

## HOW TO ENSURE FREE AND FAIR ELECTIONS IN THE EU AND BEYOND: A NEED FOR RULE OF LAW, DEMOCRACY AND HUMAN RIGHTS PRINCIPLES TO STAND TOGETHER

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### **ABSTRACT**

*The objective of the paper is to examine the available mechanisms of the EU institutions to ensure a free and fair national and local election process in the EU Member States in the EU acceding countries. Over the past few decades, the EU institutions designed several mechanisms to protect the principle of the rule of law, that, however, have not been used in the election context. A need for securing free and fair elections has instead been recently emphasized through the European Democracy Action Plan adopted in 2020. Moreover, the right to political participation which contains explicit requirements regarding elections is also reflected in supranational human rights instruments, including the Charter of Fundamental Rights of the EU and the ECtHR, and as such justiciable before both supranational courts. The ECtHR case law in particular offers helpful insights into the level of protection of citizens voting rights.*

*For the acceding countries, elections come under the EU radar primarily through the annual Commissions reports, but could also become the subject of discussion earlier, depending on the EU institutions' views. In line with the 2020 Revised enlargement methodology, elections have been identified as one of the key sub-areas of the Fundamentals (Cluster 1), as part of the assessment of the Functioning of Democratic Institutions, without a clear link to the rule of law principle.*

*The authors argue in order to ensure fair and free elections, especially in countries which have lower level of democratic tradition, the rule of law principle and human rights protection also need to be put at the forefront and all three mentioned values treated as a “holy” trinity. The authors posit that the existing EU mechanisms are not sufficiently clear and mutually coherent to provide needed guarantees against the violation of free and fair election processes within both Member States and accession countries. Their identified shortcomings may lead to a possibility that the EU institutions “turn a blind eye” in particular cases, e.g. the Serbian 2023 elections, which are still awaiting the official EU Commission’s reaction. In order to address these challenges, the authors attempt to propose how to develop a more comprehensive legal and methodological framework for ensuring fair and free elections, especially for acceding countries, but also within the EU realm.*

**Keywords:** *democracy, EU, free and fair elections, human rights, rule of law, Serbia*

## 1. INTRODUCTION

There is a global autocracy crisis.<sup>1</sup> The World Justice Project (WJP) Rule of Law Index 2023 shows that authoritarian trends are present around the world, with over 6 billion people living in countries where the rule of law is declining.<sup>2</sup> However, the autocracy crisis is not just about the rule of law, it relates also to the fundamental value of democracy. In that light, the 2024 Varieties of Democracy project report (2024 VoD report) rightly links the dominant trend of growing autocratization and democracy in decline across the world.<sup>3</sup>

Freedom, fairness, and integrity of elections constitute the very core aspects of democracy. Unfortunately, the quality of elections also appears to be worsening across the world, along with a notable increase in the number of electoral autocracies worldwide.<sup>4</sup> The issue of the quality of electoral justice has gained particular prominence in 2024, with approximately 30 percent of all countries in the world holding national elections this year. Elections are considered “critical events”, as

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<sup>1</sup> Manners, I., *The External Dimensions of the European Union’s Autocracy Crisis*, in: Södersten, A.; Hercock, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 50.

<sup>2</sup> World Justice Project, *Rule of Law Index 2023*, p. 8 [https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf], Accessed 15 March 2024.

<sup>3</sup> V-Dem Institute, Department of Political Science of the University of Gothenburg, *Democracy Report 2024, Democracy Winning and Losing at the Ballot*, pp. 5-9, [https://v-dem.net/documents/44/v-dem\_dr2024\_highres.pdf], Accessed 27 March 2024.

<sup>4</sup> The Clean Elections Index aims to measure the extent to which elections are free and fair, the freedom, fairness, and integrity of elections. Based on its collected and processed data it appears that in 2023 the quality of elections is worsening in 23 countries and improving in 12. See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit.*, note 3, p. 15.

they influence the level of democracy across the world, and consequently their quality is currently an issue of key global relevance.<sup>5</sup>

The issue of free and fair elections is also a relevant topic for the European Union (EU), considering that it has been widely argued in the literature that the EU is facing an autocracy crisis.<sup>6</sup> Certain EU Member States and candidate countries have been labelled “electoral autocracies” or even “illiberal democracies”.<sup>7</sup> There is a well-documented concern based on the findings of the international observers of the elections performed in Member States that manipulations of elections through media capture occur in various EU Member States.<sup>8</sup> The 2023 Serbian elections may serve as a case of elections held in an EU candidate country allegedly marred by intimidations against opposition candidates and electoral fraud.<sup>9</sup>

Against this background, the authors aim to contribute to the ongoing academic discussion on the position of the right to free and fair elections within the triangular relationship of democracy, the rule of law, and respect for human rights, and critically examine the available EU mechanisms for ensuring the above right. For the purposes of this paper, the concept of free and fair elections in Member States and acceding countries is understood as being limited to local and national elections, while excluding elections for the European Parliament (EP) even though they are also governed by the EU *acquis*. The chosen approach can be justified by

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<sup>5</sup> More specifically, according to the 2024 V-Dem report, 60 countries will hold elections in 2024. Please note that V-Dem report does not take into account the election for the European Parliament, therefore the countries holding only those supranational elections are excluded. In addition, countries holding elections in 2024 make up almost a half of the world’s population (45%) since they include seven of the world’s ten most populous countries. See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit.*, note 3, pp. 39-41.

<sup>6</sup> Kelemen, R. D., *The European Union’s failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe’s unused tools*, *Journal of European Integration*, Vol. 45, No. 2, 2023, p. 223; Mannes, I., *op. cit.*, note 1, p. 49.

<sup>7</sup> Although the term “illiberal democracy” was introduced by scholar Fareed Zakaria, almost three decades ago, it attracted particular attraction two decades later when its essence was understood as providing a basis for decoupling democracy, as the majority rule, from human rights and the rule of law. See Zakaria, F. *The Rise of Illiberal Democracy*, *Foreign Affairs*, Vol. 76, No. 6, 1997, pp. 23-43; Müller, J. W., *Should the EU protect democracy and the rule of law inside Member States*, *European Law Journal*, Vol. 21, No. 2, 2015, p. 141; Weiler, J.H.H., *Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance*, in: von Bogdandy, A. *et al.* (eds.), *Defending Checks and Balances in EU Member States*, Springer, 2021, pp. 5-6.

<sup>8</sup> Meijers Committee, *Policy Brief on Free and Fair Elections in The Eu*, CM2302, March 2023, p. 1, [<https://www.commissie-meijers.nl/wp-content/uploads/2023/03/CM2302-policy-brief-on-free-and-fair-elections-in-the-EU.pdf>], Accessed 22 March 2024.

<sup>9</sup> See V-Dem Institute, Department of Political Science of the University of Gothenburg, *op. cit.*, note 3, p. 25.

the fact that the EP elections constitute *sui generis* elections held only in Member States, and as such, they cannot be subject to a systematic comparison between accession and post-accessing countries.

The paper is structured into four key parts. The authors will first examine the concept of free and fair elections through the prism of three EU foundational principles. In the second part, the authors analyze the limitations of the existing EU mechanisms to address violations of the election process in EU Member States and acceding countries with due regard to other existing supranational standards and mechanisms. The third part examines the case of the 2023 Serbian elections through the prism of the EU foundational principles and the EU accession mechanisms. In the concluding section of the paper, the authors attempt to propose ways to develop a more comprehensive legal and methodological framework for ensuring fair and free elections, especially for acceding countries. The authors will use a normative-legal method combined with a sociological method to analyze the implementation of the theoretical and legal concepts of the EU core values in practice.

## 2. CONCEPT OF FREE AND FAIR ELECTIONS EXAMINED THROUGH THE PRISM OF THREE EU FOUNDATIONAL VALUES

The values of democracy, human rights, and the rule of law have been understood as the “three complementary and indivisible principles” within various Council of Europe (CoE) and EU legal acts.<sup>10</sup> The intrinsic link between these principles has been illustratively explained by Weiler:

“Majority governance without the constraints of human rights and the rule of law is but a tyranny of the majority. Human rights without effective

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<sup>10</sup> That appears from the official CoE acts (i.e., preambles of the Statute of the Council of Europe and the ECHR) as well as from the case law of the European Court of Human Rights (ECtHR). Their interconnection is also evident in the EU *acquis* such as in Article 2 TEU, the Preamble of the Charter, and the Rule of Law Conditionality Regulation (recital 6). See more on this: Project Group of the Council of Europe: Human Rights and Genuine Democracy, Committee of Ministers ‘*Draft Declaration on Genuine Democracy*’, *Final Activity Report of Project Group on Human Rights and Genuine Democracy*, Strasbourg, 19 January 1996, p. 5; [<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f0da5>], Accessed 10 March 2024; Steiner, S., *The Rule of Law in the Jurisprudence of the European Court of Human Rights*, in: Schroeder, W. (ed.), *Strengthening the Rule of Law in Europe*, Hart Publishing, 2016, p. 140; Rosas, A., *Democracy and Human Rights: Some Conceptual Observations*, in: Södersten, A.; Hercock, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, Vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 80.

rule of law are but slogans. The rule of law outside a democracy is simply the most effective instrument of authoritarianism and worse.<sup>11</sup>

The EU has constitutionalized these values through the provisions of the Treaty on European Union (TEU) applicable to EU Member States and acceding countries.<sup>12</sup> The relevance of these three EU foundational values has increased in the meanwhile, especially since the recent Court of Justice of the European Union (CJEU) clarification that these values do not constitute a mere political statement and rather have a legally binding quality.<sup>13</sup> Given their significance, this paper will examine the conceptual contribution of these values to ensuring free and fair elections at the national and local levels in both Member States and acceding countries.

Firstly, the principle of democracy is key to ensuring free and fair elections. Democracy in its very essence is defined as a form of government in which the supreme power is vested in the citizens and is exercised by them through a system of representation usually involving periodically held free elections.<sup>14</sup> There is no dispute in the academic discussions that democracy, which has been identified as one of the foundational values by Article 2 TEU, is further operationalized in the 'Provisions on Democratic Principles', which are included in Title II TEU and two EU directives setting down the detailed rules for the exercise of electoral rights in the EP elections and municipal elections.<sup>15</sup>

Two main lines of reasoning have emerged in the academic literature with respect to the question of whether the interpretation of the TEU provisions (Articles 10, 11 and 12) giving concrete expression to the Article 2 value of democracy can result in imposing essential democratic requirements on Member States concerning the so-called domestic dimension of democracy, or they should be limited to the

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<sup>11</sup> Weiler, J.H.H., *op. cit.*, note 7, pp. 3-13.

<sup>12</sup> These are TEU provisions governing *inter alia* the EU values, Charter of Fundamental Rights, external actions, the conditions for membership, and the EU commitment to accede to the ECHR. See. Manners, I., *op. cit.*, note 1, p. 50.

<sup>13</sup> See Case C-157/21 *Poland v European Parliament and Council* [2022] EU:C:2022:98, par. 264.

<sup>14</sup> Oxford Dictionary of Law, Oxford University Press, 2019 as cited in: European Parliament: European Parliamentary Research Center, *EU mechanism on democracy, the rule of law and fundamental rights*, Annex 1 PE 579.328, April 2016, p. 12, [[https://www.europarl.europa.eu/EPRS/EPRS\\_STUD\\_579328\\_annexI\\_EU\\_Mechanism\\_MILIEU.pdf](https://www.europarl.europa.eu/EPRS/EPRS_STUD_579328_annexI_EU_Mechanism_MILIEU.pdf)], Accessed 15 March 2024; On different definitions of democracy within the EU framework see, *inter alia*, Schütze, R., *Democracy in Europe: Some Preliminary Thoughts*, European Law Review, Vol. 47, 2022, p. 24.

<sup>15</sup> Rosas, A., *op. cit.*, note 10, p. 81; Rosas, A.; Armati, L., *EU Constitutional Law: An Introduction*, Hart Publishing, Oxford, 3<sup>rd</sup> edition, 2018, pp. 124-140; Lungova, M., *Electoral Rights of Non-National EU Citizens with a Focus on Elections in Brno*, Masarykova Univerzita Faculty of Law, Brno, Master Thesis, 2020, pp. 33-36; Meijers Committee, *op. cit.*, note 8, p. 9.

“European” dimensions of democracy in Member States, such as elections to the European Parliament.<sup>16</sup>

While some authors claim that the EU does not have the explicit competence to regulate “national democracies”, including the national and local electoral systems and processes,<sup>17</sup> others posit that the EU influences the conditions in which these structures operate, and that it should also try to regulate more closely the electoral processes at the national and local level.<sup>18</sup> For the supporters of the first approach, it would require a lot of imagination to derive from these TEU provisions clear standards and concrete obligations for Member States regarding “national democracy”, including the fairness of national elections. In addition, they state that no parallelism can be made with the standards developed by the CJEU concerning judicial independence at the national level, since there is much more to draw on the EU law and the European Convention on Human Rights (ECHR) law, and the common traditions of Member States in the area of judicial independence than it is the case with the national election standards.<sup>19</sup> On the other hand, the supporters of the second line of reasoning claim that “national democracy” is not entirely out of the reach of the EU, and that the EU has recently become more attentive to democracy in the EU, considering that its protection and strengthening have been identified as one of the six priorities of the current EC.<sup>20</sup> Such increased interest and anticipated engagement of the EU give rise to the expectations of further extension of the EU competencies in the national democracy field.

The first steps in the anticipated extension of the EU competencies in the national democracy field have already started to emerge. In recent years, several new policy initiatives to promote democracy in the EU including the EC European Democ-

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<sup>16</sup> Claes, M., *Safeguarding the European Union's Values Beyond the Rule of Law*, in: Södersten, A.; Hercock, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, Vol. 10p, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, pp. 69-70; Geiger, R., *Article 10, Principles of Democracy*, in: Geiger, R.; Khan, D.E.; Kotzur, M. (eds.), *European Union Treaties: A Commentary*, 2015, C.H. Beck- Hart, pp. 65-70; Platon, S., *The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union*, in: N. Cambien; D.V. Kochenov; E. Muir (eds.), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges*, Brill Nijhoff, Leiden and Boston, 2020, pp. 1245-1264; Cotter, J., *To Everything There is a Season: Instrumentalizing Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council*, *European Law Review*, Vol. 47, No. 1, 2022, pp. 69-78; Spieker, L. D., *Beyond the Rule of Law How the Court of Justice can Protect Conditions for Democratic Change in the Member States*, in: Södersten, A., Hercock, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, Vol. 10p, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p 77.

<sup>17</sup> Geiger, R., *op. cit.*, note 16, pp. 65-70; Platon, S., *op. cit.*, note 16, pp. 364-386.

<sup>18</sup> Cotter, J., *op. cit.*, note 16., pp. 69-78; Spieker, L. D. *op. cit.*, note 16, p. 77.

<sup>19</sup> Geiger, R., *op. cit.*, note 16, pp. 65-70; Platon, S., *op. cit.*, note 16, pp. 364-386.

<sup>20</sup> Claes, M., *op. cit.*, note 16, pp. 69-70.

racY Action Plan and the EC Recommendation on Inclusive and Resilient Electoral Processes in the Union were adopted.<sup>21</sup> The European Democracy Action Plan (EDAP) is particularly relevant as it promotes free and fair elections and upholds the electoral rights of the EU citizens.<sup>22</sup> At the same time, the EDAP is not limited to the “European” dimension of democracy, and recognizes the national, regional and local dimensions of democracy as well.<sup>23</sup> It is expected that the EU hard law instruments, such as the relevant founding treaties provisions and the relevant secondary legislation pieces will be interpreted taking into account the recent and progressive soft law instruments. The aforementioned EC Recommendation on Inclusive and Resilient Electoral Processes in the Union is fairly important as it underlines the need for complying with the Code of Good Practice in electoral matters, adopted by the CoE Commission for Democracy through Law (Venice Commission), stipulating that the fundamental elements of national electoral law should not be open to amendments in the period of less than one year before an election.<sup>24</sup>

Furthermore, the Directive 94/80/EC as amended in 2013 on the right to vote and to stand as a candidate in municipal elections, which is applicable for the EU citizens, also shows an impact on the national democracy and election processes.<sup>25</sup> The Commission’s 2018 Report on the implementation of the Directive refers to Luxembourg as the only Member State that applied the derogation set out by the given Directive according to which the right to vote is given to mobile EU citizens who have had their legal domicile in Luxembourg and have resided there at least 5 years before registration. Such a derogation was permitted in compliance with the Directive since it provided that a Member State where the proportion of mobile EU citizens of voting age exceeds 20% of the total electorate may require both

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<sup>21</sup> The official name of the said document is: Communication from the Commission To The European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions on the *European Democracy Action Plan*, Brussels, 3.12.2020 COM(2020) 790 final, [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790>], Accessed 16 March 2024 (European Democracy Action Plan); EC Recommendation 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament. Brussels [7 March 2024] (EC’s Recommendation on Inclusive and Resilient Electoral Processes in the Union).

<sup>22</sup> Claes, M, *op. cit.*, note 16, p. 70.

<sup>23</sup> See European Democracy Action Plan, as cited in Rosas, A, *op. cit.*, note 10, p. 81.

<sup>24</sup> See EC’s Recommendation on Inclusive and Resilient Electoral Processes in the Union [2024], par. 10, p. 2.

<sup>25</sup> Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] (OJ L 368 p. 38), consolidated text (Directive 94/80/EC on the exercise of the right to vote and to stand as a candidate in municipal elections); Lungova, M., *op. cit.*, note 15, pp. 35-36.

the voters and candidates to set/have a minimum period of residence.<sup>26</sup> It seems that the possibility to derogate from the above Directive is well balanced and adequately reflects the national democracy needs.

The arguments in favor of the broader interpretation of the EU competences in the field of national and local elections do not stem solely from the mere text of the analyzed EU soft and hard law instruments. There is another wider conceptual argument for a broader interpretation of the TEU provisions on democracy and their application to the national and local elections processes in Member States. As von Bogdandy rightly explains: “democracy at the EU level and that at the national level are essentially intertwined” since Article 10 TEU which, *prima facie*, mainly governs democracy at the EU level, cannot function if democratic decision-making in Member States falters. Put differently, it does not make sense to hold a government democratically accountable at the European level if it governs autocratically at home.<sup>27</sup>

That link primarily appears from Article 10(2) TEU, which specifies that Member States must be “democratically accountable either to their national parliaments or to their citizens”. In other words, the democratic legitimacy at the EU level depends to a significant extent on the situation in Member States, since the Member State governments represented in the Council derive their legitimacy from the national level.<sup>28</sup>

Moreover, as further illustration of the interconnectivity between democracy at the EU and the national level, Spieker rightly observes that it is clear from the applicable *acquis* that elections to the European Parliament are to some extent regulated by national law, and as such occur within “each domestic public sphere”.<sup>29</sup>

Finally, some authors call for a more proactive role of the CJEU in protecting domestic democratic processes, including elections. This stance has a strong theoretical basis, although such an intervention might be understood by its opponents as

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<sup>26</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections, 25 January 2018, COM(2018) 44 final, p. 9, [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0044>], Accessed 19 March 2024.

<sup>27</sup> von Bogdandy, A., *The Emergence and Democratization of European Society, A Hegelian and Anti-Schmittian Approach*, Oxford University Press, Oxford, 2023, as cited in Spieker, L.D., *op. cit.*, note 16, p. 77.

<sup>28</sup> *Ibid.*

<sup>29</sup> Article 8 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5 as cited in: Spieker, L.D., *op. cit.*, note 16, p. 77.



“yet another power grab” by the CJEU.<sup>30</sup> There is a prevailing view in the literature that constitutional courts and the CJEU should play a crucial role in ensuring the functioning of democratic decision-making. This stance could be supported by the argument that constitutional courts already play such a role in many fragile democracies, and that if the CJEU also followed that approach, it would discharge a mandate assumed by many courts.<sup>31</sup> The proposed judicial activism on the side of CJEU can give benefits for the protection of national election processes not only through recourse to democracy as a value, but also by invoking other values such as the rule of law and respect for human rights.

Respect for human rights as one of EU foundational principles in the sense of Article 2 TEU should also be carefully taken into account when examining the concept of fair and free elections. Respect for human rights as a value can be achieved in ensuring free and fair (national and local) elections through the relevant human rights envisaged by the Charter of Fundamental Rights of the EU (Charter) and other applicable international human rights instruments. For instance, Article 11 of the Charter protecting freedom of expression seems fairly relevant for ensuring fair and free elections, since “the functioning of democratic debate and pluralist societies” can be protected through the given provision.<sup>32</sup> On the other hand, Article 39(2) of the Charter reads that members of the EP shall be elected by direct universal suffrage in a free and secret ballot. However, it is of limited importance as it relates solely to the election of members of the EP, while the same guarantees are not provided in Article 40 relating to municipal elections.<sup>33</sup>

It is noteworthy that even where a specific human right contained in the Charter seems applicable to the national and local elections, such as the case of freedom of expression, there is an inherent limitation to the overall scope of the Charter, as it applies at the national level only to the situations where the implementation of the EU law is at stake.<sup>34</sup> Hence, the Charter is not applicable to guarantees

<sup>30</sup> On the notion of “power grab” see: Kochenov, D., *De Facto Power Grab in Context*, XL Polish Yearbook of International Law, 2021, p. 197.

<sup>31</sup> Spieker, L. D., *op. cit.*, note 16, p. 75; Issacharoff, S., *Fragile democracies. Contested power in the era of constitutional courts*, Cambridge University Press, Cambridge, 2015, p. 241; On constitutional courts’ jurisprudence regarding e-voting and achievement of democracy as a value in Europe see Marković, V., *E-Voting – Trojan Horse or Deus ex Machina in Contemporary Democracies*, Strani pravni život, Vol. 67, No. 3, 2023, pp. 427-446.

<sup>32</sup> Claes, M., *op. cit.*, note 16, p. 70.

<sup>33</sup> Compare Articles 39 and 40 of the Charter of Fundamental Rights in the EU, [2012] OJ C 326.

<sup>34</sup> Von Bogdandy A. *et al.*, *A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine*, in: Von Bogdandy, A.; Sonnenfeld, P. (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing, Oxford, 2015, pp. 248–267.

against violations of free and fair elections as long as the implementation of the EU law is not involved as it is determined by Article 51 (1) of the Charter. This matter is further complicated by the fact that the EU fundamental rights could not be considered generally applicable in Member States since Article 52 (1) of the Charter adds limitations to the application of the Charter according to which the value of “respect for human rights” in the sense of Article 2 TEU can relate only to the “essence” of the fundamental rights as referred to in Article 52(1) of the Charter.<sup>35</sup> Such restrictive criteria cause delimitation problems and create legal insecurity, which could be overcome to some extent by interpreting the Article 2 TEU value of respect for human rights as a triggering rule in the sense of Article 51(1) Charter, meaning that whenever the violation of the Article 2 value is at stake, the Charter would become applicable at least as far as the “essence” of its fundamental rights is at stake.<sup>36</sup>

In that light, the CJEU has already extended its so-called combined approach beyond the connection between judicial independence and the rule of law as the Article 2 value, which was initially established in the *Portuguese Judges* case.<sup>37</sup> The CJEU started to apply such a combined approach as to interlink specific Charter rights such as freedom of expression with the “respect for human rights” as the Article 2 value. More specifically, the CJEU underlined in *La Quadrature du Net and Privacy International*, that “freedom of expression [...] is one of the values on which, under Article 2 TEU, the Union is founded.”<sup>38</sup> It remains to be seen whether the CJEU will continue to apply the so-called “Article 2-Charter nexus”<sup>39</sup> to give a “concrete expression” to the respect for human rights as the Article 2 value through the Charter provisions for the sake of ensuring the fairness of local and national elections.

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<sup>35</sup> Spieker, L. D., *op. cit.*, note 16, p. 76.

<sup>36</sup> The recourse to Article 2 as a triggering rule mostly reflects a proposal brought by Jakab. See Jakab, A., Kirchmair, L., *Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Re-interpretation of Article 51 of the EU Charter of Fundamental Rights*, Cambridge Yearbook of European Legal Studies, Vol. 24, 2022, p. 239.

<sup>37</sup> In the *Portuguese Judges* case, the link between the EU version of the rule of law and the concrete requirement of effective judicial protection in Article 10 became clear. See Reichel, J., *The Rule of Law in the European Composite Administration: in Need of a New Approach?*, in: Södersten, A.; Hercocck, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, vol. 10p, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, pp. 84-85; Cotter, J., *op. cit.*, note, p. 10; Case C-64/16 *Associação Sindical dos Juizes Portugueses (ASJP)* [2018] EU:C:2018:117.

<sup>38</sup> More specifically, the CJEU, for instance, underlined in *La Quadrature du Net and Privacy International*, that “freedom of expression [...] is one of the values on which, under Article 2 TEU, the EU is founded”. See Joined Cases C-511/18, 512/18, and 520/18 *La Quadrature du Net* [2020] EU:C:2020:791, par. 114.

<sup>39</sup> This term “Article 2-Charter nexus” was coined by Spiker, see Spiker, L.D, *op. cit.*, note p. 76.

When it comes to the concretization of the foundational value of respect for human rights from the standpoint of ensuring free and fair elections through other applicable international human rights instruments, the right to free elections at the national level, which is guaranteed by Article 3 of the first Protocol to the ECHR, is of key importance.<sup>40</sup> Even though it is limited in scope to the election of the “legislature”, and as such does not afford an unlimited right, the protection of the right to free elections under the ECHR seems broader compared to the protection under the Charter as it concerns national elections and is not limited to supranational elections. In principle, the scope of Article 3 of Protocol No. 1 does not cover local elections, whether municipal or regional. However, recently, in the case *Miniscalco v Italy*,<sup>41</sup> the ECtHR deviated from such an approach and found that Article 3 of Protocol No. 1 applied to local elections to provincial councils in Italy. That stance can be explained by the fact that the Italian regions were granted very broad legislative powers by the 2001 constitutional reform, and thus the provincial councils were to be considered as part of the “legislature”.<sup>42</sup>

It has been claimed in the literature that the accomplishment of the EU’s accession to the ECHR should be given the top priority to bridge the gap that may discredit the relevance of the ECHR law within the EU.<sup>43</sup> However, even in its absence, the authority of the ECHR law, including its right to free elections within the EU, is undisputable since Article 6 TEU explicitly refers to the ECHR when determining the content of the guaranteed EU fundamental rights.

Other supranational and universal human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also envisage the right to political participation. As the TEU only refers to the ECHR and not to other universal human rights instruments when specifying the content of the fundamental rights in the sense of its Article 6, the

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<sup>40</sup> More precisely Article 3 of the first Protocol to the ECHR states “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” See Press Unit of the European Court of Human Rights, *Factsheet – Right to vote*, 2023, p. 1, [[www.echr.coe.int/documents/d/echr/fs\\_vote\\_eng](https://www.echr.coe.int/documents/d/echr/fs_vote_eng)], Accessed 21 March 2024.

<sup>41</sup> *Judgment, Miniscalco v. Italy*, Application No. 55093/13, 19 June 2021; See also the case *Decision, Repetto Visentini v Italy*, 2021, Application No. 42081/10, 9 March 2021.

<sup>42</sup> Registry of the European Court of Human Rights, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections*, updated on 31 August 2022, p. 5. [[https://www.echr.coe.int/documents/d/echr/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG](https://www.echr.coe.int/documents/d/echr/Guide_Art_3_Protocol_1_ENG)], Accessed 19 March 2024.

<sup>43</sup> On the background and developments on the EU accession to the ECHR see: Ćorić, V., Knežević Bojović, A., *Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights Before European Supranational Courts, Strani pravni život*, No. 4, 2020, pp. 27-40; Rosas, A, *op. cit.*, note 10, p. 83.

aforementioned universal human rights instruments will not be further examined here.

Finally, the substance of the rule of law concept as one of the foundational values in the sense of Article 2 TEU has remained fluid for a rather long time. Neither the documents related to the Rule of Law Mechanism nor those related to the EU accession provide a closer definition or a more precise understanding of what the rule of law implies.<sup>44</sup> However, in 2020, the EU has defined the rule of law in the Rule of Law Conditionality Regulation. The Regulation envisages that the rule of law includes: the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. It appears from this definition that the free and fair election guarantees constitute its indispensable part since its organization and performance mainly require a prohibition of arbitrariness of the executive powers and effective judicial protection, including access to justice concerning electoral fraud and abuse in place, which are in the very essence of the concept of the rule of law.<sup>45</sup>

The extensive ECtHR case law also proves the relevance of the rule of law concept for election processes as it shows that independent and impartial judicial control is needed for ensuring fair and free elections at the national level. Yet, the ECtHR grants states through its jurisprudence a fairly wide margin of appreciation concerning various issues on national electoral systems.<sup>46</sup>

### **3. EU MECHANISMS FOR ENSURING FREE AND FAIR ELECTIONS IN THE ACCESSION AND POST-ACCESSION CONTEXT**

The analysis of the position of the concept of free and fair elections within the triangular relationship of democracy, the rule of law, and the fundamental rights

<sup>44</sup> Knežević Bojović, A.; Ćorić, V., *Challenges of Rule of Law Conditionality in EU Accession*, Bratislava Law Review, Vol. 7, No. 1, p. 52.

<sup>45</sup> Article 2 of the 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, [2-2-] *OJ L 433I*, pp. 1–10 (Rule of Law Conditionality Regulation).

<sup>46</sup> Rosas, A., *Democracy and the Rule of Law: Odd Bedfellows or Siamese Twins?*, in Rosas, A.; Raitio, J., Pohjankoski, P. (eds.), *The Rule of Law's Anatomy in the EU: Foundations and Protections*, Hart Publishing 2023, p. 11.

shows their interconnection and interdependence.<sup>47</sup> Those three EU foundational principles are rightly described as dynamic concepts seemingly relatively unclear boundaries, further resulting in their partial overlaps.<sup>48</sup> The blurring boundaries and the existing overlaps between these three Article 2 values are further reflected in the insufficiently integrated and unsystematic approach taken by the EU when it comes to developing their monitoring mechanisms for ensuring free and fair election processes in the EU and beyond.<sup>49</sup>

The authors have identified three main problems hindering the consistency and effectiveness of the existing EU mechanisms for ensuring free and fair national and local elections, which will be examined below. These include: lack of comprehensive mechanisms protecting the three Article 2 values, lack of a more coherent approach between the external and internal monitoring mechanisms for upholding and promoting the free and fair electoral process, and insufficiently effective compliance mechanisms.

### **3.1. Lack of comprehensive EU mechanisms for upholding and promoting three Article 2 values**

The EU has not developed any specific mechanisms for ensuring the right to free and fair elections in Member States and candidate countries. While the EP elections have not been internationally observed since 2009, both the EP and the European Commission (EC) have failed to routinely observe and evaluate the national parliamentary and presidential elections in both Member States and candidate countries, even though their outcomes can have serious implications for the functioning of the EU, as elaborated earlier in the paper. Such a notable lack of state-specific observation missions conducted by the EU to both national and local elections in Member States and in acceding countries is in stark contrast with the EU's longstanding tradition of sending election observation missions to third

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<sup>47</sup> The term “triangular relationship” in the sense of determining the relationship between the three Article 2 values was introduced in the study published by the EP in 2013. See European Parliament, Directorate General for Internal Policies, *The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism*, 2013, p. 59. However, there is some unnecessary debate among the stakeholders in practice regarding which of these three values should be considered as the most important. See European Parliament: European Parliamentary Research Center, *op. cit.*, note 14, pp. 22-23.

<sup>48</sup> European Parliament: European Parliamentary Research Center, *op. cit.*, note 14, p. 22; Rosas, A., *op. cit.*, note 46, pp. 16–19.

<sup>49</sup> Pech, L., *The EU as a global rule of law promoter: the consistency and effectiveness challenges*, *Asia Europe Journal*, Vol. 14, No. 1, 2016, pp. 7-24; Democracy Reporting International, *Proposals for new tools to protect EU values: an overview*, Briefing Paper 43, November 2013.

countries outside Europe.<sup>50</sup> In addition, Member States and candidate countries do not have an explicit obligation to provide the EU with detailed inputs and contributions relating to their respective election processes, as will be explained later in the paper. In the absence of the EU election observation missions and specific mechanisms for monitoring compliance with the free and fair election standards, other EU activities toward ensuring free and fair elections mostly fall under the ambit of the specific existing mechanisms for monitoring compliance with one of the three Article 2 values.

Although these existing broader scope mechanisms have appeared to be useful, they can be considered as “fragmented in nature”, since neither of them is focused on protecting all the three above Article 2 values.<sup>51</sup> For instance, the Rule of Law Framework applicable to EU Member States has been widely criticized for not explicitly covering democracy and the respect for fundamental rights as the two fundamental values enshrined in Article 2 TEU.<sup>52</sup> In a similar vein, the EC Annual Report on the Application of the Charter of Fundamental Rights, which monitors progress in the areas where the EU has powers to act, shows how the Charter fundamental rights have been taken into account in actual cases without giving due regard to the concretization of the other EU foundational values such as the rule of law and democracy. As a counterargument to such a lack of comprehensiveness of this approach, it has been argued that all these values are implicitly addressed by the given mechanisms as there can be no democracy and respect for fundamental rights without the respect for the rule of law and *vice versa*.<sup>53</sup>

Over the last decade, the EP has repeatedly come up with proposals for setting up the most comprehensive EU mechanism to monitor democracy, the rule of law, and the fundamental rights, the so-called DRF Pact. It aims to ensure particularly that the obligation to align to the Copenhagen criteria remains after

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<sup>50</sup> Over the last 20 years, the EU conducted more than 75 Election Observation Missions (EU EOMs) in around 75 countries outside of Europe. See Election Observation and Democracy Support, *The EU observation methodology*, [https://www.eods.eu/methodology], Accessed 27 March 2024; Meijers Committee, *op. cit.*, note 8, p. 2.

<sup>51</sup> In 't Veld, Sophie, *Input into the Commission's reflection process on the Rule of Law*, EU Monitor, 4 June 2019, [https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkz2lwi2grzs?ctx=vg09llzikht8], Accessed 15 March 2024.

<sup>52</sup> See European Commission, *European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report*, [https://commission.europa.eu/document/download/72ff8a72-5d69-49ba-8cb6-4300859ee175\_en?filename=63\_1\_52674\_rol\_methodology\_en.pdf], Accessed 27 March 2024. European Parliament: European Parliamentary Research Center, *op. cit.*, note 14, p. 61.

<sup>53</sup> European Parliament: European Parliamentary Research Center, *op. cit.*, note 14, pp. 22-61.

the accession to be maintained by each Member State.<sup>54</sup> Unfortunately, it has been considered a missed opportunity since the EC had refused to engage in setting it up. If it had been adopted, the proposed comprehensive mechanism would have been beneficial for the protection of the Article 2 values, as it was envisaged to incorporate and synthesize a wide variety of the already existing mechanisms, including some external instruments of the CoE.<sup>55</sup>

It is indisputable that the procedures under Article 7 are sufficiently comprehensive as they are triggered by the infringement or by the existence of a clear risk of such an infringement of any of the values guaranteed by Article 2 TEU, thus extending to the rule of law, respect for human rights, and democracy. Nevertheless, their comprehensive character is undermined by the fact that they can be applied only when there is a serious and persistent breach or a clear risk of such a breach by a Member State. The threshold is additionally strengthened as the European Council shall act by unanimity to determine “the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.” Those two requirements read together make it very hard to imagine Member States achieving unanimity to sanction less violent forms of backsliding of the Article 2 values such as any reported election irregularities.<sup>56</sup>

### **3.2. Lack of a coherent approach between existing external and internal monitoring mechanisms for upholding and promoting the free and fair electoral process**

In legal scholarly literature, it has been frequently argued that there is one additional layer of fragmentation in the EU internal and external policies bringing about a traditional disconnect between pre-accession and post-accession moni-

<sup>54</sup> European Parliament, *Resolution on the need for a comprehensive Democracy, Rule of Law and Fundamental Rights mechanism*, 14 November 2018, PE624.231 [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0456\_EN.html?redirect] Accessed 15 March 2024; European Parliament, *Report on the situation of fundamental rights in the European Union*, 2013/2078(INI), paragraph 5, [https://www.europarl.europa.eu/doceo/document/A-7-2014-0051\_EN.html], Accessed 15 March 2024; European Parliament, LIBE, Legislative Train, *Establishing a EU Mechanism on Democracy, the Rule Of Law and Fundamental Rights*, March 2024, [https://www.europarl.europa.eu/legislative-train/carriage/eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights/report?sid=7901], Accessed 27 March 2024.

<sup>55</sup> In'tvelt, Sophie, *Further strengthening the Rule of Law within the Union: Input into the Commission's reflection process on the Rule of Law*, June 4 2019, p. 2, [https://commission.europa.eu/system/files/2019-07/stakeholder\_contribution\_on\_rule\_of\_law\_-\_sophie\_in\_t\_veld\_mep.pdf], Accessed 27 March 2024.

<sup>56</sup> Kelemen, D., *Article 7's Place in the EU Rule of Law Toolkit*, in: Södersten, A.; Hercocock, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, vol. 1op, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 14.

toring, including in the area of elections.<sup>57</sup> To illustrate the lack of a convergent approach in accession and post-accession monitoring mechanisms relating to the electoral processes, a closer look will be taken into the methodologies and structure of the annual reports on candidate countries and the rule of law reports on Member States. The rule of law reports are taken as an example due to their underlying methodological approach, which is highly resemblant to that used *vis-à-vis* acceding countries.<sup>58</sup> However, within the “fundamentals of the accession process” cluster of the annual report on candidate countries, the examination of the rule of law is still closely linked to the fundamental rights, while within the same cluster, the functioning of democratic institutions and public administration reform are examined separately. Conversely, the rule of law reports on Member States include four pillars: justice systems, anti-corruption framework, media pluralism, and media freedom, and other institutional issues related to checks and balances.<sup>59</sup> The inclusion of all these pillars into the structure of the rule of law reports unambiguously shows that the EU’s internal concept of the rule of law is viewed as a broader notion compared to the one accepted by the annual reports as it covers democracy as well. However, electoral matters do not have a clear position within the structure of the rule of law reports on Member States, and consequently they occasionally appear within different parts of the report. On the other hand, in the annual reports, electoral matters are structured as a separate subchapter, within the functioning of democratic institutions and public administration reform.

Furthermore, the EC in its annual reports adopts a more comprehensive approach concerning elections in relation to the position it takes in the rule of law reports. In the annual reports, the EC goes beyond the general democratic standards when reporting on elections (i.e., it examines the competitiveness, fairness, and inclusiveness of the elections, election administration procedures, constitutional and legal framework, and the electoral reform), and includes other issues such as gender balance, minority representation, one-party dominance and campaign financing. Unlike its stance towards candidate countries in the annual reports, in the rule of law reports, the EC only sporadically and scarcely examines any election-related

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<sup>57</sup> See Knežević Bojović, A.; Ćorić, V., *op. cit.*, note 44, pp. 41-62; Editorial Comments, *Fundamental rights and EU membership: Do as I say, not as I do!*, Common Market Law Review, Vol. 49, No. 2, 2012, pp. 481–488.

<sup>58</sup> The new accession methodology aims to further streamline the accession processes through opting for thematic clusters instead of individual chapters, and consequently the annual reports take on a rather different format, due to the introduction of such new structure.

<sup>59</sup> While no accession-related documents refer to the relevant methodology based on which the attainment of the three foundational values is achieved in candidate countries, the internal Rule of Law reporting methodology is announced every year. See Knežević Bojović, A.; Ćorić, V., *op. cit.*, note 44, p. 53.



matters. Both the reporting processes have been criticized for not paying sufficient attention to electoral matters, although there is a notable disproportion in favor of the annual reports on candidate countries in terms of covering a much broader set of election issues.<sup>60</sup> In that context, in one of its recent commentaries on the European legislation, the Meijers Committee recommends that the EC should systematically review and use, where appropriate, the findings of supranational election observation missions to Member States in its annual rule of law reports. This recommendation is valuable as it seeks to address the problem of an insufficient set of election-related findings that are contained in the rule of law report on Member States. However, there is a need to follow the same respective recommendation in upgrading the structure and content of the annual reports on candidate countries and strengthening their mutual coherence.

Finally, the common limitation of both the reporting mechanisms is that they lack internal consistency<sup>61</sup> of reporting on relevant electoral issues, meaning that, in the perspective, a set of relevant standards has to be consistently assessed to the same extent across all country reports to provide more meaningful cross-country comparisons and eventually enable a more effective monitoring, which is currently not the case.<sup>62</sup>

### 3.3. Insufficiently Effective Compliance Mechanisms

There is a large number of supranational actors, including the EU, which have been formally mandated to supervise electoral processes in the European countries, such as the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the Parliamentary Assembly of the CoE (PACE), the Venice Commission, and the Congress of Local and Regional Authorities. Despite their extensive

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<sup>60</sup> Subotić, S.; Pavković, M., *Identifying Inconsistencies in the 2022 European Commission's Country Reports for WB6*, Policy brief, CEP Belgrade, 2023, pp. 3-11., [<https://cep.org.rs/en/publications/identifying-deficiencies-in-the-2022-european-commission-s-annual-reports-for-wb6/>], Accessed 27 March 2024.

<sup>61</sup> The internal consistency should be understood as a synonym for internal coherence. According to the prevailing view in the academic literature, the lack of “inner coherence” in terms of Article 2 TEU is attributable to divisions among Member States concerning the importance of those values, which further undermine the EU’s ability to develop a common understanding and interpretation of the given values. See Zweers, W. *et al.*, *The EU as a promoter of democracy or ‘stabilitocracy’ in the Western Balkans? A report by The Clingendael Institute and the Think for Europe Network (TEN)* The Hague: Clingendael Institute, 2022, p. 10, [<https://www.clingendael.org/sites/default/files/2022-02/the-eu-as-a-promoter-of-democracy-or-stabilitocracy.pdf>], Accessed 20 March 2024. For the purpose of this paper, the term “internal coherence” relates also to different understanding and application of foundational values across acceding countries.

<sup>62</sup> Subotić, S.; Pavković, M., *op. cit.*, note 60, p. 10.

and to some extent synergetic involvement in election observation, it has been rightly argued in the literature that supranational election processes monitoring is mostly grounded on voluntariness and lack of effective compliance mechanisms.<sup>63</sup> There are several reasons that substantiate these claims.

Firstly, all the above supranational actors use their mechanisms for compliance with the international free and fair election standards, and by doing so, they bring added value to the existing EU mechanisms. For instance, the ODIHR reports on election observation missions are based on a better and more comprehensive methodology than the EC evaluation reports. As is the case with ODIHR, observation missions deployed by PACE also relate to parliamentary and presidential elections. They are of particular importance considering that PACE is the only supranational actor that provides a mandatory compliance mechanism attaching consequences to a state's lack of cooperation, such as challenging the credentials of the concerned national delegation, freezing the application procedure in respect of candidate countries, or the withdrawal of special guest status or partner for democracy status. In so doing, PACE was the first institution to introduce democratic conditionality by linking membership of the CoE to the respect for the free and fair election principles. On the other hand, local elections are the only sort of elections where an observation mission cannot be imposed without the consent of the respective country. Instead, local elections can be observed only by ODIHR or Congress of Local and Regional Authorities, since any Member State or candidate country may refuse to invite an observation mission for local elections without bearing any consequences of such a decision.<sup>64</sup>

Secondly, although both the European supranational courts play an important role in protecting the individual right to free and fair elections, so far they have failed to address more general democratic backsliding tendencies, including governmental manipulations of the electoral process and other forms of electoral injustice.<sup>65</sup> Their limited contribution is to some extent attributable to the fact that the electoral rights protected by the Charter and the ECHR respectively are limited in scope, as elaborated earlier in the paper. Thus far, the CJEU case law has not developed extensive jurisprudence on sensitive electoral issues, such as manipulation of election campaigns or media capture, and the franchise as to determine the individuals entitled to vote within the limits of the EU law. Most of the CJEU case law on the franchise relates to the rights for the EU citizens to participate in the

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<sup>63</sup> Meijers Committee, *op. cit.*, note 8, pp. 5-12.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, pp. 1-2.

EP elections,<sup>66</sup> while the ECtHR case law on the matter of voting rights for non-residents leaves a wide margin of appreciation to states in this area.<sup>67</sup>

The EC's key supervisory activities in the electoral matters relate to the implementation of the EU directives setting down the detailed rules for the exercise of electoral rights in the EP elections in the Member States of residence and municipal elections, respectively.<sup>68</sup> Directive 94/80/EC as amended in 2013 is of particular importance as it sets down the detailed rules for the exercise of electoral rights in municipal and local elections. The EC's supervisory activity is triggered primarily by citizens' complaints and the obligation to report periodically.<sup>69</sup> This supervisory mechanism cannot be considered of crucial importance mainly due to quite long reporting intervals, and therefore it cannot be considered an effective compliance mechanism.

It is also important to mention the Rule of Law Conditionality Regulation as a pertinent piece of the hard *acquis* aimed to address the rule of law backsliding. It imposes measures for the protection of the EU budget in the case where breaches of the principles of the rule of law in a Member State affect or seriously risks affecting sound financial management. In other words, the above Regulation envisages clear mandatory consequences for the rule of law violations. The employed definition of the rule of law in the sense of the above Regulation implicitly gives room for the application of the Regulation to breaches of the electoral processes since it includes *inter alia* prohibition of arbitrariness of the executive powers, and effective judicial protection, including access to justice.<sup>70</sup>

Finally, Article 7 TEU, which specifies the procedure for the protection of the Article 2 values, seems at first sight as the most powerful mechanism for the protection of all the three values.<sup>71</sup> While the comprehensive character of its procedures

<sup>66</sup> On the CJEU jurisprudence in this area see e.g.: Platon S., *op. cit.*, note 16, pp. 364-386.

<sup>67</sup> On the ECtHR case law in this field see Registry of the European Court of Human Rights, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections*, *op. cit.*, note 42, pp. 11-12.

<sup>68</sup> In 2020, the European Commission declared its intention to further amend these two directives as to upgrade the electoral rights of mobile EU citizens. These are: Directive 94/80/EC on the exercise of the right to vote and to stand as a candidate in municipal elections, and 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 [1993] (OJ L 329, p. 34) as amended by Council Directive 2013/1/EU of 20 December 2012 (Directive 93/109/EC on the exercise of the right to vote and stand as a candidate in elections to the European Parliament).

<sup>69</sup> Meijers Committee, *op. cit.*, note 8, pp. 9-10.

<sup>70</sup> Rule of Law Conditionality Regulation, Article 2.

<sup>71</sup> Kelemen, D., *op. cit.*, note 56, p. 13.

is promising, Sadurski rightly points out that Article 7 is impotent “by design”. In that context, he explains that the effectiveness and applicability of the Article 7 procedures turned out to be rather limited due to requiring a unanimity threshold for the imposition of sanctions and diminishing the roles of the EU and CJEU.<sup>72</sup> Until recently, the EU refrained from invoking Article 7 TEU against Member States. In recent years, a notable change has taken place with Article 7 activation concerning Poland and Hungary.<sup>73</sup> However, so far it has not been applied in the specific context of the principle of free and fair elections.

It has been rightly pointed out in the literature that strengthening the effectiveness of the EU mechanisms for ensuring the electoral process requires prior amendments to the Rule of Law Conditionality Regulation. Those amendments should envisage that any finding by the observation missions that national elections in a Member State were overall unfair or unfree constitutes a breach of the rule of law principles in the sense of the said Regulation. In a similar vein, such a finding on the unfairness of elections should be regarded as a clear risk of a serious breach by a Member State of the EU values in the meaning of Article 7 TEU triggering the above mechanism.<sup>74</sup>

Overall, creating a stronger link between the EU mechanisms and other presented supranational mechanisms would improve the effective protection of the right to free and fair elections. In that light, the EU should apply the PACE principle of democratic conditionality by consistently linking EU membership with a more strict respect for the principles of free and fair elections. To that end, the findings of election observation missions conducted in individual Member States or acceding countries should be particularly reviewed and used in the annual rule of law reports on Member States and in the annual reports on acceding countries, respectively.<sup>75</sup> In particular, effective electoral justice would be more achieved if any refusal of a Member State or accession country to invite supranational observation missions for national or local elections had consequences at the EU level either through available accession or post-accession instruments.

So far, the sanctioning mechanisms have been used only sparsely in the accession process, although they can be applied in the case of violation of election processes

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<sup>72</sup> Sadurski, W., *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, Columbia Journal of European Law, Vol. 16, No. 3, 2010, pp. 385-426.

<sup>73</sup> Nergelius, J., *The Rule of Law Crisis in 2023: More of the Same or Changes to Come?*, in: Södersten, A.; Hercocq, E. (eds.), *The Rule of Law in the EU: Crisis and Solutions*, vol. 10p, SIEPS (Swedish Institute of European Policy Studies), Stockholm, 2023, p. 91.

<sup>74</sup> Meijers Committee, *op. cit.*, note 8, p. 13.

<sup>75</sup> *Ibid.*

as long as they constitute a serious and persistent breach of the values on which the EU is founded by the respective candidate country or where there is significant democratic backsliding.<sup>76</sup>

#### 4. CASE OF THE 2023 SERBIAN ELECTIONS EXAMINED THROUGH THE PRISM OF THREE EU FOUNDATIONAL VALUES

On 17 December 2023, Serbia held early parliamentary, provincial, and partial local elections, monitored by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), which deployed a special Election Observation Mission for this purpose.<sup>77</sup> Before getting into the assessment of the extent to which the approach taken by the Resolution complies with the three Article 2 foundational values and contributes to strengthening the effectiveness of the mechanisms aimed at ensuring the right to free and fair elections, the authors will first provide a bird's eye on the background and challenges that occurred during the 2023 Serbian election process.

Early elections were held for the members of the National Assembly of the Republic of Serbia, the Assembly of the Autonomous Province of Vojvodina, members of the Belgrade City Assembly, and around one third of local administrations of cities and municipalities (66 out of 174).<sup>78</sup> Local elections for other cities and municipalities were postponed tentatively for June 2024. The decision to hold local elections at different times was unprecedented in previous election practice, and was not followed by any explanations,<sup>79</sup> but at the time did not raise any serious concerns with the public.

One of the key contentious issues of the December 2023 elections was the untransparent unified voter register. Although the voter lists were made available for online scrutiny and were available at local authority premises, the data provided

<sup>76</sup> See Knežević Bojović, A.; Ćorić, V., *op. cit.*, note 44, p. 50.

<sup>77</sup> The role of the Election Observation Mission was to assess the compliance of the electoral process with the OSCE and international instruments and standards for carrying out democratic elections. See OSCE Office for Democratic Institutions and Human Rights, Republic of Serbia, Early Parliamentary Elections 17 December 2023, ODIHR Election Observation Mission Final Report, Warsaw, 28 February 2024 [[https://www.osce.org/files/f/documents/1/3/563505\\_0.pdf](https://www.osce.org/files/f/documents/1/3/563505_0.pdf)], Accessed 27 March 2024.

<sup>78</sup> CRTA, Preliminary Statement on ORGANIZED VOTER MIGRATION ahead of the December 17, 2023 Elections in Serbia, Belgrade, December 22, 2023, [<https://crt.rs/wp-content/uploads/files/12/CRTA-Preliminary-Statement-on-Organized-Voter-Migration-2023.pdf>], Accessed 27 March 2024.

<sup>79</sup> CRTA, *op. cit.*, note 78, p. 2.

was inadequate for a comprehensive verification.<sup>80</sup> This was due to the fact that the lists contained only the voters' names in alphabetical order, without any further identification as required by the Law on Unified Voter Register.<sup>81</sup> Before the elections, the ODIHR had recommended on several occasions an audit of the United Voters Register, but this recommendation was not implemented by the Serbian Government, on the grounds of legal restrictions related to personal data privacy.<sup>82</sup>

Several days after the elections, a local civil society organization, Center for Transparency, Research and Accountability (CRTA), issued a report raising serious concerns about the election irregularities, relating primarily to organized voter migration.<sup>83</sup> The report presents qualitative and quantitative evidence of alleged organized voter migration before the 17 December elections, pointing to the irregularities in the Unified Voters Register, fraud voter transportation and supervised voting practices.<sup>84</sup>

Organized voter migration constitutes a serious breach of the citizens' electoral will and allegedly involves two key actors – the Ministry of the Interior, responsible for the issuance of permanent residence permits to citizens, as a basis for entrance into the voter register, and the Ministry of Public Administration and Local Self-Government (MPALSG), responsible for maintaining the Unified Voter Register. Although the new Law on Election of Members of Parliament, adopted in 2022,<sup>85</sup> no longer prescribes permanent residence as a prerequisite for the right to vote, the Law on Unified Voter Register has retained a requirement of permanent address for inclusion in the Register.<sup>86</sup> In September 2023, the MPALSG and the Ministry of the Interior issued a clarification that voters without a permanent address

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<sup>80</sup> OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 2.

<sup>81</sup> Article 7 of the Law on Unified Voter Register (Zakon o jedinstvenom biračkom spisku), Official Gazette of the Republic of Serbia, Nos. 104/2009 and 99/2011.

<sup>82</sup> OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77 p. 2; See more on the Serbian legal framework governing personal data privacy: Law on Personal Data Protection (Zakon o zaštiti podataka o ličnosti), Official Gazette of the Republic of Serbia, No. 87/2018; On the limitations to access to information due to personal data privacy in Serbia see: Knežević Bojović, A.; Reljanović, M., *Free Access to Information An Analysis of the Regulatory Frameworks in selected Western Balkan countries*, Institute of Comparative Law, 2022, pp. 49-55.

<sup>83</sup> Allegations of organized voter migrations have featured in several neighboring countries: Hungary, North Macedonia and Montenegro in order to secure safe votes and electoral victories, see: CRTA, *op. cit.*, note 78, p. 5.

<sup>84</sup> OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 10.

<sup>85</sup> Law on Election of Members of Parliament (Zakon o izboru narodnih poslanika), Official Gazette of the Republic of Serbia, No. 14/2022.

<sup>86</sup> OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 10.

would remain included in the voter list based on their last registered address,<sup>87</sup> while previously these voters had been automatically removed from the list.

The analysis presented in the CRTA report showed instances of suspected unlawful changes in the Unified Voter Register before the December elections where voters from other Serbian municipalities in which elections were not held were given permanent addresses in the City of Belgrade, thus providing them a basis to be entered into the Unified Voting Register and vote in Belgrade to secure the victory of the ruling party at the Belgrade City Assembly elections. The analysis further identified the polling stations in Belgrade with a high probability of being a destination for organized voter migration.<sup>88</sup> Additional evidence was also collected to demonstrate alleged organized voter migrations from other regions in Serbia and from abroad. CRTA observers also recorded several logistical centers from where the voters were allegedly sent to the polling stations across Belgrade.<sup>89</sup>

In the aftermath of the elections, a number of appeals were brought to the Republican Electoral Committee and the Local Electoral Committees, and only a small number of those were adopted. The voting results were annulled in 35 polling stations, where a repeat voting took place on 30 December.<sup>90</sup> The Administrative Court received 47 appeals, dismissed 20 of them on procedural grounds, and upheld the Republican Electoral Committee's decisions in all cases reviewed on merit.<sup>91</sup> The Belgrade City Electoral Commission rejected all the opposition petitions.<sup>92</sup>

Two requests for a partial or full annulment of the elections were also brought to the Constitutional Court, which has the legal authority to determine whether irregularities significantly influenced the election result and can annul the electoral process partially or in whole.<sup>93</sup> However, the Constitutional Court is not bound to resolve electoral disputes by a specific deadline, which affects significantly the

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<sup>87</sup> *Ibid.*

<sup>88</sup> CRTA, *op. cit.*, note 78, pp. 7-14.

<sup>89</sup> *Ibid.*

<sup>90</sup> Most of the appeals brought to the Republican Election Committee were rejected, frequently as a result of the majority of REC members present abstaining from voting on the appeal. OSCE Office for Democratic Institutions and Human Rights, *op. cit.*, note 77, p. 27.

<sup>91</sup> *Ibid.* 28.

<sup>92</sup> Battle for Belgrade came to the Constitutional Court, [<https://www.slobodnaevropa.org/a/beograd-izbori-ustavni-sud-srbija/32782357.html>], Accessed 2 April 2024.

<sup>93</sup> Article 77 of the Law on Constitutional Court, Official Gazette of the RS, Nos. 109/2007, 99/2011, 18/2013 – Constitutional Court Decision, 103/2015, 40/2015 – separate law, 10/2023 and 92/2023.

timeliness of this remedy. The Constitutional court has not made a ruling upon the request for election annulment by the time of writing of this paper, April 2024.

In February 2024, the EP adopted its Resolution on the situation in Serbia following the elections,<sup>94</sup> acknowledging serious allegations of the Serbian authorities' involvement in electoral manipulations and abuse, and confirming that some of the election irregularities represented potential breaches of the Serbian law and Constitution.

It appears that the EP Resolution on the situation in Serbia following the elections mostly reflects the integrated approach according to which all three Article 2 values should shape the concept of free and fair elections in acceding countries. Specifically, it explicitly acknowledges the contribution of democracy and the rule of law as the EU foundational values to ensuring free and fair elections in the Republic of Serbia, while it is more implicit when it comes to explicitly recognizing the relevance of the third foundational value of respect for human rights. Although the above Resolution did not go explicitly into details about classifying specific breaches as stemming from one of the three foundational values, such a classification appears to exist. Specifically, the excessive use of the executive power, shown by the alleged changes of the permanent residence and the Unified Voters List and the inactivity of the Constitutional Court and the Serbian authorities to investigate, prosecute, and bring to justice those responsible for the criminal offenses during the elections fall under the rule of law realm. Furthermore, the practice of amending fundamental elements of the national electoral law less than one year before an election may serve as a clear example of a violation of the value of democracy. Finally, the EP Resolution on the situation in Serbia following the elections notes that the election irregularities constitute potential breaches of the Serbian law and Constitution, further clarifying that the violations of the right to vote, other electoral rights, and media freedoms should be addressed by the Serbian authorities. These violations fall under the realm of the respect for human rights as a foundational value.<sup>95</sup>

Although it implicitly highlights all these three values, the European Parliament Resolution does not appear to be an adequate instrument to specify the violated pieces of the EU *acquis* and international acts along with the available supra-

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<sup>94</sup> European Parliament, Joint Motion for a Resolution pursuant to Rule 132(2) and (4) of the Rules of Procedure replacing the following motions: B9-0106/2024 (The Left) B9-0108/2024 (S&D) B9-0131/2024 (Verts/ALE) B9-0132/2024 (PPE) B9-0133/2024 (Renew) B9-0134/2024 (ECR) on the situation in Serbia following the elections (2024/2521(RSP)) [7.2.2024] (EP Resolution on the situation in Serbia following the elections).

<sup>95</sup> EP Resolution on the situation in Serbia following the elections, paras. 6 and 10.



national human rights mechanisms for addressing the alleged violations of the election-related rights and freedoms. It would have been more appropriate if the Commission took an official stance on the identified breaches of the election rules and implemented more concrete measures related to Serbia's EU accession process.

Nevertheless, the authors believe that the above Resolution may contribute to the effective protection of the right to free and fair elections in Serbia as it proposes sanctions for the Serbian authorities if they fail to fully implement the recommendations of the OSCE/ODIHR and Venice Commission, reiterating the EP's position that the accession negotiations with Serbia should not advance in that case. In a similar vein, the EP "calls for the suspension of EU funding on the basis of severe breaches of the rule of law in connection with Serbia's elections" if the Serbian authorities are unwilling to implement the key election recommendations or if the findings of this investigation indicate that they were directly involved in the voter fraud. The EP in its Resolution further calls on the EC and the Council to "apply strict conditionality" under the given circumstances, which should contribute to the improvement of the overall effectiveness of election oversight mechanisms and embedding of the democratic conditionality in the EU's rule of law framework by linking the respect for the free and fair election principles with full benefits stemming from the candidate status.<sup>96</sup>

Finally, the wording of the EP Resolution reflects the approach supported in this paper according to which the effective protection of the right to free and fair elections could be achieved by creating a stronger link between the EU mechanisms and other available supranational mechanisms. In that light, the EP in its Resolution calls on the Serbian authorities to fully and substantially cooperate with the ODIHR, and urges them to implement the key recommendations of the OSCE/ODIHR and the Venice Commission.<sup>97</sup> Such a synergetic involvement of different supranational actors in the election observation process would bring added value to the existing EU mechanisms, as it would take advantage of the benefits of different mechanisms.

However, all the efforts by the EP in its Resolution to overcome the voluntary character of the election-related mechanisms and strengthen the effective protection of electoral rights did not have tangible results. Specifically, two months after the adoption of the EP Resolution on the situation in Serbia following the elections, the envisaged initiative to send an expert mission to Serbia to assess the situation as regards the recent elections and post-election developments has still

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<sup>96</sup> EP Resolution on the situation in Serbia following the elections, para. 27.

<sup>97</sup> EP Resolution on the situation in Serbia following the elections, para. 13.

not been launched by the EC, even though the EP had urged them to take such a step.<sup>98</sup>

## 5. CONCLUSION

Elections are considered “critical events” as they strongly influence the level of democracy across the world. In the light of the ongoing autocracy crisis among EU Member States and candidate countries, which appears to be spreading across the planet, the concept of free and fair elections is gaining new momentum. Consequently, the authors have analyzed in depth the election fairness concept from the standpoint of the EU regulatory framework and the examples of the alleged election irregularities reported in some EU Member States, and most recently in Serbia as a candidate country.

Although elections are considered critical for the quality of democracy as a value, this analysis shows that ensuring fair and free elections, especially in countries with lower levels of democratic tradition, requires that the three EU fundamental values are put at the forefront and that they are all treated as a “holy trinity”. In other words, in order to achieve its full potential, the concept of free and fair elections needs to be placed in the center of the triangular relationship of democracy, the rule of law, and the fundamental rights to maintain an intrinsic link and interdependence with all the three Article 2 values. The EP Resolution on the situation in Serbia following the elections mostly reflects such an integrated approach according to which all the three Article 2 TEU values should contribute to the full achievement of the concept of free and fair elections in acceding countries.

The analysis has further proven that the principle of democracy as one of the Article 2 foundational values is key for ensuring free and fair elections in both EU Member States and candidate countries. The authors are therefore of the view that the principle of democracy and its operationalization by the relevant TEU provisions and EU directives governing elections do have an influence on “national democracies”, including the national and local electoral systems and processes showing that so-called domestic dimension of democracy, and that it is not entirely out of the reach of the EU. The detailed analysis of the EU treaties makes it clear that the outcomes of national elections have a direct bearing on the composition and functioning of the EU institutions, hence free and fair elections should be taken very seriously by the EU. Moreover, the EU has recently become more attentive to democracy in the EU, considering that its protection and strengthening have been identified as one of the six priorities of the current EC.

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<sup>98</sup> EP Resolution on the situation in Serbia following the elections, para. 5.

The above discussion has also demonstrated that respect for human rights as one of the EU foundational principles in the sense of Article 2 TEU is also intrinsically linked with the concept of fair and free elections. Respect for human rights in the election context should be achieved through relevant human rights provisions envisaged by the Charter and other applicable international human rights instruments. However, the scope of the Charter is limited, and consequently, even where the specific human right contained in the Charter seems applicable to the national and local elections, such as in the case of freedom of expression, there is an inherent limitation to the overall scope of the Charter, as it applies at the national level only to situations where the implementation of the EU law is at stake.

Therefore, the interpretation of the Charter rights has to be in line with the restrictive scope of application of the Charter when examining whether free and fair elections have been ensured in the specific Member State. Such a restrictive criterion can be to some extent overcome by interpreting the Article 2 TEU value of respect for human rights as a triggering rule in the sense of Article 51(1) Charter, meaning that whenever the violation of the Article 2 value is at stake, the Charter might become applicable. The CJEU started to apply its so-called combined approach to interlink the specific Charter rights, such as freedom of expression, with the “respect for human rights” as the Article 2 value. So far, the given “Article 2-Charter nexus” approach has not been applied in the context of national or local election irregularities. However, the second limitation of the Charter is that it merely envisages the right to vote and to stand as a candidate at municipal elections without providing within the same article any further guarantees against the violation of the right to free and fair municipal elections.

The protection of free and fair elections under the ECHR is also limited in scope, as it applies only to the election of the “legislature” and as such does not afford protection in case of local elections, whether municipal or regional. Given the alleged election irregularities reported regarding the 2023 Serbian local elections, it is noteworthy that the ECtHR has recently deviated from such an approach having found that Article 3 of Protocol No. 1 of the ECHR applies also to local elections to provincial councils in Italy. However, that stance can be applied only to situations where the concerned regional or local authority has been granted very broad legislative powers and as such can be qualified as part of the “legislature”.

The discussion above has also demonstrated that the Article 2 rule of law foundational value is inseparably linked to the right of free and fair elections, and has identified a need for more consistency in its application in both EU and candidate states to ensure its coherent and effective protection. The definition of the rule of law offered by the Rule of Law Conditionality Regulation seems useful as

it includes the prohibition of arbitrariness of the executive powers and effective judicial protection, which are pertinent for the full achievement of the right of free and fair elections. However, as the above Regulation is not applicable to candidate countries, some challenges remain, such as that the rule of law reports on Member States and the annual reports on candidate countries provide incoherent criteria for reporting and monitoring election fairness. Furthermore, the common limitation of both the reporting mechanisms is that they lack consistent internal reporting on relevant electoral issues, meaning that a set of relevant standards is not consistently assessed to the same extent across all country reports. This methodological approach needs to be changed to facilitate more precise and meaningful cross-country comparisons and eventually enable a more effective monitoring, which is currently not the case.

It appears there is a need for reducing fragmentation and developing comprehensive EU monitoring mechanisms for ensuring free and fair election processes in the EU and beyond. As argued earlier in this paper, the EU has not developed its tailor-made mechanisms for ensuring the right to free and fair elections in Member States and candidate countries. In the absence of EU-specific mechanisms for monitoring compliance with the free and fair election standards in Member States and candidate countries, the EU relies on the findings of election observation missions of other supranational organizations, without having the capacity to fully endorse them. All the supranational election monitoring activities in Europe are mostly grounded on voluntariness and lack of effective compliance mechanisms, with the exception of the PACE election oversight. Therefore, the synergetic involvement of different supranational actors in the election observation process is commendable as it will bring added value to the existing EU mechanisms, since it will take advantage of the benefits of different mechanisms, such as advanced ODIHR methodology.

One of the possible ways forward in this respect would be to amend the Rule of Law Conditionality Regulation to include the documented breaches of the election process rules as a basis for imposing sanctions for the rule of law violations. These amendments should envisage that any finding by observation missions that national elections in a Member State were overall unfair or unfree constitutes a breach of the principles of the rule of law in the sense of the Rule of Law Conditionality Regulation. In a similar vein, such a finding on the unfairness of elections should be regarded as a clear risk of a serious breach by a Member State of the EU values in the meaning of Article 7 TEU triggering the above mechanism.<sup>99</sup>

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<sup>99</sup> Meijers Committee, *op. cit.*, note 8, p. 13.

Overall, creating a stronger link between the EU mechanisms and other presented supranational mechanisms would improve the effective protection of the right to free and fair elections. To that end, the findings of election observation missions conducted in Member States or accession countries by some of the existing supranational mechanisms should be particularly reviewed and used in the annual rule of law report on Member States and annual reports on acceding countries, respectively. In particular, effective electoral justice would be further achieved if any refusal by a Member State or accession country to invite supranational observation missions for national or local elections had consequences at the EU level either through available accession or post-accession instruments. In addition, further efforts are expected to bridge the existing gaps in the area of local election oversight. For the time being, local elections in Member States and candidate countries are the only sort of elections where an observation mission cannot be imposed without the consent of the respective country. Finally, the wording of the EP Resolution on the situation in Serbia following the elections reflects the view advocated in this paper according to which the effective protection of the right to free and fair elections would be achieved if a stronger link was created between the EU mechanisms and other available supranational mechanisms.

There also appears to be a need for introducing effective and coherent sanctioning mechanisms for violations of the election process in the EU and beyond. So far, sanctioning mechanisms were only sparsely used in the accession process, even though they should be applied in the case of violation of election processes as long as they constitute a serious and persistent breach of the values on which the EU is founded by the respective candidate country, or where there is significant democratic backsliding. In such cases, the EU should more intensively recourse to provisions stipulating that the negotiations can be put on hold in certain areas, or overall suspended, or that the scope and intensity of EU funding downward can be adjusted. The recently adopted EP Resolution on the situation in Serbia following the elections contributes to the effective protection of the right to free and fair elections in acceding countries as it introduces a sort of sanctions for the Serbian authorities should they fail to fully implement the recommendations of the OSCE/ODIHR and Venice Commission reiterating the EP's position that accession negotiations with Serbia, in that case, should not advance.<sup>100</sup> Moreover, the EP in its Resolution calls for "the suspension of EU funding on the basis of severe breaches of the rule of law in connection with Serbia's elections" and calls on the EC and the Council to "apply strict conditionality" if Serbian authorities are unwilling to implement key election recommendations or if the findings of this investigation indicate that they were directly involved in the voter fraud.

<sup>100</sup> EP Resolution on the situation in Serbia following the elections, para. 27.

However, all the efforts made by the EP in its Resolution to overcome the mostly voluntary character of election-related mechanisms and to strengthen the effective protection of electoral rights, so far have not brought about tangible results, as two months after the adoption of the EP Resolution, the envisaged initiative to send an expert mission to Serbia to assess the situation as regards the recent elections and post-election developments has still not been launched by the EC.

In a nutshell, the authors believe that the improvement of the overall effectiveness of election oversight requires the EU to follow more strongly the PACE principle of democratic conditionality by linking the EU membership to the respect of the principle of free and fair elections. Following such an approach by the EU would particularly strengthen the position of democratic conditionality in the EU's rule of law framework. In addition, further efforts are needed to bridge the existing gaps and overcome the limitations in the area of mechanisms for monitoring compliance of national and local elections with the supranational standards identified in this paper.

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