

**Executive Master**  
**in EU Studies**

*Protecting the Fairness of  
European Parliament Elections  
via Preliminary Ruling.*

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## Abstract

This thesis assesses how Member State courts and the Court of Justice can better protect the integrity of the European Parliament elections. EU law and the Court's practice offer an EU-level constitutional framework for European Parliament elections, which will be compared to the more developed rule of law case law in order to identify possible next steps for the enforcement of democracy. Despite the solid constitutional framework and legal, structural, and practical reasons placing the Court of Justice at the helm of adjudicating election cases, only five democracy-related cases reached the Court since citizens elected the European Parliament directly for the first time in 1979. To make such supervision more effective, the Court of Justice should respond to the need for quick decision-making in election cases and establish an emergency procedure under which it can deliver judgments within days if needed. Currently, we are in a special *Solange* situation in which Member State courts will be unwilling to refer in election cases as long as the Court of Justice lacks a suitable emergency procedure. To test the viability of using the preliminary reference procedure in election cases, the author contributed to submitting a request for a preliminary reference to a Hungarian court in the 2024 European Parliament election cycle. The court denied the request because of the time pressure, which underlines the need for an emergency preliminary procedure. The thesis maps out two examples for the engagement of the Court of Justice, using Hungary as the testing ground: one on state neutrality and another on the equality of the vote. The chances of Hungarian election commissions qualifying in the preliminary references procedure are assessed with the conclusion that their questionable independence might hinder a successful reference. The thesis concludes with the mapping out of possible next steps for more robust protection of election integrity in the European Union.

# 1. Introduction<sup>1</sup>

Supreme or constitutional courts regularly step in to protect the democratic process by deciding election disputes. It is remarkable that the Court of Justice has so far barely been engaged in the European Parliament elections. Using Hungary as an example, this thesis will argue that the Court of Justice is institutionally well-positioned to help protect the integrity of the European Parliament elections via the preliminary ruling procedure.

Chapter 2. analyses the EU legal order, including the Treaties, the Court's case law, and the legal, structural, and practical reasons why the Court is institutionally well-positioned to decide election cases. It compares the Court's argumentation in the rule of law and democracy domains to identify lacking elements in the latter. Chapter 3. argues for an emergency preliminary ruling procedure under which the Court could respond to preliminary references within days, as comparable courts – such as the US Supreme Court – can render judgments within such deadlines, if needed. Without such a procedure, a special *Solange* situation persists: Member States might be unwilling to refer election disputes as long as the Court of Justice cannot offer adequate assistance in time-sensitive election cases.

Chapter 4. analyses two examples, using Hungary as a testing ground, to better understand the feasibility of using the preliminary ruling procedure in election cases. One example concerns state neutrality, and the other concerns the equality of the vote. This Chapter includes the analysis of a submission requesting a preliminary reference by the applicant, prepared, in part, by the author and decided by the Hungarian court in the 2024 European Parliament election cycle. Chapter 5. investigates whether a Hungarian election commission might qualify as a court or tribunal eligible for the preliminary ruling procedure and concludes that problems persist with the independence of these bodies. Chapter 6. is a conclusion describing possible next steps after a stronger enforcement of democratic values by the Court of Justice during the European Parliament elections.

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<sup>1</sup> Some part of this paper in an earlier version has been published on Verfassungsblog. G. Szabó, Dániel: Protecting the Fairness of European Parliament Elections via Preliminary Ruling, Verfassungsblog, 7 December 2023, <https://verfassungsblog.de/protecting-the-fairness-of-european-parliament-elections-via-preliminary-ruling/>.

## 2. EU Law on Electing the European Parliament

### 2.1. Legal Provisions

The EU legal order has a fully-fledged constitutional framework for European Parliament elections. The Treaties, the Charter, and the 1976 Electoral Act lay down basic principles and values of a democratic process for the directly elected chamber of EU decision-making, the European Parliament. Below are the most basic provisions found in EU constitutional documents regarding elections of the members of the European Parliament.

#### Article 2 TEU

*The Union is founded on the values of ... **democracy** ... .*

#### Article 10 TEU

- 1. The functioning of the Union shall be founded on **representative democracy**.*
- 2. Citizens are **directly represented** at Union level in the European Parliament. ...*
- 3. Every citizen shall have **the right to participate in the democratic life of the Union**. ...*

#### Article 14 TEU

- 2. The European Parliament shall be composed of **representatives** of the Union's citizens. ... Representation of citizens shall be **degressively proportional**, ...*
- 3. The members of the European Parliament shall be elected for a term of five years by **direct universal suffrage** in a **free and secret ballot**.*

#### Article 20 TFEU

- 2. Citizens of the Union shall enjoy ..., inter alia:*
  - (b) the **right to vote** and to **stand as candidates** in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*

#### Article 39 EU Charter

*Right to vote and to stand as a candidate at elections to the European Parliament*

1. Every citizen of the Union has **the right to vote** and to **stand as a candidate** at elections to the European Parliament ...

2. Members of the European Parliament shall be elected by **direct universal suffrage** in a **free and secret ballot**.

Article 1 1976 Electoral Act

1. In each Member State, members of the European Parliament shall be elected on the basis of **proportional representation**, using the list system or the single transferable vote.

3. Elections shall be by **direct universal suffrage** and shall be **free and secret**.

Article 4 1976 Electoral Act

Each Member State **may set a ceiling for candidates' campaign expenses**.

Article 2 TEU provides for the principle of democracy as a foundation of the EU. Article 10 details this provision, adding the foundational value of representative democracy and direct representation in the EP. According to Armin von Bogdandy and Luke Dimitrios Spieker, “Article 10(3) TEU can translate the value of democracy into justiciable obligations”.<sup>2</sup> Article 14(3) TEU, as well as Article 1(3) of the 1976 Electoral Act, require direct universal suffrage and a free and secret ballot for European Parliament elections. Article 20(2)(b) TFEU establishes EU citizenship and prescribes that the citizens of the EU have the right to vote and to stand as candidates in elections to the EP. Article 39(2) of the Charter establishes a fundamental right to free elections, with universal suffrage and a secret ballot.

This amount of constitutional legislation is easily comparable to any national constitution’s level of detail. For example, the Constitution of the United States does not go into further detail than the Treaties do. The European Parliament might be compared to the House of Representatives in a model where these are the directly and proportionally elected legislative bodies representing directly the people; the Council of the European Union and the Senate are the non-proportional bodies representing either directly or indirectly the states comprising of their respective unions. The US Constitution in Article I lays down – similarly to the Treaties – that the House of Representatives is directly elected by the

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<sup>2</sup> Von Bogdandy, Armin and Spieker, Luke Dimitrios: Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions, Columbia Journal of European Law, Vol. 29.2. 2023, [https://cjel.law.columbia.edu/files/2023/04/8.-BOGDANDY\\_SPIEKER-PROOF.pdf](https://cjel.law.columbia.edu/files/2023/04/8.-BOGDANDY_SPIEKER-PROOF.pdf), p. 77.

people proportionally and regulates who has the right to vote, the frequency of elections, the powers and basics of the procedures of the legislative bodies. This is not more than the EU constitutional order provides. Yet, the US Supreme Court – as we will see in Chapter 3 below – is able to decide an election case within four days with enormous consequences and we have not seen any decision like that from the Court of Justice of the European Union.

## **2.2. Case law of the Court of Justice of the European Union**

In national constitutional systems, high or constitutional courts find no hardship in ruling election cases based on a constitutional framework similar to the EU's. It is not uncommon for a national court to even deprive an elected member of parliament of his or her mandate if serious violations of laws occurred during the campaign. In the United Kingdom, for example, it was – nevertheless of its high-stakes nature – a standard judicial procedure to deprive Phil Woolas, an elected parliamentarian, of his seat because of the blatant lies he has spread during the campaign about his opponent. Woolas distributed leaflets portraying him as accepting foreign donations and as an Islamic extremist, as a result of which the High Court ruled that Woolas should lose his seat in the Parliament.<sup>3</sup> As we will see in Chapter 3 below, the US Supreme Court also exercises judicial review vehemently, if needed, in election cases. There are numerous other examples from other jurisdictions, but these two will suffice for illustrative purposes.

Despite the fully-fledged constitutional framework, the EU legal order for European Parliament elections is less strongly enforced than similar provisions in other jurisdictions or the Member State level. The Court of Justice has so far been given only limited opportunity to rule on the organisation of European Parliament elections by Member States: in the 45 years since 1979, the first directly elected European Parliament, there have been a total of five cases where the Court of Justice ruled on democracy, with only a few more cases pending before the Court.

In a 2006 judgment in *Eman and Sevinger*, the Court had to decide on the conformity with EU law of the Dutch legal provisions allowing all citizens to vote for the members of the

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<sup>3</sup> Judgment of 3 December 2010, *Woolas, R. v The Speaker of the House of Commons*, CQ/11578/2010, [2010] EWHC 3169 (Admin), [2011] 2 WLR 1362, [2012] QB 1, <https://www.bailii.org/ew/cases/EWHC/Admin/2010/3169.html>.



European Parliament, except for the residents of the Netherlands Antilles and Aruba. The Court found this practice illegal and has set the condition of equal treatment in the right to vote for the European Parliament elections: “*there is nothing which precludes the Member States from defining ... the conditions of the right to vote and to stand as a candidate in elections to the European Parliament ... the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified*”.<sup>4</sup> The referring judge in *Eman and Sevinger* requested an expedited procedure from the Court of Justice, but it was denied on the grounds that the European Parliament elections are already over, and thus, nothing requires a swifter-than-normal decision.<sup>5</sup>

In the 2009 judgment in *Donnici*, the Court explicitly ruled that it – and not the European Parliament – is the final arbiter of elections: ‘*it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court of Justice, ... to rule on the lawfulness*’ of the organisation by Member States of European Parliament elections.<sup>6</sup> The case concerned the verification of mandates by the European Parliament, and the Court ruled that the European Parliament lacked the competence to review the merit of elections. This power is retained for the Member State authorities, together with national courts and the Court of Justice. The lack of competence for the European Parliament to review Member State actions during elections was reinforced in the 2019 decision in *Junqueras*.<sup>7</sup>

The 2015 landmark judgment in *Delvigne* concerned the right to vote of convicted persons. The Court of Justice ruled that it does not run against EU law if a Member State excludes persons convicted of severe crimes from the voters of the members of the European Parliament. The Court, however, made one of the most significant findings in *Delvigne*. The Court ruled that Member States are implementing EU law when organising European Parliament elections, and thus the Charter applies: “*a Member State which, in implementing its obligation under Article 14(3) TEU and Article 1(3) of the 1976 Act [on direct universal suffrage and free and secret ballot], makes provision in its national legislation ... must be considered to be implementing EU law within the meaning of Article*

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<sup>4</sup> Judgment of 12 September 2006, *Eman and Sevinger*, C-300/04, EU:C:2006:545, §61.

<sup>5</sup> Decision of the President of the Court of 23 August 2004, *Eman and Sevinger*, C-300/04, ECLI:EU:C:2004:835.

<sup>6</sup> Judgment of 30 April 2009, *Donnici*, C-393/07 and C-9/08, C:2009:275, §70.

<sup>7</sup> Judgment of 19 December 2019, *Junqueras*, C-502/19, EU:C:2019:1115, §69.

51(1) of the Charter.”<sup>8</sup> This judgment makes it clear that the election of the European Parliament is an activity regulated by EU law, which is quite self-evident if we take into account that the European Parliament is an eminent example of an EU institution: it only exists because the EU exists and because EU law so provides. Therefore, arguing that EU law has no enforceable standards on European Parliament elections would be hard. The judgment is highly significant, as it created a clear situation for the review of Member State actions when organising European Parliament elections.

*Junqueras* was a 2019 decision in the context of the Catalan independence movement. The applicant was an elected member of the European Parliament who was also sought after by the Spanish criminal authorities. Eventually, the Court of Justice was engaged, and the Court decided that elected members enjoy immunity in a similar way to fully sworn-in members. *Junqueras* was the only decision analysed here where the Court provided the parties with an expedited procedure because the applicant had to be deemed as being in custody.<sup>9</sup> *One of Us*, decided on the very same day as *Junqueras*, concerned not the election of the European Parliament but was an appeal against a decision of the European Commission on not taking action as a result of a successful European Citizen’s Initiative. In *One of Us* and *Junqueras*, the Court established that Article 10(1) TEU gives concrete expression to one of the Article 2 TEU values, namely representative democracy. As the Court has put it: “Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU”.<sup>10</sup> This finding by the Court is also a very significant one which will be relevant for the comparison of the Court of Justice’s practice on the rule of law and on democracy in Chapter 2.4. below.

Some cases are pending before the Court of Justice on elections. In *Puigdemont*, the Court is to decide on the validity of the mandate for an elected, but not sworn-in candidate.<sup>11</sup> In two infringement cases, the Commission claims that Poland and the Czech Republic violated EU law because they did not allow EU citizens to join political parties in their respective national legislation. The Advocate General argues in both cases for the Court to

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<sup>8</sup> Judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, §§32-33.

<sup>9</sup> *Junqueras*, §45.

<sup>10</sup> *Junqueras*, §§63, 82-84. Judgment of 19 December 2019, *One of Us*, C-418/18 P, EU:C:2019:1113, §64. Kornezov, Alexander (ed.): *Mutual Trust, Mutual Recognition and the Rule of Law*, XXX Fide Congress in Sofia, 2023, Congress Publications, Vol. 1., pp. 45-46, 116.

<sup>11</sup> Order of the Vice-President of the Court on 20 December 2019, *Puigdemont*, Case C-646/19 P(R), ECLI:EU:C:2019:1149.

find a violation of Article 22 TFEU and claims that EU citizens from different Member States should be treated equally under Article 9 TEU.<sup>12</sup>

### 2.3. Legal, Structural, Practical: Arguments for a More Active Court of Justice

It would be beyond the scope of this thesis to fully unearth why the total number of election cases before the Court of Justice is so low. Nevertheless, several authors argue that the Court of Justice could and should be engaged to protect the fairness of the European Parliament elections,<sup>13</sup> and the low number of cases reaching the EU's top court regarding the election of the EU-level legislator is surprising for three reasons. First, from a legal standpoint, the Court ruled that carrying out the European Parliament elections is an implementation of EU law,<sup>14</sup> and – despite some attempts to undermine it by certain Member State constitutional courts – the final arbiter of EU law is the Court of Justice.<sup>15</sup> Disputes must be decided, which is even more true for election disputes that carry enormous significance and require swift decisions. Without a single interpreter of election rules for the European Parliament elections, the equality of the vote might be threatened, undermining the democratic legitimacy of all EU decision-making.

Second, from a structural point of view, the Court of Justice has the EU-wide perspective necessary to make legitimate decisions on the most critical aspects of the European Parliament elections. A national high court or constitutional court lacks the required overview of Member State legal systems, languages and practices and is also primarily a national – rather than an EU – institution. This narrower perspective makes their decisions

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<sup>12</sup> Opinion of Advocate General de la Tour delivered on 11 January 2024, *Commission v. Poland*, C-814/21, ECLI:EU:C:2024:15, §§96-98, 103; Opinion of Advocate General de la Tour delivered on 11 January 2024, *Commission v. Czech Republic*, C-808/21, ECLI:EU:C:2024:12, §§69-71, 76

<sup>13</sup> Bogdandy and Spieker: Transformative Constitutionalism in Luxembourg, p. 79. Spieker, Luke Dimitrios: Beyond the Rule of Law, in Södersten and Hercock (eds.): *The Rule of Law in the EU: Crisis and Solutions*, Swedish Institute for European Policy Studies, April 2023:10p, [https://www.sieps.se/globalassets/publikationer/2023/2023\\_10p\\_digital.pdf](https://www.sieps.se/globalassets/publikationer/2023/2023_10p_digital.pdf), p. 77. Cotter, John: 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) 69-84, 2022, <https://dx.doi.org/10.2139/ssrn.4032080>, p. 69. Verellen, Thomas: Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable, *Verfassungsblog*, 8 April 2022, <https://verfassungsblog.de/hungarys-lesson-for-europe/>. Vissers, Nora: Enforcing Democracy: How the European Commission is Testing out the Legal Waters, *Verfassungsblog*, 13 June 2023, <https://verfassungsblog.de/enforcing-democracy/>.

<sup>14</sup> *Delvigne*, §§32-33.

<sup>15</sup> Judgment of 14 December 2000, *Fazenda Pública*, C-446/98, ECLI:EU:C:2000:691, §49. Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, §33. See also Kelemen, R. Daniel; Eeckhout, Piet; Fabbrini, Federico; Pech, Laurent; Uitz, Renáta: National Courts Cannot Override Court of Justice Judgments: A Joint Statement in Defense of the EU Legal Order, *Verfassungsblog*, 26 May 2020, <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

easier to question when the topic is the election of the EU – and not the Member State – legislator. National procedures for electing the members of the European Parliament might favour Member State nationals against other EU citizens – as we can see in the Polish and Czech cases cited above, pending before the Court of Justice – or might not meet the democratic standards laid down in the Treaties. The legitimacy of national courts to decide in such cases is much smaller than that of the Court of Justice, both because of the latter’s EU-wide perspective and because of its composition, where judges elected on behalf of all affected parties participate in decision-making.

The European Court of Human Rights is also not a viable option because of its human rights focus and lenient approach towards systemic – that is, not directly rights-based – claims related to elections. Moreover, the enforcement mechanism of Court of Justice judgments is much stronger than that of the ECtHR.

Third, from a practical standpoint, a more frequent involvement of the Court of Justice is needed to face the crisis of democracy in some Member States. This is directly linked to the second reason above: if the high and constitutional courts of a Member State are captured, there is no chance these courts will ensure a democratic election for the members of the European Parliament in that Member State. This has far-reaching consequences because it can potentially undermine the legitimacy of EU decision-making. Take the example of Hungary: the country’s democratic track record has been in decline according to the European Parliament,<sup>16</sup> the Commission<sup>17</sup> and various democracy indices.<sup>18</sup> The problems include the lack of a level playing field,<sup>19</sup> targeted action by authorities against opposition parties,<sup>20</sup> overlaps between the activities of the government and the governing

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<sup>16</sup> European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2018/0902R(NLE).

<sup>17</sup> European Commission: 2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary, 5.7.2023, SWD(2023) 817 final, [https://commission.europa.eu/system/files/2023-07/40\\_1\\_52623\\_coun\\_chap\\_hungary\\_en.pdf](https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf).

<sup>18</sup> Hungary fell back at the V-Dem Varieties of Democracy Liberal Democracy Index from 0,77 in 2009 to 0,34 in 2022 ([https://www.v-dem.net/data\\_analysis/CountryGraph/](https://www.v-dem.net/data_analysis/CountryGraph/)). Freedom House considered Hungary a ‘Free’ country in 2017 with 76 points, while ‘Not Free’ in 2023 with 66 points (<https://freedomhouse.org/country/hungary/freedom-world/2023>). The Economist Intelligence Unit Democracy Index awarded Hungary with 7,53 points in 2006, while only 6,64 in 2022 (<https://ourworldindata.org/grapher/democracy-index-eiu?tab=chart&time=earliest..2022&country=~HUN>).

<sup>19</sup> Jakab, András: How to Defend the Integrity of the EP Elections against Authoritarian Member States, Verfassungsblog, 31 March 2019, <https://verfassungsblog.de/how-to-defend-the-integrity-of-the-ep-elections-against-authoritarian-member-states/>.

<sup>20</sup> The State Audit Office threatened opposition parties with a considerable fine in 2020 and again before the 2024 European elections: Hungary: Auditor suspends state funding of opposition party, Associated Press, 21

parties,<sup>21</sup> state funding of campaigning and party financing in general, lack of media pluralism, and the different means of voting for citizens living abroad (postal vote for some and not for others).<sup>22</sup> Some even consider the situation so severe and understand EU law to mean that Hungary is not entitled to representation in the European Council and the Council,<sup>23</sup> while others disagree.<sup>24</sup> In the 2019-2024 cycle, Hungary has 21 seats in the European Parliament, of which 13 belong to the national ruling parties. If the election of these parliamentarians is questioned because of the lack of a level playing field, a tight vote in the European Parliament can also be questioned. If such a proposal is adopted only with the votes of these 13 members, the decision's legitimacy can be questioned based on the argument that these members were elected undemocratically. This is extremely dangerous for the European Parliament and the EU, because the entire decision-making process can be questioned. Letting Member States alone ensure democratic elections for the European Parliament without EU-level supervision by the Court of Justice is a dangerous constellation: EU and Member State interests will, from time to time, naturally diverge, and this allocation of powers undermines the independence of the European Parliament from Member States.

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May 2020, <https://apnews.com/42084d3b0ada743d9caf5b6884a8a48a>. Kiszivárgott: hárommilliárd forintnál is nagyobb büntetést tervez az ÁSZ az ellenzéknek a 2024-es kampányok előtt, 24.hu, 20 June 2023, <https://24.hu/belfold/2023/06/20/ellenzek-asz-buntetes-kampany-marki-zay-peter/>. ÁSZ head: Opposition parties' fine over foreign campaign financing 'as yet undecided', Daily News Hungary, <https://dailynewshungary.com/asz-head-opposition-parties-fine-over-foreign-campaign-financing-as-yet-undecided/>, 21 June 2023.

<sup>21</sup> Wójcik, Anna: A fragmented response to media freedom at risk in the Union, *Verfassungsblog*, 24 December 2022, <https://verfassungsblog.de/a-fragmented-response-to-media-freedom-at-risk-in-the-union/>.

<sup>22</sup> Bogdandy and Spieker mention the media, election laws, party financing and campaigning: Bogdandy and Spieker: Transformative Constitutionalism in Luxembourg, pp. 79, 83. Sonnevend mentions freedom of the press, party financing and corruption: Sonnevend, Pál: How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary, in: Bobek, Michal; Bodnar, Adam; von Bogdandy, Armin; Sonnevend, Pál: *Transition 2.0 – Re-establishing Constitutional Democracy in EU Member States*, 2023, Nomos, Baden-Baden, <https://www.nomos-elibrary.de/10.5771/9783748914938/transition-2-0?page=1>, p. 564. Organization for Security and Co-operation in Europe (OSCE) ODIHR Election Observation Mission: Parliamentary Elections and Referendum – 3 April 2022 – Final Report, <https://www.osce.org/files/f/documents/2/6/523568.pdf>, pp. 1, 3, 16, 19-30. Kazai, Viktor Z., Mécs, János: Local Elections in Hungary: the Results in Context, *Verfassungsblog*, 14 October 2019, <https://verfassungsblog.de/local-elections-in-hungary-the-results-in-context/>.

<sup>23</sup> Cotter, John: The Last Chance Saloon: Hungarian Representatives may be Excluded from the European Council and the Council, *Verfassungsblog*, 19 May 2020, <https://verfassungsblog.de/the-last-chance-saloon/>. Cotter: To Everything there is a Season, p. 69.

<sup>24</sup> Bradley, Kieran: Showdown at the Last Chance Saloon: Why ostracising the representatives of a Member State government is not the solution to the Article 7 TEU impasse, *Verfassungsblog*, 23 May 2020, <https://verfassungsblog.de/showdown-at-the-last-chance-saloon/>.

## 2.4. Comparison of the Arguments for Democracy and to the Rule of Law before the Court of Justice

Application of EU law for European Parliament elections could be construed in a similar way as Article 19 was used in conjunction with Article 2 by the Court of Justice in judicial independence cases.<sup>25</sup> The underlying idea is that, just as with courts, the European Parliamentary elections cannot be fair if one or more national electoral systems comprising it are fundamentally flawed. The table below shows the main arguments used by the Court of Justice in the rule of law cases<sup>26</sup> and a comparison with the respective arguments in democracy. Those arguments already used by the Court of Justice are marked with green.

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<sup>25</sup> Bogdandy and Spieker: Transformative Constitutionalism in Luxembourg, p. 83. Vissers: Enforcing Democracy. Sonnevend argues that Article 3 of Protocol No. 1 ECHR should be used through Article 6(3) TEU to interpret Article 10 TEU, and understands *Hungary v. Parliament and Council* to suggest that Article 2 is operationalised by other Treaty provisions (Judgment of 16 February 2022, *Hungary v. Parliament and Council*, C-156/21, EU:C:2022:97, §232). Sonnevend: How to Make Article 10 TEU Operational?, pp. 576, 580. Arguments against connecting Article 2 and 10 TEU: Schuller, Miriam: Why the EU should care about national elections, European Law Blog, 16 October 2023, <https://europeanlawblog.eu/2023/10/16/why-the-eu-should-care-about-national-elections/>. Some are skeptical about the justiciability of Article 10 TEU, because democracy has – unlike Article 19 TEU and judicial independence – fewer clear judicial standards: Monica Claes: Safeguarding the European Union’s Values Beyond the Rule of Law, in Södersten and Hercock (eds.): The Rule of Law in the EU: Crisis and Solutions, Swedish Institute for European Policy Studies, April 2023:10p, [https://www.sieps.se/globalassets/publikationer/2023/2023\\_10p\\_digital.pdf](https://www.sieps.se/globalassets/publikationer/2023/2023_10p_digital.pdf), p. 69.

<sup>26</sup> See, for example the arguments in: Judgment of 24 June 2019, *Commission v. Poland*, C-619/18, ECLI:EU:C:2019:531. Judgment of 27 February 2018, *Portuguese Judges*, C-64/16, ECLI:EU:C:2018:117.

Branch of Government / Court of Justice Argument	Judiciary Rule of Law	Legislature Democracy
1. Main provision	Art. 2 TEU: Rule of Law	Art. 2 TEU: Democracy
2. ‘Giving concrete expression’	Art. 19 TEU	Art. 10 TEU
3. Reaffirmed / Operationalised	Art. 47 Charter: independent and impartial tribunal, established by law, right to an effective remedy...	Arts. 14 TEU, 20(2)(b) TFEU, 39(2) Charter, 1(1) Electoral Act: right to vote, direct universal suffrage, free and secret ballot, proportional representation
4. Systemic importance for the EU	Sincere cooperation, mutual trust, judicial review, protection of individuals	Legitimacy for the EP / EU through the legislative procedure
5. Constitutional tradition	✓	✓
6. Accession criteria	✓	✓
7. Standards	ECHR	ECHR, OSCE, CoE
8. MS competence, but must comply with EU law	✓	✓

Table 1. Arguments used by the Court of Justice in the rule of law cases and their equivalents in democracy. Arguments already used by the Court of Justice are marked with green.

1-3. The basic constitutional provisions on the rule of law, as well as democracy, is Article 2 TEU, laying down the most important values for the EU. as the Court of Justice has put it, there are further provisions ‘giving concrete expression’ to these values: Article 19 TEU for the rule of law,<sup>27</sup> and Article 10 TEU for democracy. The court reinforced this

<sup>27</sup> Portuguese Judges, §32.

relationship of Article 2 and 19 TEU in its democracy practice.<sup>28</sup> These provisions are still quite general in nature and are further detailed and operationalised in EU law. The Court of Justice used Article 47 of the Charter for the rule of law because it details what judicial independence means. For democracy, a much more detailed list of requirements is available in the TEU, the TFEU, the Charter and the 1976 Electoral Act, as we have seen above. In its newer case-law, the Court relied on and interpreted the relationship of these detailing provisions with each other and with the main ones, namely Article 2 and 19 TEU as seen in *Delvigne* and *Junqueras*.<sup>29</sup>

4. Both the rule of law and democracy are of systemic importance to the EU. For the rule of law, the Court argued that *“in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law”*<sup>30</sup> and that the specific characteristics of EU law have given rise to *“a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other”*.<sup>31</sup> The preliminary ruling procedure is a concrete example of this EU judicial cooperation system: *“the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between ... the Court of Justice and the courts and tribunals of the Member States, has the object of securing that consistency and that uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy”*<sup>32</sup> Besides the preliminary ruling procedure, another example where mutual trust is essential in judicial matters is the European Arrest Warrant procedure under which Member State authorities almost blindly trust each other in depriving even their citizens of their freedom based on the assessment of another Member State’s court. Lack of independent courts in one Member State can lead to the fragmentation of such a system: *“the high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States ... meet the requirements inherent in the fundamental right to a fair trial ... as a guarantee ... that the values common to the*

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<sup>28</sup> *One of Us*, §64. *Junqueras*, §§63, 82-84.

<sup>29</sup> *Junqueras*, §86. *Delvigne*, §41.

<sup>30</sup> *Commission v. Poland*, §44.

<sup>31</sup> *Achmea*, §33.

<sup>32</sup> *Commission v. Poland*, §45. In effect: *Portuguese Judges*, §43.



*Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded*<sup>33</sup>

The Court argued that mutual trust requires the respect of all Article 2 TEU values in all Member States<sup>34</sup> which includes democracy as well. As I mentioned above, the fairness of European Parliament elections is an essential requirement for democratically legitimate decision-making because the European Parliament is one primary source of democratic legitimacy for the EU as prescribed by Article 10(2) TEU. Compared to cooperation in judicial matters, it can be argued that Member States are even more interdependent in European Parliament elections: a court can render courts from another Member State not sufficiently independent and adequate measures can be adopted, such as not enforcing a European arrest warrant. There is no parallel for the European Parliament. As the law stands, members elected in one Member State cannot be suspended or deprived of their mandate because of democratic deficiencies in elections. This is why ensuring the free and fair nature of the election process itself is crucial.

The Court did reflect on the need for uniform rules in all Member States for the election of the European Parliament. Still, so far, it has yet to fully embrace the systemic importance of fair elections in all Member States for the European Parliament and the EU itself. The Court only cited Article 223(1) TFEU, which requires the election of the European Parliament to take place in a *'uniform procedure in all the Member States or in accordance with principles common to all Member States'*.<sup>35</sup> Most probably, the argumentation on the systemic importance of the fairness of the European Parliament elections is the most significant possible step forward to exercise a strengthened oversight in electoral matters by the Court of Justice.

5. In the rule of law cases, the Court also relied on the fact that it is part of the common constitutional tradition of the Member States,<sup>36</sup> and it is valid for democracy, too. The Court has not directly argued that democracy is a constitutional tradition common to the Member States but has cited Article 223(1) TFEU and emphasised that the 1976 Electoral Act sets out *'the common principles'* applicable to the European Parliament elections.<sup>37</sup>

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<sup>33</sup> Judgment of 22 February 2022, *X and Y*, C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, §45.

<sup>34</sup> *Portuguese Judges*, §30.

<sup>35</sup> *Eman and Sevinger*, §41. *Junqueras*, §66.

<sup>36</sup> *Commission v. Poland*, §49. *Portuguese Judges*, §35.

<sup>37</sup> *Junqueras*, §67.

6. The value of the rule of law and democracy are part of the accession criteria under Article 49 TEU, also reinforced by the Court of Justice<sup>38</sup> and also under the Copenhagen Criteria.<sup>39</sup> The Court has not yet utilised this argument in the cases of democracy.

7. The Court referred to non-EU standards, namely the European Convention on Human Rights (the ECHR),<sup>40</sup> better to substantiate the meaning of the rule of law. Similarly, the ECHR contains provisions on elections which have already been interpreted by the Court.<sup>41</sup> Non-laws also contain recommendations on elections which could be relied on by the Court of Justice, such as Organization for Security and Co-operation in Europe and Council of Europe documents<sup>42</sup> which the Court has not used as supporting argumentation.

8. Finally, both the organisation of the national judiciary and the organisation of the election of the European Parliament is a national competence. Still, in both cases, there are requirements and standards to be obeyed by Member States. In the case of the rule of law, these standards are supervised quite powerfully since the *Portuguese Judges* case brought about a legal revolution in 2018 as a result of a preliminary reference. The Court has made it clear that the organisation of European Parliament elections is an implementation of EU law and therefore – while it remains in a national competence – Member States should obey EU law while exercising this competence.<sup>43</sup> These constitutional standards for the election of the European Parliament are not yet strongly enforced. In the following, I offer a possible avenue to enforce the value of democracy more effectively.

### 3. The Need for an Emergency Preliminary Ruling Procedure

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<sup>38</sup> *Commission v. Poland*, §42.

<sup>39</sup> European Council DOC/93/3, 22 June 1993, European Council in Copenhagen, Conclusions of the Presidency, [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_93\\_3](https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3).

<sup>40</sup> See, for example: *Portuguese Judges*, §35, *Commission v. Poland*, §49.

<sup>41</sup> *Eman and Sevinger*, §§48, 54, 62. *Donnici*, §44. *Junqueras*, §84.

<sup>42</sup> See, for example: Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During Electoral Processes, CDL-AD(2016)004, Venice, 10-12 March 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)004-e). Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, CDL-AD (2002) 23, Venice, 5-6 July and 18-19 October 2002, <https://rm.coe.int/090000168092af01>. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, <https://www.osce.org/files/f/documents/9/c/14304.pdf>.

<sup>43</sup> *Delvigne*, §32-33.

### 3.2. The US Supreme Court as an Example

The above legal provisions and the Court of Justice's emerging democracy case law offer solid foundations for establishing strong supervision of democratic standards in European Parliament elections. My claim is that national courts – or maybe election commissions – dealing with an electoral dispute should more frequently submit requests to the Court of Justice for a preliminary ruling. After all, under *Donnici* and *Junqueras*, it is up to the courts – national courts or, after a preliminary reference, the Court of Justice – to decide on the lawfulness of European Parliament elections.<sup>44</sup> The preliminary reference procedure has already been used in several cases: three out of the five Court of Justice cases on democracy were dealt with under this procedure.<sup>45</sup> *Junqueras* concerned the immunity and the mandate of an elected member of the European Parliament, and the case was referred to the Court of Justice after the elections. *Delvigne*, concerning the right to vote of a convicted person, and *Eman and Sevinger*, on the right to vote of overseas residents, came the closest to a 'real' election dispute affecting an election. In *Delvigne*, the national court lodged a request for a preliminary ruling in December 2013, less than six months before the 2014 European Parliament elections.<sup>46</sup> The Court, however, delivered its judgement only after the elections in October 2015. *Eman and Sevinger* – although it concerned the right to vote of residents of the Netherlands overseas territories – reached the Court of Justice only a month after the 2004 European Parliament elections.<sup>47</sup>

The election of the European Parliament is running on short deadlines, which requires quick decision-making. The 1976 Electoral Act requires the convening of the European Parliament to happen one month after its election.<sup>48</sup> Until then, all disputes directly related to the election result need to be settled. Not only do disputes affecting the election results require swift decision-making, but all disputes should be dealt with quickly in an election campaign to remedy any wrongdoing, such as illegal campaign practices. In Hungary, for example, election commissions and courts must decide within three days.<sup>49</sup> For such short

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<sup>44</sup> *Donnici*, §70. *Junqueras*, §69. Kornezov, Alexander, p. 49. Spieker: Beyond the Rule of Law, p. 75.

<sup>45</sup> *Delvigne*, *Junqueras*, and *Eman and Sevinger*.

<sup>46</sup> Request for a preliminary ruling on 9 December 2013, *Delvigne*, C-650/13, <https://curia.europa.eu/juris/document/document.jsf?docid=150351&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=6549143>.

<sup>47</sup> Request for a preliminary ruling in the case on 13 July 2004, *Eman and Sevinger*, C-300/04, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=52211&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6547805>.

<sup>48</sup> Article 11(3).

<sup>49</sup> Election Procedure 214. § (1), 228. § (1) and (2).

deadlines, even the rarely granted expedited procedure of the Court of Justice for preliminary references needs to be faster. On average, such an expedited preliminary ruling procedure lasted 7.4 months in 2022,<sup>50</sup> which is way too long for an election dispute. The urgent preliminary ruling procedure offers an even faster decision. Still, it is only applicable in questions related to the Area of Freedom, Security and Justice,<sup>51</sup> therefore, it is not applicable in electoral matters. Even if it were usable in electoral cases, it is too slow: on average, an urgent procedure lasted for 4.5 months in 2022.<sup>52</sup>

Election cases would need a special, emergency preliminary ruling procedure. The Venice Commission recommends short time limits for deciding election cases: “*A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.*”<sup>53</sup> This is not impossible for courts comparable to the Court of Justice. The Supreme Court of the United States, for example, rendered an 8,000-word-long judgement in four days during the 2000 presidential election with enormous consequences for the electoral race: the Florida Supreme Court ordered the recount of the votes on 8 December 2000, the Supreme Court stayed this order one day later in an interim measure, and issued a final judgment four days later, on 12 December<sup>54</sup> effectively ending the election count and granting Bush a victory. Such swiftness should not be impossible for the Court of Justice, especially since it should do so only once every five years during the election of the European Parliament. Such an emergency procedure would require special arrangements for deliberation, submission of observations, and either rapid translation services or the usage of English only, which is the most widely known language within the European Union.

The Court ruled in *Donnici* that “*it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court of Justice, pursuant to Article [267 TFEU], to rule on the lawfulness of the national electoral provisions and procedures*” for the

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<sup>50</sup> Annual Report 2022 Statistics concerning the judicial activity of the Court of Justice, Court of Justice of the European Union, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats\\_cour\\_2022\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf), p. 14. The faster urgent procedure is available only in questions relating to the area of freedom, security and justice under Article 107(1) of the Rules of Procedure of the Court of Justice, 29 September 2012, OJ L 265/4..

<sup>51</sup> Article 107(1) of the Rules of Procedure of the Court of Justice, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:265:0001:0042:en:PDF>.

<sup>52</sup> Annual Report 2022 Statistics, p. 14.

<sup>53</sup> Code of Good Practice in Electoral Matters, II.3.3.g. on p. 11 and §95 on p. 28.

<sup>54</sup> Judgment of 12 December 2000, *Bush v. Gore*, 531 U.S. 98 (2000).

election of the European Parliament.<sup>55</sup> This argument is in line with the Court’s general practice on the role of preliminary references. Still, it requires the Court to answer this challenge if it is to take responsibility for ensuring free and fair elections for the European Parliament by establishing an emergency procedure to deal with requests during European Parliament elections.

### *3.2. A Special Solange: Without an Emergency Procedure, No References During Elections*

Apart from its general reluctance to use the preliminary ruling procedure, an implicit conditionality is to be found in the argument of the *Kúria* against suspending election procedures and referring to the Court of Justice: as long as – *Solange* – a preliminary ruling procedure lasts this long, it is impossible to refer in an election case.

Without such an emergency procedure, mentioned above, available at least during European Parliament elections every five years, Member State courts will not be willing to refer to the Court of Justice. The Hungarian example underlines this. The need for a swift decision is the general counter-argument against any suspension of an election procedure. A non-binding but highly authoritative legal analysis of the *Kúria*’s (the Hungarian supreme court having almost exclusive jurisdiction to exercise judicial review in election disputes)<sup>56</sup> case law noted that “*due to the short deadlines in an election procedure, there is no possibility to suspend the court proceedings and to initiate a constitutional review before the Constitutional Court against the applicable law.*”<sup>57</sup> In a May 2024 judgment – analysed below in Chapter 4.1.2. –, the *Kúria* explicitly ruled against any possibility of initiating a preliminary ruling procedure: “*in the judicial review procedure there is no place for the initiation of [the constitutional review procedure before the Constitutional Court], the preliminary decision procedure according to Article 267 TFEU, or any other procedure requiring the suspension of the proceedings before the Kúria because such a suspension would result in a violation of the obligation to deliver a decision within three*

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<sup>55</sup> *Donnici*, §70. Reinforced in *Junqueras*, §69.

<sup>56</sup> Election Procedure, 229. § (1). An important exception are appeals against the electoral register, including for the ability to vote by post by nationals living abroad, Election Procedure §236(4).

<sup>57</sup> A választási és népszavazási eljárásokkal kapcsolatos jogorvoslat tárgyában létrejött joggyakorlat-elemző csoport – Összefoglaló vélemény, *Kúria*, January 2018, [https://kuria-birosag.hu/sites/default/files/joggyak/valasztasi\\_nepszavazasi\\_joggyak.pdf](https://kuria-birosag.hu/sites/default/files/joggyak/valasztasi_nepszavazasi_joggyak.pdf), pp. 28, 65.

days.<sup>58</sup> The judgment reinforced this finding in the closing part of the judgment, where the *Kúria* has to highlight the general conclusions; it argued that “*the extremely short deadlines specified in the [law] and governing the election procedure do not allow [the examination of constitutionality or conformity with EU law] in the [electoral] judicial review procedure*”.<sup>59</sup>

There were two additional cases where the applicant submitted a request for preliminary reference in an election case, but both were initiated outside the temporal scope of the Hungarian electoral procedure starting 50 days before the elections. Therefore, the *Kúria* dismissed the requests for preliminary references based on the lack of temporal jurisdiction.<sup>60</sup> There was only one case where the *Kúria* recognised that election cases might be suspended – despite the tight time-frames – to refer a constitutional review question to the Constitutional Court, despite the lack of a corresponding procedure in the law, if the applicant has no other realistic possibility of reaching the Constitutional Court.<sup>61</sup> This was a novelty, but the most recent judgement mentioned above – delivered by the judicial panel involving the President of the *Kúria* – is unequivocal that the *Kúria* sees no possibility of suspending an election dispute pending before it and submitting a request for preliminary ruling.

This judgment of the *Kúria* essentially forbidding all Hungarian courts from submitting a preliminary reference to the Court of Justice clearly violates EU law because no national provision can bar a judge from engaging the Court of Justice.<sup>62</sup> However, it shows that national courts might find themselves between two pressing obligations: enforcing EU law and, when necessary, requesting the preliminary reference procedure from the Court of Justice while ensuring legal certainty by quickly deciding election cases. It is essential to embrace the requirement to decide election cases swiftly. Therefore, the situation is that a special *Solange*-style interdependence exists between national courts dealing with election cases and the Court of Justice: while it is no question that national courts should submit questions for preliminary reference if so required by EU law, the Court of Justice should be

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<sup>58</sup> Judgment of 21 May 2024, Kvk.VII.39.089/2024/4, §19.

<sup>59</sup> Kvk.VII.39.089/2024/4, §21(3).

<sup>60</sup> Judgment of 1 February 2023, Kvk.VII.39.007/2023/2, §27. Judgment of 4 March 2024, Kvk.III.39.013/2024/2, §27.

<sup>61</sup> Judgment of 24 September 2019, Kvk.III.38.043/2019/2, §23.

<sup>62</sup> Judgment of 23 November 2021, *IS* [Illégalité de l'ordonnance de renvoi], C-564/19, ECLI:EU:C:2021:949, §§67-82. Judgment of 16 January 1974, *Rheinmühlen-Düsseldorf*, C-166/73, EU:C:1974:3, §§2-4; Judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 és C-189/10, EU:C:2010:363, §§43-45.

responsive to the requirements of an election dispute and should establish suitable procedures to act as the nature of an election case requires and decide if needed, within days.

#### 4. Possible Questions for Referral

This Chapter offers two examples of possible topics for preliminary reference using the Hungarian legal context. These examples will shed more light on the arguments explained before and will also be useful for assessing the real-life viability of using preliminary references in European Parliament election cases.

Hungarian election disputes are generally handled by election commissions, and a judicial review is available. There have been no cases where a Hungarian court has referred an election question to the Court of Justice. Hungarian law does not explicitly provide a suitable suspension and referral procedure either. Under settled Court of Justice case law, the right of national courts to refer preliminary questions derives directly from Article 267 TFEU<sup>63</sup> therefore, Hungarian courts could set aside national provisions. As we have seen in Chapter 4.1.2., Hungarian courts are reluctant to do this, arguing that a preliminary ruling procedure would be too slow for an election process (see Chapter 3. as well).

Moreover, it might not only be a possibility but an obligation for the *Kúria* to engage the Court of Justice under Article 267 TFEU. As a court of last instance, the *Kúria* is obliged to submit a preliminary reference unless very specific conditions are met: the question is not relevant to the case, EU law is unequivocal, or the Court of Justice has already decided an essentially similar case.<sup>64</sup> As seen above, none of the latter two conditions are met because of the uncharted nature of the territory. Statistics also tell that the *Kúria*, as a court of last instance, has higher chances of an answer on the merits of the case by the Court of Justice instead of a rejection, as the Court of Justice accepts almost all questions from courts of last instances.<sup>65</sup> The lack of reference for a preliminary ruling by a court of last instance, on the other hand, might result in several repercussions: infringement

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<sup>63</sup> See, for example in the Hungarian context: Judgment of 23 November 2021, *IS*, C-564/19, EU:C:2021:949, §70.

<sup>64</sup> Judgment of 6 October 2021, *Conorzio*, C-561/19, EU:C:2021:799, §§33-66.

<sup>65</sup> Pavone, Tommaso and Kelemen R. Daniel: The Evolving Judicial Politics of European Integration: The European Court of Justice and national courts revisited, *European Law Journal*, 2019;1–22, <https://doi.org/10.1111/eulj.12321>, p. 18.

proceedings by the Commission,<sup>66</sup> a finding of a violation of fair trial by the European Court of Human Rights,<sup>67</sup> and even a liability for possible damages.<sup>68</sup> However, the substance of an answer and how far the Court of Justice is willing to go in setting standards for Member States for organising European Parliament elections depends on delicate considerations of judicial politics and is very hard to predict.

Some election-related questions might only be raised during an election period, but others can also be submitted afterwards. Persuading a judge to submit to the court might be easier outside of the election periods, with more time available and less attention and pressure focused on the dispute. In other words, it should not be a problem if a question does not bear immediate results; rather, it focuses on establishing precedent in a somewhat similar fashion to *Eman and Sevinger*, where the case was not moot despite the European Parliament elections being over because the applicants might have asked for compensation for not being able to vote.<sup>69</sup> Possible topics for a preliminary reference might include the following:

#### **4.1. Lack of Neutrality of Public Authorities During Elections**

##### *4.1.1. State Neutrality as a European Standard*

As explained in Chapter 2.3. above, Hungary faces serious shortcomings in democracy in elections. Several observers have found that the overlap between the activities of the government and governing parties undermines the free and fair nature of elections.

Although state neutrality is an established concept in several jurisdictions, and previously it was – at least in the law if not in practice – a requirement in Hungary as well, Hungarian law does not require state neutrality during elections any more. Following a legislative change in 2018, the Kúria in 2019 contrasted this change of law and the recent decisions of the Constitutional Court with the well-established German case-law on state neutrality and found that this requirement has been removed from the legal system: “*After the*

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<sup>66</sup> See, for example: Judgment of 4 October 2018, *Commission v. France*, C-416/17, EU:C:2018:811.

<sup>67</sup> Judgment of 8 April 2014, *Dhahbi v. Italy*, ECtHR 17120/09. Judgment of 20 September 2011, *Ullens De Schooten and Rezabek v. Belgium*, ECtHR 3989/07 and 38353/07. Judgment of 20 April 2019, *Repcevirág Szövetkezet v. Hungary*, ECtHR 70750/14. Judgment of 14 March 2023, *Georgiou v. Greece*, ECtHR 57378/18.

<sup>68</sup> Judgment of 30 September 2003, C-224/01, *Köbler*, EU:C:2003:513, §§50, 55.

<sup>69</sup> *Eman and Sevinger*, §17.



*amendment of [the Election Procedure in 2018] the Kúria's case-law on state neutrality ... can no longer be maintained. ... Reviewing the decisions of the Hungarian Constitutional Court, the Kúria found that the application of the doctrine [of state neutrality] cannot be inferred ... rather, it can be concluded that it does not exist and the case-law [of the Constitutional Court] allows for the overlap of party and government communications. Therefore, ... the Basic Law of Hungary does not require the neutrality of state bodies, which are otherwise not neutral in nature, in the election campaign".<sup>70</sup> In subsequent cases, both the Kúria and the Constitutional Court ruled that the requirement of state neutrality during elections has been removed from the legal system.<sup>71</sup>*

There is no clear standard for state neutrality in EU law, but there are provisions and case law based on which a reasonable argument might be proposed for the existence of such a requirement. The Court of Justice has ruled that “*Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, ... are an integral part of the very identity of the European Union as a common legal order; values which are given concrete expression in principles containing legally binding obligations for the Member States*”.<sup>72</sup> It is settled case law that Article 10(1) TEU requiring representative democracy is giving concrete expression for Article 2 TEU values.<sup>73</sup> This principle is further implemented by the requirement of equality in Article 9 TEU and Article 20 of the Charter and the requirement of free elections in Article 14(3) TEU and Article 39(2) of the Charter. According to Articles 2 and 9 TEU, the principle of equality between citizens is one of the fundamental principles covering all activities of the EU. The Court of Justice confirmed the requirement of equality for European Parliament elections as well in *Eman and Sevinger*.<sup>74</sup> The Court also ruled in *Junqueras* that the composition of the European Parliament must faithfully and fully reflect the will of the voters, who have voted based on direct and universal suffrage.<sup>75</sup>

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<sup>70</sup> Kvk.III.38.043/2019/2, §§21-23.

<sup>71</sup> Decisions of the Kúria: Judgment of 29 March 2022, Kvk.II.39.356/2022/2, §§70-71; Judgment of 18 May 2019, Kvk.V.37.637/2019/6, §§37-38; Judgment of 4 March 2022, Kvk.VII.39.244/2022/4, §42; Judgment of 26 September 2019, Kvk.V.38.047/2019/5, §21. Constitutional Court: Decision of 11 March 2022, 3130/2022. (IV. 1.); Decision of 22 March 2022, 3151/2022. (IV. 12.); Decision of 18 October 2019, 3256/2019. (X. 30.), §29.

<sup>72</sup> Judgment of 16 February 2022, *Hungary v. Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, §232.

<sup>73</sup> *One of Us*, §64; *Junqueras*, §§63, 82-84.

<sup>74</sup> *Eman and Sevinger*, §§57, 61.

<sup>75</sup> *Junqueras*, §83.

In the two cases currently pending before the Court of Justice, the Advocate General argues that voters must be treated equally given the requirement contained in Article 9 TEU regardless of whether they are citizens or not of the Member State where they are voting for the members of the European Parliament.<sup>76</sup> The requirement of equal treatment of voters and parties can be easily inferred from this argument.

State neutrality can be found in the European Court of Human Rights practice, which is relevant to the EU level of protection of fundamental rights. Under Article 6(3) TEU and Article 52(3) of the Charter, the EU guarantees the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms at least at an equal level. The European Court of Human Rights explicitly refers to the principle of State neutrality.<sup>77</sup> National legislation on European Parliament elections, which, as argued above, constitutes an implementation of EU law, must comply with the Charter, which in turn must at least provide the level of protection required by the ECtHR.

According to the European Commission for Democracy through Law – the Venice Commission – equal opportunities for parties and candidates should be ensured, which includes a neutral attitude of public authorities, especially in election campaigns and in the financing of campaigns with public money.<sup>78</sup> According to the Venice Commission, freedom of choice also implies the requirement of neutrality of public bodies and equal treatment of all actors.<sup>79</sup> Under the Venice Commission and the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights joint guideline, public bodies are prohibited from taking advantage of their official status during the campaign and, in order to prevent the misuse of public resources to influence competition, the legislation should state that no major announcement may be made during the campaign period that is intended or likely to favour a party or candidate; this does not extend to announcements made necessary by unforeseen circumstances, such as economic and political changes in the state or region, in particular natural disasters or other emergencies requiring immediate and urgent action which cannot be postponed.<sup>80</sup> The

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<sup>76</sup> Opinion of Advocate General de la Tour in *Commission v. Czech Republic*, §§69-71, 76 and *Commission v. Poland*, §§96-98, 103.

<sup>77</sup> Judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt v Belgium*, ECtHR 9267/81, §54. Judgment of 19 June 2012, *Russian Communist Party v Russia*, ECtHR 29400/05, §§51, 107-108, 127-128.

<sup>78</sup> Code of Good Practice in Electoral Matters, §I.2 .3, on p. 7.

<sup>79</sup> §I.3 .1.a, on pp. 8 and 20.

<sup>80</sup> Venice Commission and the OSCE ODIHR Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During Electoral Processes, CDL-AD(2016)004, Venice, 10-12 March 2016,

OSCE Copenhagen Document states that there should be a clear separation between parties and the State.<sup>81</sup>

Under Hungarian law, such a case is to be decided by the *Kúria*, Hungary's supreme court, which is a court of last instance in the meaning of Article 267 TEU. Therefore, this court has a duty to refer a preliminary question whenever the application of EU law is relevant to the case. According to the settled case law of the CJEU, courts of last instance may only be relieved of the obligation to refer if the question raised is (a) irrelevant or (b) the Court of Justice has already interpreted the provision of EU law in question, or (c) the correct interpretation of EU law is so obvious as to exclude all reasonable doubt.<sup>82</sup> In a case where state neutrality is at the helm of the dispute, neither condition (b) nor (c) can be satisfied. Therefore, a national court must refer the question to the Court of Justice.

Based on the above, it might be fruitful to provide the Court of Justice with an opportunity to set standards for state communication (including public broadcast companies and state-run news agencies) during European Parliament elections not only for Hungary but for the entire European Union to set clear and enforceable standards for campaigning across Member States for the election of the members of the European Parliament.

#### *4.1.2. The Response of the Hungarian Kúria*

For general information, the Hungarian government established an email mailing list during the Covid-19 pandemic. Millions of people subscribed to the service with the hope of receiving information on pandemic-related issues. However, to the surprise of many, they received government propaganda on, for example, the Russian war in Ukraine. The privacy policy was blurry, and in reality, it did not promise that subscribers would only receive pandemic-related information. The whole setup, however, including the webpage and the communication around the service, was ambiguous, which caused many people to expect only health-related information. The *Kúria* held that the government violated the equality of arms between the government and the opposition by using the database for

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[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)004-e), §II. B.1 .1 and 1.3.

<sup>81</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, <https://www.osce.org/files/f/documents/9/c/14304.pdf>, 5.4.

<sup>82</sup> Judgment of 6 October 2021, *Conorzio*, C-561/19, ECLI:EU:C:2021:799, §33. Judgment of 6 October 1982, *Cilfit and Others*, C-156/21, EU:C:1982:335, §21.

campaign purposes,<sup>83</sup> but the Constitutional Court reversed.<sup>84</sup> The National Data Protection Authority also affirmed the legality of the use of data.<sup>85</sup>

A May 2024 submission<sup>86</sup> attempted to challenge the overlap between the government and the governing parties' campaign messaging and ask for a preliminary reference. The case originated in a newsletter sent out by the government to the subscribers of the above newsletter. The message concerned the Ukraine war and read as follows:

*Dear Sir / Madam!*

*NATO plans to set up a mission in Ukraine. This would include military training and the coordination of arms shipments. The North Atlantic Treaty Organization would pump 100 billion dollars into the war in five years, so they expect it to be prolonged for at least five years.*

*What we are seeing is the worst case scenario because it could lead to a world war.*

*There is enormous pressure in Hungary to support plans to expand the war. However, the government's position is clear: We want to stay out of the war.*

*We do not want to participate in this NATO mission. We will do everything we can to avoid having to send weapons and soldiers. War has no solution on the battlefield. Back to the negotiating table.*

*Lives can only be saved with a ceasefire and peace.*

*Sincerely:*

*Government Information Center*

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<sup>83</sup> Judgment of 9 March 2022, Kvk.V.39.269/2022/4.; Judgment of 5 March 2022, Kvk.II.39.260/2022/5.

<sup>84</sup> 3130/2022. (IV. 1.).

<sup>85</sup> Statement of the National Data Protection Authority on data protection regarding registration for a newsletter at [vakcinainfo.gov.hu](https://www.naih.hu/adatvedelmi-allasfoglalasok?download=509:allasfoglalas-a-vaksinainfo-gov-hu-oldalon-torteno-regisztraciohoz-kotodo-hirlevelek-adatvedelmi-kerdesei-kapcsan), 2 April 2022, <https://www.naih.hu/adatvedelmi-allasfoglalasok?download=509:allasfoglalas-a-vaksinainfo-gov-hu-oldalon-torteno-regisztraciohoz-kotodo-hirlevelek-adatvedelmi-kerdesei-kapcsan>.

<sup>86</sup> The author take part in writing the request for judicial review in this case.

The messaging in the above letter closely overlaps with the messaging of the governing parties, which run a very significant campaign against supporting Ukraine's war effort. The applicant – a citizen who received the newsletter – complained to the National Election Commission, and, after being rejected by it,<sup>87</sup> requested a judicial review of the decision by the *Kúria*.

The applicant requested the *Kúria* to submit the following questions for a preliminary ruling:

1. Having regard to the principle of equality and democracy enshrined in Article 2 TEU and the principle of equality enshrined in Article 9 TEU, and the requirement of representative democracy enshrined in Article 10(1) TEU, are the provisions of those articles and Article 14(3) TEU, Article 1(1) of the 1976 Electoral Act and Article 20 and 39(2) of the Charter to be understood as requiring, in the election of members of the European Parliament, that the Member States, the authorities and the institutions of the Member States must remain neutral and create a level playing field for parties and candidates in the electoral contest?
2. If the answer to Question 1 is in the affirmative, is it contrary to the requirements of EU law for a national government to disseminate the message of a party or candidate in an election contest in a disproportionate manner compared to the messages of other parties or candidates, in close proximity to election day.

The *Kúria* dismissed the case, arguing that the applicant had no standing.<sup>88</sup> It aligns with the extremely restrictive interpretation of standing in Hungarian judicial practice in election cases. The *Kúria* asserted that it is not enough to be a voter; it is required that the case at hand directly affects the applicant.<sup>89</sup> What is more interesting is that the court – for

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<sup>87</sup> Decision of 15 May 2024, NVB 338/2024, [https://www.valasztas.hu/hatarozat-megjelenito?p\\_p\\_id=decision\\_WAR\\_nvidecisionportlet&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&decision\\_WAR\\_nvidecisionportlet\\_mvcPath=%2Fdetails%2Fview.jsp&decision\\_WAR\\_nvidecisionportlet\\_urlTitle=338%2F2024.-nvb-hat%25C3%25A1rozat-a-dr.-k.-zs.-mag%25C3%25A1nszem%25C3%25A9ly-%25C3%25A1tal-beny%25C3%25BAjtott-kifog%25C3%25A1s-t%25C3%25A1rgy%25C3%25A1ban](https://www.valasztas.hu/hatarozat-megjelenito?p_p_id=decision_WAR_nvidecisionportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&decision_WAR_nvidecisionportlet_mvcPath=%2Fdetails%2Fview.jsp&decision_WAR_nvidecisionportlet_urlTitle=338%2F2024.-nvb-hat%25C3%25A1rozat-a-dr.-k.-zs.-mag%25C3%25A1nszem%25C3%25A9ly-%25C3%25A1tal-beny%25C3%25BAjtott-kifog%25C3%25A1s-t%25C3%25A1rgy%25C3%25A1ban).

<sup>88</sup> Kvk.VII.39.089/2024/4.

<sup>89</sup> §11.

the first time – categorically denied any possibility of turning to the Court of Justice in an election case due to the short deadlines required in an election procedure, as was analysed above in Chapter 3.

#### *4.1.3. Possible Next Steps: Linking GDPR and an Infringement Procedure*

A possible next step would be to focus on entangling the novel questions on elections and the interpretation of democracy under EU law with an area of law where the Court of Justice has more settled case law. Data protection, with its very detailed and settled, high-profile case law, offers an option for this approach.

It might be an option to initiate new proceedings against a newsletter message like the one above and connect data protection and the requirement of state neutrality. The national court might be asking for clarification from the Court of Justice on whether providing not entirely clear information on the purpose of the data processing satisfies the GDPR in an election context. Additionally, the national court should ask whether the government's privacy policy promising further information is complied with by one-sided information aligned with the governing coalition's opinion during an election campaign.

A possible referral should question whether the right to the protection of personal data under Article 16(1) TFEU, the provisions on the protection of personal data under Article 5(1)(b) GDPR and Article 8 of the Charter should be understood as precluding the sending out of political messaging shortly before the European Parliament election based on the processing purposes 'to establish further contacts, to seek opinions, to provide information', which are generally formulated in the privacy notice. The court should also ask whether EU law forbids the government from distributing information or funding advertisements from a financial source under the control of a Member State government, which is disproportionately beneficial to some of the competing parties.

Another next step might be to raise awareness at the European Commission in its capacity as the guardian of the treaties. The Commission receives complaints<sup>90</sup> for alleged breaches of union law by Member States and is entitled to launch an infringement procedure if it

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<sup>90</sup> How to make a complaint at EU level, European Commission, retrieved on 29 May 2024, [https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level\\_en](https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en).

finds a violation. In the present case, it is quite straightforward that the *Kúria*'s ruling is incompatible with EU law on the right and – in cases of courts of last instances – the obligation of Member State courts to submit requests for preliminary rulings. It is not the first time the *Kúria* has attempted to restrict the Hungarian court's ability to submit preliminary references. In the *IS* case, the Court of Justice quite bluntly reprimanded the *Kúria* by ruling in the operative part: "*Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, ... that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. The principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court*".<sup>91</sup> However, it is impossible to predict how willing the Commission would be to launch an infringement procedure for a single judgment.

#### **4.2. Equality of the Vote in Postal Voting**

Some Hungarian nationals living outside the country have the possibility of a postal vote, while others do not have this option. This practice heavily favours ethnic Hungarians living in neighbouring countries, who have voted 96 % for the governing parties in the 2019 European Parliament elections,<sup>92</sup> while more opposition-leaning emigrants residing in Western Europe can only vote in person at embassies. The difference is based on having a Hungarian address. In practice, a Hungarian citizen studying in Birmingham (who did not renounce their Hungarian address) has to travel to London to vote in person at the embassy while her fellow Hungarian citizens born and living in Subotica, the centre of Hungarian life in Serbia, might vote via post.

The European Court of Human Rights accepted this regime for national elections,<sup>93</sup> but building on *Eman and Sevinger*, the practice might be challenged. In this case, the Court examined the Netherlands' practice of allowing citizens residing in third countries to vote and stand as a candidate at the European Parliament elections but did not allow the same for the residents of the Netherlands Antilles and Aruba. The Court ruled that this treatment

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<sup>91</sup> *IS*, §148(1).

<sup>92</sup> Results of the postal vote in 2019, National Election Office, [https://www.valasztas.hu/levelsavazas-eredmenye\\_ep2019](https://www.valasztas.hu/levelsavazas-eredmenye_ep2019).

<sup>93</sup> Decision of 17 February 2005, *Zsófia Vámos and Others v. Hungary*, ECtHR 48145/14.

was not objectively justified and, therefore, infringed on the principle of equal treatment.<sup>94</sup> The situation is not identical, but comparable to the Hungarian legislation, which goes one step further than the Dutch law examined in *Eman and Sevinger* and allows for all citizens living abroad the right to vote, but has separate regimes based on seemingly arbitrary conditions, namely, having or not having a Hungarian domicile. As the Commission argued in the *Eman and Sevinger* case: “since the Netherlands legislature gives to all Netherlands nationals who are not resident in Aruba or the Netherlands Antilles, wherever they live, the right to participate in [European Parliament] elections, that right must also be granted to Netherlands nationals from Aruba and the Netherlands Antilles. If not, the legislation would include an unjustified discrimination between a Netherlands national who, for example, resides in New York and one who resides in Aruba.”<sup>95</sup>

This question can be raised during an election period through an appeal against not being enrolled as a postal voter and after the elections through an action for damages caused by the violation of EU law. In the latter case, to remain in our imaginary example, the material loss is the cost of a Birmingham-London train ticket.

#### 4.2.1. Before the Elections: An Election Case

Voters can request their enrollment to the roster of postal voters and request a judicial review against the decision of the National Election Office should it reject them. The court should decide within three days but no later than the day before the election.<sup>96</sup> What is exceptional in these cases is that – unlike almost all other judicial review procedures – it is not decided by the *Kúria*. The reason behind such allocation of judicial powers might be the repetitive nature and high number of cases against the electoral roster. The fact that these cases are decided not by the *Kúria* but by another court allows litigants to reach out to more judges and thus increase the chances of a possible referral to the Court of Justice.

As pointed out above, the decision time of the Court of Justice is also not fast enough, and an answer is to be expected after the newly elected European Parliament is convened. There is thus a legal possibility that the Court of Justice and the referring court can decide the case only after the European Parliament has already been convened and functioning. In

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<sup>94</sup> *Eman and Sevinger*, §60.

<sup>95</sup> *Eman and Sevinger*, §39.

<sup>96</sup> Election Procedure 236. § (5).



*Eman and Sevinger*, this did not render the case moot because the applicants might still be eligible for compensation for the violation of EU law.<sup>97</sup> Election cases initiated right before the election might influence the outcome of these elections. There is the ultimate possibility of finding a candidate who is ineligible to run or to repeat the elections. This responsibility puts enormous stress on courts, both national and the Court of Justice, which might hamper their willingness to refer a question or make a bold judgment.

#### 4.2.2. *After the Elections: A Small Claims Case*

From a strategic litigation viewpoint, it might be advisable to take a step-by-step approach and offer opportunities to courts where they can work without time pressures and lower stakes. Another option to challenge the double voting regime for Hungarians living abroad is to sue for damages *after* the elections. This scenario is easiest to understand through the example given above: if the student living in Birmingham, the United Kingdom, which is a third country as regards the EU, wants to vote at the European Parliament elections, they must travel to London because only there is a suitable Hungarian embassy. At the same time, their fellow Hungarian citizen living in Subotica can easily vote via post. The lawsuit in this scenario would be initiated after the elections for damages caused by the Hungarian state to the amount of the price of a Birmingham-London two-way train ticket. The student would have to launch a small claims case against the Hungarian authorities claiming reimbursement for the train tickets. In this proceedings, the applicant should request the Hungarian judge dealing with her case to refer a question to the Court of Justice because she might have had to pay for the train tickets in violation of the equality of the vote, a requirement under EU law.

This scenario alleviates the courts from the pressures of having to decide on the European Parliament elections itself, and no outcome of this case might result in directly questioning the legitimacy of the EP. This design makes its consequences obviously *pro futuro*, not affecting the incumbent EP. The next European Parliament elections being years ahead (supposing that the case concludes in a few years), so all actors would have enough time to accommodate the consequences.

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<sup>97</sup> *Eman and Sevinger*, §17.

The case of course, would still be an important one, but this is the best avenue to lower the heat in an election case.

This design would be to some extent similar to the setup of *Eman and Sevinger*, where the Court of Justice concluded that despite being after the elections, the case is not moot because of a possibility for damages.<sup>98</sup> As for the damages, the Court ruled in the operative part: “*It is for the national law of each Member State to determine the rules allowing legal redress (rechtsherstel) for a person who, because of a national provision that is contrary to Community law, has not been entered on the electoral register for the election of the members of the European Parliament ... and has therefore been excluded from participation in those elections. Those remedies, which may include compensation for the loss caused by the infringement of Community law for which the State may be held responsible, must comply with the principles of equivalence and effectiveness.*”<sup>99</sup> The ruling of the Court is in line with its *Francovich* case law establishing state liability for breaches of EU law.<sup>100</sup> Member States are required to designate the competent courts and develop suitable procedures to rule on such cases.<sup>101</sup>

Hungary does not have a clear legal procedure to enforce damages caused by the violation of EU law. This clearly runs contrary to the *Francovich* and *Köbler* case law of the Court of Justice, but Hungarian law does not offer a clear procedure for claiming damages for a failure to comply with EU law by the state. The Civil Code contains provisions on liability for damages caused by the exercise of public power, but this is understood as applicable for administrative actions only.<sup>102</sup>

The practice of Hungarian courts is also reluctant: Hungarian judges tend to side with state immunity or, by other means, reject claims submitted for damages caused by the violation of EU law. The same reluctance is present in cases of different types of state liability.<sup>103</sup> Due to the uncertainty in the legal procedure to be followed, it is unclear which court

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<sup>98</sup> §17.

<sup>99</sup> *Eman and Sevinger*, §72(3).

<sup>100</sup> Judgment of 19 November 1991, *Francovich*, C-6/90 and C-9/90, ECLI:EU:C:1991:428, §35.

<sup>101</sup> *Köbler*, §46.

<sup>102</sup> Lábady, Tamás; Parlagi, Mátyás, In: Gárdos, Péter; Vékás, Lajos (eds.): Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez, commentary for 6:548. §.

<sup>103</sup> Varga, Zsófia: A Köbler-doktrína magyarországi alkalmazása – A bírósági jogkörben az uniós jog megsértésével okozott kár megtérítésének gyakorlata, *Európai Jog* 2015/1, pp. 1-24, <https://szakcikkkadatbazis.hu/doc/2988048>. Elő, Dániel: A jogalkotással okozott kár, *Polgári jog* 2018/2, <https://jogaszvilag.hu/jogtar-info/elo-daniel-a-jogalkotassal-okozott-kar/>. Tran, Róbert Péter: A jogalkotással okozott kárért való felelősség, *Polgári Jog* 2019/5-6.

would have jurisdiction to rule on the case in the first instance. It can either be a lower or a middle-level court around Budapest.<sup>104</sup>

For the present case, the lack of a definite practice in favour of state liability for the violation of EU law means that the judge must be persuaded to either apply the *Francovich* and *Köbler* case law directly or to refer questions to the Court of Justice not only on the merits of the case – the equality of the right to vote – but also on its enforcement and state liability. This further complicates the issue and lowers the chances of a successful referral. It is important to note, however, that the case – unlike most of the election cases – will not start at the *Kúria*, which offers a possibility to engage other judges and thus increase the chances of finding one willing to submit a request for a preliminary reference.

### **4.3. Assessment of the Possible Questions for Referral**

The above examples served partially illustrative purposes to explain better the arguments laid out above. As we have seen, there are plausible arguments for the need for a reference because EU law is unclear, and reasonable doubts might emerge among national judges regarding the meaning of EU constitutional requirements regarding European Parliament elections. As argued in 4.1.1. above, a national court of last instance is bound to refer under Article 267 TFEU unless the *Cilfit* criteria are met. These criteria are, in fact, not satisfied because there is neither suitable case law of the Court of Justice on the matter nor the law is clear. This means that a national high court should refer to the Court of Justice in a case concerning state neutrality or the equality of the vote, and possibly in other areas.

Judicial politics might play a very significant role in these high-profile cases because, after all, these questions touch upon the very core of democracy. The Court of Justice might be reluctant to offer clear standards simply because of the lack of general practice among the Member States and the possible consequences for both the European Parliament and national elections. Instead, should the case reach the Court of Justice, it might offer general considerations, which can be the stepping stones of further litigation.

The main benefit of the second GDPR-linked variant of the state neutrality example (Chapter 4.1.3.) would be that it links elections and the standards of democracy under EU

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<sup>104</sup> The court differs under Civil Procedure 20. § (3) a) or 20. § (3) ab). Civil Code 25. § (4) should be applied on the seat of the court.

law with the well-established legal area of data protection. This might make both national courts more willing to refer and the Court of Justice more apt to engage with the case in detail. A question on democracy wrapped into the GDPR might be easier to swallow, however, there is a risk that the case might be decided entirely on data protection grounds without any finding on democracy.

The possible question for referral regarding the equality of the vote (Chapter 4.2.) has two sub-options, and the second one is the more suitable. This version, launched after the elections, alleviates the courts from the immense responsibility of deciding a case during the election campaign because it can be initiated after the elections without strict time limits. Another very important advantage of the second variant is that the small claims case will not be dealt with by the *Kúria*, which decides on election cases, but by lower-level courts. This offers more room for manoeuvre to find a judge willing to refer to the Court of Justice.

## 5. Reference by an Election Commission

There is no question that a Hungarian court can refer a preliminary question to the Court of Justice, but it might be hard to convince a judge to do so, especially in light of the recent practice of the *Kúria* analysed above in Chapter 3. It is considerably more difficult to decide whether a Hungarian election commission can be framed as a “*court or tribunal*” under Article 267 TFEU, meaning that the Court of Justice would accept a question for preliminary reference from such a body. This is important because, in practice, it might be much easier to convince an election commission than a court to turn to the Court of Justice. The independence of the *Kúria* is under threat, and judges, in general, are discouraged from using the preliminary reference procedure.<sup>105</sup>

It is up to the Court of Justice to decide whether a body qualifies as a court or tribunal for the purposes of Article 267 TFEU on the preliminary ruling procedure, and the national

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<sup>105</sup> Hungarian Helsinki Committee: Fundamental Deficiencies of the Hungarian Judicial Reform, 31 October 2023, [https://helsinki.hu/en/wp-content/uploads/sites/2/2023/10/Fundamental\\_deficiencies\\_Judicial\\_Reform\\_20231030.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2023/10/Fundamental_deficiencies_Judicial_Reform_20231030.pdf), pp. 5, 7-9. Hungarian Helsinki Committee: A Brief Assessment of the Case Allocation Scheme and System of the *Kúria* Based on the Experiences of the Period Since the Entry Into Force of the Judicial Reform, 26 September 2023, [https://helsinki.hu/en/wp-content/uploads/sites/2/2023/09/case\\_allocation\\_system\\_of\\_Kuria\\_20230926.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2023/09/case_allocation_system_of_Kuria_20230926.pdf).

categorisation is not conclusive.<sup>106</sup> The Court of Justice uses several criteria to determine whether a body qualifies, which can be structured into organic and functional criteria. In general, *organic criteria* are whether the body is (i) established by law, (ii) permanent, (iii) entrusted with a compulsory jurisdiction, (iv) applies rules of law, and (v) is independent; *functional criteria* are (i) whether the procedure is *inter partes*, (ii) the existence of a dispute, and (iii) the judicial nature of the decision.<sup>107</sup> The Court of Justice considers all factors as a whole and might accept the reference even in the absence of one or more individual criteria.<sup>108</sup>

While many of the criteria are met by Hungarian election commissions, two issues remain: due to their composition of elected and delegated members by political parties, their independence can be questioned, and proceedings before the election commissions are not *inter partes*.<sup>109</sup> As for the independence criterion, the Court of Justice has extensive practice on all types of bodies<sup>110</sup> under which a detailed review can be done regarding the nature of Hungarian election commissions. The requirement for the procedure being *inter partes* is not an absolute one, and several bodies were accepted as courts or tribunals within the meaning of Article 267 TFEU having only a single party.<sup>111</sup>

## 5.1. Organic Criteria

There are three levels of election commissions relevant to decide on complaints during European Parliament elections: local (city-level), territorial (county-level), and national election commission.<sup>112</sup> Hungarian election commissions are established by the Law on

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<sup>106</sup> Craig, Paul and de Búrca, Gráinne: EU Law, Oxford University Press, 2020, p. 1198. Judgment of 14 December 1971, *Politi v Italy*, C-43/71, EU:C:1971:122. Judgment of 30 March 1993, *Corbiau v Administration des Contributions*, C-24/92, EU:C:1993:118.

<sup>107</sup> Prete, Luca and Wahl, Nils: The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings, 55, *Common Market Law Review*, Issue 2, 2018, <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/55.2/COLA2018035>, pp. 523, 528. Judgment of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, §23.

<sup>108</sup> See the case law cited in Opinion of Advocate General Mengozzi on 24 November 2015, *MT Højgaard and Züblin*, C-396/14, EU:C:2015:774, §43.

<sup>109</sup> Judgment of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723, §§54-61. Judgment of 31 January 2013, *D. and A.*, C-175/15, EU:C:2013:45, §88.

<sup>110</sup> See, in particular: Judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, §25. Opinion of AG Mengozzi in *MT Højgaard and Züblin*, §39. Judgment of 17 October 1989, *Kontorfunktionærernes*, C-109/88, EU:C:1989:383, §8. Judgment of 12 June 2014, *Ascendi*, C-377/13, EU:C:2014:1754, §26. For a contrast, see: Judgment of 21 January 2020, *Banco Santander*, C-274/14, EU:C:2020:17, §64.

<sup>111</sup> *D. and A.*, §88.

<sup>112</sup> Election Procedure 333. § (1). A fourth category, the polling station commission does not decide on disputes and has a mainly administrative function.

Election Procedure<sup>113</sup> and are permanent.<sup>114</sup> The Court of Justice clarified that compulsory jurisdiction refers to the binding nature of the decisions, which does not depend on the agreement of the parties, and this is true for election commissions.<sup>115</sup> If not appealed within a short time frame (generally three days), decisions become *res judicata*.<sup>116</sup> Election commissions apply rules of law and are not merely deciding *ex aequo et bono*.<sup>117</sup>

Independence is the trickiest question regarding Hungarian election commissions because some of its members, at certain times, are delegated by political parties and might be revoked at will. Internal independence means that there is a level playing field for the parties and the body is devoid of any interest in the subject matter of the case, and external independence refers to whether the body acts as a third party in relation to the parties to the proceedings, the composition of the body and safeguards against pressure from the outside (for example, appointment, length of service, dismissal of members).<sup>118</sup> Hungarian law stipulates that election commissions are independent bodies of the electorate to maintain, among others, the fairness of the elections and impartiality, subordinated only to the laws.<sup>119</sup> All members take an oath to obey and enforce such laws.<sup>120</sup> Election commissions are third parties in relation to the dispute and are not parties to any appeal against their decisions,<sup>121</sup> and they are not in a subordinate position and take no orders from elsewhere.<sup>122</sup> There are rules on conflict of interests, such as a member might not submit a complaint to the election commission they are a member of,<sup>123</sup> and elected members might not be a member of a political party or a relative of a candidate.<sup>124</sup>

Election commissions are composed of elected and delegated members: elected members are elected by the Parliament or local governments and cannot be recalled.<sup>125</sup> Delegated

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<sup>113</sup> Election Procedure, 14. § (2). For European Parliament Elections, only

<sup>114</sup> Members of the National Election Commission are elected for nine years, members of other commissions are elected according to election cycles. Election Procedure 33. § (1) a) and (3) a).

<sup>115</sup> Prete and Wahl: The gatekeepers of Article 267 TFEU, p. 524-525. Order of 13 February 2014, *Merck*, C-555/13, §18. Judgment of 6 October 2015, *Consorti Sanitari del Maresme*, C-203/14, EU:C:2015:664, §23.

<sup>116</sup> Moreover, unpaid fines are collected by the tax authority. Election Procedure, 47. §, 219. § (3).

<sup>117</sup> Judgment of 30 June 1966, *Vaassen-Göbbels*, C-61/65, EU:C:1966:39, pp. 269, 273.

<sup>118</sup> Prete and Wahl: The gatekeepers of Article 267 TFEU, p. 526.

<sup>119</sup> Election Procedure, 14. § (1).

<sup>120</sup> Election Procedure, 37. § (1).

<sup>121</sup> *MT Højgaard and Züblin*, §25.

<sup>122</sup> *MT Højgaard and Züblin*, §26.

<sup>123</sup> Election Procedure, 45/A. § (2).

<sup>124</sup> Election Procedure, 18. § (2) a).

<sup>125</sup> Election Procedure, §20-23. For the impossibility of being recalled, see §34.

members, however, are delegated by political parties and might be recalled at will.<sup>126</sup> This results in two challenges: delegated members might have a vested interest in the subject matter of the case, and the possibility of being recalled might jeopardise their independence. In *MT Højgaard and Züblin*, the Court of Justice ruled that despite a difference in the level of independence of the members of a body, it might still qualify as independent, within the meaning of Article 267 TEU. The Danish Public Procurement Complaints Board was composed of judges and expert members, all appointed by the responsible minister,<sup>127</sup> but only judge members were specifically protected against dismissal. For expert members, only the general rules of administrative and employment law served as protection.<sup>128</sup> The decisive factor for the Court of Justice was that judge members always had the majority in decision-making, and therefore, the composition of the Board did not call into question its independence.<sup>129</sup> In another case, the Court of Justice accepted that certain members of the decision-making body were selected by the parties.<sup>130</sup> However, in *Banco Santander*, the Court of Justice applied a much stricter language and did not accept ‘judges’ who were able to be removed at will.<sup>131</sup>

Hungarian election commissions bear a certain similarity to the composition of the Danish Board in that elected members have higher protections for their independence and that they have more influence on the outcome of the decisions: the president of the election commission, who may only be an elected member, oversees the drafting process of all decisions and cast the decisive vote in case of a tie.<sup>132</sup> There are no criteria, however, that elected members should always be in the majority, and their number depends on how many parties qualify themselves to run for the election. Nevertheless, elected members are often in the majority.

However, at certain points in time, there are only elected members in some election commissions. The National Election Commission, due to a recent change in law, permanently has delegated members,<sup>133</sup> and therefore, the above concerns are present all the time. But territorial and local election commissions – besides the permanent elected

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<sup>126</sup> Election Procedure, §34(1)d).

<sup>127</sup> Opinion of AG Mengozzi in *MT Højgaard and Züblin*, §39.

<sup>128</sup> *MT Højgaard and Züblin*, §30. Opinion of AG Mengozzi, §42.

<sup>129</sup> *MT Højgaard and Züblin*, §31.

<sup>130</sup> *Kontorfunktionærernes*, §8.

<sup>131</sup> *Banco Santander*, §64.

<sup>132</sup> Election Procedure, 39. §, 45 § (1) and (3).

<sup>133</sup> Election Procedure, 33. § (1) b).

members – have delegated members only in election periods after parties qualify themselves to run for the election.<sup>134</sup> Political parties may only delegate members to territorial and local election commissions for the elections after collecting the necessary number of signatures to run for elections during a roughly two-week period starting on the 50<sup>th</sup> day before the elections.<sup>135</sup> It generally takes one or two days for big parties to collect the signatures, but taking into account the time needed to count these signatures and to take the oath by the delegated election commission member,<sup>136</sup> this results in a week-long period when election commissions are functioning only with elected members.

It is still not certain that the Court of Justice would find the organic criteria satisfied. The Court accepted a body's changing membership and still considered it as independent.<sup>137</sup> The Court also accepted that certain bodies qualify as a court or tribunal at times and not at others, although not based on composition, but on the function carried out.

## 5.2. Functional Criteria

As for the functional criteria, the Court of Justice takes into account whether the procedure is *inter partes*, but it is not an absolute criterion.<sup>138</sup> Election complaints in Hungary are to be decided within three days, and therefore, complaints are decided without the hearing of the other party at the election commission level. However, the Court of Justice has accepted references from courts in non-adversarial situations, such as from company courts.<sup>139</sup> There exists a dispute before election commissions, as the decision of the election commission affects the applicant<sup>140</sup> and decisions on election complaints are judicial and not administrative in nature.

As a reminder, it was important to analyse whether an election commission qualifies as a court or tribunal under EU law because Hungarian judges might be unwilling to refer a high-stakes question on elections to the Court of Justice and it would be considerably

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<sup>134</sup> The mandate of delegated members is terminated as soon as the election results are final. Election Procedure 33. § (3) b).

<sup>135</sup> Law CXIII of 2003 on the Election of Members of the European Parliament, 5. § (2). Election Procedure 28. § (1) b) and 333. § (2). For the deadlines: Election Procedure 121. § (2) and 338. § (1).

<sup>136</sup> Signatures must be counted within three days, the oath should be taken within a further five days. Election Procedure 127. § (1), 37. § (1).

<sup>137</sup> *Ascendi*, §26.

<sup>138</sup> *D. and A.* §88.

<sup>139</sup> *Cartesio*, §§54-61.

<sup>140</sup> Judgment of 31 May 2005, *Synetairismos*, C-53/03, EU:C:2005:333, §29. Judgment of 12 November 1998, *Victoria Film*, C-134/97, EU:C:1998:535, §14.



easier to persuade an election commission to do so. But in conclusion, it is far from certain that an election commission would fulfil all the criteria. The possible lack of independence of the delegated members poses the most serious difficulty, but the fact that the proceedings are not *inter partes* makes the case hard to argue.

## **6. Conclusion: A Problem for the EU as a Whole**

We have seen in Chapter 2. that EU law provides ample resources for a fully-fledged constitutional framework of the European Parliament elections. The Court of Justice case law also laid down the basic premises for stronger enforcement of EU-level election principles. Many elements of the Court's practice on democracy closely align with its much more developed and stronger enforced practice on the rule of law. This means there is enough substance to build upon to engage the Court in election disputes more actively. One very serious shortcoming of the present system is the lack of an emergency preliminary ruling procedure, as described in Chapter 3. Election disputes cannot wait months or even years to be decided, and other comparable courts – most notably the United States Supreme Court – are able to deliver judgments in consequential cases within days. The Court of Justice should establish such an emergency procedure for election cases. Without such a procedure, there exists what I call a special *Solange* situation: on the one hand, it is without question that national courts should refer preliminary questions if EU law so provides even in election cases, but it is hard to expect these courts to do so if they are to wait months. It is a legitimate concern for national courts to decide election cases within short deadlines as required by national law in conformity with international best practices.

In Chapter 4. we have seen two examples of possible preliminary references, one on state neutrality and one on the equality of the vote in postal voting. Both examples served as tools to shed light on the previous arguments and to assess the reality of submitting a preliminary reference. The experimental part of this thesis was to analyse a real-life case prepared partly by the author and decided by the Hungarian *Kúria* during the writing of this thesis. The national court dismissed the case, and no reference has been submitted to the Court of Justice. The *Kúria*'s argument clearly violated EU law, as it ruled that the provision of national law to decide election cases within three days strips courts of their Treaty-mandated right to engage the Court. But it also underlined the argument in Chapter

3. for an emergency procedure of the Court of Justice to answer preliminary references much quicker in election disputes.

Chapter 4. investigated whether a Hungarian election commission might qualify as a court or tribunal within the meaning of the preliminary reference procedure. It was important to carry out such an analysis because Hungarian courts are discouraged from referring to the Court of Justice. The analysis concluded that while election commissions fit most of the criteria, their independence might be questioned, which weakens a reference from such a body to be accepted by the Court.

What might be the consequences of a stronger enforcement of democratic values by the Court of Justice? The short answer is that we have seen very similar events in the Court's rule of law case law. The legal revolution began in that situation with a preliminary reference in the *Portuguese Judges* case. There, the Court, in essence, dismissed the application: it ruled that the challenged measure to lower salaries for judges in Portugal did *not* infringe on the independence of the Portuguese judicial system. At the same time, the Court of Justice issued a reasoning that turned the rule of law sphere upside down in the European Union and established the directly applicable nature of Article 19 TEU on judicial independence. This is an age-old judicial strategy used frequently, at least since *Marbury v. Madison*:<sup>141</sup> ruling in favour of the government in the actual case but unleashing a revolution in the long run.

After the first step taken by the Court in issuing a relatively short, 53-paragraph-long decision, the Commission took center stage. It launched a high number of infringement cases to remedy the violations of the rule of law primarily against Poland but also against other Member States such as Hungary, Romania and Malta,<sup>142</sup> not to speak of the numerous other tools in which the Commission plays a key role, such as the Rule of Law Mechanism with the annual Rule of Law Reports.<sup>143</sup> Not only did the Commission become active in

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<sup>141</sup> Judgment of 24 February 1803, *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>142</sup> Safeguarding the Rule of Law in the European Union: Rule of Law Dashboard, retrieved on 27 May 2024, <https://euruleoflaw.eu/rule-of-law-dashboard-new/>.

<sup>143</sup> Rule of law mechanism, European Commission, retrieved on 27 May 2024, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en).

enforcing the rule of law, but the number of preliminary references proliferated as well, especially from Poland,<sup>144</sup> but some also from Hungary.<sup>145</sup>

The new power to enforce the rule of law and judicial independence did not go without a reaction. Especially in Poland, national governments and constitutional courts fought back. At one point in 2021, the Polish Constitutional Court even declared the EU Treaties themselves as being *ultra vires* and violating the Polish Constitution.<sup>146</sup> But we have seen in the last few years that these rows and hassles eventually settled down. It would exceed the possibilities of this thesis to summarise the entire rule of law saga here, but in the end, the supremacy of EU law in judicial independence cases became the norm, and no serious actor questions it any more. Even the Commission intends to close the Article 7 procedure against Poland because it has remedied most of the threats to the rule of law.<sup>147</sup>

A similar activation of the Treaties is strongly needed in the domain of democracy. Unfair European Parliament elections in Hungary are not just a problem for Hungarian citizens, whose representation in the European Parliament will be distorted. It is also a problem for the EU as a whole, as the EU's central legislative institution (and therefore the legitimacy of all its decisions) will be tainted by the presence of unfairly elected members. Moreover, this also affects all EU citizens who have a right to be democratically governed both under EU law and under their national constitutions. As explained above in Chapter 2.3., a more active role of the Court of Justice is needed to remedy the situation in Hungary and other Member States facing a crisis of democracy in order to protect the legitimacy of EU decision-making. In that example, we have seen that it would be easy to question the legitimacy of a European Parliament decision adopted by a margin lower than the number of Hungarian members because it is possible to argue that those members were not elected in a fair election.

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<sup>144</sup> Rule of Law Dashboard.

<sup>145</sup> See, for example: G. Szabó, Dániel: A Hungarian Judge Seeks Protection from the Court of Justice – Part I, *Verfassungsblog*, 28 July 2019, <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/>. IS.

<sup>146</sup> Polish Constitutional Court declares EU Treaties *ultra vires* in Poland, *EU Law Live*, 7 October 2021, <https://eulawlive.com/polish-constitutional-court-declares-eu-treaties-ultra-vires-in-poland/>. Biernat, Stanisław; Łętowska, Ewa: This Was Not Just Another *Ultra Vires* Judgment!: Commentary to the statement of retired judges of the Constitutional Tribunal, *Verfassungsblog*, 27 October 2021, <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/>.

<sup>147</sup> Commission intends to close Article 7(1) TEU procedure for Poland, *European Commission*, 6 May 2024, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2461](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2461).

Failure to protect democracy at the EU level might then easily lead to a new *Solange-I*-style<sup>148</sup> (or even worse: a *PSPP*-style)<sup>149</sup> case law of national constitutional courts in liberal democratic EU member states about EU democratic standards. The constitutionality of the conferral of national competencies on the EU presupposes in some member states that the EU itself fulfils certain democratic criteria, which include, among others, the fairness of the European Parliament elections. If this precondition is not fulfilled anymore, then member state constitutional courts might question the competence conferral on the EU in general. Therefore, it is not an option to avoid these difficult legal questions. Otherwise, they will just keep popping up at places where they will be even more difficult to solve.

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<sup>148</sup> Hilpold, Peter: *Solange I*, BverfGE 37, 291, 29 May 1974; *Solange II*, BverfGE 73, 339, 22 October 1986; *Solange III*, BverfGE 89, 155 12 October 1993; and *Solange IV*, BverfGE 102, 147, 7 June 2000, in Ryngaert, Cedric, Dekker, Ige F, Wessel, Ramses A, and Wouters, Jan (eds.): *Oxford Scholarly Authorities on International Law*, Oxford University Press, 2016,

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<sup>149</sup> Jakab, András, Sonnevend, Pál: *The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht*, *Verfassungsblog*, 25 May 2020,

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## List of Abbreviations

1976 Electoral Act	Act concerning the election of the members of the European Parliament by direct universal suffrage, OJ L 278 8.10.1976, p. 5 and its amendments.
Charter	Charter of Fundamental Rights of the European Union
Civil Code	Act V of 2013 on the Civil Code, Hungary
Civil Procedure	Act CXXX of 2016 on Civil Procedure, Hungary
CoE	Council of Europe
Court of Justice, the Court	Court of Justice of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on 4 November 1950
ECtHR	European Court of Human Rights
Election Procedure	Act XXXVI of 2013 on Election Procedure, Hungary
EU	European Union
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Co-operation in Europe
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States of America

## **Table**

*Table 1.* Arguments used by the Court of Justice in the rule of law cases and their equivalents in democracy.

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