How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary

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In the past decade, the discourse on the enforcement of the values of the EU has been focused primarily on the rule of law. The other important core value in Article 2 TEU, democracy has had a marginal role in academic discourse and basically no weight in the actions of EU institutions. What is more, the main argument defending the deviation from mainstream European standards by Poland and Hungary offered by their governments has been democracy. This allowed the discussion to be about the conflict between the values of the rule of law and of the will of democratic majorities. Only recently the attention has been turned to the concerns relating to democracy and the role of European Union law in maintaining it.[1]

By the unilateral focus on the rule of law it was for a long time missed that the rule of law crises in Member States are equally crises of democracy.[2]

1 John Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council', European Law Review 47(1) (2022), 69-84 (77 ff.); Armin von Bogdandy, 'European Democracy: A Reconstruction through Dismantling Misconceptions', ELTE Law Journal 1 (2022), 5-23; Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: Oxford University Press 2023), 199 ff.; Luke Dimitrios Spieker 'Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 72 ff.

2 Jakab, András: Three misconceptions about the EU rule of law crisis, VerfBlog, 17.10.2022, https://verfassungsblog.de/misconceptions-rol/.

Several rule of law concerns – including but not limited to – the freedom of the press, party financing and corruption have far-reaching implications for the democratic process necessary for the legitimation of public power.[3]

The question of democracy in relation to the rule of law backsliding was exposed in the context of an eventual transition after the electoral success of the opposition. Prior to the 2022 elections in Hungary, a debate unfolded whether an eventual new government without a constitution-making majority could effectively exercise its democratic mandate.[4] It was argued that a new Parliament on its first day in office could, with a law of nullification passed by a simple majority, eliminate unwanted elements of the Fundamental Law. It was also proposed that a new simple majority could withdraw the appointment of all State officeholders chosen by a two-thirds qualified majority in Parliament, including members of the Constitutional Court.[5]

Needless to say, the idea that a Constitution could be ignored in the name of democracy is explosively dangerous. This idea has created most of the problems an eventual transition would need to handle. Still, it is a central question whether legal barriers could prevent an effective change of government in a democratic system, and how such barriers could be handled in harmony with the rule of law.[6]

This chapter seeks to address a narrow aspect of this set of issues. Its basic premise is a situation where a new government is elected without a majority necessary to change the Constitution. In this narrow context, I shall endeavour to explore the possible legal solutions to handle the issue of

3 Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxemburg: How the Court Can Support Democratic Transitions', Colum J. Eur. L. 29 (2023), 65-91 (82).

4 For the international variant see the debate Restoring Constitutionalism on Verfassungsblog, https://verfassungsblog.de/category/debates/restoring-constitutionalism/. See also Beáta Bakó, 'Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary', HJIL 82 (2022), 223-254 (223, 236 ff.).

5 See the summary of the position of Imre Vörös in: Andrew Arato and Gábor Halmai: 'So that the Name Hungarian Regain its Dignity: Strategy for the Making of a New Constitution', VerfBlog, 2.07.2021, https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/.

6 As András Sajó puts it: 'This is the problem where the Midas touch of legality has served the usurper. The Midas touch means that most of the acts which have undermined democracy and kept people in intellectual serfdom and material dependence were fully legalized' in András Sajó, 'On the Difficulties of Rule of Law Restoration', Democracy Institute Working Papers 8 (2023), 9.

laws adopted with a special supermajority – in the Hungarian constitutional system called cardinal laws – with legal means without an actual breach of the law. More specifically, I shall explore whether and how the principle of representative democracy in Article 10 TEU may assist any democratic majority to ensure its requisite room of manoeuvre against cardinal laws. By this, I am picking up a thread started by Kim Scheppele,[7] Armin von Bogdandy and Luke Spieker.[8]

In the following I shall first argue that democracy should take centre stage in the debate about the respect for the values in Article 2 TEU (Section I). As a second step I shall outline the concerns that have been raised in Hungary with a special emphasis on cardinal laws (Section II). This will allow me to expound on what standards follow from Article 2 TEU in combination with Article 10 TEU (Section III).

I shall argue that Article 10 TEU has to be interpreted in light of the general principles of law referred to in Article 6(3) TEU, and through that, the right to vote in Article 3 Protocol No. 1 ECHR and national constitutional traditions. It is submitted that the principle of democracy of EU law is applicable not only to such aspects of the operation of the national democratic system that are directly involved with the legitimation of the exercise of public power by the EU. Rather, the whole operation of the Member States must conform to some basic democratic requirements under EU law.

My choice of topic is deliberate. While I do not deny the moral force behind the calls for a general constitutional reset, I do not believe that they are of legal nature. Legal scholarship can only offer legal solutions. Disguising revolutionary proposals for a rupture in the constitutional system as some elevated, morally justified constitutional law may deliver arguments for a political debate, but it damages the long-term viability of the rule of law.[9] This is not to say that the law as it is would lack any teeth to address many salient issues. The unique setting of multilevel constitutionalism within the EU has the potential to offer solutions that are at the same time

7 Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', VerfBlog, 21.12.2021, https://verfassungsblog.de/escaping-orbans-constitutional-prison.

8 Armin von Bogdandy and Luke Dimitrios Spieker, 'How to Set Aside Hungarian Cardinal Laws: A Suggestion for a Democratic Transition', VerfBlog, 18.03.2022, https://verfassungsblog.de/how-to-set-aside-hungarian-cardinal-laws; von Bogdandy and Spieker (n. 3).

9 See chapter of András Jakab in this volume.

value based and legal and can contribute to the self-healing processes of democracy at the national level.

I also deliberately limit my considerations to the scenario where a new government possesses no constitution making majority. This is because completely different questions will arise should a new constitution making majority come to existence. In that situation, the major issue would be what limits are set for the new constitution-making, a situation similar to 2011 when the new Fundamental Law was adopted in Hungary. In other words, the question will not be how European Union law could promote changes in the national legal system but rather how it prevents certain changes to protect the rule of law and democracy.

I. Why Democracy?

Fareed Zakaria hardly thought that the term he coined in his essay in Foreign Affairs in 1997[10] would be used in the context of the European Union both by governments and their critiques. It occurs that illiberal democracy became the popular name commonly used by politicians and the media for the phenomenon otherwise described as rule of law backsliding or hybrid regimes. Yet the concept of illiberal democracy itself is misleading.

The concept of illiberal democracy suggests that democracy can exist without respect for the rule of law including the protection of a set of fundamental rights. In the words of Zakaria 'of course elections must be open and fair, and this requires some protections for freedom of speech and assembly. But to go beyond this minimalist definition and label a country democratic only if it guarantees a comprehensive catalogue of social, political, economic and religious rights turns the word democracy into a badge of honour rather than a descriptive category.'[11] This approach suggests that liberal democracies aim at guaranteeing certain values, whereas illiberal democracies are still democracies, just without these values. This in turn presupposes that if a country holds competitive, multiparty elections, we call it democratic.[12]

10 Fareed Zakaria, 'The Rise of Illiberal Democracy', Foreign Affairs 76 (1997), 22-43 (22).
11 Zakaria (n. 10), 25.
12 Zakaria (n. 10), 25.

The truth of the matter is that regimes Zakaria described in 1997 as illiberal democracies are better described by the political science term of Guriev and Treisman as spin dictatorships.[13] It occurs that there are methods to monopolise power while maintaining the impression of democracy. As Guriev and Treisman suggest, spin dictators pretend to embrace the idea of democracy yet maintain their power through distorting information and manipulating democratic processes.[14]

This is not to say that Hungary or Poland are dictatorships in the legal sense of the word. As András Jakab argues in this volume,[15] a hybrid regime could be the most fitting classification. Yet the political science term "spin dictatorship" seems to better encapsulate the issue at hand. It is wrong to assume that democracy can be illiberal in the sense Zakaria described it. Democracy as a self-government of the people presupposes democratic legitimacy. And democratic legitimacy does not arise from natural laws but from the application of many legal norms, which are indispensable for the free and informed formation and the free expression of the will of the people through elections. Hence the rule of law and protection for a core of fundamental rights are not only a necessary complement and counterweight to the will of the majority but an elementary prerequisite for its formation and articulation.

Against this background, it has been misguided to characterise the constitutional crises in the European constitutional area as rule of law crises, democracy and rule of law crises would have been a more fitting conceptualization.[16] Accordingly, exploring the meaning and functions of the principle of democracy could contribute to shifting the attention to the most burning issues.

The exploration of the possible roles the principle of democracy can play is also warranted by the very nature of the European Union as reflected in Article 10 TEU. As the Bundesverfassungsgericht[17] and especially German legal scholarship[18] had pointed out, the democratic legitimacy of the Euro-

13 Sergei Guriev and Daniel Treisman, *Spin Dictators, The Changing Face of Tyranny in the 21st Century* (Princeton and Oxford: Princeton University Press 2022).

14 Guriev and Treisman (n. 13), 13.

15 See chapter of András Jakab in this volume.

16 In this sense von Bogdandy and Spieker (n. 3), 82. See also Kim Lane Scheppele 'How Viktor Orbán Wins', Journal of Democracy 33 (2022), 45 ff.

17 BVerfGE 89, 155, 184 (Maastricht); 123, 267, 364 (Lissabon).

18 Winfried Kluth, *Die Demokratische Legitimation der Europäischen Union* (Berlin: Duncker & Humblot 1995), 78 ff.; Jelena von Achenbach, 'Theoretische Apsekte des

pean Union rests on two pillars, one EU and one national pillar. Article 10 TEU reflects this understanding: one source of democratic legitimacy of the EU consists in the direct election of the European Parliament, the other in the participation of representatives of Member State Governments in the Council, as these cabinet members are legitimised by the people of the respective Member State either directly or through their national Parliament. What is more, it is suggested that the two pillars on which the democratic legitimacy of the EU rests are by no means on an equal footing, rather the national contribution to legitimacy, mediated by the (European) Council predominates.[19]

From this it follows that issues concerning the democratic legitimacy of an EU Member State Government are a matter of concern for the whole of the European Union.[20] Though the purpose of Article 10 TEU is to ensure democracy at the EU level, this cannot function if democratic legitimacy at Member States level is flawed.[21]

It is for this reason that the supposed democratic deficit of the EU cannot question the application of Article 10 to the Member States. Admittedly, constitutional reservations against the supremacy of EU law have been based on this supposed deficit. Both the *ultra vires* and the constitutional identity reservations are premised on the assumption that democracy is only complete at the national level and the concept of democracy is different – and supposedly inferior – in EU law. But exactly this understanding is reflected in Article 10 TEU which derives the democratic legitimacy of the Union from two sources: from the direct representation of the citizens in the European Parliament and from the representation of Member States

dualen Konzepts demokratischer Legitimation für die Europäische Union' in: Silja Vöneky, Cornelia Hagedorn, Miriam Clados and Jelena von Achenbach (eds), *Legitimation ethischer Entscheidungen im Recht* (Berlin: Springer 2009), 191 ff.; Peter M. Huber, 'Art. 10 EUV [Demokratie]' in: Rudolf Streinz et al., *EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (3. edn, Munich: C.H.Beck 2018), para. 34 ff.; Matthias Ruffert, 'Art. 10 EU Vertrag [Demokratische Grundsätze]' in: Christian Calliess and Matthias Ruffert, *EUV/AEUV* (6. edn, Munich: C.H.Beck 2022), para. 7.

19 Huber (n. 18), para. 41.

20 Cotter (n. 1), 77. See also Lando Kirchmair, 'The EU and its hybrid regimes are poisoning each other. When it comes to democracy and the rule of law, we can't see the forest for the trees', https://www.politico.eu/article/eu-hybrid-regime-poison-each-other-democracy-spitzenkandidaten/.

21 von Bogdandy and Spieker (n. 3), 82.

by their respective executive powers, which are themselves democratically accountable either to their national Parliaments or to their citizens.

The supposed democratic deficit and the ensuing dual legitimation of the EU is thus not an obstacle in the way of identifying standards of democracy in EU law. On the contrary, exactly because the legitimation of the EU is partly based on the democratic legitimation of national governments it is essential that there is a common understanding on the minimum requirements of democratic legitimacy.

II. The Matter with Cardinal Laws

The debate relating to Hungary identified four major areas of concern from the perspective of democratic governance.[22] First, it was suggested that the power of the Budget Council to veto the budget on the basis of Article 44(3) of the Fundamental Law may prevent a budget being adopted, which may, in turn, could lead to the President dissolving the Parliament according to Article 3(3) of the Fundamental Law.[23] Second, concerns were articulated that the Constitutional Court could strike down any laws of a new majority. Third, the possibility of selective, politically biased law enforcement by the prosecution services was raised. The fourth focal point of the discussion was the excessive use of cardinal laws in Hungary. It was suggested that cardinal laws requiring a supermajority in Hungarian Parliament may limit the action of future democratically elected governments and could ultimately make the exercise of power by the new democratic majority impossible.[24] One might add to this list the general refusal of the Fundamental Law as illegitimate.[25]

I submit that out of these five issues, the question of cardinal laws need be and might be addressed from the perspective of European Union law. By that, I do not mean that the other issues are not or cannot become relevant. Still, some of the issues are not of legal but of sociological or political nature, others can be addressed differently.

22 See also chapter of András Jakab in this volume.

23 See already Herbert Küpper, *Einführung in das ungarische Recht* (Munich: C.H.Beck 2011), 300.

24 For a summary of the positions see Viktor Kazai, 'Restoring the Rule of Law in Hungary, Possible Scenarios', Osservatorio sulle fonti 3 (2021).

25 See supra at n. 5. Also Bakó (n. 4), 223, 237 ff.

First and foremost, the suggestion that the Fundamental Law was adopted in an illegitimate fashion, or its content makes it illegitimate cannot be handled with the toolkit of the law, as long as there is not a sufficient majority to replace it with a new Constitution. If the adoption and the amendments of the existing Fundamental Law were carried out in accordance with relevant legal provisions, its substantive illegitimacy as a whole remains a value judgment beyond the realm of the law. This is not to say that a formally legal Constitution cannot be overthrown. In fact, such constitutional ruptures usually occur after gaining independence, a lost war or a revolution. Some of these *ex nihilo* constitution making processes[26] have even become the most successful ones, like the US Constitution or the German Grundgesetz. Yet in the case of a revolutionary *ex-nihilo* constitution making, the act of de-constituting the old system will always remain a purely political act which is clearly illegal from the perspective of the existing legal system. This is where legal scholarship does not have the means to make the act of de-constituting legal, irrespective of how convincing the moral arguments are for a change.

Zooming in on the more specific issues, the right of approval of the Budget Council does in fact question the discretion of the Parliament in terms of the budget. Yet it is fair to note that according to Article 44(3) of the Fundamental Law, the Budget Council may only use its power to enforce the limit placed on State debt by Article 36(4) and (5) of the Fundamental Law. These articles mean that if the Budget Council abuses its power to deny approval, this would not prevent Parliament from passing the budget. Moreover, even a legitimate refusal to approve a budget would not in itself impede the passing of that budget, nor would it entitle the President to refuse to sign the budget without further grounds. A lack of approval by the Budget Council for the budget is ultimately a constitutional issue, which has to be ruled on by the Constitutional Court, either in the form of a preliminary review, if initiated by the President, or an ex post constitutional review on the basis of a petition from some of those entitled to do so (the relevant possibility is that one-quarter of the MPs may submit such a petition).[27]

26 Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in: Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP 2012), 426.

27 See also chapter of András Jakab in this volume.

In contrast, the question of whether the Constitutional Court would in the future unnecessarily strike down laws is a matter beyond the realms of the law. Should the Constitutional Court decide clearly beyond the limits of the Fundamental Law, such an interference with the operation of democracy would be unlawful. We cannot, however, anticipate that justices would break the law for political reasons until they do so. Nor shall we contemplate to interfere with the operation of a court merely because its members were elected by a different majority. This is all the more true as the Implementing Decision of the Council on Hungary within the framework of the conditionality mechanism does not raise concerns about the Constitutional Court,[28] and the 27 Super Milestones Hungary has to meet in order to gain access to the RRF funds only refer to the Constitutional Court in relation to reviewing final decisions by judges on request of public authorities, and does not mention concerns relating to its independence in general terms.[29]

As it seems, constitutional democracies must put up with highly controversial constitutional rulings.[30] Even a track record of almost unlimited deference to the government in politically sensitive questions could not justify touching upon the independence of the judiciary, a principle central to the operation of the rule of law.[31] If distrust and track record becomes the yardstick for respecting or not respecting the independence of the judiciary, there is no independence any more.

The issue with the prosecution services is somewhat different in nature. Both the Implementing Decision of the Council triggering the conditionality mechanism against Hungary[32] and the Implementing Decision on the approval of the assessment of the RRF plan for Hungary[33] raise the problem of the lack of effective prosecution of corruption related crimes.

28 Council Implementing Decision of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, 2022/2506.

29 Annex to the proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, 2022/0414(NLE), 86, 98; Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, paras 21, 60.

30 The obvious example being *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

31 Court of Justice of the European Union (CJEU), judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, EU:C:2018:117, para. 32.

32 Council Implementing Decision 2022/2506 (n. 28) paras 4, 12, 19, 29, 37, 44-46.

33 Proposal for a Council Implementing Decision 2022/0414(NLE), (n. 29), 20.

Nevertheless, I shall not elaborate further on this problem since the various EU mechanisms already try to handle the matter. But more important than that, the Hungarian Government can opt to join the European Public Prosecutors Office in accordance with Article 331 TFEU, thereby guaranteeing an effective prosecution at least in the matters where EPPO has a competence.

In contrast, cardinal laws in Hungary may indeed pose a legal obstacle in the way of governing in the name of a new (simple) majority. The 1989 Constitution already required a two-thirds majority for a wide range of legislative subject matters. These laws are now termed as 'cardinal laws' by Article T(4)[34] and require a qualified majority of two-thirds of the Members of Parliament present for their adoption and amendment. While the number of subjects requiring a special majority did not increase significantly with the Fundamental Law and its amendments,[35] the range of the subject matters covered changed considerably.[36] Several of these should be

34 Fundamental Law, Art. T(4): 'Cardinal Act shall mean an Act, the adoption or amendment of which requires the votes of two-thirds of the Members of Parliament present'.

35 See András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-Orac 2011), 173. Since then, however, the amendments also concerned the introduction of new topics which could only be regulated by cardinal laws, thus today the number of two-thirds majority topics is approximately the same as before the adoption of the Fundamental Law.

36 The Fundamental Law stipulates that the following issues be regulated by cardinal statutes: citizenship; national symbols and decorations; family relations; publishing of laws; authority for the protection of information rights; churches; political parties; freedom of the press; media; minority rights; elections of Members of Parliament; elections of representatives of local governments; status of Members of Parliament; operation of the Parliament and of its committees; the President; autonomous regulatory bodies; the Constitutional Court; the judiciary; prosecution services; local governments; protection of national wealth; the taxation and pension system; the National Bank of Hungary; supervision of financial institutions; the State Audit Office; the Budget Council; police and intelligence; the national army; and special legal orders. Furthermore, issues concerning the European Union also require qualified majority. According to the Constitution, qualified majority was required in the following fields: EU affairs; national symbols; legislation and publishing of laws; special legal orders; status of Members of Parliament; national referendums; the President; the Constitutional Court; the Commissioner for Human Rights; the State Audit Office; the relationship between the Parliament and the government in EU affairs; the National Army; police and intelligence; local governments; the judiciary; public prosecutors; migration; information rights; religious freedom; freedom of the press; the media; freedom of assembly; freedom of association; political parties; the right to asylum; minority rights; citizenship; right to strike; elections of Members of

left to ordinary legislation. These include the rules on the protection of families;[37] the requirements for preserving and protecting national assets, and for the responsible management thereof;[38] the scope of the exclusive property and the exclusive economic activities of the State, as well as the limitations and conditions of the alienation of national assets of outstanding importance for the national economy;[39] the basic rules for the sharing of public burdens and for the pension system;[40] and the detailed rules on the operation of the Budget Council.[41]

Since 2010, the governing parties in Hungary mostly possessed the necessary majority to adopt these cardinal acts. However, a future government having a simple majority without support from the opposition will be limited in shaping its economic and financial policies. Given the deep cleavages between the different wings of Hungarian politics, this may quickly lead to a stalemate in the case of any future Cabinet that does not have a two-thirds majority in the Parliament.

III. What, Specifically, Follows from Article 10 TEU?

There seems to be an emerging and very convincing case in legal scholarship for the justiciability and also for the application of Article 10 to the Member States.[42] It is also rightly pointed out that Article 10 TEU should be read in combination with Article 2 TEU, and specifically the principle of democracy enshrined therein, a principle being part of the identity of European Union law.[43] Still we seem to know rather little about the exact requirements flowing from Article 10 TEU. The case-law of the ECJ has thus remained rather scarce, and the principle of democracy in EU law can only be regarded as a frame concept requiring concretisation.[44]

Parliament; elections of representatives of local governments; self-governments of the minorities.

37 Fundamental Law, Art. L(3).

38 Ibid. Art. 38(1).

39 Ibid. Art. 38(2).

40 Ibid. Art. 40.

41 Ibid. Art. 44(5).

42 von Bogdandy and Spieker (n. 3), 82 ff., with further references.

43 Thomas Verellen, 'Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable', VerfBlog, 8.04.2022, https://verfassungsblog.de/hungarys-lesson-for-europe/.

44 Huber (n. 18), para. 10.

It would be misguided to try to give an all-encompassing answer to the question of what is democracy in Europe or to develop a comprehensive theory of the limits of checks and balances in this chapter. Rather, some red lines in relation to the basic value of democracy should be drawn, as the democracy at EU level can only be seen as a set of minimum standards.[45] The purpose is to identify those areas of government action that shall be reserved for the democratically elected government without undue interference by laws that are beyond the control of such government. This entails asking the question of to what extent higher ranking laws of the national legal system may limit the rule of any given democratic majority.

1. Ensuring democratic legitimacy of the EU or a general requirement of democratic legitimacy at the national level?

While attempting to identify what red lines follow from Article 10 in combination with Article 2 TEU first a distinction needs to be made. Should Article 10 in combination with Article 2 TEU be seen as ensuring the democratic legitimacy of EU action, or do these provisions guarantee democracy for Member States as a generally binding value beyond the legitimacy of national governments being the second leg of the legitimacy of the EU? In the first scenario, actions must be taken by a Council consisting of properly legitimised governments. In this case, the focus is whether the member of government acting in the name of their country possesses sufficient legitimation by their people. In the second scenario, the whole operation of the Member States must conform to some basic democratic requirements.

At first sight, the difference between the two scenarios seems to be non-existent. How could a minister of a Member State cabinet be properly legitimised by their people if the operation of the constitutional system of the very same Member State is not in conformity with at least a minimum of democratic requirements?[46] Yet exactly the question of special laws requiring a higher majority highlights the difference: not all such laws bear direct relevance for the EU, not all of them bind the hands of the government when it comes to a decision in the Council, as not all of these laws affect EU competencies. Therefore, exactly the question of how to handle cardinal laws requires a prior choice about the breadth of situations where EU democratic principles are to be applied to the Member States.

45 Huber (n. 18), para. 9.
46 Cotter (n. 1). 78.

To demonstrate the difference in the context of cardinal laws, if we opt for the narrower interpretation, the cardinal law on elections, Act CCIII of 2011 on the election of the Members of Parliament as amended by Act No. CLXVII of 2020 could be an obvious subject of review on the basis of Article 10 TEU,[47] as the democratic legitimacy of any government is primarily rooted in the electoral laws of that country. In contrast, the broad interpretation could lead to questioning cardinal laws that have no obvious direct bearing on the legitimacy of government, like Act no. CCXI of 2011 on the protection of families or Act CXCIV of 2011 on the economic stability of Hungary.

2. The right to vote as a key

In order to make a choice between the narrower and broader interpretation the scope of obligations deriving from Article 10 in combination with Article 2 TEU needs to be specified. It is submitted that the content of the principle of democracy can be operationalised through more specific Treaty provisions, just like the principle of the rule of law.[48] For example, Article 2 TEU is given concrete expression in Article 19(1)(2) TEU, which in turn must be interpreted in light of Article 47 CFR, which, again, is informed by the practice of Article 6 (1) ECHR through Article 52(3) CFR.

Article 10 TEU clearly specifies the principle of democracy enshrined in Article 2 inasmuch as it requires the democratic legitimation of national governments. It is thus fair to say that the most important aspect of democracy as a basic value of the EU is democratic legitimacy.

This requirement, however, is still quite general. The Charter of Fundamental Rights can provide some further guidance, since it protects essential political fundamental rights, like the freedom of expression, the press and assembly.[49] But the most important fundamental right protecting the operation of national democracies, the right to vote cannot be concretised on the basis of the Charter. This is because Articles 39 and 40 CFR only guarantee the right to vote in relation to the election of the European Parliament and municipal elections.

47 As suggested by von Bogdandy and Spieker (n. 8).

48 CJEU, judgment of 16 February 2022, *Hungary v. Parliament and Council*, case C-156/21, ECLI:EU:C:2022:97, para. 232.

49 von Bogdandy and Spieker (n. 3), 82.

Nevertheless Article 6(3) TEU offers an opening here, as the right to vote is undoubtedly a general principle of the Union's law as it follows from the ECHR and common constitutional traditions of the Member States. As a result, the interpretation of the right to vote in Article 3 of Protocol No. 1 ECHR by the European Court of Human Rights, as well as the case law of national Constitutional Courts can help identify certain principles. Accordingly, the right to vote as a general principle of law informs the interpretation of Article 10 TEU in combination with Article 2 TEU.

As a start, the Venice Commission made it clear as early as 2011 that the unnecessarily wide scope of cardinal laws raise concerns from the perspective of Article 3 Protocol No. 1 ECHR as it stated the following: 'Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the 'expression of the opinion of the people in the choice of the legislator', would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.'[50]

Further, the case law of the European Court of Human Rights on thresholds at national parliamentary elections and closed party lists should be considered. The Court – following the earlier case law of the European Commission of Human Rights[51] – consistently holds that thresholds applied in electoral systems to filter out representatives of parties enjoying less significant popular support constitute an interference with both the active and passive aspect of the right to vote under Article 3 Protocol No. 1 ECHR.[52] Concerning closed party lists, the Court has found that while this

50 Venice Commission Opinion 621/2011 on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), para. 24; repeated in Venice Commission Opinion 720/2013 on the Fourth Amendment to the Fundamental law Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), para. 133.

51 European Commission of Human Rights, *Magnago and Südtiroler Volkspartei v. Italy*, Decision of 15 April 1996, No. 25035/94, DR 85-A.

52 ECtHR, *Federación Nacionalista Canaria v. Spain*, Decision of 7 June 2001, n. 56618/00; ECtHR, *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, Decision of 29 November 2007, n. 10547/07 and 34049/07; ECtHR, *Yumak and Sadak v. Turkey*, Decision of 8 July 2008, n. 10226/03.

system entailed a restriction on voters as regards the choice of candidates[53] and this can also potentially be a matter for the right to vote.

Obviously, the European Court of Human Rights does not consider the right to vote to be an absolute one and accepts interference with these on the basis of the limitations implicit in Article 3 Protocol No. 1 ECHR.[54] In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined.[55]

On the face of it, this case law focuses on the equality of votes. Yet the underlying idea is that every vote of an eligible voter must have a realistic chance to influence the composition of the legislative body and through that the content of the laws to be made by that legislative body. Only through this realist chance can we talk about the representation of the electorate, the core idea of Article 3 Protocol No. 1 ECHR. This is why the European Court of Human Rights has consistently found that high electoral thresholds may deprive part of the electorate of representation.[56]

The same conclusions can be drawn from the case law of the European Constitutional Courts on electoral thresholds at the elections of the European Parliament. Although the outcome of the cases was different, the German Bundesverfassungsgericht, the Czech Constitutional Court and the Italian Constitutional Court all reviewed respective national thresholds on the basis of the right to vote.

The case law of the Bundesverfassungsgericht declaring both a 5% and a 3% threshold unconstitutional[57] is based on the formal requirement of the equality of the vote. Still the Bundesverfassungsgericht emphasises that

53 ECtHR, *Saccomanno and Others v. Italy*, Decision of 13 March 2012, n. 11583/08, para. 63.

54 ECtHR (Grand Chamber), *Ždanoka v. Latvia*, Decision of 16 March 2006, n. 58278/00, para. 115.

55 Ibid.

56 ECtHR, *Bakirdzi and E.C. v. Hungary*, Decision of 10 November 2022, n. 49636/14 and 65678/14, para. 46, with further references.

57 BVerfGE 129, 300 - five-percent hurdle, European elections; BVerfGE 135, 259 - three-percent hurdle, European elections.

general requirement that all voters should have the same influence on the election result with the vote they cast.[58]

The Czech Constitutional Court followed a similar path, albeit with the opposite result, declaring a 5% threshold not to be unconstitutional.[59] The premises of its reasoning are, however, very similar. The Czech Constitutional Court also considers a threshold to be a limitation of the principle of equal vote deriving from Art. 21 paras. 3 and 4 of the Czech Charter of Fundamental Rights and Freedoms.[60] Part of the principle of the equality of vote is the notion that every vote cast should have the same weight in relation to the number of the gained mandates.[61]

The Italian Constitutional Court also refused to declare a 4% threshold for the elections of the European Parliament to be unconstitutional.[62] Yet its reasoning is also based on the right to vote (Article 48 of the Italian Constitution)[63] and the idea of political representation where the wishes of the people are expressed through votes, as the principal instrument for expressing popular sovereignty.[64]

These judgments are primarily based on equal voting power, referred to as Erfolgswertgleichheit in the German Constitutional Court's case law.[65] Yet they also necessarily imply that the equality of the vote also protects the right of the voters to influence the way public power is exercised by the respective legislative power. This view is articulated in very clear terms in the case law of the Bundesverfassungsgericht on European integration. The centrepiece of the reasoning of the Maastricht Judgment is the idea that

58 BVerfGE 129, 300, 317f.
59 Czech Constitutional Court, 19 May 2015, Pl. ÚS 14/14.
60 Hubert Smekal and Ladislav Vyhnánek, 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014European Parliament Elections, Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14', European Constitutional Law Review 12 (2016), 148, 153.
61 Smekal and Vyhnánek (n. 60), 153.
62 Italian Constitutional Court, judgment of 25 October 2018, n. 239/2018, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_239_2018_EN.pdf.
63 Giacomo Delledonne, '"A Goal That Applies to the European Parliament No Differently From How It Applies to National Parliaments": The Italian Constitutional Court Vindicates the 4% Threshold for European Elections, Italian Constitutional Court, judgment of 25 October 2018 no. 239/2018', European Constitutional Law Review 15 (2019), 376, 382 ff.
64 Italian Constitutional Court, judgment of 4 December 2013, n. 1/2014, 11, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf.
65 Smekal and Vyhnánek (n. 60), 153.

Article 38 of the Grundgesetz guaranteeing the right to vote also encompasses the right to influence the exercise of state power.[66] The Maastricht Judgment also makes clear that the influence of voters over the exercise of state power belongs to the core of the principle of democracy. In the words of the Bundesverfassungsgericht: 'The right guaranteed by Article 38 of the Basic Law to participate in the legitimisation of state power through election and to gain influence on its exercise precludes, within the scope of application of Article 23 of the Basic Law, emptying this right by shifting tasks and powers of the Bundestag in such a way that the democratic principle, insofar as it is declared by Article 79 (3) in conjunction with Article 20 (2) of the Basic Law to be untouchable, is violated.'[67] These insights are especially relevant in the interpretation of Article 10 TEU as this provision was clearly inspired by the German case law and the ensuing debate over the democratic legitimacy of the EU.[68]

From these, it follows that the core of the requirement flowing from Article 10 TEU in combination with Article 2 TEU in relation to national governments is the right of the voters to influence the way state power is exercised. This is not just an individual right following from the right to vote, it is a guarantee for transmitting the popular will to the actions of public authority.

The most important aspect of the right to influence the exercise of state power consists in the capacity of the constituents to elect a new government if they are no longer content with the previous one. Should, however, a new government be unduly prevented from taking decisions, the right to influence the exercise of state power is also interfered with. Naturally, this right is far from being absolute. Not only is the right to vote subject to the limitations of the respective electoral system and laws. The right to influence the exercise of state power and to contribute to the formation of the popular will is embedded in the system of checks and balances and is limited by the respective Constitution. Still, the right to influence the exercise of state power imposes limits on removing issues from democratic decision making and requires proper justification for such legislative measures.

66 BVerfGE 89, 155, 182 ff. – Maastricht.

67 BVerfGE 89, 155, 182.

68 Armin von Bogdandy, *Der Strukturwandel des öffentlichen Rechts, Entstehung und Demokratisierung der Europäischen Gesellschaft* (Berlin: Suhrkamp 2022), 234.

3. The doctrinal framework

Conceiving Article 10 TEU in combination with Article 2 TEU as primarily guaranteeing the right to influence the exercise of state power allows us to answer the question of a broad or narrow application of the requirement of democratic legitimacy at the national level.[69] Putting the right to influence the exercise of state power in the centre clearly warrants the application of these articles to every aspect of democratic legitimacy of national government. Thus, the principle of democracy of EU law is not limited to ensuring that a member of a national government voting on the Council is properly legitimised. Rather, voters of the Member States must be able to exert influence on every area of the national legislation.

In this sense, the breadth of the scope of obligations following from Article 10 TEU in combination with Article 2 TEU is comparable to the requirement of judicial independence following from Article 19(1) and (2) TEU.[70] The independence of national courts is not only guaranteed by EU law in situations where they actually apply the Union's law. European Union law protects the independence of the judiciary in general terms. The reason for such a general guarantee of independence for the judiciary is different from generally ensuring the right to influence of national voters. The former is based on the possibility that any national court might be called upon to adjudicate matters of EU law,[71] whereas the latter is a consequence of the close relationship between the principle of democracy and the individual right to vote.

The right to influence the exercise of state power, however broad its application is, must leave significant room for manoeuvre for the national legal systems. First, this right can only be conceived in relation to the legislative power and those institutions that are accountable to this branch of government, otherwise, the system of checks and balances of a constitutional State takes precedence. Second, the right to influence the exercise of state power can only be invoked against the respective national Constitution only in the most extreme of cases. This restraint is necessary because the whole of state power emanates from the national Constitution, a law

69 See also András Jakab, 'Democracy in Europe through parliamentarisation' in: Andràs Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 171 ff.

70 von Bogdandy and Spieker (n. 3), 82; Spieker (n. 1), 67.

71 *Associação Sindical dos Juízes Portugueses* (n. 31), para. 40.

representing a higher consensus of the polity and setting the rule of the game for all players of the machinery of the State. To borrow the term of Bruce Ackerman, democracy is dualistic, with one body of laws emanating from the people binding the government (the Constitution) and another body of law created by the government binding the people.[72] Therefore to overrule express constitutional provisions of a Member State *in the name of the principle of democracy* of EU law would be an extreme intrusion with the constitutional order of a Member State, offsetting a broader democratic consensus within that Member State. Albeit legal, this possibility should be reserved for situations where there is not a hint of doubt that the specific provision of the national Constitution is clearly designed to and has the effect of preventing democratic decision making in questions that have nothing to do with the protection of fundamental rights or the operation of independent institutions or other subject matters that are normally reserved for the Constitution. In other words, absent a clear and excessive abuse, the principle of democracy of EU law shall not be used to question national constitutional provisions.

Consequently, Article 10 TEU in combination with Article 2 TEU understood as the right to influence the exercise of state power in the Member States is relevant for the assessment of laws not being part of the Constitution, like cardinal laws in Hungary. Even in this area, Member States must enjoy a wide margin of appreciation, similar to the one applied in the context of electoral thresholds.[73] Also, the assessment must always focus on specific provisions of laws requiring a special majority and not the laws as a whole.

Within this framework, the assessment of whether a specific provision of a cardinal law is in breach of the right to influence the exercise of state power is essentially a balancing exercise aimed at establishing whether the interference with this right is proportionate to the needs of a more consensus based law-making in certain areas of the law. Just like in other areas of human rights adjudication, legal comparison and the existence or lack of a European Consensus can largely assist the decision on the proportionality of the interference with the right to influence the exercise of state power. It is in the proportionality review where questions on the share of the popular

72 Bruce Ackermann, *We the People, Volume I: Foundations* (Cambridge: Harvard University Press 1992).

73 See supra Section III. 2.

votes behind the specific majority that adopted the cardinal law can be considered.[74]

IV. Conclusions

Interpreting Article 10 TEU in combination with Article 2 TEU taking into account Article 6(3) TEU and through that the right to vote as a general principle of Union's law emanating from Article 3 Protocol No. 1 ECHR and common constitutional traditions of Member State has the distinct advantage that issues of democratic legitimacy become justiciable according to the logic of human rights adjudication. Also, the interpretation of the right to vote by the European Court of Human Rights and by the Bundesverfassungsgericht suggest that the right to vote entails the subjective right to influence the exercise of state power, a right directly encompassing the essence of the principle of representative democracy enshrined in Article 10 TEU.

Nevertheless, one must not forget that applying Article 10 TEU to challenge the legality of provisions of cardinal law is effectively choosing democracy over the formal rule of national laws. As long as this happens on the basis of principles of EU law enjoying supremacy over national law, this choice cannot be deemed illegal. But the very idea of choosing democracy over law entails severe risks for constitutionalism.

The perils of enforcing national democracy with the help of EU law become higher if we consider the situation in which this can happen in practice. Presumably, a new government without the requisite supermajority in Parliament will not have the time to wait for decisions of European institutions. A new majority will probably adopt laws in order to execute its democratic mandate and thereby violate provisions of the inherited cardinal laws. It is in this context that the question of whether the conflicting provisions of the cardinal law in question were ultimately in breach of the right to influence the exercise of state power under Article 10 TEU in combination with Article 2 TEU will be raised. The ensuing debate will be highly politicised, and in a debate like that clear-cut and convincing legal arguments are needed.

From this, two conclusions follow. First, the legal standards need to be elaborated at the possible length and precisions before the change of gov-

74 The Hungarian electoral system can and did translate less than 50% of the popular vote for one party to a two-thirds majority in Parliament.

ernment occurs. A reference to an existing practice of European institutions and a case law of the ECJ could reduce the risk of an ugly politicised debate which would definitely damage the cause if the rule of law as it were.

Second, the right to influence the exercise of state power must be applied with utmost foresight and surgical precision. Only a nuanced examination of proportionality including legal comparison and a wide margin of appreciation can prevent the abuse of this right and the consequent backlash for the future of constitutionalism.