack of serious consultation as a violation of Art. 2 TEU, so that in its understanding these principles are to be counted as Art.

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[186] European Parliament, *supra* note 182.

[187] European Parliament, *Interim report on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.* Available on: https://www.europarl.europa.eu/doceo/document/A-9-2022-0217_DE.html. Accessed May 06, 2023.

[188] European Commission, *A new push for European democracy.* Available on: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy_en. Accessed May 06, 2023.

[189] European Commission, *European Democracy Action Plan*. Available on: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en. Accessed May 06, 2023; European Commission, *Aims and value*s. Available on: https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-andvalues_en#:~:text=The%20functioning%20of%20the%20EU,elections%20to%20the%20European%20Parliament. Accessed May 06, 2023.

[190] European Commission, *supra* note 189.

[191] European Parliament, *supra* note 187; European Parliament, *supra* note 182; European Parliament, *Supporting democracy around the globe*. Available on: https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/global-democracy. Accessed May 06, 2023.

[192] European Parliament, T*he situation in Hungary, European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*. Available on: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html. Accessed May 05, 2023.

2 TEU.[193] This position is supported by the European Commission, which places particular emphasis on the protection of the free and independent press in the area of transparency.[194] Subsequently, according to the European Commission, freedom of expression is central to a functioning democracy.[195] This is complemented by media freedom and pluralism.[196]
In the understanding of the European Parliament, it is an essential part of democracy that parliaments make the laws.[197]

In addition, the European Parliament and the European Commission raise another point: the prohibition of campaigning for a party with public funds (even indirectly)[198] is contrary to Article 2 TEU and democracy.[199] Another issue is how to deal with the redrawing of constituencies. This must be done in a transparent and professional manner. It must not be subject to political objectives and must be done in an impartial process[200], according to the European Parliament.

The Commission (like the TEU in its systematic interpretation) assumes a representative form of democracy.[201] With fair and free elections as a basis that is taken for granted.[202] The mentioning of political parties as a necessary instrument of democracy (already started by Art. 10 § 4 TEU) if picked up by the European Institutions.[203] However, the Commission attaches importance to the fact that the parties are also bound by certain rules of the game, especially with regard to funding.[204]

3.1.2.4 Discussion with consideration of scholars and courts

The CJEU is not an institution that will decide in the process according to Art. 49 TEU. However, it is an institution that has a decisive influence on the understanding of the terms in Art. 2 TEU. Therefore, its interpretation must also be taken into account. The same reasoning applies to the voices of academia, although their importance is less than the one of the CJEU.

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[193] Ibid.
[194] European Commission, *supra* note 189.
[195] Ibid.
[196] European Parliament, *European Parliament resolution of 19 May 2022 on the Commission's 2021 Rule of Law Report*, para. 22. Available on: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0212_EN.html. Accessed May 06, 2023.
[197] European Parliament, *supra* note 191.
[198] European Commission, *supra* note 194.
[199] European Parliament, *supra* note 192.
[200] Ibid.
[201] European Commission, *supra* note 189.
[202] European Parliament, *supra* note 196, para. 29.
[203] *See* for example a regulation adopted by the Parliament and the Council: Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations.
[204] European Commission, *European Democracy: Commission sets out new laws on political advertising, electoral rights and party funding*. Available on: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6118. Accessed May 06, 2023.

If we want to determine the content of democracy with the help of judges and academics, then we must always be aware of their backgrounds. One must always ask oneself whether this opinion corresponds to the EU's understanding of democracy, or whether it merely reflects a speciality of national law. In this section, the interpretative methods of historical and teleological interpretation and effet utile are applied in particular. But also, all ideas that cannot be specifically assigned to one method of interpretation. First, the elements that have already been addressed in the considerations above are taken up. Then, an attempt is made to find further elements of democracy.

The result of the interpretation of the wording was that a democratic system (as a form of government)[205] should prevent individuals or a limited number of individuals from being able to make decisions on their own for the whole state. This sovereignty of the people is not contradicted by any interpretation method or scholar, so it is an element of the EU's understanding of democracy.[206]

As mentioned earlier, elections are the crucial element of democracy in the European Union. However, the requirements on who exactly votes for whom are relatively relaxed in the EU. For example, of the European institutions, only the European Parliament is directly elected.[207] In this context, Lenaerts, von Bogdandy and Calliess speak of a "dual structure of democratic legitimacy".[208] Legitimacy is not only given by the people of Europe in elections, but also by the national institutions elected by the national people. In the view of the CJEU the European Parliaments tasks in creating laws and being consulted for other decisions is a "fundamental democratic principle"[209] because in this way the people can take part in the exercise of power with the help of an intermediary.[210] In conjunction with the discussion on the democratic deficit at the level of the European Union, a picture emerges in which the requirements for elections are rather low. Thus, candidate states must in principle strive for a state organisation based on elections. However, there is a great deal of freedom in terms of the exact organisation of the state.[211] There can be direct elections or there can be elected mediating bodies or a mixture of both. Even the transfer of competences to non-majoritarian

[205] Koen Lenaerts, *supra* note 99, p. 281.
[206] Maria Diaz Crego et al., *supra* note 40.
[207] Maria Diaz Crego et al., *supra* note 40, p. 13.
[208] Koen Lenaerts, *supra* note 99, p. 280; Armin von Bogdandy, *The European Lesson for International Democracy. The Significance of Articles 9 to 12 EU Treaty for International Organizations* (New York: Jean Monnet Working Paper, 2011), p. 11; Christian Calliess, *supra* note 99.
[209] ECJ, C-138/79, October 29, 1980, *Roquette Frères*, para. 33.
[210] ECJ, C-300/89, June 11, 1991, *Commission v Council (Titanium Dioxide),* para 20.
[211] But the most member states went for a parliamentary system instead of presidential system. Jürg Steiner, *European Democracies* (New York: Addison Weasly Educational Publishers Inc., 1998), p. 61; Maria Diaz Crego et al., *supra* note 40, p. 13.

agencies is possible.[212] The best example for this is the European Commission.[213] This means that the idea of chains of legitimacy is a permissible idea within the principle of democracy. The Council of the European Union, consisting of representatives of the national governments, receives its legitimacy through the elections that lead to the formation of the national governments. In addition to the construction in primary law, academia also takes this idea for granted.[214]

Systematic interpretation has shown that the European Union itself is fundamentally designed as a representative democracy. However, scholars give an important role to direct democracy.[215] There is a wide range of possible combinations for candidate countries between representative democracy and elements of direct democracy. This can be seen in the different practices in the states of the European Union. In Italy and Latvia, for example, there are relatively many elements of direct popular participation[216] (although not as many as in Switzerland). Whereas in Malta, Germany and Portugal there are only very few elements such as referendums or similar.[217] Although these national practices are not binding,[218] they provide a strong orientation for the EU's understanding of democracy, because this supranational concept of democracy originates in the national constitutional systems.[219]
All of this is built on the premise of the independent mandate, which is recognised in the member states and at the EU level. [220]

The previous points have dealt with why, whether and for what there must be elections and referenda. However, there are also requirements for the preconditions for elections and the conduct of elections. First, the requirement for elections:

Firstly, there is the principle of universal suffrage, which is stated in Art. 223 § 1 TFEU for the vote to the European Parliament. This means that every citizen has the right to

[212] Koen Lenaerts, *supra* note 99, p. 281; ECJ, C-518/07, March 09, 2010, *European Commission* v *Federal Republic of Germany*, para. 46.
[213] European University Institute, The state of the Union. Available on: https://stateoftheunion.eui.eu/2019/non-majoritarian-institutions-political-pressure/. Accessed May 06, 2023.
[214] Koen Lenaerts, *supra* note 99, p. 280; Christian Calliess, *supra* note 99.
[215] Josephine Lichteblau and Clara Steinke, „Direkte Demokratie und die Europäische Union," in *Die Legitimität direkter Demokratie*, ed. Wolfgang Merkel and Claudia Ritzi (Wiesbaden: Springer VS, 2017), pp. 193-225, p. 194; Bruno Kaufmann et al., „Direkte Demokratie und europäische Integration", *Baslerschriften zur europäischen Integration* 75 (2005): p. 15; Jo Leinen and Jan Kruez, „Herausforderung partizipative europäische Demokratie: Zivilgesellschaft und direkte Demokratie im Vertrag von Lissabon," *Integration* 31 (2008): p. 241.
[216] Jürg Steiner, *supra* note 211, p. 108.
[217] Jürg Steiner, *supra* note 211, p. 110.
[218] These "democratic arrangements" are an important part of national identity. Koen Lenaerts, *supra* note 99, p. 280.
[219] Thure Hanssen, *supra* note 7.
[220] Koen Lenaerts, *supra* note 99, p. 312.

vote and stand for election. Nevertheless, formal or substantive requirements may be justified for imperative reasons, for example an age requirement. The systematic interpretation has already suggested that only citizens of member states may participate in the elections. This restriction of the "dēmos" to citizens is common within Europe.[221] However, Art. 22 § 1 TFEU softens these principles by allowing EU citizens to vote in certain local elections in states of which they are not citizens. At the same time, this exception shows that a restriction of the right to vote to citizens is the basic rule in EU primary law.

The elections must be free as well. No pressure, coercion or other unlawful influence may be exerted on voters or candidates. This applies both before and after the election. Everybody agrees in this area,[222] so that the freedom of elections is part of democracy in the sense of Art. 2 TEU.

Additionally, there is consensus that the act of voting must be secret, because otherwise there is a danger of indirect pressure.[223]

The equality already mentioned in the views of the institutions becomes relevant again with regard to the counting method in elections. A distinction can be made between whether each vote it counted equally and whether each vote contributes equally to the outcome of the election. It is undisputed that every vote must count equally, regardless of who cast it. Regarding the equal contribution to the outcome two issues are causing problems. The first peculiarity of EU law is the degressive proportionality in the election to the European Parliament. According to Art. 14 § 2 TEU, for example, one vote from Malta counts more than one vote from France, because it takes fewer votes from Malta to elect one representative to the European Parliament.[224] This rule has been repeatedly objected to as undemocratic because it violates the idea of equality of outcome. This criticism is relevant because it has also been voiced by the Bundesverfassungsgericht (German constitutional court), which sees it as an obstacle to further European integration.[225] Nevertheless, Art. 14 § 2 TEU is part of the same treaty as Art. 2 TEU, which only makes sense if Art. 2 TEU is understood in such a way that Art. 14 § 2 TEU describes a permissible form of democracy. When interpreting a contract, the result which does not lead to a breach of parts of the contract shall be chosen if

[221] Maria Diaz Crego et al., *supra* note 40, p. 13.
[222] Petra Bard, *supra* note 19; Samuel Huntington, *The third wave: Democratization in the late twentieth century* (Norman: University of Oklahoma Press, 1991), pp. 9,10; Christian Calliess, *supra* note 99; Maria Diaz Crego et al., *supra* note 40, p. 13.
[223] Christian Calliess, *supra* note 99; Article 3 of Additional Protocol 1 to the ECHR also provides for this.
[224] The Committee on Constitutional Affairs of the European Parliament, *Arbeitsdokument zur Zusammensetzung des Europäischen Parlaments*, p. 2. Available on: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/AFCO/DT/2017/07-12/1123146DE.pdf. Accessed May 05, 2023.
[225] Bundesverfassungsgericht, 2 BvE 2/08, June 30, 2009, *Lissabon*, para.177.

possible. Art. 14 § 2 TEU thus represents a justified exception to the equality of outcome idea and exceptions to the equality of ballots are general possible.

The second possible exception is the percentage hurdle for parties to enter parliament. The inequality consists in the fact that the votes cast in favour of a party that receives too few percentages do not affect the result at all. In some member states such provisions exist and are recognised as a permissible exception.[226] For the European elections, the European Parliament has made a proposal in Mai 2022 for a 3.5% threshold.[227] However, according to Art. 223 § 1 TFEU, a unanimous decision of the Council is still necessary and then the consent of the European Parliament and the approval of the member states must follow. Most players agree that a percentage clause can be permissible in democratic elections.[228] There are different views on the situations in which such a clause is justified,[229] but this is a question of the justification of restrictions and not a question of whether such exceptions are permissible in a democracy at all. Thus, percentage clauses are a permissible element of democracy in the European Union.

Furthermore, the principle of democracy prohibits a practice that prevents equal opportunities in elections. "Gerrymandering" is the deliberate allocation of electoral constituencies in such a way as to give one party an advantage in the election. This practice does take place but is prohibited as a violation of the principle of democracy within the meaning of Art. 2 TEU.[230]

However, such free elections are only truly fair if there is already a level playing field in society before the election.[231] Therefore, some preconditions have to be fulfilled:

First of all, transparency is necessary. Only when voters have all the information at their disposal can they really decide freely. Transparency of government and parliament is a principle of democracy as understood by the EU.[232]

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[226] Deutsche Presse-Agentur, *Percentage thresholds in the European elections*. Available on: https://ednh.news/percentage-thresholds-in-the-european-elections/. Accessed May 04, 2023.
[227] European Parliament, Parlament: Neue Regeln für Europawahl – EU-weiter Wahlkreis gefordert. Available on: https://www.europarl.europa.eu/news/de/press-room/20220429IPR28242/parlament-neue-regeln-fur-europawahl-eu-weiter-wahlkreis-gefordert. Accessed May 06, 2023.
[228] *See* for example the systems in Latvia, Germany and the Czech Republic with a 5% threshold each and the already mentioned European Parliament.
[229] The Bundesverfassungsgericht declared a 5% and a 3% threshold for the German election to the European Parliament as void. Bundesverfassungsgericht, 2 BvE 2/13, February 26, 2014, para. 84; Bundesverfassungsgericht, 2 BvC 4/10, November 09, 2011, para. 134.
[230] Verfassungsgerichtshof Rheinland-Pfalz, VGH B 14/15, October 30, 2015, p. 10; Petra Bard, *supra* note 19, p. 189; European Parliament, *supra* note 192.
[231] Petra Bard, *supra* note 19; Samuel Huntington, *supra* note 222.
[232] Principile of transparency: Koen Lenaerts, *supra* note 99, p. 281; Petra Bard, *supra* note 19, p. 189; Christian Calliess, *supra* note 99; Maria Diaz Crego et al., *supra* note 40, p. 14.

Secondly, Kochenov[233] and others[234] see pluralism as part of democracy in the sense of Art. 2 TEU. Necessary for pluralism are in particular the freedom of expression[235] and the protection of a free and independent press.[236] This includes not only not actively suppressing reporting, but also protecting press work against attacks. These two points lead to "democratic accountability"[237] and have already been considered essential by the European Commission and are characteristics of a democratic society.

All this knowledge is only useful if one can act accordingly, and the possibility to vote alone is not sufficient.[238] The active participation of the interested public brought in by the other methods of interpretation is also seen as necessary by scholars.[239] In particular, this takes place through parties that enable the formation of will from the bottom up.[240] By looking at the member states, it can be seen that it is a common tradition and influential in the understanding of the EU that there must be not just one but several different parties.[241]

To ensure that the will is really formed by the parties from the bottom up, all parties must be given equal opportunities by the state/European Union. Unfortunately, this is difficult because the representatives of the state usually belong to one party. Here again, one can derive from the practices in the member states the understanding in Art. 2 TEU. Art. 1 § 1 and Art. 31 of the Slovakian Constitution and Art. 2 § 1 of the Czech Charter of Fundamental Rights and Freedoms are understood in such a way that "neutrality is an essential component of democracy".[242] Another example of this is the German understanding in which this neutrality is seen as part of democracy.[243] The principle of democracy therefore also imposes a duty of neutrality on state organs[244] when they act in their capacity as state organs.[245]

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[233] Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 C.
[234] Christian Calliess, *supra* note 99; Czech constitutional court, Pl. ÚS 30/98, October 13, 1999, *Election Contribution,* Reasoning part III. In English available on: https://www.usoud.cz/en/decisions/1999-10-13-pl-us-30-98-election-contribution. Accessed April 10, 2023.
[235] Christian Calliess, *supra* note 99.
[236] Marc F. Plattner, "populism, pluralism, and liberal democracy," *Journal of Democracy* 21 (2010): p. 89.
[237] Petra Bard, *supra* note 19, p. 189; with a similar wording: Koen Lenaerts, *supra* note 99, p. 293.
[238] ECJ, C-280/11 P, October 17, 2013, *Council vs. Access Info Europe*, para. 74, 75; Koen Lenaerts, *supra* note 99, p. 314; Maria Diaz Crego et al., *supra* note 40, p. 13; Christian Calliess, *supra* note 99, Art. 2 III. c).
[239] Koen Lenaerts, *supra* note 99, p. 280.
[240] Hans Jarass, „Art. 21 GG," in *Jarass/Pieroth, Grundgesetz für die Bundesrepublik Deutschland*, ed. Hans Jarass and Bodo Pieroth (München: C. H. Beck, 2022), para. 16.
[241] Christian Calliess, *supra* note 99; Jürg Steiner, *supra* note 211, p. 3.
[242] Luca Sevaracz, Do We Need a Neutral State in the Election Campaign?. Available on: https://jog.tk.hu/blog/2022/10/do-we-need-a-neutral-state-in-the-election-campaign. Accessed on May 06, 2023.
[243] Bundesverfassungsgericht, 2 BvE 4/13, June 10, 2014, para 25; Bundesverfassungsgericht, 2 BvE 1/19, June 09, 2020, para. 78.
[244] Or on the EU level the Commissioners.
[245] Czech constitutional court, *supra* note 234; European Commission for Democracy through Law, *Preventing and responding to the misuse of administrative resources during electoral processes,* p. 3. Available on: https://www.venice.coe.int/images/GBR_2016_Guidelines_resources_elections.pdf. Accessed May 05, 2023.

In addition, there are other elements that could be counted as part of democracy: All this focus on elections and their conditions only makes sense if the elected representatives ultimately make the decisions. Therefore, at the European level[246] as well as at the national level,[247] it is required that the essential decisions are taken by the Parliament. The requirements of what constitutes essential decisions are assessed differently, for example, the European Parliament has rather few rights compared to national parliaments, but the basic principle is undoubtedly part of democracy in the European Union.[248] At the level of the Union, this can be seen, for example, in the fact that Parliament is usually involved in very important decisions (e.g., for the budget or in Art. 49 TEU).

Although the Federal Constitutional Court of Germany counts identity control ("Identitätskontrolle") as part of the principle of democracy (popular sovereignty),[249] it is not yet recognised at European level as an element of Art. 2 TEU. The European Commission has even opened infringement proceedings against Germany on 2.12.2021.[250]

Democracy is based on the majority principle, but this also entails the risk of minorities being neglected or discriminated against. Since this risk is relatively obvious, the protection of minorities is seen as an integral part of the principle of democracy in the EU today.[251]

3.1.3 How is the term used in politics?

It is not easy to distinguish between a legal way of thinking and a political way of thinking. Both disciplines emerged in ancient Greece and were both elements of philosophy at the time. With the consequence that there was no clear distinction between them.[252] Still today, it is difficult to draw a clear line, because political scientists also discuss the current legal situation. Plus, lawyers like to be influenced by political ideas in their argumentation, even though this should not happen.

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[246] Koen Lenaerts, *supra* note 99, pp. 280, 281.
[247] Dirk Peters and Wolfgang Wagner, „Parlamentsvorbehalt oder Exekutivprivileg? Ursachen unterschiedlicher Entscheidungsverfahren beim Einsatz von Streitkräften," *Zeitschrift für Internationale Beziehungen* 17 (2010): p. 203; Bundesverfassungsgericht, 2 BvR 1390/12, March 18, 2014, *ESM*, para. 195.
[248] European Commission, *supra* note 189; European Parliament, *supra* note 192; Koen Lenaerts, *supra* note 99, pp. 280, 281.
[249] Benedikt Riedl, *Die Ultra-vires-Kontrolle als notwendiger Baustein der europäischen Demokratie.* Available on: https://verfassungsblog.de/ultra-vires-pspp/. Accessed May 05, 2023.
[250] These proceedings have since been dropped. Matthias Ruffert, *Verfahren eingestellt, Problem gelöst?,* Available on: https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/. Accessed May 06, 2023.
[251] Christian Calliess, *supra* note 99; Koen Lenaerts, *supra* note 99, p. 297; This is also what the ECJ means when it talks about the "independence" of certain authorities. ECJ, C-518/07, March 09, 2010, *European Commission v Federal Republic of Germany*, para. 42.
[252] Nicholas F. Jones, Politics and Society in Ancient Greece. Available on: https://www.classics.pitt.edu/publication/politics-and-society-ancient-greece. Accessed May 06, 2023.

Jurists nowadays mostly use the term democracy to describe a set of rules and principles. Politicians mostly use the term when they talk about the development of a state.[253] Or when they want to express the self-image of a state/the EU. This is well illustrated by the fact that the Treaty of Lisbon (which was concluded by politicians) did not construct the values in Art. 2 TEU as easily enforceable norms, but more as a label.

The use of the word democracy is thus very much shaped by the different functions of the two groups. Thus, the jurists usually take a more descriptive approach. Due to the fact that they are often involved in court proceedings, they often analyse situations ex-post and can thus focus on the one relevant detail of democracy. As a result, the individual elements of democracy are elaborated in great detail in the legal sources.

The individual politician usually has only a limited amount of attention that he gets from others (unlike a court), so he does not have the time to dive so deeply into the details of democracy.[254] Accordingly, the term democracy is used more superficially in politics. Therefore, not many conclusions can be drawn for the definition of the content of democracy. Democracy is used in political speeches more as an idea that we should either adhere to or export. In other words, it is about changing the existing status quo.[255] Therefore, democracy is always used in politics as something positive,[256] taking advantage of the fact that the content is not 100% fixed. In the political sphere, it is also often neglected that democracy, like any other constitutional good, can be restricted and is in reality part of a system of constitutional rules.[257]

In summary, both groups talk about the same democracy,[258] but the jurists usually focus more on a detail and orient themselves to the applicable law. Politicians, on the other

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[253] A good example for both at the same time is Ursula von der Leyen: Ursula von der Leyen, *Speech by President-elect von der Leyen in the European Parliament Plenary on the occasion of the presentation of her College of Commissioners and their programme.* Available on: https://ec.europa.eu/commission/presscorner/detail/es/speech_19_6408. Accessed May 06, 2023.

[254] *See* for example the leading figures of United Nations, the United States, the Council of Europe and European Union: Kofi Annan, *The Crisis of Democracy*. Available on: https://www.kofiannanfoundation.org/supporting-democracy-and-elections-with-integrity/athens-democracy-forum/. Accessed May 06, 2023; Joe Biden, *Remarks by President Biden on Standing up for Democracy.* Available on: https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/03/remarks-by-president-biden-on-standing-up-for-democracy/. Accessed May 06, 2023; Rik Daems, *Welcoming/introduction speech at the World Forum for Democracy - 8 November*. Available on: https://pace.coe.int/en/pages/daems-world-forum-democracy. Accessed May 06, 2023; Ursula von der Leyen, *supra* note 253.

[255] Rik Daems, *supra* note 254; Kofi Annan, *supra* note 254.

[256] Ursula von der Leyen, *supra* note 253; Joe Biden, *supra* note 254.

[257] Rik Daems, *supra* note 254; Ursula von der Leyen, *supra* note 253; but sometimes theses mistakes even happen to political scientists: Alvaro Oleart and Tom Theuns, "'Democracy without Politics' in the European Commission's Response to Democratic Backsliding: From Technocratic Legalism to Democratic Pluralism," *Journal of Common Market Studies* 60 (2022), p. 1.

[258] Luca shows that it is even true for philosophers like Rawls. Luca Sevaracz, *supra* note 242; Peter de Marneffe, "Neutrality", in *The Cambridge Rawls Lexicon*, ed. Jon Mandle and David A. Reidy (Cambridge:

hand, see democracy more as a desirable goal and thus reduce the discussion of details. Therefore, the political contribution to determining the content of democracy is not really beneficial. The core ideas are mostly taken up, but it contains little that is useful for the goal of this work.

But perhaps a stronger focus on political scientists instead of politicians can lead to success? Some political scientists write down their suggestions and wishes for improvement, but these are just new ideas and have not yet significantly influenced the understanding of democracy in the EU.[259]

Therefore, the (mainly) descriptive political scientists remain: The first thing that catches the eye is that under the umbrella term democracy, there is a great focus on democratisation. The process of how democracies come into being plays a much greater role there.[260] It is also noticeable that there is more of an attempt to sort the democracies of this world into broad categories instead of dealing in detail with the specific rules of theses democracies. However, these broad categories are also partly based on the already mentioned concepts, for example direct and representative democracies.[261] But most importantly: When political scientists talk about the elements of democracy, they usually name the same ones as the jurists[262], like for example free elections.[263] In terms of content these findings of political science do not contradict the findings made in the chapters before, but they also don't offer additional value for answering the research question. Thus, the views of the political scientists do not change the results, but reinforce the results found in Chapter 3.1.2.4.

Cambridge University Press, 2014), p. 557; Frank Decker, *Demokratie im Umbruch*. Available on: https://www.forschung-und-lehre.de/zeitfragen/demokratie-im-umbruch-1331. Accessed May 06, 2023.

[259] Maria Diaz Crego et al., *supra* note 40, p. 13; Heike Walk, *Krise der Demokratie und die Rolle der Politikwissenschaft*. Available on: https://www.bpb.de/shop/zeitschriften/apuz/31510/krise-der-demokratie-und-die-rolle-der-politikwissenschaft/. Accessed May 06, 2023; Rod Hague et al., *supra* note 175, p. 85.

[260] Rod Hague et al., *supra* note 175, p. 79; Barbara Geddes, "What causes democratization?," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan C. Stokes (Oxford: Oxford University Press, 2007), p. 318; Samuel Huntington, *supra* note 222.

[261] Georg Brunner, "Direct vs. Representative Democracy," in *Direct Democracy: the eastern and central European experience*, ed. Andreas Auer and Michael Bützer (Farnham: Ashgate Publishing, 2001), p. 215; Rod Hague et al., supra note 175, p. 72; Jürg Steiner, *supra* note 211, p. 61.

[262] Richard Bellamy, "The challenge of European Union," in *the Oxford handbook of political theory*, ed. John Dryzek et. al. (Oxford: Oxford University Press, 2006), p. 253; Mark E. Warren, "Democracy and the state," in *the Oxford handbook of political theory*, ed. by John Dryzek et. al. (Oxford: Oxford University Press, 2006), p. 387; Samuel Issacharoff, "Populism vs Democratic Governance," in *Constitutional Democracy in Crisis?*, ed. Mark Graber et al. (Oxford, Oxford University Press, 2018), p. 445; J.H.H. Weiler, "The crumbling of European Democracy," in *Constitutional Democracy in Crisis*?, ed. Mark Graber et al. (Oxford, Oxford University Press, 2018), p. 634; Jürg Steiner, *supra* note 211, p. 106; János Kis, *Constitutional Democracy* (New York: CEU Press, 2003), p. 65; Frank Decker, *supra* note 258.

[263] José María Maravall, "Accountability and the Survival of Governments," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan C. Stokes (Oxford, Oxford University Press, 2007), p. 912.

3.2 What does the rule of law mean for the EU?

3.2.1 Preliminary considerations in regard to the rule of law

With regard to the interpretation of the rule of law, there are very strong parallels to the interpretation of democracy. The rule of law is also not just an ordinary legal term, but a value of the European Union.[264] From this it follows that an approach according to the classical methods of interpretation is only possible to a limited extent, but as far as it is possible, I will use them again. This means that I will start with the interpretation of the wording, which will be followed by the systematic interpretation.

Normally, historical interpretation, teleological interpretation and the use of effet utile would then follow, but this does not work in its purest form for the rule of law. As with democracy, these individual methods of interpretation do not in themselves lead to any useful result. On the one hand, the historical interpretation is not gainful because the consultation materials of the primary law and the Copenhagen declaration have not been published.[265] The two known considerations behind the Copenhagen criteria do not help. The fact that stricter conditions towards the basics of the states should be created than in the Council of Europe and that this should be done through common principles[266] does not allow any conclusion to be drawn about the content of the rule of law. The same is true of the goal of attaching conditions to the Union's actions in general.[267] On the other hand, there was probably no precise consensus on the content of the rule of law during the discussion on whether the rule of law should be included. The rule of law is a concept which cannot be defined easily. That has allowed the member states to read their own ideas into it (at least at this moment and in justifying it towards their electorate). Hence, there was probably never an unambiguous intention of the contracting parties/authors, or in any case it is not possible to find this out, so that the historical interpretation does not lead to any results.

The teleological interpretation also does not lead to useful results: In doing so, the first step is to look at what the goals pursued by the rule of law are. The aim is to limit the power of the state and to protect citizens from arbitrariness.[268] It also aims to legitimise the actions of

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[264] *See* about the development from a principle to a value: Werner Schroeder, *supra* note 9, p. 110. But one should not think too much about this term because the preamble of the charter of fundamental rights still talks about the rule of law as a "principle".
[265] Vladimir Yaroshevskiy, *supra* note 104, p. 11.
[266] De Witte, *supra* note 13; Marcus Klamert and Dimitry Kochenov, *supra* note 23, Art. 2 A.
[267] De Witte, *supra* note 13, p. 230.
[268] Martin Loughlin, *supra* note 78, chapter I.; Jiří Přibáň, *supra* note 65, p. 71; Generaldirektion Forschung und Innovation, *supra* note 17.

the government.[269] Others use the idea of the social contract to try to achieve the goals of peace, security and order.[270] These objectives help to determine the content, but not alone. The goal of ensuring security and order, for example, could justify very extreme measures. Therefore, a meaningful application only results in combination with the other methods of interpretation, so that the teleological interpretation can only be used in the broader discussion later on.

This is also the conclusion reached by the other authors who have dealt with the content of the rule of law. There is no one who has strictly adhered to the interpretative methods mentioned in Chapter 2.3. Nevertheless, these other authors have made useful contributions to the content of the rule of law, which need to be analysed. The logic applied to democracy also makes sense for the interpretation of the rule of law: first, the views of the institutions of the European Union are considered. In the discussion that follows, the views of the academic community and the courts are then also included.

It will not be possible to find a short definition that is detailed enough to provide any insight. The concept of the rule of law is too broad to be summarised in two sentences.[271] In order to achieve the objective of defining the content of the rule of law within the meaning of Art. 49 § 1 TEU in conjunction with Art. 2 TEU, there is only one option: One need to identify the core elements of the rule of law.

3.2.2 Doctrinal research

3.2.2.1 Literal interpretation

In the case of the rule of law, the multilingualism of the EU is a major problem for the interpretation of the wording. In contrast to democracy, not all wording is similar here, but it differs significantly. In English it's the rule of law, but in German it's the *Rechtsstaatlichkeit* and in French it's État de droit. The other 21 languages of the EU all have their own variants, whereby they can mostly be assigned to the English or to the French-German group. As an example of the latter, take the Dutch with *de rechtsstaat* or the Czech with *právní stát*. The

[269] World Justice Project, *What is the Rule of Law?* Available on: https://worldjusticeproject.org/about-us/overview/what-rule-law#:~:text=It%20ensures%20human%20rights%20as,%2C%20contract%2C%20and%20procedural%20rights.&text=The%20processes%20by%20which%20the,accessible%2C%20fair%2C%20and%20efficient. Accessed May 06, 2023; Pechstein, „Art. 2 EUV," in *Streinz EUV/AEUV* (München: C. H. Beck, 2018), para. 27.
[270] Till Patrik Holterhus, Die Idee der Rechtsstaatlichkeit. Available on: https://www.bpb.de/shop/zeitschriften/izpb/rechtsstaat-351/511411/die-idee-der-rechtsstaatlichkeit/. Accessed May 06, 2023; United Nations, What is the Rule of Law. Available on: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/). Accessed May 06, 2023.
[271] Martin Loughlin, *supra* note 78, chapter I.

wordings can be divided into these two groups because the first group refers to laws in its wording and the second group always contains a reference to the state.

This fact already points to the underlying problem. Translations have been chosen here for a term of EU law that describe different concepts in the member states. As mentioned before, in the legal system of the United Kingdom (which was a very important jurisdiction when this wording was chosen) and Ireland the law can exist without a direct legitimization by the state. Therefore, it is possible that the rule of law precisely contrasts with the rule of men (king/government).[272] This separation of law (Recht/droit) from the state is inconceivable in the continental European legal systems, because they cannot imagine any law that was not created by the state.[273] Because of these different systems, different rules are necessary to limit the power of the state. Simply applying the (older) Anglo-American rules to civil law systems would not make complete sense. Thus, because the different wording describes different contents, the analysis of the wording cannot lead to definitive results.

This result is reinforced by the fact that the word law has many different meanings and would open up an endless amount of possible interpretative results.[274] Even an interpretation very closely based on the English wording seems questionable, because it is now recognised that law is created by human beings. The law cannot therefore be above human will.[275] In addition, a rule seems questionable because to rule requires action and a law cannot act itself.[276]

However, one important piece of information can be drawn from the wording. The English version speaks of "the rule of law" and not of "a(ny) rule of law".[277] Any rule of law is used elsewhere in the Treaties, e.g., in Art. 263 § 2 TFEU. This shows that it is precisely the big concept that is supposed to be in the focus of Art. 2 TEU and that it is not only about the idea that the state uses laws to govern. This aspect can be recognised even better in the German version of the primary law. In German it says "*Rechtsstaat(lichkeit*)" instead of "*Gesetzmäßigkeit der Verwaltung/des Staates*".[278] The rule of law/*Rechtsstaat* is the general, multifaceted concept, an ideal, that is described in detail in this thesis. *Gesetzmäßigkeit der Verwaltung/Staates* is the name for the rule that no state decision can be made against the law

[272] Ibid.
[273] Apart from isolated exceptions with reference to natural law.
[274] Martin Loughlin, *supra* note 78, chapter I.
[275] Ibid.
[276] Ibid.
[277] Other terms that are used for similar ideas are: "rule by law" and "rule by the law". European Commission for democracy through law, *supra* note 7, p. 4.
[278] The literal translation would be legality of administration. Whereby administration in this case means the executive.

and that subjective rights cannot be interfered with without a legal basis.[279] These terms are therefore different, but usually a rule of law/*Gesetzmäßigkeit der Verwaltung* is understood as part of the rule of law.[280]

3.2.2.2 Systematic interpretation

The first thing to do is to look at the other values mentioned in Art. 2 TEU and the Copenhagen Criteria. The fact that the rule of law is mentioned next to and in addition to respect for human rights suggests from a systematic point of view that they are different things. However, Art. 2 TEU also contains elements that overlap or are part of each other,[281] so that from the systematic interpretation alone it cannot be determined with certainty that respect for human rights does not belong to the rule of law. In the same way, the mention of justice in sentence 2 alongside the rule of law in sentence 1 speaks rather for a complementarity of the two concepts.

The mention of the rule of law in the preamble and in Art. 49 TEU does not allow any real conclusions to be drawn about its content, except that it must be a value that fits into the overall structure of liberal democracy in the EU.[282] The same is true for the use of the rule of law in Art. 21 TEU.

So far, only primary law has been used to interpret Art. 49 TEU in conjunction with Art. 2 TEU. However, secondary law could also provide guidance. It is questionable whether this is compatible with the hierarchy of norms. In principle, the law at a lower level cannot define the content of a law at a higher level. However, the elements in secondary law could be expressions of the rule of law in conformity with primary law. Since the secondary laws are legal acts created by the Unions institutions, the likelihood of conformity is high. Secondary law cannot therefore prescribe a binding interpretation of primary law, but it does provide indications of how the EU institutions understand the concept of the rule of law. And precisely these institutions are an important player in determining the content of Art. 49 TEU in conjunction with Art. 2 TEU. It therefore makes sense to use secondary law as a subordinate source of interpretation.

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[279] Ulrich Stelkens, „§ 4 Gesetzmäßigkeit der Verwaltung," in E*inführung in das Verwaltungsrecht* (Speyer: Deutsche Universität für Verwaltungswissenschaften Speyer), p. 4. Available on: https://www.uni-speyer.de/fileadmin/Lehrstuehle/Stelkens/Lehrveranstaltungen/Einfuehrung_in_das_Verwaltungsrecht/4_Gesetzmaessigkeit_EinVerwR.pdf. Accessed April 20, 2023.
[280] Maria L. F. Esteban, *supra* note 66*,* p. 68.
[281] *See* for example equality as part of democracy in chapter 3.1.2.4.
[282] Ionel Zamfir and Alina Dobreva, *EU support for democracy and peace in the world* (Brussels: European Parliamentary Research Service, 2019), p. 1. Available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628271/EPRS_BRI(2018)628271_EN.pdf. Accessed May 05, 2023.

Interesting is Art. 2 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. This Article contains a definition of the rule of law that refers to Art. 2 TEU. However, this norm itself additionally reinforces the problems with the interpretation of secondary law identified in the last paragraph by introducing the definition with the phrase "For the purpose of this Regulation". It is important to note that Art. 2 of the Regulation does not want to define the rule of law exhaustively, but only wants to name some of the elements, which can be seen in the wording "it includes". For this regulation, the rule of law entails:

1. principles of legality implying a transparent, accountable, democratic and pluralistic law-making process.

2. legal certainty

3. prohibition of arbitrariness of the executive powers

4. effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights.

5. separation of powers.

6. non-discrimination and equality before the law.

The first point is only suitable to a limited extent as a starting point for further interpretation. The reference to a "democratic" law-making process is pointless because it cannot be meant that all the elements named in chapter 3.1 are to be read into it. According to systematic and historical interpretation, it is imperative that democratic and the rule of law must be something different. Whether transparent, accountable, and pluralistic law-making processes (which were also all identified as parts of democracy) are considered part of the rule of law must be clarified with the other methods of interpretation. Regarding points 2.-6., the regulation realistically suggests these points as elements of the rule of law within the meaning of Art. 2 TEU. In further interpretation, it will be examined whether this outcome is justified.

As a result of the systematic interpretation, the following can be stated: It is hinted in the Treaties that justice and respect for human rights and are different things from the rule of law. It is safe to say that the rule of law is a piece of the puzzle of liberal democracy in the European Union. In addition, there is the possibility that the nature of the legislative process is elementary to the rule of law. It suggests that the elements of the rule of law include legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights, separation of powers and non-discrimination and equality before the law.

3.2.2.3 Viewpoint of the EU institutions

The opinions of the European Commission, the European Parliament and the Council of the European Union are very important to determine the content of Art. 49 TEU in conjunction with Art. 2 TEU. If one of these institutions disagrees the candidate state would receive a negative decision.[283]

In the documents of the three institutions, a reference to fundamental rights is often made, but it is not clear from this whether respect for fundamental rights is part of the rule of law or whether fundamental rights stand alongside it.[284] Justice is mentioned by the European Commission in the rule of law report and is seen as part of the rule of law, with a focus on justice for the benefit of citizens and businesses.[285] Which contradicts the possible result of the systematic interpretation.

According to the systematic interpretation, it stood to reason that the nature of the legislative process is important for the rule of law. The EU institutions endorse this and explicitly name the quality and inclusiveness of national legislative procedures as important for the rule of law.[286]

Legal certainty is also by the Commission seen as an element of the rule of law.[287] The same applies to the prohibition of arbitrariness of the executive powers.[288]

The justice system is so important for the European Commission that it is mentioned as the first point in the rule of law report 2022. According to the report, the justice system must be independent, of high quality and efficient. This is the only way to ensure that EU law is effectively applied and enforced.[289] Independence in this case mean judicial independence,[290] which is a principle that is also referred to in Art. 19 (2) TEU. This area includes the right to an effective remedy and effective access to justice.[291] One point that tends to be overlooked, but is included, is the autonomy and independence of the prosecution services as essential elements for the good functioning of the criminal justice system.[292]

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[283] For justification *see* chapter 3.1.2.3.
[284] As a good example: European Commission, 2020 *Rule of Law Report*, p. 1. Available on: https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en. Accessed May 05, 2023.
[285] European Commission, *supra* note 17, p. 2.
[286] European Commission, *supra* note 17, p. 22; Maria Diaz Crego et al., *supra* note 40, p. 81.
[287] European Commission, *supra* note 284.
[288] Ibid.
[289] European Commission, *supra* note 17, p. 5.
[290] Which according to the Commission shall not be curtailed by the use of disciplinary frameworks. European Commission, *supra* note 17, p. 5; European Parliament, *supra* note 196, para. 15.
[291] European Commission, *supra* note 17, p. 5; European Parliament, *supra* note 196, para. 19; with Art. 47 of the Charter being a codification of the rule of law according to the European Parliament. Rafał Mańko, *supra* note 150, p. 3.
[292] European Parliament, *supra* note 196, para. 18; European Commission, *supra* note 17, p. 7.

The European Commission and the European Parliament state that the right to a fair trial is part of the rule of law[293] and that enjoying the services of a lawyer is part of that.[294]

The separation of powers is also seen by these actors as an element of the rule of law. This includes, in particular, a culture of checks and balances and an important role for constitutional courts[295] and other independent authorities such as the ombudsperson.[296] Particularly relevant is constitutional review of government measures through the constitutional courts.[297] Non-discrimination and equality before the law is seen as a part of the rule of law by the European Parliament[298] and the European Commission.[299]

Another important topic is having an anti-corruption framework. To have no more corruption is unrealistic, but the rule of law requires that it is fought against in a structured and effective way, otherwise the trust of citizens and businesses suffers. This includes a large number of preventive and repressive measures. These are in particular the creation of a legal framework, sufficient administrative and judicial capacities, effective investigations, measures to prevent conflicts of interests, transparency of lobbying, protection of whistle-blowers[300] and transparency of political party financing.[301] Very important for the rule of law are therefore transparency and integrity in the exercise of state power[302] and judicial accountability.[303]

The European Commission also addresses investor citizenship and investor residence schemes under this point,[304] but even in the rule of law report they fail to link this point credibly to the rule of law.

The name "rule of law report" chosen by the European Commission might suggest that everything in this document is part of the rule of law. A free and pluralistic media landscape is important to defend the rule of law, according to the Commission. However, the

[293] European Parliament, *supra* note 196, para. 2.
[294] European Commission, *supra* note 17, p. 10.
[295] European Parliament, *supra* note 187, para. W.
[296] European Commission, *supra* note 17, p. 22.
[297] European Commission, *supra* note 17, p. 23.
[298] European Parliament, *supra* note 196, para. 2
[299] European Commission, *supra* note 284.
[300] European Parliament, *supra* note 196, para. 21.
[301] European Commission, *supra* note 17, pp. 10,12. Which includes all the ideas of this paragraph.
[302] European Commission, *supra* note 17, p. 2.
[303] Maria Diaz Crego et al., *supra* note 40, p. 81; European Parliament, *supra* note 196, para. 15.
[304] European Commission, *supra* note 17, p. 16. In some other documents they leave it out sometimes. As an example: European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the Rule of Law within the Union State of play and possible next steps*. p. 1. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163. Accessed May 06, 2023.

Commission also refers a lot to democracy at this part of the document,[305] so it is not clear whether the Commission sees free and independent media as a part of democracy or as part of both. In its resolution on the Commission's rule of law report, the European Parliament explicitly mentions only problems with democracy, but not with the rule of law, in relation to the media landscape.[306]

The fact whether a state regularly implements the judgments of the European Court of Human Rights is included in the rule of law report, but the Commission itself says that this is only an indicator of the functioning of the rule of law in a country,[307] so following these judgments is not itself part of the rule of law in the Commissions view. The European Parliament sees the enforcement of judgments as a crucial component of the rule of law.[308] And that makes sense, because following judgments is an elaboration of the fundamental idea that "all public powers always act within the constraints set out by law",[309] which is also seen as such by the Commission. The European Convention on human rights is international law, which is law in the meaning of the sentence before.

The institutions see civil society organisations and human rights defenders as important watchdogs,[310] but only as watchdogs and not as part of the rule of law. According to the Parliament, Article 41 of the Charter which provides for the right to good administration is a codification of the EU-rule of law.[311]

In the opinion of the Commission another element of the rule of law is legality.[312] The Parliament highlights formal legality, which from its point of view means: no retroactive laws (laws must me laid down in advance), laws must be applicable to everyone in a similar situation, the laws must be made public.[313]

It is certain that primacy of EU law is an important part of the EU legal system and that the member states have to follow EU law. The Commission also mentions primacy of EU law several times in connection with the rule of law. Still, a mention in the rule of law report[314] alone does not necessarily constitute a confirmation by the Commission that it is part of the rule of law. Similarly, the rule of law is mentioned in the "Background" in relation to the decision of the Polish Constitutional Tribunal to question the primacy of EU law. However, it

[305] European Commission, *supra* note 17, p. 17.
[306] European Parliament, *supra* note 196, para. 22.
[307] European Commission, *supra* note 17, p. 24.
[308] European Parliament, *supra* note 196, para. 15.
[309] European Commission, *supra* note 284.
[310] European Commission, *supra* note 17, p. 24.
[311] Rafał Mańko, *supra* note 150, p. 3.
[312] European Commission, *supra* note 284.
[313] Rafał Mańko, supra note 150.
[314] European Commission, *supra* note 17, p. 23.

is not explicitly stated that this is a violation of the rule of law. But while this document identifies several violations of EU legal principles explicitly.[315]

3.2.2.4 Discussion with consideration of scholars and courts

Before one can develop the list of the elements with the help of the scholars and courts, one must understand the different backgrounds of these scholars and courts. This is especially true for the content of the rule of law because the differences between the common law system and the civil law system are big. One must always keep in mind whether the opinion of these persons really shape the European understanding of the term, or whether it is just a very specific element of the national understanding.[316]

Based on the previous methods of interpretation, it is more likely that respect for fundamental rights is not an element of the rule of law but exists next to it. The comparative perspective, on the other hand, speaks in favour of this, because in several member states respect for fundamental rights is part of the rule of law.[317] Here, the argument of systematic interpretation must be given priority because it refers to the genuinely European concept (in comparison to the national systems). The systematic argument has a particularly strong effect in this case because the rule of law and respect for human rights are not only mentioned side by side in Art. 2 TEU, but also in other places such as the preamble or Art. 21 TEU.[318] Additionally, scholars also keep saying that democracy, the rule of law and fundamental rights are mutually dependent,[319] which suggests that one cannot be (fully) an element of the other.[320] In complement, one can also argue from the perspective of civil law: from the civil law perspective the rules limiting the state are rules created by the constitution whereas human rights also exist before and without a state.

The previous methods of interpretation came to different results with regard to justice. From a historical perspective, the law and justice were often opposed to each other. But even

[315] European Commission, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal. Available on: https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_21_7070. Accessed May 06, 2023.
[316] Or sometimes just an ideological specialty. Martin Loughlin, *supra* note 78.
[317] Rupert Scholz, "Art. 23 GG," in *Düring/Herzog/Scholz Grundgesetz* (Munich, C.H. Beck, 2022, 97th supplementary delivery), para. 76; Laurent Pech, *supra* note 20, p. 34; Rod Morgan, "The Rule of Law," *The British Journal of Criminology* 50 (2010), p. 1203; Matthias Pechstein, *supra* note 269, para. 27.
[318] With the same argumentation: Judith Shklar, "Political Theory and the Rule of Law" in T*he Rule of Law: Ideal or Ideology*, ed. A. Hutcheson and P. Monahan (Toronto: Carswell, 1987), pp. 13-14; P. Craig, "The Rule of Law, Appendix 5 in House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament," *HL Paper 151* (2007), p. 100; Laurent Pech, *supra* note 20, p. 52.
[319] Sergio Carrera et al., *supra* note 58, p. 3.
[320] Armin von Bogdandy and Michael Ioannidis, 'Systemic deficiency in the rule of law: what it is, what had been done, what can be done?', *Common Market Law Review* 51 (2014): p. 63; Also, the Venice Commission states that they are not synonyms and that there is just an "overlap". European Commission for democracy through law, *supra* note 7, p. 12.

then, the law had to appear just, especially in that it was sometimes just.[321] There are scholars who see justice as part of the rule of law, especially in regard to common law.[322] Other scholars see the rule of law as a system that can be unjust.[323] For the rule of law at the EU level, Pech's argumentation is convincing: he says that the division into "thin" and "thick" concepts of the rule of law is not fruitful and only artificial and that every author expects at least a minimum of substantive justice.[324] A purely formal approach would not be able to fulfil the expectations that the EU as an institution has of the rule of law. The result is therefore that the rule of law in the sense of Art. 2 TEU also includes a basic level of justice.[325]

The rule of law requires that the legislative process be transparent, open/inclusive, accountable, and pluralistic. In this, the systematic interpretation, the European institutions, and the voices in the literature agree.[326] The same applies to legal certainty, so that it is likewise part of the rule of law within the meaning of Art. 2 TEU.[327] That implies that laws are easily accessible,[328] applied in a foreseeable and consistent manner and that they are formulated with as much precision and clearness as possible.[329] The rule of law also requires that there are mechanisms in place to prevent a supreme court or constitutional court from making conflicting rulings to produce a coherent case-law.[330]

Another element is the prohibition of retroactive laws. In the area of criminal law, this is clear, and exceptions are not allowed.[331] In other areas of law, this prohibition applies as a principle, but more generous exceptions are permitted.[332] This is the case because the EU protects legitimate expectations.[333] For legal certainty it is also necessary that final judgments are only questionable on exceptional grounds and that judgments can be enforced easily.[334]

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[321] Douglas Hay, *supra* note 68, pp. 2, 13.
[322] Douglas Hay, *supra* note 68, p. 16; Randall Peerenboom, "Varieties of Rule of Law. An Introduction and Provisional Conclusion" in *Asian Discourses of Rule of Law. Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, ed. Randall Peerenboom (London: Routledge, 2004), p. 2.
[323] Judith Shklar, *supra* note 318, pp. 13-14; P. Craig, *supra* note 318.
[324] Laurent Pech, *supra* note 20, pp. 28, 44 who also sees the majority of European constitutional courts agreeing with him. With the same findings: Maria Diaz Crego et al., *supra* note 40, p. 16.
[325] Marcus Klamert and Dimitry Kochenov, *supra* note 23; *See* for that idea for example Radbruch's formula.
[326] Provincial Court of British Columbia, *supra* note 70; Preeti Ramanujam, *supra* note 72; Theo J. Angelis and Jonathan H. Harrison, *supra* note 98; European Commission for democracy through law, *supra* note 9, p. 9.
[327] UN Secretary-General, *supra* note 96, para. 6.
para. 6; European Commission for democracy through law, *supra* note 7, p. 10; General Court, T-348/14, September 15, 2016, *Yanukovych* v *Council of the European Union,* para. 99.
[328] Rafał Mańko, *supra* note 150; European Commission for democracy through law, *supra* note 7, p. 11.
[329] European Commission for democracy through law, *supra* note 7, p. 11; Rod Morgan, *supra* note 317.
[330] European Commission for democracy through law, *supra* note 7, p. 11.
[331] Ibid.
[332] Nils Grosche, „Das allgemeine Rückwirkungsverbot – Ablösung vom Vertrauensschutz," *Der Staat* 54 (2015): p. 309.
[333] European Commission for democracy through law, *supra* note 7, p. 7; Rafał Mańko, *supra* note 150.
[334] European Commission for democracy through law, *supra* note 7, p. 11.

Some see it part of legal certainty, some see it as a separate point, but all the parties agree on the content regarding the prohibition of arbitrariness of the executive power. The most important aspect of this is the rule that every decision of the executive must be proportionate. EU secondary legislation,[335] scholars[336] and national member state traditions[337] all suggest that this is part of Art. 2 TEU and of the rule of law.

In addition to the previous methods of interpretation, the literature rightly sees the following elements as part of a functioning justice system and thus as part of the rule of law: independent and impartial judges,[338] autonomy and independence of the prosecution services,[339] judicial review of government measures,[340] right to an effective remedy and effective access to justice.[341] Thereby the right to an effective remedy, which is stated in Art. 47 of the EU charter of fundamental rights and seen as a codification of the rule of law,[342] includes: Access to courts previously established by law, a fair and public trial where advise, defence and representation are guaranteed and access to legal aid.[343] Convincingly, this also includes the possibility of receiving professional translation, which can only be provided if there is generous assistance from public funds,[344] and it includes the access to information that is necessary to have an effective defence,[345] and an acceptable length of proceedings.[346] Furthermore, Art. 19 section 1 subsection 2 is also seen as an expression of the rule of law principle, which obliges the member states to provide the necessary legal remedies.[347] Many

[335] Art. 2a Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
[336] Thure Hanssen, *supra* note 7; Rod Morgan, *supra* note 317; European Commission for democracy through law, *supra* note 7, p. 1; Matthias Pechstein, *supra* note 269, para. 27.
[337] Laurent Pech, *supra* note 20, p. 34; Rod Morgan, *supra* note 317.
[338] ECJ, C-824/18, March 02, 2021, AB and Others, para.117, 119, 123; ECJ, C-791/19, July 15, 2021, *Commission* v *Poland*, para. 98-108; Maria Diaz Crego et al., *supra* note 40, p. 25; Thure Hanssen, *supra* note 7; European Commission for democracy through law, *supra* note 7, p. 12.
[339] ECJ, joint cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 und C-397/19, May 18, 2012, *Asociaţia 'Forumul Judecătorilor din România' and Others*, para. 69. European Commission for democracy through law, supra note 7, p. 12.
[340] ECJ, C-362/14, October 6, 2015, *Schrems*, para. 95; ECJ, *supra* note 120, para. 36; For France: Laurent Pech, "Rule of Law in France" in *Asian Discourses of Rule of Law. Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, ed. Randall Peerenboom (London: Routledge, 2004), p. 9; European Commission for democracy through law, *supra* note 7, p. 11.
[341] ECJ, C-50/00, July 25, 2002, *P - Unión de Pequeños Agricultores v Council*, para. 38,39; European Commission for democracy through law, *supra* note 7, p. 12; Matthias Pechstein, *supra* note 269, para. 27.
[342] Thure Hanssen, *supra* note 7; Matthias Pechstein, *supra* note 269, para. 27.
[343] Thure Hanssen, *supra* note 7; European Commission for democracy through law, *supra* note 7, p. 12; ECJ, C-216/18 PPU, 25 July 2018, para. 48.
[344] Margot Horspool, *supra* note 101, p. 416.
[345] The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, para. 21. Available on: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers. Accessed May 07, 2023; Dylan Brown, 5 reasons why lawyers need access to a quality legal database, https://www.lexisnexis.co.uk/blog/future-of-law/5-reasons-why-all-lawyers-need-access-to-a-quality-legal-research-database. Accessed May 07, 2023.
[346] Maria Diaz Crego et al., *supra* note 40, p. 25; Rod Morgan, *supra* note 317; European Commission for democracy through law, *supra* note 7, p. 12.
[347] Matthias Pechstein, *supra* note 269, para. 27; Thure Hanssen, *supra* note 7.

of these things are also contained in the Anglo-American term due process. However, this term does not contain anything further that would be useful for the EU-rule of law.[348]

The European Parliament sees Art. 41 of the Charter (right to good administration) as part of the EU rule of law.[349] Otherwise, not many relevant persons have commented on this point, except the European Court of First Instance in 2008.[350] It is, nonetheless, convincing to consider the contents of Article 41 as part of the rule of law, because this article takes many elements discussed in the previous section and transfers them from the judicial procedure to the administrative procedure. In substance, effective access to justice is extended in time. Such an extension makes sense because the administrative procedure is an extremely important point of interaction between the citizen and the state/EU. Therefore, the right to good administration is part of the rule of law with the meaning of Art. 2 TEU.[351]

There is agreement on the separation of powers as part of the rule of law.[352] However, there is a margin of appreciation for the member states and the EU itself. This room for variation can only be narrowed down on the basis of cases: the Treaties themselves provide only for a weak role of the (European) Parliament[353] and, according to the principle of consistent interpretation of Treaties, this must be in accordance with the rule of law. On the other hand, the decisive actors have recently noticed that the systems in some member states does not provide the necessary separation of powers. These include, apart from the well-known Hungary and Poland, also Germany with regard to its public prosecutors.[354]

There is consensus beyond the EU institutions[355] that non-discrimination and equality before the law are necessarily part of the rule of law.[356]

When authors write about the rule of law, most do not mention the fight against corruption separately. The EU institutions are the odd ones out with the strong focus on this extra category.[357] That said, the problem for the definition is not as big as it seems: the elements that the Commission understands as an "anti-corruption framework" can also be

[348] European Commission for democracy through law, *supra* note 7, p. 12.
[349] Rafał Mańko, *supra* note 150, p. 3.
[350] ECJ, Joined Cases T-254/00, T-270/00 and T-277/00, November 28, 2008, *Hotel Cipriani*, para. 210.
[351] While using the term "good governance" but meaning the same thing: Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 22.
[352] ECJ, *supra* note 327; Thure Hanssen, *supra* note 7; UN Secretary-General, *supra* note 96, para. 6.
[353] Jan-Werner Müller, The EU's Democratic Deficit and the Public Sphere, *Current History* Vol. 115 No. 779 (2016): p. 83.
[354] ECJ, joined cases C-508/18 and C-82/19 PPU, 27 May, 2019, para 82.
[355] The European Parliament named it as part of formal legality (chapter 3.2.2.3) but in my understanding it belongs to a separate point. But this is only matter of classification and does not have any influence on the content of the rule of law.
[356] UN Secretary-General, *supra* note 96, para. 6; European Commission for democracy through law, *supra* note 7, pp. 7,11.
[357] European Commission for democracy through law, *supra* note 7, p. 7.

classified in the other categories of the rule of law.[358] E.g., judicial capacities and effective investigations belong to a working judicial system. The transparency of lobbying belongs to the requirements that are placed on the quality of the legislative process. The transparency of political party financing is also part of this. The special feature of the EU understanding is therefore not that these individual elements are included, but that there is this extra category and the great importance given to this category.[359]

In the views of the institutions, I have already shown that it is unclear whether a free and pluralistic media landscape is part of the rule of law and that the statement of the European Parliament speaks against it. The voices in the literature match this overall picture by not picking up on this point. There is also no need to protect the freedom and plurality of the media landscape as part of the rule of law, since this is indisputably part of democracy and is protected as such. This train of thought also seems to make sense with regard to the theoretical derivation of the rule of law: according to the common law understanding, the rule of law is a technical limitation to the state[360] and then it would be a stretch to see in it the obligation to provide for a plural media landscape. The continental European understanding speaks all the more in favour of this, because it concentrates more on the vertical relationship between state and citizen (whereas the Anglo-American rule of law also deals with the relationship among citizen).[361]

The formal notion which is the supremacy of law is part of the rule of law in the EU because the idea that laws have to be followed is a core concept of the rule of law in every relevant analysis of this idea.[362] A different name for this is the principle of legality.[363] Two elements which have not yet appeared, but which can be counted towards legality and thus towards the rule of law are: public officials require authorisation to act and they have to act within the powers transferred to them.[364] The principle of legality also applies to international law. There it has found expression in the phrase: pacta sunt servanda and this corresponds to the understanding of the EU in regard to international law.[365] The EU institutions and the

[358] With a similar approach: European Commission for democracy through law, *supra* note 9, p. 29.
[359] About the "relative weight of each of the components": European Commission for democracy through law, *supra* note 9, p. 9.
[360] The common law is not so much a part of the EU in terms of numbers of member states, but it has historically shaped this concept a lot.
[361] Pim Albers, *How to measure the rule of law: a comparison of three studies* (Strasbourg: Council of Europe, 2007), p. 1.
[362] European Commission for democracy through law, *supra* note 7, p. 7.
[363] European Commission for democracy through law, *supra* note 7, p. 10.
[364] Matthias Pechstein, *supra* note 269, para. 27; Rod Morgan, *supra* note 317; Thure Hanssen, *supra* note 7.
[365] Rod Morgan, supra note 317; European Commission for democracy through law, *supra* note 7, p. 10.

member states (including the judiciary and the legislature)[366] have to honour binding international law.

There is also the discussion about the primacy of EU law. The difference is that this is not about the relationship of government to law, but about the relationship of national law to EU law. The rule of law, in its historical tradition, is more concerned with limiting governments/kings than with hierarchy of norms.[367] Although one could say that EU law is law, and part of the rule of law is that governments and courts and parliaments abide by the law.[368] This corresponds to the logic of common law, but also the civil law systems follow this logic, see for example Art. 20 III Basic Law (Grundgesetz). This argument is strengthened by the consideration that it is part of the rule of law that all public powers have to comply with international law. And if one must do everything to comply with international law, then the same must apply to European law, which is more than just normal international law.[369]

The interplay of supremacy of law legal certainty indicates that laws must be implemented in reality. Ony implementable laws can be implemented. Only through an "ex-ante and ex-post legislative evaluation",[370] which examines whether the law is effective, can the rule of law be ensured.[371]

There is still the question of whether property protection and investor protection are part of the EU rule of law. For the IMF and the World Bank, these are normal ideas.[372] However, this view is very much shaped by the American understanding[373] and does not allow many conclusions to be drawn about the European understanding. Moreover, the IMF and the World Bank and development aid in general have different objectives than the EU. The World Bank is about development aid, promoting globalisation and presumably also

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[366] European Commission for democracy through law, *supra* note 9, p. 9; Thure Hanssen, *supra* note 7.
[367] European Commission for democracy through law, *supra* note 9, p. 9.
[368] Thure Hanssen, supra note 7.
[369] ECJ, C-441/17 R, April 17, 2018, *Commission* v *Poland*, para. 102; Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2003), p. 27.
[370] European Commission for democracy through law, *supra* note 7, p. 11.
[371] European Commission for democracy through law, *supra* note 9, p. 14; Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Rule of Law A Guide for Politicians*. p. 28. Available on: https://rwi.lu.se/publications/rule-law-guide-politicians/. Accessed May 06, 2023.
[372] Anja Rohwer, "Worldwide Governance Indicators: Rule of Law, 2007," in *ifo Dice Report* 7 (2009): p. 53; Gordon Barron, "The world bank & rule of law reforms," *Working Paper Series LSE* (2005): pp. 14, 15. Or *see* the Millennium Challenge Corporation, founded by the U. S. Congress, who explicitly names as part of the rule of law "security of private property rights; protection of intellectual property; the accuracy and integrity of the property registry; whether citizens are protected from arbitrary and/or unjust deprivation of property." Millenium Challenge Corporation, Rule of Law Indicator, Available on: https://www.mcc.gov/who-we-select/indicator/rule-of-law-indicator. Accessed April 18, 2023.
[373] Christoph Bleiker and Marc Krupanski, *supra* note 16.

economic goals.[374] The EU wants to defend its values and it is about self-identification in Art. 2 TEU.[375] For Art. 2 TEU, the economic interests are rather secondary. For the tasks of the World Bank, the EU has Art. 21 TEU. Another difference is that the World Bank/IMF only provide guidelines, whereas the EU wants do deal with hard law. Similarly, the literature dealing with the EU or Europe does not focus so much on investor protection and property protection.[376] It can therefore be assumed that investor protection and property protection are protected by the fundamental right to property but are not an independent part of the rule of law in the European Union.

There are also other ideas that are part of the national rule of law in some member states. The digitalisation of the judiciary in Ireland is one example.[377] These ideas, however, are currently not part of the rule of law in the sense of Art. 2 TEU.

3.2.3 How is the term used in politics and political science?

As with democracy, the rule of law is used by jurists to describe a system of rules and principles. Similarly, politicians use this term more for envisioning the future of a legal system.[378] The difference between democracy and the rule of law is that for most people the rule of law is an even more abstract and difficult concept to grasp than democracy. It is the ideal seeking to "eradicate arbitrariness by imposing legal limits upon governmental discretion"[379] which is hard to grasp than the people having influence on the decision-making. This effect is reinforced by the fact that the rule of law is not an undisputed concept.[380]
This is true for lawyers as well, but even more so for politicians and their audiences. As one could see before, the legal sources contain many details on the rules and principles of the rule of law. For most politicians it is different: his audience is not interested in the details of the rule of law, but it sounds good to use this word as a goal. The independence of the courts or a few other buzzwords are still popular, but access to legal aid, for example, is rarely a good example in a political speech. As already described in detail in regard to democracy, politicians' speeches do not lend themselves to a precise definition of the content of concepts such as democracy and the rule of law.

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[374] Ibid.
[375] Shannon C. Stimson, *supra* note 17.
[376] Laurent Pech, *supra* note 20; European Commission for democracy through law, *supra* note 7; Maria Diaz Crego et al., *supra* note 40.
[377] Civil Liberties Union for Europe, *Liberties Rule of Law Report Ireland*, p. 13. Available on: https://dq4n3btxmr8c9.cloudfront.net/files/q3U2FR/LibertiesRuleOfLawReport2022.pdf. Accessed May 07, 2023.
[378] *See* chapter 3.1.3.
[379] Maria Diaz Crego et al., *supra* note 40, p. 15.
[380] Shannon C. Stimson, *supra* note 17; Maria Diaz Crego et al., supra note 40, p. 15.

But again, a look must be taken at political scientists: The political scientists' wishes for the future are not important because they have not yet influenced the current understanding of the rule of law as defined in Art. 2 TEU. So, what remains to analyse are the descriptive views of political scientists: One thing that stands out: Some political scientists manage to talk about legitimacy and the duty to obey law without mentioning the rule of law.[381] This is despite the fact that the same topics are dealt with, e.g. the limitation of the power of kings in England and similar topics,[382] or whose rights the law is supposed to protect.[383] In the case of the separation of powers, it is noticeable that this is written about, but again without using the concept of the rule of law as a catch-all term. In terms of content, the understanding is the same, but with the particularity that more differentiation is made between different types of separation of powers.[384] This was not as relevant for the legal understanding of the rule of law as it was for the political understanding, because the rule of law in Art. 2 TEU only mandates that there be effective separation of powers, but not which form of separation of powers must be chosen.

The general trend is that less value is placed on the rule of law in political science than in law, often on the grounds that this goal is frequently only used "rhetorically"[385] but not pursued so strict in practice.[386] Nevertheless, it recognises what the elements of the rule of law are. These include, as in Chapter 3.2.2.4, the prohibition of arbitrary decisions, the government's commitment to abide by its own laws, judicial review of legislative statues, judicial independence[387] and more things that were the findings of the legal analysis.[388] Some economic analysts and the (international) development community promote the importance of property right protection as part of the rule of law.[389] Besides this, however, it was not possible to discover an noteworthy element that was not mentioned earlier in this work. The findings of the political scientists thus do not deviate in a relevant way from the results of my

[381] Russel Hardin, "Compliance, Consent and Legitimacy," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan Stokes (Oxford: Oxford University Press, 2007), 240; Ronald Wintrobe, "Dictatorship: Analytical Approaches," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan Stokes (Oxford: Oxford University Press, 2007), 365; Jan-Erik Lane and Svante Ersson, *Politics and Society in Western Europe* (London, Sage Publications, 1999), p. 154.
[382] Russel Hardin, *supra* note 381, p. 251.
[383] Ronald Wintrobe, *supra* note 381, p. 364.
[384] David Samuels, "Separation of Powers," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan Stokes (Oxford, Oxford University Press, 2007), p. 705.
[385] John Ferejohn et al., "Comparative judicial politics," in *The Oxford Handbook of comparative politics*, ed. Carles Boix and Susan Stokes (Oxford, Oxford University Press, 2007), p. 727.
[386] Claus Offe, *Varieties of Transition The east European and east German experience* (Cambridge: Polity Press, 1996), p. 83; Shannon C. Stimson, *supra* note 17.
[387] John Ferejohn et al., *supra* note 385, p. 729; Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *supra* note 371.
[388] John Ferejohn et al., *supra* note 385; Claus Offe, *supra* note 386, p. 84; Richard Arneson, *supra* note 46; Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 28; Shannon C. Stimson, *supra* note 17, pp. 319, 328; Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *supra* note 371, p. 26.
[389] Christoph Bleiker and Marc Krupanski, *supra* note 16, p. 25.

legal analysis and thus reinforce the result found in chapter 3.2.2 in regard to the research question.

CONCLUSION

It is now time to finalise the results. The first research question was: "What is the meaning of democracy regarding Art. 49, Art. 2 TEU?" First of all, it became clear that Art. 49 TEU only operationalises Art. 2 TEU, which contains the term democracy as a common value. In the following, the research was mainly orientated towards Art. 2 TEU, while keeping the decision-making processes of Art. 49 TEU in mind. To find out what the content of democracy is in reality, it is necessary to find out which point of view the decision-makers represent. In addition to doctrinal research, a brief consideration of politics and political science was necessary for understanding the multi-faceted meaning of democracy in the social sciences. The result is that the hypothesis has been confirmed and there is an EU-specific understanding of democracy and the rule of law. The following aspects are part of the term democracy in the sense of Art. 2, 49 TEU:

1. The fundamental decisions are made by the people / the people is the sovereign.
2. Elections are the basic tool of influence for the people. It is up to the member states to decide on how they would like to conduct elections. Non-majoritarian agencies can be used.
3. Universal suffrage for national citizens plus extra rights for EU citizens. The reasons to limit these rights must meet a very high threshold.
4. Elections must be free, and the act of voting must be secret.
5. Each vote has to be counted equally.
6. As a basic principle each vote has to contribute to the outcome in the same way. Exceptions are permitted if they are necessary and proportionate.
7. In elections everybody needs to have the same fair choice. Which includes the following points:
    a. The prohibition of creating electoral constituencies in such a way as to give one party an advantage (“Gerrymandering”).
    b. Protection of minorities.
    c. Transparency of government and parliament (democratic accountability).
    d. Pluralism, with the meaning of having freedom of expression and the duty for the state to protect an independent press against possible attacks.

e. The duty of neutrality for state organs when they act in their capacity as state organs.

8. Chains of legitimacy are permissible for giving/transferring legitimacy.
9. Elements of representative democracy and elements of direct democracy.
10. The independent mandate of elected representatives.
11. The possibility to actively participate in the political process outside of elections. In particular, it must be possible to form a will through parties from the bottom up.
12. Essential decisions have to be taken by parliament (or other elected representatives).

The second research question was: "What is the meaning of the rule of law regarding Art. 49, Art. 2 TEU?". The methodology was the same as for the previous research question on democracy. As a result, it can be stated: The rule of law in the sense of Art. 2, 49 TEU includes:

1. A basic level of justice.
2. A legislative process that is transparent, open/inclusive, accountable and pluralistic.
3. Legal certainty, including laws that are easily accessible and applied in a foreseeable and consistent manner. They also have to be formulated with as much precision and clearness as possible. Legal certainty requires a mechanism to prevent conflicting supreme court and/or constitutional court judgments. Retroactive laws must be prohibited, this must be very strict in criminal matters. Lastly final judgments must only be questioned on exceptional grounds and must be easily enforceable.
4. The executive must not take decisions arbitrarily. They must be proportionate.
5. A functioning justice system, including independent judges, autonomy and independence of the prosecution services, the right to an effective remedy, effective access to justice, access to courts previously established by law as well as, fair and public trial. Financial help for defence lawyer and professional translation need to be available and information needs to be accessible for the defence. The trial must have an acceptable length.
6. Judicial review of executive measure.
7. The right to good administration.
8. Separation of powers.
9. Non-discrimination and equality before the law.
10. The fight against corruption.[390]

[390] Although this item does not contain any new points in terms of content, the categorisation and setting of priorities in the EU makes it necessary to list this item separately. *See* chapter 3.2.2.4 for that.

11. The supremacy of law; including that public officials require authorisation to act and that they must act within the power transferred to them.
12. The respect and application of international law.
13. The primacy of EU law.
14. Laws must be evaluated in terms of their effectiveness before they are adopted and after they have formally entered into force.

It is also noteworthy that respect for human rights is not part of the rule of law as defined in Art. 2, 49 TEU. The protection of free and pluralistic media is also not part of the rule of law in this sense. Equally, investor and property protection itself is not part of the EU-rule of law.

These findings are an up-to-date inventory, and the views of the key players may change in the future. However, that is improbable without changes in primary law. Several years have passed since the Lisbon Treaty and in recent years many decisions were taken in relation to Poland, Hungary, and the Western Balkans.

Based on my results, one could now continue research in this area. The comparative method would be particularly suitable.[391] Comparative research would have the potential to find new elements of the rule of law and to substantiate the aspects enumerated above. These possible points of view could be, for example, the extent to which identity control[392] is part of democracy or whether democracy could set requirements with regard to the use of electronic voting systems.

In the end one can say that democracy and the rule of law are vague concepts. But in the main areas it is clear weather a concept is part of democracy and the rule of law, or it is not part of it. Therefore, both terms are clear enough so that the European Union can work with them in their day-to-day work. The current problems with democracy and the rule of law exists on a different level: How is the rule of law enforced in the member state? How much separation of powers is needed? But this is good news for the accession candidates, because for them there is a relatively high degree of certainty as to which elements they need to concentrate on for possible accession. In addition, the analysis has shown that Art. 2 TEU has a broad framework with regard to the exact formulation (e.g., separation of powers or the percentage-hurdle in elections), so that it will be easy to accommodate national specificities. Finally, it remains to be said that democracy and the rule of law are very multi-layered, but

[391] Laurent Pech, *supra* note 20, p. 5. Only due to the limited space, it was not included in detail in this paper.
[392] Meaning the question: does an EU-rule contradict the identity of a national constitution. And if this is a problem for the application of the EU-rule. In German "Identitätskontrolle". Riedl argues, that this is part of Democracy with the meaning of Art. 2 TEU. Benedikt Riedl, *supra* note 249.

still make sense as umbrella terms. They strike a good balance between the required legal certainty and the necessary flexibility.

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