

Hungary's Lesson for Europe

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On April 5, 2022, Commission President von der Leyen [announced](#) in the European Parliament that the Commission will trigger the rule of law conditionality mechanism against Hungary. It did so nearly two months after the Court of Justice [upheld](#) the regulation introducing the mechanism, and a mere two days after Hungarians had gone to the polls in an election, which the Organization for Security and Co-operation in Europe (OSCE) considered in a [statement](#) to have been 'undermined by the absence of a level playing field.'

In this post, I zoom in on what I perceive to be a disturbing discordance in the European Commission's response to the Hungarian elections. On the one hand, the Commission triggers the rule of law mechanism. On the other, it refuses to comment on the fairness of the Hungarian elections. This contradicts the fact that, just like the rule of law, democracy is also part of Europe's constitutional identity. But what does democracy require from Member States? Hungary's elections make clear that the value of democracy, as given expression in Article 10 TEU, should be justiciable.

Caught in the middle between budget conditionality and non-interference

By triggering the rule of law conditionality mechanism – a mechanism that ties the distribution of EU funds to respect for the rule of law, the Commission shows a commitment towards protecting the rule of law within the Member States, but it seems less concerned about protecting democracy within the Member States. From one perspective, the hesitancy to 'interfere' in national democratic processes is understandable. The EU is a Union with limited competences. It does not have competence in the field of, say, electoral law. Nor does it have any powers to safeguard the freedom of the press, which, as the OSCE emphasizes, is a prerequisite for fair elections. *Ergo*, the EU has no (legal) reason to 'interfere' in national elections. This would, moreover, be entirely in keeping with the principle of non-interference, which remains one of international law's foundational principles.

From another perspective, however, the hesitancy is inconsistent and ultimately unacceptable. Both the rule of law and democracy rank among the EU's founding values as expressed in Article 2 of the Treaty on European Union (TEU). Article 10 of the same Treaty gives further expression to the value of democracy by affirming that '[t]he functioning of the Union shall be founded on representative democracy.' This representative democracy, the TEU makes clear, has two components: direct representation in the European Parliament, and indirect representation in the two Councils. A bit further down in the same chapter of the TEU, Article 19(1) provides that the Court of Justice shall ensure that in the application and interpretation of

the Treaties the law is observed, and that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

Developing a European constitutional identity

Starting with its [judgment](#) in the *Portuguese Judges* case, the Court of Justice has built an impressive body of case law in which it puts further flesh on the bones of what the ‘rule of law’ in the European Union requires of its Member States. Poland has experienced this as the Member State on the receiving end of most of the Court’s subsequent rulings. Perhaps most importantly, the Court made clear that Article 19(1) TEU applies also outside of the scope of EU law as meant in Article 51 of the Charter and as interpreted by the Court of Justice in its *Åkerberg Fransson* [case law](#). This is the case since the rule of law is a prerequisite for the EU to function. Absent the rule of law – and in particular absent judicial independence – the preliminary ruling mechanism cannot operate, and the uniform interpretation and application of EU law cannot be ensured.

In so doing, and as the Court itself acknowledges in the abovementioned [ruling](#) on the conditionality mechanism (para. 127), the ECJ doctrinally sketched the contours of a ‘European constitutional identity.’ This identity cannot be compromised by the Member States. Of course, Member States remain free to exercise their own competences, including when it comes to how they set up their judicial systems. However, this freedom is theirs to exercise only *in so far as* Member States respect this ‘constitutional identity.’ (As Armin von Bogdandy and his co-authors have [called](#) for, the ECJ has indeed introduced its own, reverse, *Solange* doctrine.)

Democracy as part of Europe’s constitutional identity

The ECJ’s willingness to construct a European constitutional identity in the face of assaults on the rule of law in a number of Member States is of course commendable. It does raise the question, though, of why this constitutional identity should consist only of one of the values listed in Article 2 TEU (the rule of law), and not the others (such as democracy). I don’t want to take a stance here on whether, say, human dignity, should also become a justiciable value. I do want to make the case, however, as others (see [here](#) and [here](#)) have done earlier, that the value of democracy should be justiciable; that it should be considered part of the EU’s constitutional identity; and that it should, as such, be enforceable at all times, including through judicial means, and even in circumstances that ordinarily would be considered to fall outside of the scope of EU law.

The reasoning is straightforward and, in my view, persuasive. Just as the rule of law is given further expression in Article 19(1) TEU, democracy is given further expression in Article 10 TEU. Just like Article 19(1) TEU imposes obligations on Member States – namely, to ensure that there be ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’, Article 10(2) second paragraph TEU requires that the representatives of the Member States in the two

Councils be ‘democratically accountable to their national parliaments, or to their citizens.’ Article 10(3) TEU builds on this by providing that ‘[e]very citizen shall have the right to participate in the democratic life of the Union.’ This language is as precise and unconditional as the language we find in Article 19 TEU: Article 10(3) TEU introduces a right, held by every citizen, to participate in the democratic life of the Union. This democratic life, Article 10(2) TEU makes clear, takes place in two arenas: the Parliament and the two Councils. If such participation is to be meaningful, the democratic process through which the representatives of the Member States in the two Councils are selected must meet what we can call ‘democracy standards.’

An unnamed EU official told the [Financial Times](#) after the elections in Hungary last weekend that ‘[t]here was a pause before the elections, consistent with our principle of not interfering in national democratic processes. But now we will look more attentively and we will not hesitate to act or trigger conditionality mechanisms, if conditions are met.’ When read against the backdrop of the abovementioned constitutional landscape, this statement by the anonymous EU official becomes difficult to accept. Indeed, refusing to ‘interfere’ with the purpose of enforcing democracy standards could be considered an act of constitutional abdication that in itself runs counter the Commission’s constitutional responsibility set out in Article 14(1) TEU to ensure the application of the Treaties.

What it means to be democratic

In a recent [paper](#), John Cotter argues that a failure to comply with what I call ‘democracy standards’ should lead to exclusion of undemocratic representatives from the two Councils. I wouldn’t go as far. However, it is a long road from ‘non-interference in national democratic processes’ to excluding representatives from Council meetings. It would already be incredibly helpful for the Court of Justice – if offered the opportunity – to declare Article 10 TEU justiciable. Several scenarios can be imagined. The Commission, or, why not, other Member States such as the [Netherlands](#) who think of the EU in terms of a community of values, can bring an infringement action. Or a Hungarian court faced with the question of whether Hungary’s electoral law complies with Article 10 TEU can ask a question to the Court of Justice. Both of these scenarios would offer the Court the opportunity to begin to articulate the contours of pan-European minimum democracy standards. This should not be an impossible task: just as the rule of law comes in different local varieties, the concept does have a normative core (judicial independence). The same holds true for democracy.

This is not the right place to articulate such a ‘thin’ theory of democracy. (Although I would suggest that the ‘wild gerrymandering’ which according to the [Economist](#) has taken place in Hungary would be as good a place as any to start such an investigation.) What I do want to emphasize is that it is part and parcel of the Court of Justice’s responsibility to ‘say what the law is’ to give further expression to what those democracy standards that Article 10 TEU envisages exactly require of Member States. One important way of achieving what German lawyers would call a *Konkretisierung* of the value of democracy in the EU is the development of a body

of case law that puts further doctrinal flesh on the bones of an otherwise abstract constitutional value.

Whether or not the resulting rulings of the CJEU will restore democracy in Hungary is – while of course incredibly important to the nearly ten million Hungarians – perhaps not the main point. What matters even more in the long run is that we develop minimum standards of democracy in the EU to offer all Member States a better understanding of what is required of them as voluntary members of this community of values we call the EU.

