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Strengthening Democracy in Europe and its Resilience against Autocracy: Daring more Democracy and a European Democracy Charter

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INTRODUCTION: THE CRISIS OF REPRESENTATIVE DEMOCRACY

Representative Democracy is in crisis and this not only in Europe, considering developments in the US in particular.¹ EU Member States like Poland,² Hungary³ and Austria⁴ are governed by populists, some of them with autocratic tendencies.⁵ France is facing a crisis of political violence with “Gilets Jaunes” rampaging on its streets. Romania is riddled by corruption.⁶ Ever lower participation in elections and declining membership in political parties on both sides of the Atlantic document the steady decline of engagement of people in representative

* To be published in S. Garben, I. Govaere and P. Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Oxford, Hart Publishing, 2019) (forthcoming).

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¹ S Levitisky and D Ziblatt, *How Democracies Die* (New York, Crown, 2018); Y Mounk, *The People vs Democracy: Why Our Freedom Is in Danger and How to Save It* (Boston, 2018); J Goldberg, *Suicide of the West: How the Rebirth of Tribalism, Populism, Nationalism, and Identity Politics is Destroying American Democracy* (New York, 2018); Y Mounk and RS Foa, ‘The End of the Democratic Century, Autocracy’s Global Ascendance’ (Mai/June 2018) *Foreign Affairs* available at <https://www.foreignaffairs.com/articles/2018-04-16/end-democratic-century>.

² M Hong, ‘Constitutional Resilience – How Can a Democratic Constitution Survive an Autocratic Majority?: Freedom of Speech, Media and Civil Society in Hungary and Poland’ (9 December 2018) *Verfassungsblog* available at <https://verfassungsblog.de/constitutional-resilience-how-can-a-democratic-constitution-survive-an-autocratic-majority-freedom-of-speech-media-and-civil-society-in-hungary-and-poland/>; Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20.12.2017 COM(2017) 835 final 2017/0360 (NLE). K Kovács, M Kumm, M Steinbeis and GA Tóth, ‘Introduction: Constitutional Resilience and the German Grundgesetz’ (6 December 2018) *Verfassungsblog* available at <https://verfassungsblog.de/introduction-constitutional-resilience-and-the-german-grundgesetz/>.

³ *ibid* and 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 (2017/2131(INL)).

⁴ WA Perger, ‘Rechtspopulismus in Österreich: Ein Hauch von Machiavelli’ (18 December 2017) *Die Zeit* available at <https://www.zeit.de/politik/ausland/2017-12/rechtspopulismus-oesterreich-europa-demokratie-zukunft>.

⁵ M Spittler in ‘Gefährden Rechtspopulisten unsere Demokratie?’ shows that government participation of right wing populists has a negative effect on the good functioning of democracy (3 August 2018) *Verfassungsblog* available at <https://democracy.blog.wzb.eu/2018/08/03/rechtspopulismus-in-europa-demokratie-in-gefahr/>. M Spittler, ‘Are Right-Wing Populist Parties a Threat to Democracy?’ in W Merkel and S Kneip (ed), *Democracy and Crisis* (Springer International Publishing, 2018) 97-121, https://doi.org/10.1007/978-3-319-72559-8_5; see also GA Tóth, ‘Laws, Conventions, and Fake Constitutions’ (7 December 2018) *VerfBlog* <https://verfassungsblog.de/laws-conventions-and-fake-constitutions/>, DOI: <https://doi.org/10.17176/20181209-204519-0>; P Oltermann, ‘Can Europe’s new xenophobes reshape the continent?’ (3 February 2018) *Guardian* available at

<https://www.theguardian.com/world/2018/feb/03/europe-xenophobes-continent-poland-hungary-austria-nationalism-migrants>.

⁶ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, 13 November 2018, COM(2018) 851 final.

democracy. At the same time, the US under President Trump tries to weaken the EU⁷ and so does Russia, both spreading fake news, openly and covertly undermining democracy in Europe.⁸ And the new electronic communication environment on the internet, controlled by a few mega corporations, undermines journalism and the free, privately financed press of the fourth estate. They provide not only a fertile ground for populist slogans and the mobilisation of hate and violence but also the means to manipulate voters, effectively leading to situations like the Facebook Cambridge Analytica scandal and in fine the result of the Brexit vote in the UK.⁹ They socialise people to instant consumption, cutting out the middlemen – and create the illusion that this is possible in democracy, as it is possible in markets, thus undermining elections, elected lawmakers and representative democracy.

Many identify migration, economic and social policy causes which in the most dramatic accounts may lead to the demise of Europe.¹⁰ And without intending to question the importance of economic causes and the need to address financial and employment risks as well as social inequalities, this contribution asks the question what the EU can do apart from economic,¹¹ financial,¹² labour market and social policy to strengthen democracy in Europe and to allow both the EU as such but also its Member States to withstand autocracy.¹³

A seminar in Berlin in December 2018 addressed the question what Germany can learn from the ascent of autocratic regimes in Poland and Hungary in order to make its own constitutional democracy more resilient.¹⁴ And indeed, the ascent of populist far right parties in Germany and France make the matter urgent, as the virus of autocracy may spread. But the hope that Member State's on their own will resist if around them their EU partners become autocracies is in vein and European populists are getting organised across borders.

The purpose of this contribution is therefore to demonstrate that the EU can and must play an important role in avoiding a spread of the virus of autocratic populism. It can help to share among all EU Member States the historical learnings drawn from democracies sliding

⁷ SB Glasser, 'How Trump Made War on Angela Merkel and Europe' (17 December 2018) *The New Yorker* available at <https://www.newyorker.com/magazine/2018/12/24/how-trump-made-war-on-angela-merkel-and-europe>; see also R Bravo, G Viscusi, N Chrysoloras and J Green, 'Inside Steve Bannon's Plans for a New European Political Order' (19 September 2018) *Bloomberg* available at <https://www.bloomberg.com/news/articles/2018-09-19/bannon-seeks-european-upset-with-appeal-to-eu-s-populist-forces>.

⁸ See on that <https://www.economist.com/briefing/2018/02/22/russian-disinformation-distorts-american-and-european-democracy> and <https://ec.europa.eu/digital-single-market/en/fake-news-disinformation>; see also Speech by Vice-President Ansip on cybersecurity at the RSA Conference 2018, San Francisco, 18 April 2018 and Commissioner Jourova at Seimas (Lithuanian Parliament) on New Unity or Old Divisions – Europe at the crossroads, Vilnius, 22 November 2018: "Russia has been identified as one of the main sources. Our team working on this since 2015 has identified over 4.000 cases of pro-Kremlin disinformation."

⁹ See on this Commission Communication of 12 September 2018, Securing free and fair European elections, COM(2018) 637 final, which details the sources of information and the measures proposed by the European Commission in a reaction to the Facebook Analytica Scandal and the resulting Brexit vote; see also P Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' at Royal Society Philosophical Transactions A 376: 20180089 available at <http://dx.doi.org/10.1098/rsta.2018.0089>.

¹⁰ TL Friedmann, 'The end of Europe?' *New York Times* available at <https://www.nytimes.com/2018/12/18/opinion/europe-france-economy.html>.

¹¹ Five President's report, 'Completing Europe's Economic and Monetary Union' (2014) https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf.

¹² T Piketty and A Vauchez, 'Manifesto for the democratization of Europe' (11 December 2018) <https://www.socialeurope.eu/manifesto-for-the-democratization-of-europe>.

¹³ Generally, without specific reference to the EU, see M Kumm, 'How populist authoritarian nationalism threatens constitutionalism or: Why constitutional resilience is a key issue of our time' (6 December 2018) *VerfBlog* <https://verfassungsblog.de/how-populist-authoritarian-nationalism-threatens-constitutionalism-or-why-constitutional-resilience-is-a-key-issue-of-our-time/>.

¹⁴ Kovács, Kumm, Steinbeis and Tóth, above n 2.

into dictatorship, such as it happened to the Weimar Republic.¹⁵ And it can help to learn together today from developments in Poland and in Hungary. Of course, democracy and democratic engagement of people in the Member States can never be imposed from the EU level. The rule of former German constitutional Judge *Böckenförde*,¹⁶ that the democratic state does not command the preconditions on which its existence is predicated, thus that law cannot secure democracy if there is no culture of people engaging in and for democracy, is a fortiori true for the EU and in the relation between the EU and its Member States. This being said, and contrary to cheap and outdated claims that the EU itself is not democratic, the EU features a success story of progressive internal democratisation and a track record as the biggest donor for democracy and election observation worldwide, thus outside the EU.¹⁷

The EU will thus be able to give a new meaning to engagement in democracy in times of globalisation.

Europe has built a tradition not only of external controls over its states, but actually of protecting citizens against their state, first in the area of Human Rights with the European Convention on Human Rights and the European Court of Human Rights, later with the system of directly applicable EU law in areas today going far beyond economic rules for the internal market. There is no reason why the EU should not also develop stronger tools to support domestic democracies and democratic engagement, using the tried and tested Community methods and thus spreading resilience against autocracy.¹⁸ Supporting democracy and constitutional resilience in the EU is an existential matter for democracy in Europe, and the misguided silence of EU institutions on existential matters, such as domestic referenda on the EU Treaties and the Brexit vote, shall not be repeated in re Democracy in Europe.

TIME TO REFOCUS ON DEMOCRACY IN EUROPE

Of the three pillars of constitutional democracy, this paper will address neither the Rule of Law nor the protection of Fundamental Rights. The reason for this is that in both of these pillars, important steps forward have already been made in the EU which are still not present in relation to democracy.

As regards Fundamental Rights, the European Convention of Human Rights and the EU Charter of Fundamental Rights are legally binding, detailed texts, interpreted in extensive jurisprudence and enforced by the respective competent Courts in Strasbourg, Luxembourg and in the Member States. The Commission has already in 2010 set out its policy on the application of EU Charter of Fundamental rights in a strategy document.¹⁹ Both the Commission and the independent Fundamental Rights Agency in Vienna report annually on the application of the Charter.

¹⁵ B Carter Hett, *The Death of Democracy: Hitler's Rise to Power and the Downfall of the Weimar Republic* (New York, 2018); see also EJ Dionne jr, 'The path to Autocracy is all too familiar' (18 August 2018) *Washington Post* available at https://www.washingtonpost.com/opinions/the-path-to-autocracy-is-all-too-familiar/2018/08/08/6f3602f8-9b25-11e8-b60b-1c897f117e185_story.html?noredirect=on&utm_term=.dbc84c6a5d36.

¹⁶ EW Böckenförde, *Staat, Gesellschaft, Freiheit* (Frankfurt, 1976) S. 60.

¹⁷ It is telling that for the definition of Democracy in a recent opinion pool on Democracy in Europe by DG JUST of the European Commission, reference is made to the Foreign Policy Instrument (FPI), *Special Eurobarometer 477, Democracy and Elections*, November 2018, footnote 1, page 2.

¹⁸ In the same direction, 'The other Democratic Deficit, A Toolbox for the EU to Safeguard Democracy in Member States', Expert Group of the Friedrich-Ebert Stiftung (Berlin, 2017).

¹⁹ Communication of the Commission of 19 October 2010, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final.

As regards the Rule of Law, there is recent Jurisprudence of the Court of Justice detailing its key elements.²⁰ The CEPEJ²¹ of the Council of Europe is a core institution reporting on and assessing the Rule of Law situation in Member States. The Commission interacts well with this institution and has adopted in 2014 a policy on how to strengthen the Rule of Law in the Member States and how to proceed under Article 7 TEU in case of non-respect for the Rule of Law.²² The Commission has also proposed a “Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States”.²³

However, as to Democracy, neither does EU primary law contain the necessary consolidations and concretisations as they were achieved as regards Fundamental Rights in the Charter. Nor is there an external mechanism which in an authoritative and obligatory manner exercises an external discipline as to democracy over Member States as the ECHR does as to the respect of Human Rights and the FRA and the Court of Justice do as regards the Charter. Also, while President Juncker made Democracy in the EU a priority of the Commission, the Commission has not yet presented an overarching policy strategy for the strengthening of democracy in Europe and for making both the EU but also its Member States resilient against temptations and challenges of autocracy. It is also clear that while the Union is the biggest observer of elections and democracy programmes in third countries, no similar activities are carried out so far within the EU by the EU.

In the Triangle of Fundamental Rights, Rule of Law and Democracy, Democracy is thus presently the weakest link and needs work. There can certainly not be Democracy without either the Rule of Law or the protection of Fundamental Rights of Individuals, which are constitutive of Democracy. But there can be a certain Rule of Law and certain Fundamental Rights without Democracy, as the history of Prussia teaches us. If we do not want Europe and its Member States to fall back into a state of Prussia, it is now time to renew the institutional and popular engagement for Democracy in Europe.

With this in mind, this article continues with a brief description of the success story of evolution of democracy in the EU, setting out the main milestones in this process. Afterwards it broaches the range of challenges to democracy in Europe today. It will then jump to present sources for further work on democracy and provide a global overview of some important universal and regional democracy documents before describing possible elements of a future European Charter for Democracy (EUDC) as one part of an action plan to revive engagement of people in representative democracy and to equip the EU with the tools necessary to support resilience of democracies in Europe against Autocracy. We close with a number of historical comparisons to the post 1968 democracy drive and process related observations on the way towards an action plan for daring more democracy now in the EU and an EUDC in an outlook.

EVOLUTION OF DEMOCRACY IN THE EU

The democratisation of the European project has been a long, painstaking process. Main steps in this evolution were the introduction of direct elections to the EP, the subsequent strengthening of the EP, in particular through the broadening of Co-Decision, and of European political parties and finally the nomination of Spitzenkandidaten by the European political parties in the 2014 European election campaign. But difficult as it was and is, Europe must

²⁰ Judgment of the Court (Grand Chamber) of 27 February 2018. C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117; Judgment of the Court (Grand Chamber) of 25 July 2018. C-216/18 PPU *LM (Ireland)* EU:C:2018:586; Order in C-619/18 R *Commission v Poland* EU:C:2018:1021 (English not available at time of writing).

²¹ Council of Europe European Commission for the Efficiency of Justice, <https://www.coe.int/en/web/cepej>.

²² Communication from the Commission of 11 March 2014, ‘A new Framework to strengthen the Rule of Law’ COM(2014) 158 final; for its application see https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en.

²³ Proposal 2018/0136 (COD) of 2 May 2018, COM(2018) 324 final.

learn to recount its history of democratisation as a success story of step by step overcoming resistance and introducing new elements of democratisation.

Direct Elections to the European Parliament

Article 10 (1) TEU makes it clear that the Union works as a representative democracy. Article 10(2) TEU states that citizens are directly represented at Union level in the European Parliament. Article 10(3) TEU states that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen. Article 14 TEU sets out the basic rules on the Parliament as the centre of Democracy on EU level.

The founders of the EEC set the objective of a directly elected Parliament right from the outset of the European project. The Treaties provided for an Assembly consisting of “[...] representatives of the peoples of the States brought together in the Community [...]” (Article 137 EEC), which would “[...] draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.” (Article 138(3) EEC). However, it took a few decades for this objective to materialise. In December 1974, the “*summit meeting*” (predecessor of the European Council) decided to proceed with direct elections “[...] as soon as possible [...] at any time in or after 1978.”²⁴ Based on the EP’s proposal of January 1975,²⁵ the Council reached an agreement in September 1976 on an Act concerning the election of the representatives of the EP by direct universal suffrage. This Act had the status of primary law and provided for a directly elected parliament with a five-year mandate, with polling to take place across the Community within the same three days. On this basis, the first direct elections to the EP took place in 1979. The first directly elected EP proposed in 1982²⁶ to extend proportional representation and to grant the nationals of Member States residing in another Member State for more than five years the right to vote in their Member State of residence. The idea about the right to vote in the Member State of residence materialised ten years later in the Treaty of Maastricht – importantly, without the 5-year residence qualification. Instead it was granted to mobile EU citizens “*under the same conditions as nationals*” of the State of residence. This right, corollary to the right to free movement, contributed to stimulate transnational, EU-wide politics – with the participation of non-national candidates and voters. Based on the *Anastassopoulos* Report²⁷ a 2002 Council decision,²⁸ amending the 1976 Act, codified Proportional Representation and fixed an *optional* threshold for seats to be allocated at 5 percent or lower of the total votes obtained.

The most recent amendment of 2018, based on a proposal of the European Parliament in 2015, failed to codify the Spitzenkandidaten practice, as proposed by the Parliament,²⁹ but introduced a number of technical improvements of the election procedures.³⁰

²⁴ Paragraph 12 of the Final communiqué of the Paris Summit (9 and 10 December 1974).

²⁵ See *Patijn* Report, Doc 368/74.

²⁶ See the so-called *Seitlinger* Report which passed the EP in March 1982.

²⁷ See Resolution on a draft electoral procedure incorporating common principles for the election of Members of the European Parliament (*Anastassopoulos* Report), adopted on 15 July 1998; OJ 1998 C 292.

²⁸ Council Decision of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (2002/772/EC, Euratom).

²⁹ European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union (2015/2035(INL)).

³⁰ Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, ST/9425/2018/INIT, OJ 2018 L 178, 1-3, ELI <http://data.europa.eu/eli/dec/2018/994/oj>.

Increasing Powers of the European Parliament

The above-mentioned developments were accompanied by a remarkable evolution of the role of the EP in the legislative process from having a mere advisory role under the 1957 Treaty of Rome to having a co-decision role, as introduced by the Treaty of Maastricht in 1992 and extended by the Treaty of Amsterdam in 1999. This new powerful role was finally consolidated by the Treaty of Lisbon, which made the EP a full co-legislator alongside the Council. The EP now decides on the vast majority of EU legislation and has power over the entire EU budget on an equal footing with the Council.

Importantly, the power of the EP has also increased in relation to appointment of the European Commission, on which it previously was only consulted. Today, the President of the European Commission is elected by the European Parliament (Article 17(7) TEU), after nomination by the European Council with qualified majority, which must take into account the outcome of the European elections in its nomination. No one can become a Member of the Commission without agreement of its President. Only after individual hearings of each candidate for the Commission, the Parliament then votes again on the full Commission. The Parliament indeed today carries out hearings of the candidate for the President of the Commission and every single candidate for the Commission, which have no parallel in terms of depth and transparency in Member States' processes of nomination of government, and only after satisfactory hearings does the Parliament vote.³¹

In parallel, the President gained more power over the College of Commissioners through the introduction of the principle of political guidance of the President under which the College operates, his/her organisational powers and the powers of the President in the appointment of individual Commissioners and their removal from office. In previous Treaties, the President was only consulted on the appointment of Commissioners. She or he must now agree to any individual appointment. The President can also, since the Treaty of Lisbon signed in 2007, ask individual Commissioners to step down, without support of a majority of Commissioners, which previously was necessary to remove individual Commissioners, a power that the President in the original text of the EEC Treaty until the changes in the Nice Treaty did not have at all. But as the Parliament gained the power to remove the College as a whole, through a vote of non-confidence (Article 234 TEU), after the experience with the *Santer* Commission, the power of the President to remove individual Members of the College needed to be strengthened, to allow the President to avoid a sanction of the full Commission in this way, thus ensuring a stability of the Executive of the Union.³²

European Political Parties

Article 10(4) TEU and Article 12(2) of the Charter of Fundamental Rights of the European Union assign a key role to European political parties. The statute and funding of European political parties and European political foundations is regulated at European level.

The European political parties developed in parallel to the powers of the European Parliament, albeit not to their full potential. While the Treaty of Maastricht mentioned Parties, it was only a decade later, with the Treaty of Nice in 2003, that a *legal base* was introduced for the creation of a Statute for European political parties (Article 191(2) EC).³³ On 4 November 2003 Regulation (EC) No 2004/2003 of the European Parliament and of the Council on the regulations governing political parties at European level and the rules regarding their funding was adopted. With this regulation the parties were given very limited resources from the EU

³¹ See for further details, P Nemitz, Art 17 EUV, para 70 ff in Becker, Hatje, Schoo, Schwarze (eds), *EU-Kommentar*, 4th edn (2019).

³² On the history and ratio legis of the new Article 17(6) TEU, see paras 136-142, T-562/12 *John Dalli v European Commission* EU:T:2015:270 and Nemitz, above n 33, para 69 in Becker, Hatje, Schoo, Schwarze, above n 32.

³³ See also Declaration on Art 191 of the Treaty establishing the European Community.

budget as well as staffing and hence a small degree of operational autonomy vis-à-vis the parliamentary groups, which remain much better resourced. This regulation was amended in 2007³⁴ which allowed the political parties, among other things, to set up political foundations with very little funding from the EU budget, compared to national political foundations. In the run-up to the 2014 EP elections, the European Commission issued a recommendation in March 2013, to increase the visibility of European political parties as a means of better communicating the connection between political processes at national and EU level. It thus recommended that voters should be informed of the affiliation between national parties and European political parties during the whole electoral process, from the campaign to the casting of votes in elections to the EP.³⁵ A new regulation on political parties and political foundations, adopted in 2014,³⁶ provides EU-level legal status for European political parties and their political foundations, aiming to increase their visibility and EU-wide recognition.³⁷ This legal status is a pre-condition to receive public funding from the EU budget.

In 2018, in a first move of what could be called a European Democracy that defends itself, these rules were further detailed, in particular sanctioning the link of funding to the respect of the values of the Union set out in Article 2 TEU and to the visibility of the European Party in the campaign materials of the national parties. The conditions on transnationality of the European Parties were also tightened, in order to avoid abuse.³⁸ The Commission stated in 2018, as it had stated already in 2013, that “*European political parties play a key role in forming European political awareness, encouraging voter participation and in expressing the will of the citizens of the Union. This role could be enhanced if (...) European political parties would reach out to their national affiliate parties and civil society and raise awareness on choices regarding the future of Europe and the interests of the citizens they are representing.*”³⁹

However, the European Political Parties⁴⁰ and the political foundations on EU level are severely underfunded. To illustrate that, while the two foundations of the Socialists (Foundation of European Progressive Studies – FEPS) and Conservatives (Martens Center) on EU level receive less than 10 million euro annually from the EU budget,⁴¹ the similar foundations in Germany alone (Friedrich Ebert Stiftung and Konrad Adenauer Stiftung) have a budget of over 360 million euro annually.⁴²

³⁴ See Regulation (EC) No 1524/2007 of the European Parliament and of the Council of 18 December 2007 amending Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding.

³⁵ See the EC Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, Brussels, 12 March 2013, C(2013) 1303 final.

³⁶ Regulation 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.

³⁷ The regulation sets the conditions for them to enjoy a legal status and qualify for funding from the EU budget, namely being represented in at least one quarter of the Member States and respecting the founding principles of the EU.

³⁸ Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 amending Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations. OJ 2018 L 114I, 1-6, <http://data.europa.eu/eli/reg/2018/673/oj>; consolidated version <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R1141-20180504&qid=1546444985179&from=EN>.

³⁹ Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament, C/2018/0900, OJ 2018 L 45, 40-43, <http://data.europa.eu/eli/reco/2018/234/oj>.

⁴⁰ For an extensive presentation see J Priestley, ‘European Political parties: the missing link, Les partis politiques européens: le chaînon manquant’ *Notre Europe* policy paper No 41.

⁴¹ See the report card of the European Parliament on the funding of political foundations, available at http://www.europarl.europa.eu/pdf/grants/Grant_amounts_foundations%2001-2018.pdf.

⁴² See annual report 2017 of Konrad Adenauer Stiftung, with a total budget of 182 million euros in 2017, page 39 of the report, available at https://www.kas.de/c/document_library/get_file?uuid=a5ee2563-5295-af5c-fdb4-2c07f56e5240&groupId=252038, and the annual report of the Friedrich Ebert Stiftung, with a total budget of 176 million euros in 2017, page 71 of the report, available at <http://library.fes.de/pdf-files/fes/03208/jb-2017.pdf>.

It is probably fair to say that the allocation of EU internal budgets for purposes of making democracy work, thus education about and supporting democracy, Rule of Law and Fundamental Rights in the EU, have by far not been restructured in line with the development of the Union from a Union of economic integration and without own democratic structure nor challenge to democracy in some of its Member States to a Union with important own democratic processes and a role to play in supporting and strengthening democracy within Member States. Democracy in Europe will pay a high price if European Political Parties and European Political Foundations remain as underfunded as they have been so far, and thus neither can seriously invest in Europe wide campaigns during election time nor indeed play the roles on which they are most needed, namely to engage citizens to participate in European policy making and to provide political education about Europe in all parts of the EU.

Spitzenkandidaten (Lead Candidates) for the Function of President of the European Commission

The most recent step in the democratisation of the European project has been the introduction of Spitzenkandidaten in the 2014 European election campaign. The first discussions in European political parties to present Spitzenkandidaten go as far back as 1998 but, until after the 2009 elections, no substantial progress had been made.⁴³ It was the Treaty of Lisbon in 2007 that established a new constitutional order for the EU, empowering the EP to elect the President of the Commission: The European Council must according to Article 17(7) TEU take into account the results of the European elections when proposing a candidate. Both, the Parliament, in two resolutions issued in 2012 and 2013,⁴⁴ and the Commission, in its March 2013 recommendation,⁴⁵ called on European and national political parties to make known their nominations for the function of President of the Commission. This aimed at making the link between EU citizens' votes for prospective Members of the EP and their party's candidate for the Commission President visible. It was also only logical to seek a higher legitimacy for a President of the Commission, namely through having campaigned for office as a Spitzenkandidat, now that the President received so much additional power that the

⁴³ "In 1999 the EPP became the largest group at the EP but its right to see a member nominated from the EPP family was thwarted by the hasty compromise necessary to appoint a Commission president after the implosion of the Santer Commission, just before the elections. Separately, some socialist Prime Ministers from larger member states argued the case for nominating someone from their political family, namely, Wim Kok, the Dutch Prime Minister. Many in the EPP drew the conclusion that for future elections, the European party which topped the poll should have the right to the Commission presidency, but this was still a long way off from developing a lead candidate system." N Peñalver Garcia and J Priestley, 'European Political parties: learning from 2014, preparing for 2019' *Notre Europe – Jacques Delors Institute* Policy paper of 4 May 2015 (hereafter referred to as "Notre Europe paper on European parties") section 2.1; see also P Nemitz, 'Europwahl 1999: Für die indirekte Wahl des EU-Kommissionspräsidenten' in *Internationale Politik/Europa Archiv* (1998) 6, 45-50; A Volle and W Weidenfeld (eds), *Europa hat Zukunft, Der Weg ins 21. Jahrhundert* (Bonn, 1998); more recently, 'Building on the Spitzenkandidaten Model', European Political Strategy Center of the European Commission, 16 February 2018, available at https://ec.europa.eu/epsc/publications/road-to-sibiu/building-on-the-spitzenkandidaten-model_en; on this see also A Armellini, 'Schulz approved as Socialist candidate for commission presidency' (1 March 2014) <https://euobserver.com/eu-elections/123323> and J Janning, 'Five lessons from the "Spitzenkandidaten" European Parliament campaign' European Council on Foreign Relations, 1 July 2014, available at https://www.ecfr.eu/article/commentary_five_lessons_from_the_spitzenkandidaten_european_parliament_campaign, which show that the then President of the European Parliament Martin Schulz was the key driver for effectively having Spitzenkandidaten in the 2014 elections and that he was nominated by the Party of European Socialists before the EPP was able to nominate Jean Claude Juncker as Spitzenkandidat. After the elections, it were in particular conservative Heads of State, led by David Cameron of the UK, who objected to the nomination of Jean Claude Juncker as President of the European Commission.

⁴⁴ See European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP)) and European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 (2013/2102(INI)).

⁴⁵ See again the Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, Brussels, 12 March 2013 C(2013) 1303 final.

Commission was effectively operating not anymore under a simple principle of collegiality, but, considering the cumulated powers in the appointment process, the power of political guidance and the power to remove individual Commissioners, factually under a Presidential regime.⁴⁶

This materialised in the 2014 elections: The European political families nominated candidates for President of the Commission for the first time, launched EU-wide election campaigns and held public events across Europe to raise awareness of their candidates and their political programmes for Europe. Just to give an indication, as detailed in the Commission's report on the 2014 elections, the lead candidates visited 246 cities across the Member States. In addition to being mobilised in this way on the ground, the lead candidates took part in ten televised debates in different Member States and different languages, sharing their vision for the future of Europe and on issues that particularly matter to voters, such as jobs and growth. The debates received wide coverage across the EU, were broadcasted live and generated high volumes of social media traffic.⁴⁷

Importantly, the European Council nominated Jean-Claude Juncker as the candidate of the party with the most seats in the EP⁴⁸ and he was subsequently elected as Commission President by the EP, with a coalition of the EPP, the PES and others. The result of the elections allowed for a stable parliamentary majority in a grand coalition that has enabled the EP to function effectively for the duration of the legislative period. The Commission highlighted in its report on the 2014 EP elections: *"These elections have laid the ground for future European elections and established a clear link between the results of the European Parliament elections and the choice of European Commission President. An important precedent has been set for 2019 and beyond, and a European-level forum for political debate has been established."*⁴⁹ Later on, the report states: *"Under this new system, voters could more easily make the link between a vote cast for a national party and the impact of this vote on the political direction of the European Union for the next five years. This allowed voters to make an informed choice between alternative political platforms for Europe, rather than on exclusively national political issues. It injected a greater element of information and choice into the election, reinforced the democratic legitimacy of the European Commission, and has the potential to enhance public interest and strengthen accountability in the future."*⁵⁰

Regarding the 2019 elections, the Commission stressed in its report: *"There is a need to act not only shortly before the start of the election campaign but also far in advance [...]. Looking ahead to the 2019 elections, it is important to identify ways of further enhancing the European dimension and the democratic legitimacy of the EU decision-making process [...]."*⁵¹

On 14 February 2018, the Commission updated its recommendation on European elections of 2013.⁵²

It looked both back at the 2014 experience with Spitzenkandidaten but also repeated basic appeals: *"Reinforcing the democratic legitimacy of the EU and ensuring the participation of citizens in the political life at European level is essential. Citizens would be readier to vote in the elections to the European Parliament if they were more aware of the impact of EU policies in their day-to-day life, and if they would trust that they can have their say on the Union's most important choices, such as the selection of the leaders of the EU institutions and the establishment of priorities for the future of the Union. (...) The system of lead candidates*

⁴⁶ H Kassim, S Connolly, R Dehousse, O Rozenberg and S Bendjaballah, 'Managing the house: the Presidency, agenda control and policy activism in the European Commission' (2017) 24:5 *Journal of European Public Policy* 653-674 available at DOI:10.1080/13501763.2016.1154590; see also Nemitz, above n 32.

⁴⁷ Report on the 2014 European Parliament elections. Brussels, 8 May 2015, COM(2015) 206 final, 7-8.

⁴⁸ See European Council Conclusions 26/27 June 2014, EUCO 79/14, CO EUR 4, CONCL 2, see page 2, sentence 1: *"The European Council agreed to propose Jean-Claude Juncker to the European Parliament as candidate for President of the European Commission."*

⁴⁹ Report on the 2014 European Parliament elections, above n 48, 5.

⁵⁰ Report on the 2014 European Parliament elections, above n 48, 17.

⁵¹ Report on the 2014 European Parliament elections, above n 48, 17.

⁵² C(2018) 900 final.

for President of the Commission — ‘Spitzenkandidaten’ — (...) has helped to reinforce the Union’s efficiency and its democratic legitimacy, which rests on the dual pillars of direct representation of citizens in the European Parliament and their indirect representation by governments of the Member States in the European Council and the Council. It has also contributed to strengthening the Commission’s accountability, in line with Article 17(7) of the Treaty on European Union. It should be continued and improved in view of the 2019 elections to the European Parliament. (...) European and national political parties should announce well ahead of the start of the electoral campaign, ideally by the end of 2018, the candidate for President of the Commission they support and, ideally by early 2019, the candidate’s own programme. This would make more transparent the link between the individual vote of a citizen of the Union for a particular political party in the elections to the European Parliament, the candidate for President of the Commission supported by that party and his/her vision for the future of Europe. (...) By selecting their lead candidates in an open, inclusive and transparent way, eg through ‘primary’ elections, European political parties and their national member parties would further strengthen this process. This would also help to raise wider attention as well as to mobilise voters.”

The presentation of candidates for President of the Commission in the elections to the EP in 2014, discussed since more than 15 years, has stopped the decline of participation. Heads of State in the European Council, while appointing finally Jean-Claude Juncker, the candidate of the European People’s Party (EPP), as a goodwill compromise gesture to UK Prime Minister David Cameron, who opposed the appointment, did plant a seed of future challenge to this progress of European democracy in their Conclusions by announcing to review the procedure of appointment of the President of the Commission in the run up to the European elections of 2019.⁵³ This announcement reflects the oscillating attitude of Member States towards democracy in Europe.

It is however undeniable that the “lead candidates process” was a success – one could say, against the odds, against the background of widespread scepticism in the media and in national capitals, because the steady fall in electoral participation could be halted to a substantial degree. The credibility of the process may have been established but it still needs to be consolidated and recognised as the usual practice.

This is where we stand now with regard to the evolution of democracy in the EU.

CURRENT CHALLENGES TO DEMOCRACY IN EUROPE

In Europe, the challenges to representative democracy are found on three levels, namely on the level of the EU itself, within the Member States as well as in the relation between the EU and the Member States.

Debates on the future of Europe have always been debates about how to make Europe more democratic and how to make democracy work better on the EU level. While Europe has made good progress in shaping the EU as a representative democracy, it needs to learn to tell its stories of democratisation and the many cases of successful citizen engagement in the processes of representative democracy on the EU level with enthusiasm, in order to encourage future and increased engagement.

For example, without the engagement of Eduard Snowden and Max Schrems⁵⁴ and without the digital rights organisations coming together in the European Digital Rights Initiative

⁵³ See European Council Conclusions 26/27 June 2014, EUCO 79/14, CO EUR 4, CONCL 2, para 27, sentence 4: “Once the new European Commission is effectively in place, the European Council will consider the process for the appointment of the President of the European Commission for the future, respecting the European Treaties.”

⁵⁴ See for example ECJ Judgment of the Court (Grand Chamber) of 6 October 2015, C-362/14 *Maximilian Schrems v Data Protection Commissioner* EU:C:2015:650. Following his engagement for data protection during the legislative process for the GDPR, Schrems created the GDPR enforcement NGO NOYB - None of your Business (<https://noyb.eu/>) together with the Parliamentary Rapporteur on the GDPR Jan Albrecht,

EDRI⁵⁵ and the engagement of the people in these organisations interested in data protection during the legislative process of four years, the success of the adoption of the GDPR⁵⁶ would not have been possible. But the example of the GDPR also shows that politicians and their qualities make an important difference, be they Members of the Commission (or Member States Executives) or Members of Parliament.⁵⁷ This is another important reason why engaging with representatives of democracy on the EU level and in the political parties which put forward the individuals to take political functions on the EU level is so important.

With rising populism, a new question arises: How resilient is the Constitution of the EU against autocracy on the EU level? And what can the EU do to strengthen the resilience of Member States against rising populism and risks of autocracy? Let us turn to this question first, focussing the attention on a new perspective on EU law, from how to move forward in democratisation also to include the question how to secure against sliding back from democratic rights and procedures already established.

One difficult question among these is the question of referenda in Member States and EU Law. Closely linked to this, due to the Greek experience, but not exhausted by that, is the democratisation of the governance of the Eurozone. The new Technologies of the Internet have become tools of dictators and populists alike. They create a new class of challenges for free and fair elections.

At the same time, the free press and pluralistic journalism, so important as 4th estate in Democracy, is challenged by the new Technologies and autocrats alike.

Finally, a word also on public consultations and citizen's dialogues as intensified by the European Commission as part of the President Juncker priority of Democratisation in Europe.

It is these issues we focus on here, without intending to neglect the importance of the many other issues important in the debate on democracy and resilience, such as the need to defend and extend the space for civil society engagement and for free, independent sciences⁵⁸ in Member States and the EU.

In Search of Constitutional Resilience and a New Democracy Policy for the EU

Resilience of democracy against autocracy certainly has many facets, and broad popular democratic engagement is most likely the best way to achieve resilience – but also the least likely to be achieved by an order of law, even though a differentiated body of primary and secondary law is vital to make possible, encourage and protect engagement in democracy.

Starting at the Constitutional level, there is resilience against changes leading to autocracy in the high majorities which are usually required in constitutional democracies for the change of constitutions. In some Member States, such as in Germany, there are constitutional provisions which cannot even be changed by a constitutional majority and thus are protected in eternity. An example for this is Article 79(3) of the German Grundgesetz, which prescribes that the fundamental right to human dignity, the principle of Democracy and the structure as federation as laid down in the Grundgesetz can never be abrogated.

one of the authors and others; a detailed history of the successful civil society engagement on GDPR, which brought together activists from many Member States, still remains to be written.

⁵⁵ <https://edri.org/>.

⁵⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119, 1-88, ELI <http://data.europa.eu/eli/reg/2016/679/oj>.

⁵⁷ See in particular on GDPR Vice President of the European Commission Viviane Albrecht and Parliamentary Rapporteur Jan Albrecht in the impressive long term Cinema Documentary 'Democracy – Im Rausch der Daten', David Bernet, 2015, <http://www.democracy-film.de/> which received the German Documentary Film price 2017.

⁵⁸ Commission Press release of 24 April 2018, Hungary: Commission takes legal action on Higher Education Law and sets record straight on 'Stop Brussels' consultation, MEX/17/1116, available at http://europa.eu/rapid/press-release_MEX-17-1116_en.htm.

In EU law, the Treaties provide as to their own content a high resilience, above that of national constitutions, but below the specific case of guarantees for eternity: Although they do not contain eternity clauses, the Treaties can as a general principle only be revised by unanimity among Member States and ratification by all national parliaments. This is a much higher hurdle to change than the usual constitutional majority of 2/3 of the Members of the legislative.⁵⁹

But what protections does EU law provide against autocracy taking over in Member States, and in fine, against constitutional change in Member States which legally or factually does away with domestic Democracy in that Member State – in practice or as a constitutional principle?⁶⁰

Here we fall back on the weak mechanism of Article 7 EU on the constitutional level, and on the infringement procedures, in cases, in which rights and processes of democracy are enshrined in secondary law, such as it is the case on the right to for EU citizens to vote in local and European elections.⁶¹

It is important not to underestimate that many rights and protections for individuals, but also institutional arrangements, which are created by secondary EU law, are key for the good functioning of Democracy in Member States, in particular when also considering that the Rule of Law and Fundamental Rights are core elements of Democracy.⁶²

The Commission should therefore develop a policy to systematically include such hooks for democracy and democratic engagement in EU secondary legislation and develop a checklist and toolbox for such purposes, as it has done in its strategy for the application of the Fundamental Rights Charter. For example, were EU legislation foresees domestic bodies, such as sectoral regulators or data protection authorities, the toolbox would require to certain levels of participation and consultation rights and rights of appeal for citizens and also for civil society associations in relation to such body, in order to create space for engagement, thus addressing the problem of the shrinking space for civil society engagement where populists gain power.

As part of such a “Mainstreaming for democracy policy”, impact assessments of the Commission in future would need to set out how the proposal has been systematically screened to include elements for democratic engagement in the process of legislation as well as in the institutions, rights and procedures set up through the law. Impact assessments for this purpose would have to be enlarged to non-legislative action of the Commission where legislation could be an alternative to non-legislative action. These democracy impact assessments would also have to discuss what it means for representative democracy on the EU level and in Member States if the Commission choose to prefer non-legislative action over a legislative proposal. In case of non-legislative action, such as the recourse to voluntary codes of conducts for industry, the impact assessment would have to assess the impact of cutting out Parliamentary decision on EU level and Parliamentary consultation rights of Member State’s Parliaments, both individually for the act in question, but also seen in cumulation over time, considering other similar cases, before resorting to non-legislative measures where legislation is possible in principle.

⁵⁹ See in addition R Passchier and M Stremmer, ‘Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision’ (2016) 5(2) *Cambridge Journal of International and Comparative Law* available at SSRN <https://ssrn.com/abstract=2561209>.

⁶⁰ G Halmai, ‘Internal and external limits of constitutional amendment sovereignty’ *EUI Paper* available at <https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutional-Amendment-Power.pdf>.

⁶¹ Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ 1993 L 329, 34-38, ELI <http://data.europa.eu/eli/dir/1993/109/oj>, as amended, concretizes Art 22(2) TFEU.

⁶² The most recent example is the Commission proposal on the protection of persons reporting on breaches of Union Law (“Whistleblowers”), COM(2018) 218 final of 23 April 2018.

A crucial question in democracy is which of the challenges on the table can be safely and with good conscience left to non-legislative action, self-regulation, voluntary codes of conducts of simply ethics, and which challenges need to be addressed by rules which are enforceable and based on democratic process, thus laws.

In answering this question, democracy impact assessments will have to consider the principle of essentiality which has guided legislation in constitutional democracies for so long. This principle prescribes that any matter which is essential because it either concerns fundamental rights of individuals or is important to the good functioning of the state, which includes Democracy, must be dealt with by a parliamentary, democratically legitimised law.⁶³

To close on this section, attack is often the best defence and thus creating and extending democratic rights of engagement wherever possible in a wave of new European, democratic creativity, may well be the best way to go for the next Commission, as a guiding principle for policy development to avoid democracy being undermined in Europe.

Should we allow Demagogues to use Referenda against Europe? Reviving Representative Democracy

The EU Treaties contain elements of direct democracy, such as the Citizen's Initiative to be re-invigorated.⁶⁴ But Article 10(1) TEU also states clearly that Europe is functioning as a representative democracy.

And for good reasons, drawing on lessons of history, the core of the decision-making system and the appointment system is strictly based on representative democracy. Populists have abused calls for direct democracy to avoid deliberation and compromise. Referenda have become the dancefloor of populism and calling for referenda, while claiming to be the sole spokesperson for the one will of the people,⁶⁵ is a core method of populists.

The Brexit referendum of 23 June 2016.⁶⁶ in the UK is the most flagrant example of alleged direct democracy dividing a people, providing a fertile ground for lies and manipulation to steel the vote.

The specificity of referenda in Member States regarding matters concerning the EU is that these referenda can be used to pitch national democracy against *pacta sunt servanda* and democratic decisions on the EU level.

The invalid Referendum against migration quotas orchestrated by the *Orban* Government in Hungary led President Juncker to the comment that Europe cannot function if decisions taken under the rules of the Treaty are *ex post*⁶⁷ put in question by referenda organised by Governments which do not agree with the decision.

⁶³ Jo Eric Khushal Murkens considered the judgement of the UK High Court on decisions relating to Brexit not being left alone in the hands of the government but giving Westminster a say a case of application of the principle of essentiality, see The High Court's Brexit Decision, 'A Lesson in Constitutional Law for the UK Government' *Verfassungsblog – On matters constitutional* 3 November 2016 available at <https://verfassungsblog.de/the-high-courts-brexit-decision-a-lesson-in-constitutional-law-for-the-uk-government/>; for the principle of essentiality in German, US and EU law, see J Saurer, 'EU Agencies 2.0: the new constitution of supranational administration beyond the EU Commission' in S Rose-Ackerman, PL Lindseth and B Emerson (eds), *Comparative Administrative Law*, 2nd edn (2017) 619-628; further recent examples in the jurisprudence of the CJEU are the judgments in cases C-355/10 *European Parliament v Council* EU:C:2012:516 para 64ff, with further precedent, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1534186617433&uri=CELEX:62010CJ0355> and C-293/12 and 594/12 *Digital Rights Ireland* EU:C:2014:238 para 54ff available at <http://curia.europa.eu/juris/documents.jsf?num=C-293/12>.

⁶⁴ See Commission Proposal of 13 September 2017, COM(2017) 482 final and European Citizens' Initiative: Political agreement reached on the Commission's proposal, Press Release of 12 December 2018, IP/18/6792.

⁶⁵ A Voßkuhle, 'Ein Populist ist ein Gegner der Demokratie' (23 November 2017) *FAZ* available at <https://www.faz.net/aktuell/politik/inland/bundesverfassungsrichter-vosskuhle-und-sein-rezept-gegen-populismus-15304961.html>.

⁶⁶ Official title: United Kingdom European Union membership referendum.

⁶⁷ Juncker rages against UK and Hungary, Euractiv with AFP, 7 October 2016, updated 10 October, available at <https://www.euractiv.com/section/uk-europe/news/juncker-rages-against-the-uk-and-hungary/>.

The Irish referendum of 2001,⁶⁸ the French and the Dutch referenda of 2005⁶⁹ and the Greek referendum of 2015, the negative result of which could exceptionally not be followed by the Government, precisely because it would have jeopardised the Greek membership in the Economic and Monetary Union (EMU),⁷⁰ are other cases of referenda to consider. In the last case the challenge of a clash between the EU and national democracy is more than obvious, even if the referendum itself could well be qualified as unconstitutional and, thus, null and void.⁷¹

The relationship between democracy on the level of Member States and on the level of the EU should in principle be resolved by the division of competences in the Treaty.

For the rest, a simple principle of considering referenda a domestic matter to Member States will not be good enough if the referendum concerns EU matters, as such an answer does not take into account the common EU interest.

In a systematic on referenda in the EU, one would have to distinguish a number of different constellations, namely those relating to changes in the Treaty, those on Membership and those relating to decisions in secondary law, the management of the Eurozone being a particularly delicate case, dealt with in a separate section below in the next section.

Relating to changes within the Treaties, one would further have to distinguish between situations where national law obliges to hold a referendum and where this is not the case, and a fortiori where this not obligatory and is practically never done in relation to domestic policy issues.

As to Membership, the domestic litigation on the division of powers between Government and Parliament in the case of Brexit and the stress that Brexit process as such, including the need for such litigation, puts on the whole of the EU, demonstrates the need for further reflection as regards orderly processes in the future.

As to referenda relating to secondary law, one would need to distinguish between referenda before and after decisions on secondary law on EU level, and between Member States in which referenda are a common tool to decide also on other matters than those relating to the EU and those where this is not the case.

Beyond a reflection of systematic nature, what both the EU and Member States urgently need, and not only just before elections, but from early school education onward, is a strengthened teaching, learning and practice of representative democracy and a critical discourse on direct democracy, based on our historical experience.

It is striking that representative democracy is increasingly taken for granted. What people throughout history have fought so hard to achieve and still fight for in many parts of the world, is steadily losing support across European society. One example are the findings of the second European Youth Study carried out by pollster YouGov on behalf of the TUI Foundation. For this study 6080 young people aged between 16 and 26 were polled in seven EU countries (France, Germany, Greece, Italy, Poland, Spain and the UK). The authors of the study concluded inter alia that young people tend to be more critical of the design of the democratic system: 39 per cent rate the political system in their country so poorly that they see a need for

⁶⁸ On 7 June 2001 the people of the Republic of Ireland voted against the ratification of the Treaty of Nice in a referendum.

⁶⁹ On 29 May 2005 the European Constitution was rejected by the voters in France and on 1 June 2005 the Dutch voted against the European Constitution.

⁷⁰ In the so-called Greek bailout referendum on 5 July 2015 it was the bailout conditions, proposed jointly by the European Commission, the International Monetary Fund (IMF) and the European Central Bank (ECB), that were rejected by the voters, although fiscal matters are normally excluded from such referenda, according to Art 44 of the Greek Constitution.

⁷¹ Not only because fiscal matters cannot be put to popular vote, above n 71, but also because the question to be answered was imprecise (about unknown terms still under negotiation), the alternative option (acceptance of the terms) was only presented as a second choice, the consequences of the rejection were unclear and the reflection period for the voters too short (1 week instead of 2 as the minimum recommended by the Council of Europe, see press reports of 1 July 2015).

radical change. This view is predominantly expressed by respondents from Greece (66 per cent), Italy (51 per cent), Poland (41 per cent) and Spain (39 per cent).⁷²

Since the first direct elections in 1979, the turnout in European elections has fallen steadily from 61,99 per cent to 42,61 per cent in the latest elections.⁷³ Also, although the new Member States freed themselves of dictatorships and enthusiastically embraced democracy at the outset, there was a very low European election turnout in 2014 in some of these countries. Slovakia had for example a turnout of 13,05 per cent, and also countries like the Czech Republic (18,20 per cent) and Poland (23,83 per cent) showed record lows.⁷⁴ This has direct effect on the European Institutions as a whole as it reduces their democratic legitimacy; Joseph H. Weiler has correctly determined that this development shows a “democratic paradox”. He wrote: “*What is striking about these figures is that the decline coincides with a continuous shift in powers to the European Parliament, which today is a veritable co-legislator with the Council. The more powers the European Parliament, supposedly the vox populi, has gained, the greater popular indifference to it seems.*”⁷⁵

Moreover, voter turnout in national elections is also dropping. When looking at the seven EU Member States in which the above-mentioned European Youth Study was carried out, the following voter turnout appears: France (2017: 42,64 per cent, parliamentary and 74,56 per cent, presidential),⁷⁶ Germany (2017: 76,15 per cent, parliamentary), Greece (2015: 63,94 per cent, parliamentary), Italy (2018: 72,93 per cent, parliamentary), Poland (2015: 50,92 per cent and 55,34 per cent presidential), Spain (2016: 69,84 per cent, parliamentary) and finally the UK (2017: 68,93 per cent, parliamentary).⁷⁷ These figures show that the downwards trend is not restricted to Eastern Europe. Many countries with traditionally strong participation rates have seen participation gradually decrease since the early seventies. The participation rate in Germany in 1972 was 91,11 per cent and in Italy 93,18 per cent. Since then, the voter turnout has been in steady decline.⁷⁸

To close on this chapter, if referenda on EU related matters are unavoidable, EU Institutions need to speak out.⁷⁹ It is normal both within the US, where any President intervenes in the election campaigns not only for Congress but also for Governors, and in Federal Lands in Germany, where Members of the Federal Government participate in and comment extensively on people and issues coming up in elections and in – rare – referenda in the Lands.

The recent Eurobarometer survey of the European Commission shows a high concern as to populist movements in many Member States,⁸⁰ and people expect the EU to speak out and actively provide information on matters relating to the EU.⁸¹

⁷² See Young Europe 2018 – The Youth Study of TUI Foundation, available at <https://www.tui-stiftung.de/en/our-projects/young-europe-2018-the-youth-study-of-tui-foundation>.

⁷³ Report on the 2014 European Parliament elections, above n 48, 11.

⁷⁴ See www.europarl.europa.eu/elections2014-results.

⁷⁵ J. Weiler, ‘The political and legal culture of European integration: An exploratory essay’ (2011) 9 *International Journal of Constitutional Law* 678 (681).

⁷⁶ This turnout for the 2017 French presidential elections, which were said to determine the fate of Europe, was the lowest since 1969.

⁷⁷ For these numbers see the Voter Turnout Database of the International IDEA, available at <https://www.idea.int/data-tools/data/voter-turnout>.

⁷⁸ *ibid.*

⁷⁹ The Commission spoke to set facts straight before the referendum in Hungary, Commission Press release of 24 April 2018, Hungary: Commission takes legal action on Higher Education Law and sets record straight on ‘Stop Brussels’ consultation, MEX/17/1116, available at http://europa.eu/rapid/press-release_MEX-17-1116_en.htm.

⁸⁰ 67 % of respondents think that the rise of political parties protesting against the traditional political elites in various European countries is a matter of concern. *Eurobarometer* (November 2018).

⁸¹ Special *Eurobarometer* 477 on Democracy and Elections (September 2018).

Democratising the Eurozone – the five President’s Report

Some of the European decisions of biggest impact on people in Member States, namely those relating to the economic and financial crisis, are not taken in the form of legislation, with co-decision by the EP. They are taken by the Council alone, or even, in an intergovernmental format, among Member States. The never-ending discussion on the role of the Troika⁸² exemplifies the challenge to democracy – both on EU level and on Member State level – of these decisions.

The Regulation on the European Financial Stabilisation Mechanism (EFSM)⁸³ makes the Council’s decision on loan financing dependent on the conditions set by the Commission (on the basis of underlying recommendations by the Council), as well as on the approval of a reform program prepared by the Member State concerned.⁸⁴ However, in the case of decisions taken directly on the basis of Article 126, paragraph 9⁸⁵ and 136 TFEU, the Council’s decisions⁸⁶ go much further in regulating in detail matters, for which the EU has not legislated (because it is bound by the unanimity requirement) or has no competence to legislate (mere coordination or support competences, see Article 6 TFEU). Taxation, social security and working conditions fall under the former category, whereas health and hospital care and education fall under the latter, let alone the restructuring of the national administration and justice, the privatisations or the reduction of military expenditure.⁸⁷ This encroachment on national competence, which may be justified by the urgency to save the Eurozone or, at least, the countries concerned,⁸⁸ raises the question of the democratic legitimation of the decisions imposed on the countries concerned, first on the EU level. The texts on economic governance⁸⁹ foresee only the invitation of Commission and Council representatives by the competent committee of the EP, as well as the invitation of the President of the EP to the Euro summit, whereas the so-called European Stability Pact provides also for a common convention of representatives of the EP and of the national parliaments. These are provisions of a rather informative nature. The representatives of the people(s) are at best consulted, but they do not decide themselves. This is an obvious democratic deficit regarding the measures of economic governance taken on the European level.⁹⁰

Transnational Democracy in the EU, *pacta sunt servanda* in Europe, and national democracy have always been in a relation of dialectic tension. The situation between Europe and the Greek government elected in January 2015 was only the latest and possibly most dramatic example, which shows that the interaction between both worlds sometimes leads to a loss of either “supra-national democratic will” or “national democratic will”. Furthermore, it exemplifies that there is sometimes not enough mutual respect between national and EU Institutions as both sides perceive themselves as the true democratic custodians. Even if the bail-out program is formally “appropriated” by the national Government that endorses it as a “national program”, the fact remains that it is imposed by the Member State’s creditors.⁹¹ The discrepancy between form and reality in that respect is well reflected in the majority and dissenting opinions of the Greek Council of State⁹² about the national law “receiving” the Memorandum “agreed” with the creditors. The challenge to transnational democracy becomes

⁸² With respect to the financial crisis the term “troika” refers to the Commission, the European Central Bank (ECB), and the International Monetary Fund (IMF).

⁸³ Council Regulation 407/2010, OJ L 118, 1 ff.

⁸⁴ See the Irish and the Portuguese cases.

⁸⁵ Mainly because of delays or negligence of the Member State concerned (see the Greek case).

⁸⁶ Approving the creditors’ agreements with the Member state concerned (“memoranda”).

⁸⁷ For an overview see DN Triantafyllou, ‘Nachholende Wirtschaftsregierung unter der Gewalt des Geldes’ in *Grundlagen, aktuelle Entwicklungen und Perspektiven der EWU* (Nomos, 2012) 145 ff.

⁸⁸ See for possible legal justifications the previous footnote.

⁸⁹ See Regulations 1173-1177/2011, OJ L 306, 1 ff.

⁹⁰ See S Goulard and M Monti, *De la démocratie en Europe* (Paris, 2012).

⁹¹ See the codified Council decision 2011/734, OJ 2011 L 296, 38.

⁹² Judgment of the Plenary of 20 February 2012 in Case 668/2012 (about Greek law 3845/2010).

even bigger if one considers the peak attained with the jurisprudence of the German Constitutional Court, which allows every citizen, on the basis of his fundamental right to elect deputies who have to approve any new expenditure (or exposure thereto), to challenge any laws (like the ones approving European mechanisms) that may increase their State's budgetary liability⁹³ (through a of *popular action*). Does this mean, surely asked in a provocative way, that there is a democratic "surplus" of the creditors versus a democratic "deficit" of the debtors?⁹⁴

There are thus contradictory trends relating to democracy on the EU level: On the one hand, moves towards more democratisation, through direct election of the EP (1979), expansion of the scope of co-decision since then, and now the indirect election of the President of the Commission (2014). On the other hand, key decisions on the social and economic situation of European societies have been moved outside this democratic mechanism by Governments of Member States. These governments, in the classic patterns of executives, also strengthen their role in legislative decision-making, including indirectly through increased activism of the Council Secretariat, which, in contrast to the EP and the Commission, has no role as an organ in the TEU (see Title III, Articles 13-19, "provisions on the institutions") and no democratic legitimacy.

President Juncker has made Democracy in Europe one of his ten priorities for the present Commission. He presented proposals, in the five President's report, on the future democratisation of the Eurozone Governance, most likely the most crucial issue of tension between democracy in Member States and Democracy on the EU level.

In the economic governance of the Eurozone, there is need for a common discipline on EU level, which requires common binding decisions, which in turn require democratic legitimacy, as they touch on matters essential in the democracies of Member States and traditionally very important in domestic democratic debates and decision-making.

Whether progress in this area is possible depends on whether a first framework consensus can be reached between Member States on these questions, which will be seen at the European Council on 9 May 2019.

Securing Free and Fair Elections to the European Parliament and in Member States

The European Commission has reacted swiftly to the new challenges, as identified in the Facebook Cambridge Analytica Scandal. Its communication package of 12 September 2018 on "Securing free and fair European Elections"⁹⁵ details a broad panoply of actions to secure the technical infrastructure for the elections, to ensure that personal data are not abused in the campaign and that propaganda and fake news are combatted so as to avoid voters being intentionally misled. Many of the elements of this communication are also relevant for elections on all levels in the Member State. The learnings which Member States will draw from protecting European Elections in the application of the measure in this package will be extremely useful to protect national elections.

While an important part of the Communication is an appeal to Member States and its authorities to act, given the absence of EU competences, the Communication package also provides guidance on the relevance of EU law, for example in the area of data protection, to electoral campaigns.⁹⁶

The Commission is also recommending greater transparency in online political advertisements and targeting. European and national political parties, foundations and

⁹³ Judgment of the German Federal Constitutional Court of 18 March 2014 (file reference 2BvR 1390/12 ao).

⁹⁴ On this aspect DN Triantafyllou, 'Die asymmetrische Demokratie' (2014) *Europarecht* 458 ff.

⁹⁵ COM(2018) 637 final and the measures referred to therein.

⁹⁶ See on this the detailed guidance document of 12 September 2018, Free and Fair elections, Commission guidance on the application of Union data protection law in the electoral context COM(2018) 638 final.

campaign organisations should make available information on their expenditure on online advertising campaigns, by disclosing which party or political support group is behind online political advertisements as well as by publishing information on targeting criteria used to disseminate information to citizens. Where these principles are not followed, Member States should apply national sanctions.

The Commission for this purpose issued a Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns. National authorities, political parties and media should take measures to protect their network and information systems from cybersecurity threats, based on guidance developed by national authorities within the Network and Information Systems (NIS) cooperation group, with the EU Cybersecurity Agency and the European Commission Guidance on the application of EU data protection law.

A small change of the 2014 Regulation on party funding will make it possible to impose financial sanctions for breaching data protection rules in order to deliberately influence the outcome of the European elections. Sanctions would amount to 5 per cent of the annual budget of the European political party or foundation concerned. The sanction will be enforced by the Authority for European political parties and European political foundations. In addition, those found to be in breach would not be able to apply for funding from the general budget of the European Union in the year in which the sanction is imposed. To keep up with the ever-evolving cyber threats, the Commission is proposing to create a Network of Cybersecurity Competence Centres to better target and coordinate available funding for cybersecurity cooperation, research and innovation. A new European Cybersecurity Competence Centre will manage cybersecurity-related financial support from the EU's budget and facilitate joint investment by the Union, Member States and industry to boost the EU's cybersecurity industry and make sure our defence systems are state-of-the-art.⁹⁷

While this package only addresses the latest, up to date challenges to free and fair elections made possible by new technologies of the internet and data processing, and thus is not a full guidance on all important aspects for free and fair elections, it must be credited as the first document of the Commission which pulls together measures from different policy areas, dealt with in different Directorates General of the Commission (DGs Connect, Home, Secretary General, Just) for the purposes of strengthening Democracy within the EU.

As to other aspects of the free and fair elections, the Commission has already previously taken position, for example in the context of Citizen's Rights (Article 22 TFEU) and the related reports on European Elections.

On more thorny issues, relating to activities of autocratic regimes, the Commission has officially been vocal when assessing democracy outside the EU, as in some developing countries or most recently in Turkey (Turkey report of 2019),⁹⁸ and less so as to the situation within Member States, for examples as regards the rules for TV political advertising in Hungary.⁹⁹

In particular, the EU leaves election observation within its Member States to the OSCE,¹⁰⁰ while itself being the biggest donor to election observation worldwide.¹⁰¹

To conclude, while the package of the Commission on Free and Fair Elections is a good start and documents the relevance of secondary legislation in many areas to the good

⁹⁷ This summary is taken from the Press release of the package of proposals, IP/18/5681 of 12 September 2018.

⁹⁸ 2018 Turkey Report of 17 April 218, SWD (2018) 153 final, ch 2.1, 10 ff. See also https://ec.europa.eu/europeaid/sectors/human-rights-and-democratic-governance/democracy_en; I Zamfir and A Dobrova, 'EU support to peace and democracy in the world' (October 2018) *European Parliamentary Research Service* PE 628.271.

⁹⁹ President Barroso in his speech of 2 July 2013, Speech 13/608.

¹⁰⁰ See for an overview of forthcoming or recent election observation in EU Member States <https://www.osce.org/odihr/elections>.

¹⁰¹ https://eeas.europa.eu/topics/election-observation-missions-eueoms_en?page=1.

functioning of Democracy also on the national level, it at the same time shows that a further consolidated and mainstreamed approach to democracy could yield important benefits to the Union.

Freedom and Pluralism of the Press and Journalism

Traditionally, the EU emphasized Media as a business, to be regulated as part of the Digital Single Market, rather than press and journalism as the vital 4th estate function of Democracy. It is in this logic that the Commissioners and VPs responsible for DG CONNECT were in the lead on matters of the press and journalism, rather than the Commissioners dealing with Freedom of Speech, Democracy and Citizen's rights.

EU legislation affects the Press and Journalism in many ways, starting from direct effects of legislation addressing media, such as the Audiovisual Services Directive, the Cable and Satellite Directive, the Copyright Directive, right through to legislation which may not mention media, but due to the convergence between internet and media may effectively influence the competitive position of media as compared to internet platforms.

This is the case, for example, in the e-Commerce Directive, which in its Article 13 privileges Internet Platforms by granting a limitation of liability for third party content which is not available for third party content on websites maintained by press and journalistic enterprises. This results in a costs advantage of 3-5 per cent for internet platforms, as internet platforms do not have to carry the costs of ex ante moderation of third-party content which is incumbent on press and journalistic websites.

There is EU legislation in many other areas which affects journalism and the press, ranging from the VAT rules for the printed and electronic press right through to the proposed rules on Whistle-blower protection,¹⁰² given that Whistle-blowers are an important source of information for Journalists.

Also, both the competition and State Aid rules of the Treaty have been applied to the Press.¹⁰³

And while the EU has not monitored or financed the monitoring of elections within its Member States, it has financed the monitoring of media pluralism and media freedom within the EU.¹⁰⁴

The Press obviously also has an important role to play in fighting fake news and foreign propaganda, a challenge which the Commission addressed recently in an action plan and with a voluntary code of conduct.¹⁰⁵

Vital issues of press pluralism and journalistic freedom were discussed at the Annual Colloquium on Fundamental Rights of the Commission in 2016, and the Commission produced a detailed account of follow up actions, based on the discussions.¹⁰⁶

But since the Council Conclusions of 2013¹⁰⁷, neither the Council nor the Commission have adopted an overarching, coherent policy on press and journalism in its 4th estate function in Europe in order to address the new challenges to freedom and pluralism of the Press in Europe nor to put the challenges for the press into the context of the new challenges to Democracy, and to draw the necessary policy consequences from this.

¹⁰² COM(2018) 218 final of 23 April 2018.

¹⁰³ See, as examples, the cases reported in the Annual Report on Competition on 8 June 2018, COM(2018) 482 final, 7.

¹⁰⁴ See for details <https://ec.europa.eu/digital-single-market/en/policies/media-freedom-and-pluralism>.

¹⁰⁵ <https://ec.europa.eu/digital-single-market/en/fake-news-disinformation>.

¹⁰⁶ <https://ec.europa.eu/digital-single-market/en/news/european-commission-presents-follow-actions-fundamental-rights-colloquium-media-pluralism-and>.

¹⁰⁷ Council conclusions and of the representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital Environment, Education, Youth, Culture and Sport Council meeting, Brussels, 25-26 November 2013, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/139725.pdf.

The mega trend of digitalisation and convergence between the internet and media has now led to a serious economic challenge to the free privately financed press and public broadcasting and this is compounded by the increasing grip on the press and broadcasting by populist governments. The fourth estate cannot be replaced or losses in its functionality compensated by the cacophony of the internet. For the sake of Democracy in Europe, for which a vibrant fourth estate is vital, the Commission must invest in a new overall policy for the 4th estate, addressing all the new and old challenges in a new coherence with its policies for Democracy, Fundamental Rights and the Rule of Law.

Dialogue with Citizens and public consultations

The sense that the challenges of Democracy in Europe must be addressed is omnipresent, both in society and politics. The five Presidents report,¹⁰⁸ the Bratislava declaration,¹⁰⁹ the declaration of Rome,¹¹⁰ and Juncker's white paper on the future of Europe;¹¹¹ what characterises each of these is the knowledge that a continuation of the status quo will inevitably lead to disaster, and that change must be brought about as a Union. The EU is only strong enough to face internal and external pressures when it is a real *Union*. The heads of state and of the European Institutions have reiterated their belief that the way forward must be determined together. Both the Whitepaper and the declaration of Rome invite society to deliberate upon the future of the EU and the problems it currently faces. As the Whitepaper accurately points out, now is the time to remind ourselves of the values upon which the EU was founded and to reaffirm them. Redefining what democracy means, will enable us to mark out a path and a goal to strive for – an even stronger, more democratic Union.

As of December 2018, since the European Year of the Citizen in 2013, 160000 citizens of all nationalities, ages, races, religions and from across the political spectrum have taken part in over 1,200 town hall style debates in city halls, universities, factories and other places all across our Union.¹¹²

Since January 2015, the current Commission has held 478 Citizens' Dialogues across all Member States, also in cooperation with institutional partners such as the European Parliament, national Parliaments, the Committee of the Regions and the European Economic and Social Committee. Between February 2018 and 9 May 2019, the Commission intends to organise or support the organisation of around 500 additional Dialogues in cooperation with the Member States, regional, local authorities as well as with the European Parliament and other European Institutions.

Several Member States have announced their readiness to engage in broad public discussions on the future of Europe, and such national dialogues are already taking place in a number of Member States. By engaging with citizens across Europe and holding outreach events, organised according to their respective political structures and practices, Member States could help raise awareness among citizens on the importance of their vote in determining which vision would best advance the European project. Such events should take place over the period between the Leaders' meeting of 23 February 2018 and the Summit in Sibiu on 9 May 2019, just ahead of the elections to the European Parliament, where Heads of State or Government are expected to draw conclusions on the next steps for the Union.¹¹³

¹⁰⁸ Completing Europe's Economic and Monetary Union, Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 22 June 2015.

¹⁰⁹ Bratislava, 16 September 2016.

¹¹⁰ Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017.

¹¹¹ Reflections and scenarios for the EU27 by 2025, European Commission, COM (2017)2025 of 1 March 2017.

¹¹² Citizens' Dialogues and Citizens' Consultations, Progress report, December 2018, available at https://ec.europa.eu/commission/sites/beta-political/files/eu-progress-report-consultations-111218_en.pdf.

¹¹³ See recitals of the 2018 Commission Recommendation on the European Elections, above n 39.

While the Commission efforts on consultation are important and its work has become increasingly transparent, there remain deficits on openness and transparency in the Council and also important deficits of the resourcing of Members of Parliament in terms of staff to assist them in their tasks. It is important for democracy in Europe that the Parliament becomes the center of democratic debate and that it as an institution and its Members are better equipped. The resourcing of central research and budget control services of the US Congress and the staffing of Congress Men and Women in the US remain a good comparator.

As to the Commission, it needs to continue addressing the increasing imbalance between those interests which can afford a presence in Brussels and lobby intensely and those which cannot. Much more must be done to go out to citizens not only on general dialogues, but also to seek out actively interest concerned by specific legislation and invite them to enter into dialogue and to provide the assistance necessary for this purpose, where necessary.

Transparency in consultation and dialogues is not enough; the Commission must get better in all policy areas in actively seeking a balanced picture of concerns and interests, and to pro-actively rebalance consultation outcomes where they are influenced by a difference in means of those concerned by the policies in question.

Consultations which are correct in process may be counterproductive in democracy, if people perceive that the complexity of the process or the substance simply does not allow them to participate in a meaningful manner. It is therefore important that the Commission develops a culture of reducing complexities and increasing accessibility of consultations also for those who will not take the initiative from their side to provide input, but who must be approached actively. This requires in particular a greater human effort of the Commission and a practice of meaningful engagement in dialogue on all levels, as well as a serious and regular check whether the electronic ways of public consultation actually allow for meaningful dialogue at all.

Engaging the College and all levels of staff of the Commission in an exercise of searching meaningful dialogue and consultation with the public right from the beginning of the mandate will in turn also increase sensitive on all levels for public interests and thus overall broaden the skills of the Commission from technocratic charisma (Katherine Day) to include also more political and technocratic wisdom which the Commission needs as an institution to succeed.

To close, all EU Institutions must take care not to be captured by commercial consultancies but actively seek input by independent academia, where they exist. The question of independence of academia is key for democracy, not only independence towards the state (see Hungary) but also towards commercial interests. It is important that EU policies help to secure independence of academia and that the Commission, in all policies fields, complements general public consultations with a regular, public interest oriented and nurturing dialogue with independent academia.

SOURCES OF INSPIRATION AND POSSIBLE CONTENT OF A EUROPEAN DEMOCRACY CHARTER

Constitutional Law and Practice of the EU and EU Member States

Before we address the question of sources for work on a European Democracy Charter, let it be clear that the work on EUDC itself will be an important source of inspiration for practical understanding and learning on Democracy. This journey of discovery and comparison will, like in the case of the Conventions on the Treaties and the Fundamental Rights Charter, be a key effect of work on a EUDC, first informally, then on the level of the EU Institutions and eventually, if necessary, in a Convention preparing a Text for a possible Treaty change. It will start a broad debate and reflection and as such already serve the purpose to invigorate Democracy, by involving many in the common process of discovery, learning and constitutional debate. This is the primary purpose of the first stage of work on the EUDC, and whether Treaty changes in the ever more democratic European Union are necessary in the form of the EUCD (rather than in a more surgical, smaller intervention, limited for example only to the Governance of the Eurozone and a few other issues, such as the effectiveness of Article 7 EU) can remain open. One also does not exclude the other over time.

Work on the EUDC will be the occasion to discuss questions like the advantage of representative democracy in an ever more complex world and on the scale of the European Union (as compared to Switzerland), right through to the relevance of the development of Technologies for Democracy and what impact they may have on the formulation of rules for democracy and democratic practice.

Importantly, however, many of the challenges to Democracy in Europe and in the Member States, as discussed above, can be addressed on the level of secondary law and do not need a Treaty change. It is vital that the work on these challenges, as well as the general mainstreaming of all policies for Democracy by the Commission, go ahead in parallel to the preparatory work on the EUDC. And again, the debates on the EUDC will inspire discovery of such possibilities to strengthen Democracy in Europe, on the EU level and in Member States, via secondary law.

Turning now to the sources of inspiration, a first step of the work would simply be to collect the information on the varied texts and practices of democracy in the EU and in the Member States. On the level of EU, there are detailed texts on democracy in the area of international relations and development aid, as well as assessments of candidate countries, and the content of Treaties and secondary law relevant to democracy is, in the case of the institutions, further detailed by inter institutional agreements and rules of procedure as well as practice. There is also an important body of jurisprudence on democratic principle by the Court of Justice, such as on the limits of delegated law making.¹¹⁴

The work on EUDC will thus first of all be a work of collection, codification and consolidation on the level of the EU.

Then there are the similar texts and practices as well as judgements, much richer and much more elaborate on Democracy and its principles, on the level of Member States. The schools of comparative constitution studies and comparative election law and parliamentary law will have important contributions to make, including on the common practices among Member States and on best practices,

There will certainly also be important learning in the comparative history of constitution making and the materials documenting the preparatory work and debates for important constitutions of the Member States and third countries with great histories of Democracy, like that of the United States.

And it is possible to draw on a newer body of materials, namely Universal and Regional Democracy Documents, to which we will now turn our attention.

¹¹⁴ See C-355/10 *European Parliament v Council* EU:C:2012:516 para 64 ff, with further precedents and C-293/12 and 594/12/ *Digital Rights Ireland* EU:C:2014:238 para 54 ff.

Examples of Universal and Regional Democracy Documents

The massive human rights violations – especially during the Second World War – have led to the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948. This has caused the creation of many human rights conventions in the following decades. In a similar way it can be observed that the worldwide challenges to democracy have led to the adoption of a number of democracy documents in many regions of the world after 1990. Overall, there are more than a dozen full-fledged democracy charters.

The existence of the manifold challenges described above warrants turning our attention to some of these landmark democracy documents, which address similar challenges. Broadly speaking, there are two types of universal and regional democracy documents. Firstly, there are those that have a comprehensive approach combining many topics that are directly relevant for democracy. The second group comprises concrete issue-related democracy texts that address very specific themes like for example the rights and duties of the opposition in Parliament or that set out criteria for free and fair elections. For this analysis, the first group is particularly interesting.¹¹⁵ To this category belongs for instance the “Universal Declaration on Democracy” (1997) of the Inter-Parliamentary Union (IPU), which formulates the common aspirations of the international parliamentary community.

Apart from this, there are also very prominent regional democracy texts. On the African continent the “African Charter on Democracy, Elections and Governance”, adopted by the Assembly of the African Union (AU), in Addis Ababa (Ethiopia), on 30 January 2007, is surely the most important one. It is a formal international treaty, entered into force on 15 February 2012 and is currently binding on 31 AU member states.¹¹⁶ Definitely less well known than the AU Democracy Charter, but nevertheless of high sub-regional importance are the “Protocol A/SP1/12/01 on Democracy and Good Governance” (2001) of the Economic Community of West African States (ECOWAS) as well as the “International Conference on the Great Lakes Region Protocol on Democracy and Good Governance” (2006), which entered into force on 20 February 2008 and 21 June 2008 respectively. Also, these two protocols are legally binding instruments relating to democracy.¹¹⁷ A dominant founding idea for the adoption of these African democracy documents was surely to stabilise the often-fragile African democracies. This interpretation is also reflected in the fourth preamble consideration of the ICGLR Democracy Protocol, which blames “*the accumulated deficits in the matter of democratisation*” as an “*origin of the conflicts in the Great Lakes Region.*”

Further examples for regional documents can be found in the Americas. Among the binding treaty instruments especially four documents have to be highlighted, which specifically address the topic of democracy. The first one is the “Framework Treaty on Democratic Security in Central America”, adopted by the Central American Integration System (SICA) in 1995. The second important treaty is the “Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile” of 1998. Thirdly, the so-called Additional Protocol to the Cartagena Agreement “ANDEAN Community Commitment to Democracy” of 10 June 2000 must be mentioned in this context, which in fact, is very similar to the Ushuaia Protocol. Finally, the “Additional Protocol to the Constitutive Treaty of the Union of South American Nations on Commitment to Democracy” of 2010 belongs to the “contractual documents”, which entered into force on 19 March 2014 and reiterates – like other texts mentioned above – the organisation’s commitment to democracy and its condemnation of any

¹¹⁵ All documents mentioned on the following pages are printed in F Ehm and C Walter (ed), *International Democracy Documents – A Compilation of Treaties and Other Instruments* (Leiden and Boston, Brill – Nijhoff, 2015).

¹¹⁶ See the list of countries which have signed, ratified/acceded to the African Charter on Democracy, Elections and Governance, on 10 May 2018 available at https://au.int/sites/default/files/treaties/7790-sl-african_charter_on_democracy_elections_and_governance.pdf.

¹¹⁷ See F Ehm, *Das völkerrechtliche Demokratiegebot – Eine Untersuchung zur schwindenden Wertneutralität des Völkerrechts gegenüber den staatlichen Binnenstrukturen* (Tübingen, 2013) 46, 48.

unconstitutional means of overthrowing the government. However, although these four documents are proper international treaties, the most popular, important and comprehensive democracy document on the American double-continent is the “Inter-American Democratic Charter”, which was adopted on 11 September 2001 by a special session of the General Assembly of the Organization of American States (OAS), held in Lima, Peru. Last but not least, one further example for a “comprehensive democracy document” can be mentioned, which is the “SAARC¹¹⁸ Charter of Democracy” of February 2011.¹¹⁹

However, with regard to these documents it must be underlined – although seven of them are classical international treaties and only three are merely soft-law approaches to democracy of a political rather than a legal nature – that there is the open question of implementation and that these documents have to be of course interpreted in different cultural contexts. Therefore, caution is needed and an over-optimistic assessment concerning their practical impact should be avoided.

Apart from this point, these ten documents that have “democracy” as their principal theme, address for example – mostly in separate chapters or sections – the following topics: (1) definition of democracy/the principles of democracy, (2) democratic institutions, (3) the international dimension of democracy, (4) the triangle of democracy, rule of law and human rights, (5) promotion of a democratic culture/education, (6) democratic elections, (7) election monitoring, (8) urgent measures and sanctions in case of threats or breakdown of democracy, (9) the role of the armed forces, the police and the security forces in a democracy, and (10) some final clauses.¹²⁰

Possible Content of a European Democracy Charter

The described challenges to democracy in Europe and the mere existence of the above-mentioned democracy documents in other regions of the world are reason enough to consider the creation of an EUDC. This question is even more self-evident, when we bear in mind that the only EU document that solely addresses democracy on the highest level is the “Declaration on democracy”, adopted by the European Council in Copenhagen of 7-8 April 1978, which comprises only six paragraphs. One obvious explanation for this rather moderate result is that the field of activity of the EU is – in comparison to all other international organisations – very broad, and that, of course, the Treaties contain numerous operational provisions of practical relevance for a functioning democracy, which are further specific in secondary law, as discussed above. The principle of democracy is thus explicit not only in Article 2 TEU and in its “provisions on democratic principles” (Title II, Articles 9-12) but also in the provisions on the Institutions in the Treaties, the Charter and in Secondary law.

The EUDC could help to effectively address the many challenges to Democracy on the EU level, within the Member States, and, third, in the relation between the EU and the Member States. As to the issues arising in the third group, a key question is whether, without touching the division of competences between the EU and Member States, the EUDC could add value by setting out principles and processes on how to articulate democratic process on both levels in mutual respect and within the existing competence distribution.

Against this background, the following part will discuss some selected elements such a document could address, in addition to those already discussed.

With regards to the content of an EUDC, the starting point should be a provision that concisely defines the core elements and the common denominator of European democracy that build on Article 2 TEU. Generally speaking the concept of “democracy” refers to the involvement of citizens in political decision-making and its core is based on consensus. A

¹¹⁸ SAARC stands for “South Asian Association for Regional Cooperation” which is a political and economic international organization comprising eight countries that has been formed on 8 December 1985.

¹¹⁹ For more background information about these documents see Ehm and Walter, above n 116, 253 ff.

¹²⁰ With regard to some of these issues see also Ehm and Walter, above n 116, 12 ff.

feasible *definition of democracy* is something which is often missing in many of the documents mentioned above¹²¹, which already shows how difficult it is to consolidate all the differing conceptions. However, a starting point for finding a European definition of democracy could be its intrinsic element, ie the “majority rule”, which had been included in the first Draft Preamble of the European Constitution,¹²² and which, on the European level, has to rely both on some majority of Member States and some majority of the population, in order to also take account of the federal nature of the EU (presently set at 55 and 65 per cent respectively –see Article 16 TEU).

Furthermore, one should take into account the international core consensus concerning this term. A comparative look at all relevant international democracy documents reveals six general principles for a democratic government: (1) human rights, (2) free and fair elections, (3) rule of law, (4) a multi-party system, (5) separation of powers, and (6) an independent judiciary.¹²³ However, the EU could never be content with such a “skeletal structure definition” and it has to go – also due to its self-conception – beyond this. Simultaneously, it must be underlined that already these principles are extremely vague and open to different interpretations.¹²⁴ This being said, as outlined above, there is already a substantial body of concretisations through secondary law, practice and jurisprudence in these areas.

On the other hand, we also need a generally understandable definition that speaks to the people and has integrative capacity. A paradigmatic phrase for this is that democracy is safeguarded as long as it is “*a social structure open to change and novelty, and yet preserving its own basic character*”.¹²⁵ By defining the minimum requirements for a functioning pluralist democracy, the definition could serve as a new legal benchmark for the Court to assess possible democracy threats, and thus strengthen the capacity of the EU to ensure, through the concept of preserving the basic character, effective and equal protection of democracy in all Member States.¹²⁶ It could be the concrete expression of the EU maturing as a democratic constitutional system, based on common EU values.

The functioning of the EP could be improved by political practice based on existing rules, by ensuring stable democratic majorities through the development of a coalition agreement culture capable of hammering out compromises with the Council.

The use of the threshold for the allocation of seats at national level can serve as an important means to this effect.

Of the 28 Member States, only 12 have established an electoral threshold for the allocations of seats in the EP,¹²⁷ and in some it is being challenged before the national courts – with divergent results. On 26 February 2014, the German Federal Constitutional Court had found the country’s 3 per cent minimum threshold unconstitutional¹²⁸ whilst, in a ruling handed down on 1 June 2015, the Czech Supreme Administrative Court upheld the applicable threshold of 5 per cent.¹²⁹ The Constitutional Court in Italy has also been called upon to decide on the legitimacy of the 4 per cent threshold in the elections to the EP. The case is still pending.

¹²¹ See also Ehm and Walter, above n 116, 12 ff.

¹²² Following *Thucydides* report on Pericles Epitaphy speech (History, II, 37). It is regretful that that fundamental and symbolic reference had been deleted from the final text, due to the bigger states’ fear of being marginalised by the numerous smaller ones, as well as due to the smaller states’ fear of their citizens being outvoted by the citizens of the bigger member states (see DN Triantafyllou, *La Constitution de l’UE* (Brussels, 2015) footnote 3).

¹²³ Ehm and Walter, above n 116, 22.

¹²⁴ For a similar conclusion see N Petersen, *Demokratie als teleologisches Prinzip* (Heidelberg, 2009) 124 ff.

¹²⁵ Z Barbu, *Democracy and Dictatorship – Their Psychology and Patterns of Life* (New York, 1956) 4.

¹²⁶ See ideas about an analogous function of a possible “Copenhagen Charter”, cited in B Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (July 2014) LEQS Paper No. 79/2014, 30-31.

¹²⁷ The thresholds mostly vary between 3% and 5%. See Bux, ‘The European Parliament: Electoral Procedures’ (2018) 02 *Fact Sheets on the European Union* 2.

¹²⁸ Judgment of the German Federal Constitutional Court of 26 February 2014 (file reference 2 BvE 2/13 u.a. – 2 BvR 2220/13).

¹²⁹ Press release (in Czech), file reference: Pl. ÚS 14/14.

Needless to say, that promoting this threshold becomes increasingly important in the light of the significant role the Parliament now plays in ensuring a stable executive through the election of the President and the Commission, but also through its power of ensure and through its co-decision and budgetary powers. It is now not correct anymore to state that in practice, there is no need for a threshold, as the Parliament does not have the function of electing and supporting a stable executive.

The EP has been conducting its own reflection on the reform of the electoral law of the EU with a view to “Europeanise” European elections and the aim to introduce more harmonization of the electoral systems in Member States.¹³⁰ While many of these reflection were not taken up in the latest 2018 amendment to the 1976 Election act, many remain valid for the future work on the EUDC.

To make the EP the core of a real European parliamentary democracy it will be inevitable to further increase co-decisions even more and to make this procedure the normal case.

Some claim the EP should have the right to initiate laws (like in the Member States the legislative initiative is usually shared between parliament and the executive). The argument is that the legislative initiative of the EP is needed to counterbalance the power of the Council and to correct its initiatives. In addition, it offers all political groups of the EP the way of emphasising their own political orientations.¹³¹ However, reality shows that legislative initiatives of Member States in the Council are rare and even rarer is their success. The Community Method of entrusting the independent European Commission, which only has a duty toward the European interest, with a monopoly of initiative has demonstrated its value. With the powers of appointment, co-decision, budget approval and control and censure, the Parliament has power over the Commission to ensure that it follows its orientation, including on important legislative initiatives.

Another change that could be envisaged in the perspective of strengthening European democracy would concern the selection process for party candidates for election to the EP. There is the perception that national politicians may exert pressure on Members of European Parliament (MEPs), who can be “the weakest links”, particularly in cases where places on the list are given as “gifts” by the party leaders.¹³²

An avenue to explore would be to provide for a “normal” political career for MEPs. They would first perform well as legislators and could then have the opportunity to move into the Commission, in the same way that national Members of Parliament learn their business in politics before they, if an opportunity arises, take on functions in the executive. The powers of the President in the selection of Members of the Commission and the organisational powers within the present statute of personnel for the Institutions would allow to implement a clear orientation that a certain percentage of Members of the College must have experience in the European Parliament and that in every Directorate General and/or Cabinet, there shall at least be one political civil servant, thus at Director level or above, with a background in the EP, functioning along the model of Parliamentary State Secretaries in Germany. Proceeding in this way would acquire important political capital for the Commission, stabilise the relation with the Parliament and, as a trickle-down effect, most likely increase the interest in a career as MEP, in comparison to the present situation in which being an MEP is often – although much less than in the past – the end of a political career. It would also be a certain counterbalance to the increasing presence, in the staff of the Commission, of civil servants with a strong background in the national government, thus on the executive and Member State side, rather than on the EU and Parliamentary side.

¹³⁰ See the report of the extraordinary AFCO committee, Brussels, 1 October 2015 (OR. en), 12501/15.

¹³¹ European Commission for Democracy through Law (Venice Commission), comments on legislative initiative in Europe, by Sergio Bartole (Member, Italy), Strasbourg, 30 September 2008, Study No 446 / 2007, *cf* page 2.

¹³² See Priestley, above n 41, 4.

Also, as regards some of the classic issues discussed since long, such as the transparency of the Council and the role of European Political Parties, the EUDC process could be helpful. One can very well imagine that an EUDC never becomes law, but still codifies certain best practices, such as relating to Spitzenkandidat or in the areas just mentioned, and in doing so makes an important contribution to stabilising Democracy in Europe. The same could be true as regards Democracy in Member States, for which the EUDC could already be of help if it just were an aid to interpretation of the meaning of Democracy in Article 2 TEU, and not only when it comes to Article 7 procedures.

There has been a rich discussion in academic circles about ways to further refine and strengthen the current powers of the EU to uphold the rule of law, democracy and fundamental rights. For instance, to set up a “*Copenhagen Commission*”, which should continuously assesses democracy and the rule of law within Member States.¹³³ Another proposal is to allow national courts in a situation when human rights are systemically violated in the respective Member State (and this will always have a severe effect on democracy), to invite the Court of Justice of the EU (CJEU) to consider the legality of national actions in the light of Article 2 TEU.¹³⁴ There are many more proposals addressing this issue, ranging from the most radical one to the least far-reaching.¹³⁵

A detailed “*EUDC democracy protection mechanism*” could eventually complement Article 7 TEU and widen its applicability. Due to the fact of so-called “anti-democratic pinprick tactics” in some EU Member States this mechanism should inter alia be applicable if a critical mass of single anti-democratic events has been exceeded (“*Critical Mass Theory*”). If the conclusion is that a critical mass has been reached, a warning could be issued and eventually sanctions could be applied.

To address these issues in an EUDC would raise awareness and create positive pressure to act on the stakeholders concerned. At the same time, it would mean to start doing the homework that anyway needs to be done, but in an integrated way and with a view for the full picture and not by closing loopholes and acting only on emergencies.

CONCLUSIONS AND OUTLOOK: DARING MORE DEMOCRACY IN EUROPE AND AN EU DEMOCRACY CHARTER

In his famous speech before the German Bundestag in 1969, then Chancellor Willy Brandt said, “*we want to dare more democracy*”.¹³⁶ The speech of Chancellor *Brandt* came at a time, when right wing extremism was on the rise. For the first time since the end of the war, a far-right party, the National Democratic Party of Germany (NPD), only very narrowly missed entering the German Parliament with 4.3 percent of the votes. In conjunction with the first big economic crisis in 1966/1967, the political landscape partly resembled that of today. The promise of Chancellor *Brandt* to dare more democracy came as a response to the German student movement of the 1960s, when students began protesting against what they perceived as the authoritarian structures of the German state and the discrepancies between the rapid growth of the German economy and wealth after the wars in relation to the comparative stagnation of social values. The students demanded more individual rights and social democracy. This translated into them pressing for a reform of the political structures and the education system, for more codetermination at universities, emancipation of women and a

¹³³ See JW Müller, ‘Safeguarding Democracy inside the EU, Brussels and the Future of Liberal Order’ (February 2013) *Transatlantic Academy Paper Series*.

¹³⁴ A von Bogdandy et al, ‘Reverse Solange – Protecting the essence of fundamental rights against EU Member States’ (2012) 49 *Common Market Law Review* 489 ff.

¹³⁵ For an overview see just D Kochenov and L Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ (12 May 2015) 356 *Robert Schuman Foundation Policy Paper*, 7 ff.

¹³⁶ Government Declaration of Federal Chancellor *Willy Brandt* in front of the German Bundestag in Bonn on 28 October 1969.

break with traditional authoritarian education measures. After the student movements reached their height in 1968, the new social-liberal coalition government managed to channel the movement, on multiple levels. The Government brought on the way many pro-democratic reforms in different areas of life. The voting age was reduced from 21 to 18 in 1972. More universities were created, and many reforms introduced. Students were given more participation and self-determination in university structures. Workers were given more rights of codetermination with a reform of the Works Council Constitution Act in 1972.¹³⁷ Another huge leap for workers' rights was taken with the introduction of the co-determination law in 1976¹³⁸ which ensured that democracy does not end right at the door of the big enterprises. While highly contested, the law was deemed as constitutional by the German Constitutional Court in the same year.¹³⁹ The Court confirmed the principle of co-determination and thereby introduced the idea of the economic neutrality of the Constitution and the equality of capital and work. In the 1970s, anti-democratic tendencies and general dissatisfaction were very successfully combatted by the German government with the revival of democratic spirit across all layers of society and within many sectoral policies, from the economy right through to education. The policy was not only to create individual rights, but also organisational structures to empower people to jointly exercise these rights or delegate the exercise to the new bodies thus created, such as works councils or student councils. Routes of engagement for people were opened which were more than just consultation or exercise of defensive rights. These structures created a new balance of power in society and encouraged people to engage, in different ways, in democratic processes. Europe can learn from this history of Democracy as much as it can learn from Weimar.

The question of balance of power is again on the table today, with the concentration of power in the hands of a few digital mega corporations. And so are proposals to extend co-determination in Europe, as a visible increase of democracy, and capitalising on the empiric reality that where people have co-determination rights in their work, they are less likely to vote for populists with autocratic tendencies.¹⁴⁰

This day and age, Europe needs to "Dare more democracy" and continue on its way to be a democracy that defends itself, just like at the time of Brandt "Mehr Demokratie wagen" and "Wehrhafte Demokratie", while avoiding its pitfalls.¹⁴¹

As in time of Brandt, strong political will, leadership and readiness to innovate is now necessary on the side of the next Commission, to intensify the commitment of the Juncker Commission to Democracy with a multitude of new actions. These actions should include a general democracy mainstreaming and a distinctive programme of actions for Democracy to be implemented within the mandate.

The Commission could in this work also draw on the results of the annual colloquium of the Commission on Fundamental Rights in November 2018 which was focussed on

¹³⁷ Official German title Betriebsverfassungsgesetz (BetrVG).

¹³⁸ Official German title Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz – MitbestG).

¹³⁹ BVerfGE 50, 290.

¹⁴⁰ Aufsichtsräte - Mehr Mitbestimmung wagen, Detlef Esslinger, SZ, 24 Mai 2018, <https://sz.de/1.3991244>.

¹⁴¹ A key action of 'Wehrhafte Demokratie' under Willy Brandt was the much-contested order against radicals from the left and the right in public service of 28 January 1972, available at https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0113_ade&object=translation&st=&l=de. On this, see Wissenschaftlicher Dienst des Deutschen Bundestages 2017, Parlamentarische und zivilgesellschaftliche Initiativen zur Aufarbeitung des sogenannten Radikalenerlasses vom 28. Januar 1972, Ausarbeitung WD 1 - 3000 - 012/17, available at <https://www.bundestag.de/blob/531136/a0a150d89d4db6c2bdae0dd5b300246d/wd-1-012-17-pdf-data.pdf>, and more recently the translation of 'Wehrhafte Demokratie' as 'militant democracy' in the press release of the German Constitutional Court on an order rejecting constitutional complaints against prohibitions of associations. This order recounts in part the history of 'Wehrhafte Demokratie' and the lack of it in the Weimar Republic, German Constitutional Court, Press Release No. 69/2018 of 21 August 2018 on the Order of 13 July 2018 1 BvR 1474/12, 1 BvR 57/14, 1 BvR 57/14, 1 BvR 670/13, available at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-069.html>.

“Democracy in the EU”. The colloquium aimed to reaffirm that Democracy is a central value common to the European Union and all its Member States and looked at how to renew democratic engagement within the European Union and the European societies.¹⁴²

It could also draw on the non-legislative resolution, adopted by and the European Parliament (EP) on 10 June 2015, in which the Commission is asked “[...] *to present a proposal for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights [...] to carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States [...] and [...] in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level [...].*”¹⁴³

But the new Commission should also bring forward work towards a European Charter of Democracy, using the tried and tested methodology which led to the adoption of the Charter of Fundamental Rights, to produce a major document, that contains a clear and visible commitment of the EU to democratic values and that addresses the challenges to democracy in the EU, in the Member States and between them, and potentially complements the European legal framework in the long run.

This would not be a new start, but rather an important contribution to strengthen democracy in Europe, based on the great history of success of the progress of Democracy, and in light of President Juncker’s emphasis on a Union of Democratic Change and Democracy as a priority of the European Commission.

¹⁴² https://ec.europa.eu/info/events/annual-colloquium-fundamental-rights/2018-annual-colloquium-fundamental-rights-2018-nov-26_en.

¹⁴³ Para 12 European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8_TA-PROV(2015)0227, Situation in Hungary; see also EP Press release, Hungary: MEPs condemn Orbán’s death penalty statements and migration survey, Plenary sessions [10-06-2015 - 13:26].



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