
CHAPTER 9

# (Disap)pointing in the Mirror: The European Parliament's Obligations to Protect EU Basic Values in Member States and at EU Level

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## Introduction

The political groups that constitute the European Parliament (EP) are usually portrayed (and think of themselves) as the main champion of protecting EU values like democracy, the rule of law and human rights in the EU setting. This translates into a majority of Members of European Parliament (MEPs) laudably insisting with the Commission and the Council to act to protect these values inside and outside the EU (Morijn, 2018). The most visible aspect of this is consistent criticism, laid down in political resolutions supported by a majority of the EP's members, of member states where rule of law backsliding occurs. The

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real target of such criticism is the actions of heads of states, prime ministers and ministers of governing parties in member states such as Poland and Hungary.

However, such member state level politics and politicians are not entirely divorced from politics at EU level. The same national governing parties that are criticised by the EP's political groups form part of the Council of Ministers, the EP's co-legislating partner-EU institution. They also nominate persons to serve in the most European of political EU institutions, the Commission. Member State level rule of law backsliding has therefore already 'trickled up'. This has caused the EU to be less able to respond to backsliding. Instead, it is caught in an 'authoritarian equilibrium' (Kelemen, 2020). It is crucial to realise that the EP is part of that problem too. In fact, when political groups put pressure on and criticise the behaviour of member states and other EU political actors vis-à-vis EU basic values, they have an unexpected further target … themselves.

How so? Its own members are elected in nationally organised European elections, including of course in the member states that a majority of the political groups consistently criticise for rule of law violations. Political parties leading national governments in member states that violate EU values evidently also successfully participate in EP elections. As a logical consequence, politicians affiliated to these very same national political parties end up as MEPs. They become member parties in Europarties and members in political groups alongside national parties and MEPs that have criticised, in EP resolutions, the very same national political parties through which they were elected. This logically means that when a majority in the EP rightly preaches, it is directly criticising its own ranks.

Building on previous research (Morijn, 2018, 2019a, 2019b), this chapter aims to map and reflect on the track-record of political groups in the EP with regard to the use of tools at their disposal to act on their legal obligations to protect EU basic values at both member state and EU level. Remedies to deal with member state level problems are well-known and include political resolutions and Article 7 of the Treaty on European Union (TEU) (rule of law clause), as well as infringement proceedings and the more recent Regulation 2020/2042 (rule of law conditionality regulation). With regard to the EP's role in addressing EU-level rule of law problems, three tools are worth highlighting. Firstly, Parliament proposed changes to the Electoral Act to erect a 5% electoral threshold for EP elections. Secondly, Regulation 1141/2014 on the statute and

funding of Europarties and European political foundations links EU-funding to continued compliance with EU basic values. Thirdly, the EP's own Rules of Procedure (EPRoP) include instructions on how the EP itself will use Regulation 1141/2014.

This web of different legal and policy commitments is then contrasted with the actual practice of political groups. It is argued that what becomes visible, in quite sharp contrast to their (self) image of being an active proponent of basic EU values, and perhaps their very self-understanding, is the large disconnect between the political groups' activity in upholding these values versus member states and their inactivity to do the same at EU level. In other words: by criticising only member states, political groups act problematically inconsistently—and are (disap)pointing in the mirror.

This chapter first provides an overview of different frequently discussed tools to protect EU values *at member state level*, with a focus on the EP's political groups' role in putting these to use. It then zooms in specifically on instruments available to the political groups inside the EP to protect EU basic values *at the EU level itself*, particularly the Electoral Act regulating EP elections, requirements incumbent on Europarties and European political foundations regarding complying with EU values and the EPRoP. Based on this, it is assessed how these instruments are actually used and what improvements could be considered to (better) reach the aim of protection and promotion of EU basic values across all the EP's activities with this purpose. A conclusion wraps up the discussion.

## Context: EU Protection of EU Values at Member State Level and the EP

When pressed on the question of how EU institutions fight to uphold EU values, such as the rule of law, democracy and fundamental rights (Article 6 TEU) at Member State level, most observers will likely primarily point to how the Council is trying to address this through Article 7 TEU. As is well-known, this procedure was initiated with regard to two member states, Poland (European Commission, 2017) and Hungary (European Parliament, 2018). Political groups play a role in this procedure too. In fact, it was them, particularly the mainstream political groups like the liberal Renew Europe, the Greens/European Free Alliance (Greens/EFA), the Progressive Alliance of Socialists and Democrats (S&D) and the (large majority of) the European People's Party (EPP),

that referred the case of Hungary to the Council. After Hungary had challenged whether a sufficient number of MEPs had supported the resolution, the European Court of Justice recently upheld the legality of this action (European Court of Justice, 2021). The EP also adopts regular resolutions aimed specifically at the ongoing Article 7 proceedings (European Parliament, 2020a). However, the EP's further role in Article 7 proceedings is, unfortunately, rather secondary. For example, it is not formally invited to, and therefore not directly involved in Article 7 TEU hearings when they take place in the Council (Pech et al., 2019).

For a variety of reasons, the EU institutions' intervention under Article 7 TEU has not yet led to concrete change within the two member states concerned. The most important reason is that this mechanism was never designed for a possible situation in which it would (likely) need to be applied to more than one Member State at a time. In the current situation, Poland and Hungary can veto truly effective actions against the other Member State. On the other hand, periodic attention at the ministerial level may be in fact be instrumental to gradually driving home the political importance of the topic in the long run. In any event this is by no means the only route through which the EU's political institutions are engaged in enforcing EU basic values at Member State level. Indeed, there are various other political and legal means, that each entail a different role for the EP.

As to political tools, political groups have a long track-record of adopting political, legally non-binding resolutions addressing the situation regarding EU basic values in member states, varying from Poland and Hungary to Malta and the Czech Republic (Morijn, 2018). Majorities vary somewhat, as MEPs are unlikely to vote to criticise their own member state, but by and large they are supported by Renew, the Greens/EFA, the S&D and the EPP. The Commission also operates various political tools. The most prominent is its Annual Rule of Law Report, which it introduced to create a facts-based basis for 'dialogue' with and between member states (European Commission, 2020b, 2021b). These reports are now bi-annually discussed in the Council, where five member states are being discussed each time. There is no role for the EP in this, although the EP often organises its own hearings on specific member states or particular EU basic values-related procedures.

Likely as a result of the EP's exclusion from political discussions about basic EU values, the EP has itself adopted resolutions that somewhat replicate the political dialogue mechanism based on the Commission's

reports. There are some subtle differences, but the central issue is to give a more central role to the EP itself. In 2016, it adopted a resolution calling on the Commission for an EU mechanism on Democracy, Rule of Law and Fundamental Rights (DRF) to be set up, that would also aim to constitute a dialogue about how EU basic values are protected by and at Member State level, based on objective facts, and that would involve both the EP and national parliaments (European Parliament, 2016). More recently, a similar mechanism was called for by the EP once again and received very wide support among the four mainstream political groups (European Parliament, 2020b).[1] The Commission has so far not really embraced these proposals, instead of pointing out that what the EP is asking for is already being done. In that respect, the Commission has disregarded the EP's plea to widen the political debate from only the Council to also the EP, or to at least end the practice that discussions are now not undertaken in a way that engages the three political EU institutions equally or simultaneously.

In addition, tools that are more legal in nature, and more consequential in their effect, have been employed and developed by EU institutions to try and induce change at member states level. These involve the EP and its political groups in various ways, but most importantly simply in its role as the EU institution exercising democratic control over the Commission as executive, or as co-legislator together with the Council.

The most important tool is the Commission's power under Article 258 of the Treaty on the Functioning of the European Union (TFEU) to enforce Union law vis-à-vis member states. Until recently the Commission was criticised for doing too little too late in that respect, even if EU values are clearly binding EU law (Scheppele et al., 2020). The paralysis resulting from a refusal to use tools that were clearly the best for the job at hand was rightly criticised as highly damaging and lamentable (Pech & Scheppele, 2017). That state of play can now be written about in the past tense. The Commission has now initiated a number of infringement procedures against Hungary and Poland to try and induce compliance with various aspects of EU basic values, such as judicial independence, media freedom and LGBTI rights (European Commission, 2021a) and gone back to the Court of Justice to insist a ruling about judicial independence in Poland is properly implemented (European Commission, 2021a). The EP had often called for this type of actions in political resolutions, but it is an open question whether and to what extent the Commission has moved to being more assertive *because* the EP has called upon it to do so.

A powerful example of legislation that is aimed at enforcing basic EU values that the EP has helped bring about in its role of co-legislator is Regulation 2020/2042, the so-called rule of law conditionality regulation.[2] This instrument links the principle of sound financial management of any EU funds handed out to member states to compliance with rule of law principles. It enables the Commission to propose to the Council to block EU funds when well-documented and persistent Member State level problems to enforce basic EU values 'affect' or 'risk affecting' how EU funds are spent (Kelemen et al., 2021).[3] The instrument is in force since 1 January 2021, and political groups have put pressure on the Commission to apply this instrument more quickly. In a recent resolution, supported by the four mainstream political groups, the EP even threatened to sue the Commission for failure to act under Article 265 TFEU—an unprecedented move (European Parliament, 2021). This underlines the political commitment to act on protecting EU values at member state level.

The purpose of this overview is to signal these developments as relevant context and to highlight that these EP efforts are focused on addressing and suppressing the practice of illiberal politics, which may contravene EU values at *national*, Member State level. The rationale of EU-level intervention against specific member states, however, is not only to change the situation in these member states themselves. Perhaps as importantly it is to avoid that illiberalism spills over to other member states, or gets permanently anchored within EU institutions, in the sense that nationally and EU-level elected and appointed politicians with an agenda that is at odds with EU values consolidate their position. If that remains uncontested, this could create an 'authoritarian equilibrium' (Kelemen, 2020).

In that regard, it may be both important and somewhat surprising to learn that EU institutions have in fact put in place measures to protect basic EU values not *only* vis-à-vis member states, but also at EU level itself. Indeed, these measures, their significance and their implementation, as well as how that compares to political groups' activity when it comes to member state level enforcement of basic EU values, are not frequently analysed and commented upon. The next three sections aim to do just that.

## The EP and Regulating Compliance with Basic EU Values at EU Level: Instruments

EU institutions have accompanied measures to confront member states violating EU values with legislation and other measures that aim to engage with the mirror problem at the EU level. This stems from the necessity to deal with the knock-on effects that the same problems in the same member states can have or are already having on the EU's *own* political setting. In particular, the EU legislator, and therefore also the EP and its political groups, have moved to introduce legislation and rules within the EP's self-regulatory EPRoP that boil down to measures to *restrict and condition access to and participation in* the EP political arena to only those Europarties and political groups that commit to complying with EU values. These measures are motivated by the overarching aim to avoid that the EU-level political setting is used to undermine the legally binding minimum commitments laid down in Article 2 TEU.

Restricting *access* to the EP political arena for political parties was attempted by the EP by proposing the inclusion of a compulsory 5% electoral threshold in the Electoral Act. This legal text lays down rules for how member states need to organise the EP elections. Under current rules, electoral thresholds, by which you need a minimum percentage of the vote to be able to gain seats at all, are allowed but not compulsory. Some member states, but far from all, use them for EP elections too. Justifications for using an electoral threshold can vary. Sometimes a seemingly objective reason is given, like avoiding political instability through fragmentation of parliament into too many different political parties. In reality, although sometimes more implicitly, more substantive implicit reasons appear to animate a desire to denying access to specific political parties with agendas that are perceived to be odds with basic EU values, as was the case for the Alternative für Deutschland (AfD) that was growing at the time that the electoral threshold was proposed.

The push to include an EU-level *obligation* too, rather than the already existing mere possibility, resulted from 2011 and 2014 rulings by the German Federal Supreme Court. That court stated twice that the German national rules to apply the electoral threshold in national German elections could not be used for the EP elections as the EU setting had different characteristics (German Federal Supreme Court, 2014a, 2014b). The German government, comprised at the time of the Christian Democratic Party (CDU/CSU) and the Social Democrats (SPD),

and represented in the EPP and S&D political groups, wanted to be able to apply the same electoral rules to different elections. It therefore lobbied the EP, that has the right of initiative on this file (Article 223 TFEU), for there to be an explicit EU legal basis for the obligation to use an electoral threshold too.

The initial EP proposal to amend the Electoral Act[4] suggested a compulsory threshold for member states with more than 26 EP seats. The final result in the negotiations was to apply the obligation only to single-constituency member states with more than 35 EP seats. The key phrase, Article 3(2), reads as follows:

> Member States in which the list system is used shall set a minimum threshold for the allocation of seats for constituencies which comprise more than 35 seats. This threshold shall not be lower than 2 per cent, and shall not exceed 5 per cent, of the valid votes cast in the constituency concerned, including a single-constituency Member State.[5]

Remarkably, after the re-allocation of EP seats due to Brexit, this wording meant it would only apply to *two* member states: Germany and Spain.[6] These are not, evidently, two member states that have been on the EU institutions radar in that governing parties have a systemic and problematic track-record in terms of upholding EU basic values. The choice to formulate the requirement in such a way that it only focuses on two member states is not explicated. Given the unanimity requirement in the Council, it is clearly a political compromise. The practical effect, nonetheless, would be that these threshold rules would make it harder for smaller parties from only these member states to enter the EU political arena (including, but *not* limited to political parties that would likely violate EU basic values once in power). Interestingly, one of three member states that did not ratify the rules in time to be applicable to the 2019 EP elections was … Germany[7] (European Parliament, 2020c; EPRS, 2021).

The EU legislator, and political parties in the EP on their own, have also acted in two ways to condition the terms of *participation* by MEPs in the EU political debate once elected. First by laying down rules in Regulation 1141/2014[8] about compliance with basic EU values by Europarties and European Political Foundations, adopted by the ordinary legislative procedure (i.e. Commission proposal, EP deciding by majority, Council by qualified majority). Second, through establishing rules about the formation of political groups laid down in the EPRoP (Brack &

Costa, 2018), which, according to Article 232 TFEU, are adopted and can be adapted by a simple majority of the EP. The applicable rules and procedures will be described in turn.

As a starting point, however, it is important to note first that Europarties and political groups, although governed by different rules, are interconnected in many respects (see Bressanelli; Johansson and Raunio in this volume). A Europarty is defined as a political alliance of member political parties from at least 25% of EU member states.[9] Its purpose is to develop a common European political agenda. A European political foundation is a think tank related to it. A Europarty is distinct from, yet linked to political groups in the EP. A political group, according to the EPRoP[10] is a group of at least 23 MEPs from at least 25% of EU member states that shares a political affinity (see Bressanelli; Ahrens and Kantola in this volume).[11] The purpose of such cooperation is access to political influence by dividing speaking times and files.

The intricate connection between Europarties and political groups[12] was explained by the Court of Justice too in a case which confirmed the legality of the need for a substantive political affiliation when forming a political group.[13] The large majority of MEPs belong to Europarties, which in turn belong to political groups in their entirety. Some political groups are home to more than one Europarty. It is possible, but not common, for MEPs not be part of a Europarty but still to be part of a political group (non-affiliated). It is equally possible, but again rare, to be part of a Europarty but not of a political group (non-aligned). Most of the directly elected MEPs perform their functions both within a Europarty and a political group.

As concerns Europarties and European political foundations, protection of EU values was strengthened by amending long existing (but never enforced) rules that lay down the requirement that EU-funding to Europarties can only be issued on the condition that in their programme and actions basic EU values (Article 2 TEU) are complied with (Grasso & Perrone, 2019; Katsaitis, 2020; Morijn, 2019a, 2019b; Norman, 2021; Norman & Wolfs, 2022; Saitto, 2017; Wolfs & Smulders, 2018). To this effect Regulation 1141/2014, recently further amended by Regulation 2018/673,[14] introduced a registration obligation for Europarties with a newly established, independent Authority for European Political Parties and European Political Foundations (APPF).

Next to a check on whether establishment criteria to set up a Europarty or European Political Foundation are fulfilled, part of the requirement is a

written pledge of allegiance to the basic EU values Article 2 TEU. Failure to register with the APPF means not receiving any EU-funding. In addition, a procedure was set up to verify continuing values compliance after the moment of registration. This can be triggered by the Commission, Council and the EP itself. It involves alerting the APPF, that in turn can ask the help of a special committee of independent experts to assess continued compliance with EU values (Morijn, 2019a).

The EP has adopted rules in the EPRoP on how to trigger this procedure. At the request of 25% of MEPs who represent at least three political groups, the EP can take a vote to trigger the EU values verification procedure under Regulation 1141/2014 (Rule 353(2)). Such a request should include substantial factual evidence showing that a Europarty does not comply with EU values in its actions (Rule 235(2)). The EP president will then forward it to be considered by the Constitutional Affairs Committee (AFCO) (EPRoP Annex VI). If AFCO orders an investigation into EU values violations by a Europarty to go ahead, the Conference of President appoints two members of the committee of eminent persons to help investigate the allegation of EU values violations further (Rule 235(5)). Once the APPF has investigated the requests and actually proposes for a Europarty to be deregistered, 25% of MEPs representing at least three political groups, can ask for the full EP to object to the APPF decisions (Rule 235(4)).

More recently the EP has also discussed, and apparently adapted various times, other wording in the EPRoP with a more indirect bearing on protection of EU basic values. In an effort to establish more stringent criteria for political groups, it included that MEPs can form themselves into groups according to their *political affinities* (Rule 33(1)). This seems to be innocuous, but has been a de facto attempt to make it more difficult for MEPs to benefit from being in a political group together. This was clearly intended to ensure that 'likely value violators' would be less likely to form a political group while not entirely agreeing on an agenda.

However, the most recent version of Rule 33(1) has a somewhat mysterious addition, even provided fully in italics (to stress it has the nature of an explanatory memorandum to the rule itself), that reads:

> *Parliament need not normally evaluate the political affinity of members of a group. In forming a group together under this Rule, the Members concerned accept by definition that they have political affinity. Only when this is denied*

*by the Members concerned is it necessary for Parliament to evaluate whether the group has been constituted in accordance with the Rules.*

This seems to mean that there is a default understanding that if MEPs from at least seven member states team up together as a political group, each of them is to be taken to agree they have a political affiliation in common with the other MEPs in the political group. At the same time, the subsequent Rule 33(5), setting out the necessary content of a political declaration that needs to be part of an application to be considered a political group sets out, again in an explanatory memorandum-like italics, that:

*The political declaration of a group shall set out the values that the group stands for and the main political objectives which its members intend to pursue together in the framework of the exercise of their mandate. The declaration shall describe the common political orientation of the group in a substantial, distinctive and genuine way.*

This seems to mean that only MEPs that agree on a substantial and distinctive political direction, and do so in a genuine way (i.e. not as a simple political marriage of convenience to fulfil requirements to get funding and access to power) can form a political group.

As these two passages are strongly at odds with one another, this wording has all the hallmarks of a compromise. Yet, read in combination, on balance this has likely made it harder for national delegations and MEPs on the fringes of the political spectrum, including those with political agendas that openly set out to violate EU values, to have a political deal to cooperate based purely on political expediency. One example that may test the meaning of this wording is how MEPs and national delegations that strongly disagree on how to deal with Russia, for example, could still be able to set up a new political group if they wanted to, Think of a combination of pro-Russian Hungarian Fidesz and Italian Lega and anti-Russian Polish Law and Justice (PiS). Would such a political affiliation, required to form a political group under the EPRoP, then be *substantial, distinctive and genuine*? Arguably not. But will other political groups decide to test the self-certification?

All in all, there is quite the robust set of instruments applicable or available to political groups to protect EU values at EU level, particularly in their own setting. But have these been used?

## The EP and Regulating Compliance with EU Values at EU Level: Practice

As previously noted, rules have been agreed or are already in force that regulate both access to the EP political arena itself, and—once such access is gained—conditions for participation in it. The relevant rules for access to the EP, those on the electoral threshold, have not yet been ratified by all member states (European Parliament, 2020c). But once they will be, they would be applicable to the 2024 EP elections if all member states do so.

Let us imagine for a moment that these rules will be ratified by the three remaining member states that have not yet done so. Even if it can then be debated whether this 'partial militant democracy' approach at EU level (see Müller, 2015; Wagrandl, 2018) should be judged as 'better something than nothing' or rather a failed attempt to regulate this aspect fully, the fact will be that the legislation introduces a de facto distinction in treatment between German/Spanish and non-German/Spanish politicians belonging to national parties running on a political agenda intended to roll back on EU basic values participating in EU-level elections. To the first category a compulsory threshold of 5% would apply, to all other political candidates from all other EU member states running for EP elections it would not. That is partial and incomplete, and not particularly tailored to the nature of the problem of fortifying against degradation of EU values. If indeed this is seen as a potentially suitable tool by the EP to act to protect EU values at EU level—i.e. by avoiding that MEPs belonging to certain political parties running on a political agenda to undermine EU values can too easily enter the EU political arena—perhaps there is time to develop something more comprehensive and less one-sided before the 2024 EP elections. The obvious solution is to introduce the 5% compulsory electoral threshold across the board, in all member states.

Also practice with regard to regulating participation in the EP political agenda once elected to ensure (continued) compliance with EU values has been quite different from the theoretical discussions underlying developments of legislation and the self-regulation in the form of the EPRoP. For although most attention in the negotiations on Regulation 1141/2014 was on how the values verification would work, this was not where the real effect has been so far. For what is remarkable is that the registration requirement *itself*, rather than the explicit EU values verifications, seems

to have served as a major hurdle. Many Europarties in existence (and funded) before the entry into force of the Regulation have not registered, thereby foregoing EU-funding. Those who have not registered are almost entirely in the (extreme) right-wing corner.

These implications of the rules laid down in Regulation 1141/2014 suggest that perhaps the requirement to be seen to endorse Article 2 TEU was itself judged politically too damaging. Or rather, that the paperwork involved was simply too intense. There is also a recent instance where a group of national political parties with a distinctly extreme right-wing flavour attempted to register but found the APPF rejecting its application for reason it did not comply with the formal criteria of being represented in at least one-fourth of member states.[15] In this sense, arguably, the rules have been helpful in addressing (potential) violation of EU basic values at EU level, albeit in unexpected and unintended ways. It is too early to tell whether adapted EPRoP rules that necessitate showing political affinity as MEPs to form a political group will have a similarly chilling effect on those MEPs belonging to national parties that operate a political agenda in tension with EU basic values.

As concerns Regulation 1141/2014 the lack of practice also shows highly problematic aspects. The EPRoP-requirement of support by at least three different political groups to trigger a verification request with Article 2 TEU values under Regulation 1141/2014 is proving counterproductive. It almost certainly serves to protect 'values violators' who sit inside mainstream Europarties and political groups. To make this more concrete: The EPP until recently harboured Hungarian Fidesz, and still contains national parties and MEPs elected through national parties with track records that are in strong tension with basic values, like the Bulgarian governing party. The S&D harbour the Maltese and Romanian governing parties, member states that were both scolded for Rule of Law related problems by majority adopted European Parliament (2014–2019) resolutions. Renew harbours the Czech ANO ruling party, which also faced majority backed European Parliament (2014–2019) scrutiny. Polish PiS sits in the right-wing European Conservatives and Reformists (ECR) group, where it cooperates with at least a few politicians who are not themselves to be categorised as potential values violators in quite the same ways but apparently have no problems to rub elbows, and base part of their own power and influence on closely cooperating with them.

Apparently, then, picking principle over power is not yet sufficiently politically attractive (or, put the other way: not acting on principle is

not yet sufficiently politically damaging). As *all* mainstream Europarties have some such illiberal forces, it is unlikely political groups that largely contain the very same political actors would act against other mainstream Europarties. This would certainly cause fingers to point the other way too, and why expose their own 'bad apples'? (Morijn & Butler, 2019).

In this way the EP, in implementing Regulation 1141/2014 that it was responsible for as a co-legislator, inadvertently but surely, may have actually *entrenched* the problem rather than effectively acting against the backsliding. It has come up with a solution that only hits at part of the 'values violators' in the EP without a real justification for why (indeed, some of the worst of bad apples are unaffected by this legislation). An EP majority may still act against Europarties fully consisting of values violating national parties, however, both under the Regulation and the EPRoP. This has not yet occurred, but may be on the horizon if Hungarian Fidesz, which recently 'voluntarily left' the EPP group, succeeds in forming a new Europarty after also leaving the EPP Europarty. If such a Europarty would be set up, and a concomitant political group as well, current possibilities under Regulation 1141/2014 and the EPRoP could make it hard for these cooperating national delegations in the EP to register, have access to funding and have access to political power inside the EP, even if they would be quite a few in number. In that scenario, EU-level enforcement of EU values could happen under the current rules.

What emerges therefore is that political groups have not acted under Regulation 1141/2014 and have not enforced the EPRoP with regard to political groups. None of the illiberal elements in each of the political groups and European political parties has so far been effectively confronted for violating EU basic values using the actual tools developed for it (even if Parliament has itself called these illiberal elements out in other settings and ways, e.g. Article 7 TEU procedures and majority adopted political resolutions). When Fidesz was forced out of the EPP, this was done politically as an EPP internal matter.

Worse, the Regulation as currently structured and the EPRoP as formulated actually continue to *nurture* sustaining liberal–illiberal cooperation within political actors inside the EP (Wolkenstein, 2022). This is because they each require participants from at least 25% of member states for reason of European representativeness and financially and politically reward such formation more than that they reward values compliance. In

other words: Parliament is setting itself up to fail in fulfilling its duties to protect EU basic values.

Taking a milder perspective, it could perhaps be argued that the current role that political groups have to nudge the EU-level approach to restricting access to and participation in the EU political arena is at heart correct but just a work in progress that needs to slowly come of age. On that reading over time, it could be further sharpened and ratcheted up because it is and remains desirable politically to incapacitate MEPs, political groups and Europarties aiming to act on an agenda directly at odds with EU basic values. After all: why finance political parties with a stated aim and track-record of acting on us versus them which will inevitably undermine what the EU is built on? This is a difficult debate about the desirability of a fleshing out militant democracy approach at EU level (Müller, 2015; Wagrandl, 2018). Reasonable observers may disagree. A (more) open debate about it is, however, desirable. Currently the EU legislator clearly makes these choices implicitly and in isolated ways. But practice shows too that it is largely divorced from rules in force.

In any event, given the above description, the EP urgently needs to act more consistently and seriously to protect EU basic values at EU level itself if its valuable value rhetoric, that is currently almost entirely outwardly focused, is to have any lasting effect or political credibility and resonance. It will, quite simply, need to look in the mirror and improve on what it sees there. Various methods and instruments can be considered in this respect. Yet it requires careful consideration on how to do/go about with this. In the following section, some ideas are provisionally formulated for this purpose.

## Some Proposals to Strengthen Protection of EU Values by Political Groups

In terms of substance, the combination of the regulatory solutions as laid down in the Regulation and the EPRoP currently has a very uneven effect on efforts to protect EU basic values at EU level—it hits some 'likely EU values violators', but very likely not others. This raises the political question: is it possible to re-design the rules of access to funding in such a way that it actually hits all political actors aiming to act contrary to Article 2 TEU values?

This seems to touch on more general choices concerning the regulation of the composition of Europarties and political groups, that represent

a balance between considerations about Europe-wide representativeness in the form of geographical distribution in political cooperation, on the one hand, and choices about what sort of cooperation is deemed worthy of EU financing in the first place, on the other. These are questions that are at the heart of what supranational democracy should be about. However, they evidently have a direct bearing on how EU basic values can be protected. It may therefore be worthwhile to reconsider these basic rules with a view to placing greater emphasis on protecting EU basic values. In terms of options would it, for example, help to limit the number of member states where MEPs should originate from (currently 25%) and/or lower the number of MEPs required to form a political group? This would need to be further investigated. Perhaps the Conference on the Future of Europe (European Commission, 2020a) would be a useful forum for that (see Johansson and Raunio in this volume).

One idea that seems particularly worthy of exploring in this context in any event is whether, rather than the behaviour of the Europarty or political group as a whole, the behaviour of just *one* member party or the behaviour of specific members of a political group should be what should be measured against protection of EU basic values. More concretely, should it not be sufficient to investigate the whole of a political group or Europarty if a part of it that is a sine qua non for the financing of the whole Europarty or political group shows signs of acting against EU basic values? This would reverse the logic from an intuition to deny, hide or harbour violations of EU basic values to confronting them straight away for it could endanger financing or access to power for the whole political cooperation.

Finally, a suggestion for improvement could be one of (legal) form. As shown above, regulation of the terms of participation in the political debate with a view to promoting protection of EU values at EU level is now achieved by a combination of a Regulation (adopted by the Union legislator, in accordance with the ordinary legislative procedure) and the EPRoP (adopted by the EP itself, by simple majority). Given the interconnectedness, it can be questioned whether the EP should be allowed to regulate *itself* which colleague MEPs have access to power by a simple majority, without all the safeguards and input of other perspectives that a normal legislative procedure would guarantee. Indeed, it may be better to integrate this aspect of the governance of political groups in Regulation 2014/1141, so as to synchronise the way in which compliance with EU

basic values is promoted in all the actions of EU-level parties, in whatever precise context—Europarties or political groups—they take place. It may be at the cost of freedom of MEPs. And MEPs will definitely claim this infringes upon their free mandate. But the overwhelming logic of all protection of EU values is that freedom, of national and EU political actors, needs to be limited to the extent necessary for liberal democracy more generally to be protected.

## Conclusion

EU institutions, including the EP, are trying to push back on the consequences of violating EU basic values. Yet the way in which they currently do so falls short. Although just very recently, we may be witnessing some change for the better, their efforts are so far ineffective at best when confronting problems where they typically receive most attention: the *national* level. However, as has been shown in this chapter, the full complexity of the challenge is often not even acknowledged. The member state political level is directly connected to the EU level too, and the protection of EU basic values has been put on the agenda at EU level too. It is therefore necessary to study the EP's efforts to protect EU basic values in comprehensive fashion.

On close inspection, the analysis must be that the EP's efforts to protect EU basic values at EU level, such as the introduction of an electoral threshold, Regulation 1141/2014 and its RoP, not only stand in marked contrast to the active stance taken with regard to the member state level, but are also partial and one-sided, partially entrenching or deepening problems, and mostly not implemented. This is highly paradoxical. And therefore, given the stakes, highly undesirable. Because disappointing in the mirror undermines political groups' own credibility and legitimacy.

## Notes

1. 446 votes in favour, 178 against, 41 abstentions.
2. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433 I, 22 December 2020, pp. 1–10.

3. This study was conducted at the request of Daniel Freund, an MEP from the Green Party. It shows how the Commission could immediately trigger this mechanism with regard to Hungary.
4. All documents relating to the file can be found at: http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu
5. Council Decision 2018/995 of 13 July amending the [1976 Electoral Act], OJ EU L178/1, 16 July 2018.
6. Poland (52), Italy (76) and France (79) have more seats in the post-Brexit EP, but have multiple constituencies, i.e. EP seats are divided locally rather than based on the vote over the whole territory.
7. Given the political situation in Germany at the time of initiation of the negotiations, the political party that may have been targeted for prevention from entering the political arena at the time of formulation of these rules was the right-wing party Alternative für Deutschland. However, due to political developments after that, that political party would likely have easily cleared any threshold (it won more than 10% in the 2019 EP elections). It could of course have hit any other small party not clearing the threshold, including political parties considered mainstream. For example, the small liberal party FDP (Freie Demokratische Partei), a past government party, scored barely over 5%.
8. Regulation (EU, Euratom) No. 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundation, OJ L 317, 4 November 2014, 1.
9. Regulation 1141/2014, Article 3(b).
10. The latest version of January 2021 can be found here: https://www.europarl.europa.eu/doceo/document/RULES-9-2021-01-18-TOC_EN.html.
11. Rule 33(2). The number of MEPs required to form a political group is somewhat subject to change. Until recently it was 25.
12. For a visualisation of the interconnection between Europarties and political groups as the situation stood in 2019, see Morijn (2019a), p. 623.
13. Court of First Instance, Joined cases T-222/99 *Jean-Claude Martinez and Charles de Gaulle v European Parliament*.
14. Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 amending [Regulation 1141/2014], OJ L 114I, 4 May 2018, 1.
15. For examples, see: http://www.appf.europa.eu/appf/en/applications/applications-not-approved.

## References

Brack, N., & Costa, O. (2018). Democracy in parliament vs. democracy through parliament? Defining the rules of the game in the European Parliament. *The Journal of Legislative Studies, 24*(1), 51–71.

European Commission. (2017). Reasoned proposal in accordance with Article 7(1) of the TEU regarding the rule of law in Poland, COM(2017)835, 20 December 2017.

European Commission. (2020a). Shaping the Conference on the Future of Europe, COM(2020a)27, 22 January 2020.

European Commission. (2020b). Communication 2020 Rule of Law Report, COM(2020)580, 30 September 2020.

European Commission. (2021a). Press release of 31 March 2021: Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures. Retrieved June 30, 2021 from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524

European Commission. (2021b). Communication 2021 Rule of Law Report, COM(2021)700, 20 July 2021.

European Court of Justice. (2021). Case C-650/18, Hungary v. European Parliament, 3 June 2021.

European Parliament. (2016). Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, Do. P8_TA(2016)0409.

European Parliament. (2018). Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, Doc. A8-0250/2018.

European Parliament. (2020a). Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, Doc. 2020/2513(RSP).

European Parliament. (2020b). Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Doc. 2020/2072(INI).

European Parliament. (2020c). Resolution of 26 November 2020 on stocktaking of European elections (2020/2088(INI), Document P9 TA(2020)0327.

European Parliament. (2021). Resolution on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092, 10 June 2021, Doc P9_TA(2021)0287.

European Parliamentary Research Service (EPRS). (2021). Statute and funding of European political parties under Regulation 1141/2014: Ex post evaluation. *Doc. ST, 2021*, 662646.

Grasso, G., & Perrone, R. (2019). European political parties and the respect for the values on which the European Union is founded between the European legislation and the national laws. *European Public Law, 25*(4), 665–688.

German Federal Supreme Court. (2014a). Decision 2BvE 2/13 etc., 26 February 2014.

German Federal Supreme Court. (2014b). Press release: Three-percent electoral threshold in the law governing European elections unconstitutional under the current legal and factual circumstances, 26 February 2014. Retrieved June 30, 2021 from https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-014.html

Katsaitis, A. (2020). Following the money: Exploring business financial contributions to the European Union's political parties. *Journal of Common Market Studies, 58*(5), 1342–1351.

Kelemen, R. D. (2020). The European Union's authoritarian equilibrium. *Journal of European Public Policy, 27*(3), 481–499.

Kelemen, R. D., Scheppele, K. L., & Morijn, J. (2021). The EU Commission has to cut funding to Hungary: The legal case. Report prepared for the Greens/EFA Group in the European Parliament, 7 July 2021. Retrieved June 30, 2021 from https://danielfreund.eu/rule-of-law-study/?lang=en

Morijn, J. (2018). Post-Lisbon civil rights protection by the EU's political institutions. In S. De Vries, H. De Waele, & M.-P. Granger (Eds.), *Civil rights and EU citizenship* (pp. 14–42). Edward Elgar.

Morijn, J. (2019a). Responding to populist politics in the EU: The case of Regulation 1141/2014 and beyond. *International Journal of Constitutional Law, 17*(2), 617–640.

Morijn, J. (2019b). Formation and funding of European Parliament political groups, political parties and political foundations v EU-level political rights. In A. Pahladsingh & R. Grimbergen (Eds.), *The Charter and the Court of Justice of the European Union: Notable cases 2016–2018* (pp. 257–272). Wolf Publishing.

Morijn, J., & Butler, I. (2019). Tracking anti-values MEPs: EP seat projections and Rule of Law protection. *Verfassungsblog*, Retrieved February 20, 2019 from https://verfassungsblog.de/tracking-anti-values-meps-ep-seat-projections-and-rule-of-law-protection/

Müller, J.-W. (2015). Should the EU protect democracy and the rule of law inside Member States? *European Law Journal, 21*(2), 141–160.

Norman, L. (2021). To democratize or to protect? How the response to anti-system parties reshapes the EU's transnational party system. *Journal of Common Market Studies, 59*(3), 721–737.

Norman, L., & Wolfs, W. (2022). Is the governance of Europe's transnational party system contributing to EU democracy? *Journal of Common Market Studies, 60*(2), 463–479.

Pech, L., & Scheppele, K.-L. (2017). Illiberalism within: Rule of law backsliding in the EU. *Cambridge Yearbook of European Legal Studies, 19*, 3–47.

Pech, L., Kochenov, D., & Platon S. (2019). The European Parliament sidelined—On the Council's distorted reading of Article 7(1) TEU. *Verfassungsblog*, 8 December 2019. Retrieved June 30, 2021 from https://verfassungsblog.de/the-european-parliament-sidelined/

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433 I, 22 December 2020, pp. 1–10.

Saitto, F. (2017). European political parties and European public space from the Maastricht Treaty to the Reg. No. 1141/2014. *ZBW Discussion Paper* No. 2/17, Europa-Kolleg Hamburg, Institute for European Integration, Hamburg.

Scheppele, K., Kochenov, D., & Grabowska-Moroz, B. (2020). EU values are law, after all—Enforcing EU values through systemic infringement actions by the European Commission and the member states of the European Union. *Yearbook of European Law, 39*, 3–121.

Wagrandl, U. (2018). Transnational militant democracy. *Global Constitutionalism, 7*(2), 143–172.

Wolfs, W., & Smulders, J. (2018). Party finance at the level of the European Union—Party finance reform to vitalize the EU's proto-party system? In J. Mendilow & E. Phélippeau (Eds.), *Handbook of political party funding* (pp. 182–202). Edward Elgar.

Wolkenstein, F. (2022). European political parties' complicity in democratic backsliding. *Global Constitutionalism, 11*(1), 55–82.

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