Taking democracy seriously: The Commission’s Infringement Action against Poland for violating EU law with the new law in Poland on the State Committee for the Examination of Russian influence

By Miriam Schuler

Over the past years, backsliding EU member states have caused increasing concerns. For almost a decade, EU institutions have concentrated most of their efforts on defending the rule of law against attacks from member states. On 8th June, however, the European Commission seems to have broadened the scope of value enforcement. In a Press Release, the Commission has announced its most recent infringement action against Poland. This time the focus is not on reforms which undermine the independence of the judiciary and thereby violate an essential component of the rule of law. This time, the principle of democracy is the central element of the Commission’s concern. Considering that this is the very first time that a violation of the principle of democracy is invoked against member states, and given that EU law, to date, does not provide a clear answer as to what democratic standards member states are obliged to respect under Article 2 TEU, this is a ground-breaking development.

However, after seemingly starting to endorse a stand-alone application of Article 2 TEU in one of its recent infringement actions launched against Hungary for violating LGBTIQ-rights (for an analysis, see here), the Commission bases its legal argument not just on Article 2 TEU as a free-standing provision. Rather, the Commission’s action to defend the principle of democracy is based on a joint reading of Article 2 and 10 TEU. Article 10 TEU provides rules on the functioning of democracy and the democratic life in the Union. Reading the infringement action against Poland in this light, then, one wonders whether the Commission is defending democracy in the Union or whether it is in fact concerned with the democratic standards governing the domestic process in Poland. What
implications does the principle of democracy under Article 2 and 10 TEU have for democracy in member states? This post will show that, for the time being, it is still unclear to what extent the principle of democracy has been operationalised in EU law. As a result, the consequences that this action may have for the enforcement of the principle of democracy in the EU are yet unclear. Using the new Polish law as an example, this blogpost argues for a wide understanding of democracy under Article 2 TEU, which takes into account the many ways in which national democracy is intertwined with European democracy, and, accordingly, sets democratic standards that member states are obliged to comply with as a matter of Union law.

Background

The infringement action tackles the new law in Poland on the State Committee for the Examination of Russian influence on the internal security of Poland between 2007 and 2022. The law has not only evoked criticism from the European Commission, but has also been condemned by the US Department of State, as well as by the Polish NGO Iustitia. The law in question sets up a new administrative committee, whose members would be appointed by the Sejm (the lower house of the Polish Parliament). This committee is vested with the power to conduct inquiries determining whether senior public officials in Poland acted, in the period between 2007-2022, under Russian influence to the detriment of the public interest. On this basis, the committee is empowered to assess and to decide whether individuals should be deprived of the right to hold public office relating to the use of public funds for up to ten years. Whereas the committee’s decisions can be reviewed by administrative courts, the courts are barred from verifying the correctness of the Committee’s assessment of the facts and its weighing of evidence.

The new law entered into force on 31 May 2023 and is hence able to influence the campaigning for parliamentary elections to the Sejm which will take place in autumn this year. As explained by Sadurski, the new law can thus be seen as the ruling PiS-party’s targeted attempt to reduce Donald Tusk’s and his centrist-liberal party’s chances of winning the upcoming elections.

It is in this specific context, the European Commission acted promptly: In its press release, the European Commission states that the Polish law ‘unduly interferes with the democratic process’ as ‘[t]he activities of the committee (...) risk[s] to create grave reputational damage for candidates in elections and, by finding that a person acted under Russian influence, could limit the effectiveness of the political rights of persons elected in democratic elections.’ However, the Commission does not explicitly mention the forthcoming Polish elections. When reading the rather vague explanations of the Commission, one question thus remains unanswered. When it comes to the law having an undue influence on the democratic process, does the Commission refer to the Union’s democratic process, i.e.
elections to the European Parliament, to the domestic democratic process, or to both? In my view, there are different ways as to interpret the Commission’s infringement action with regards to the way in which the principle of democracy has allegedly been violated.

**A Union-centred approach**

As the European Court of Justice has held at several occasions (see for example here and here), ‘Article 10(1) TEU provides that the functioning of the European 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.’ According to the Court (see for example here and here), this principle is implemented in Article 14(3) TEU according to which the members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Taking the case law of the Court and the wording of Article 10(1) TEU at face value, one could hence conclude that the principle of democracy only matters when it comes to the EU’s functioning and elections to the European Parliament which will next be held in June 2024. From this point of view, the Polish law only violates the principle of democracy as guaranteed by Union law if it bars individuals from standing as a candidate in elections to the European Parliament or if it creates grave reputational damage for candidates standing in elections to the European Parliament. Although not being able to offer an authoritative interpretation of Article 10 TEU, the European Parliament itself perceives the state of domestic democracy as relevant to EP elections. This is demonstrated, for example, by its most recent Resolution on the situation in Hungary (see here) where ‘in view of the forthcoming European Parliament and local elections in 2024’, it ‘urges the Hungarian Government to bring its conduct of elections in line with OSCE commitments and other international obligations and standards for democratic elections’.

In my view, however, reducing the scope of the principle of democracy to the regular holding of European elections would run counter the dual structure of democratic legitimation laid down in Article 10(2) TEU. According to that provision, the EU derives its democratic legitimacy from two sources: from the European citizens as a whole and from its member states representing their domestic peoples. Consequently, I think we should adopt an all-encompassing understanding of democracy under Article 2 TEU, which takes into account the many ways in which national democracy is intertwined with European democracy, recognizing that democracy in the EU presupposes democracy in its member states.

**The interdependence of European and member state democracy**

It can be derived from Article 10(2) TEU that every member of the Council or the European Council – that is the representative (respectively head) of a member state’s government –
must be democratically legitimized. If this is not the case, the whole body (i.e. the Council or the European Council) is democratically defective. To give but one important example of why this is the case, it is clear that when a democratically defective Council then partakes in the EU legislative process, and, together with the Parliament, adopts a new directive or regulation, the Member States are subsequently forced to implement or apply an improperly legitimized act within their national legal orders.

The Commission’s recent infringement action could hence also be understood in these terms: The new Polish law unduly interferes with the democratic process in Poland and might lead to the legitimacy of the national democratic process being flawed. If, in such a flawed or even undemocratic process, a new government is elected and consequently represented in the Council, the Council – as an EU body – is democratically defective so that Article 10 and 2 TEU can be engaged. Put simply, the principle of democracy in the EU requires that those participating in the Council are legitimized domestically following a process compliant with democratic standards.

Yet, the impact of illiberal and undemocratic member states is not limited to the influence that their governments exert on the Union’s legislative process. To the contrary, according to Article 10(3) TEU, every citizen shall have the right to participate in the democratic life of the Union. Taking a more general view, one could thus argue that democracy in the EU ‘presupposes a democratic life in the Member States’ (Bogdandy and Spieker, here). This is because without a (European) public and political space the active and passive right to vote would be meaningless.

Looking at the Polish law on the State Committee for the Examination of Russian influence through this lens, and considering the deterring effect it might have on the rights of the opposition, one might ask whether the Polish people are still able to fulfil their role as European citizens. This role as a European citizen arguably is not limited to partaking in European elections but also comprises scrutinising and holding to account members of their national government for their actions, inter alia, in the Council. This necessarily presumes that there is an opposition that a member state’s people can vote for and that there is an alternative that the current government (and its representatives in the EU institutions) can be replaced with. If this is not the case, a member state’s people is unable to fulfil its role as European citizens. Neither is it able to control or ultimately vote its national government out if it does not perform according to the Polish people’s wishes and directions in the Council.

Last, and more precisely, Article 20(2)(b) TFEU expressly guarantees EU citizens the right to vote and to stand as candidates in municipal elections in their Member State of residence. In follows from this, that the Union must care about the state of democracy even on the municipal level. This is because if a European citizen due to the Polish law is
barred from standing in municipal elections, or if he or she suffers grave reputational damage as a result of activities undertaken by the Committee on Russian influence, EU citizens are actively prevented from exercising their citizenship rights guaranteed in the treaties and the effectiveness of the political rights guaranteed to European citizens is limited.

A wide interpretation of the European Commission’s infringement action thus leads to the following conclusion: The new Polish law seems to influence the democratic process on the European, the domestic, and the municipal level. A violation of the principle of democracy under Article 2 and 10 TEU should be found on all those levels. This is because European democracy requires member state democracy. Just as the Court has argued in the Portuguese Judges case that all member state courts must respect the requirements of judicial independence stemming from EU law since every member state court may be called upon to interpret or apply EU law, one could argue that a member state’s general democratic structure must comply with EU standards of democracy. This is because European democracy and member state democracy are inherently intertwined (see also Bogdandy and Spieker, here). This interplay finds its expression in Article 2 TEU, according to which democracy is one of the values the Union is founded on, but it is, at the same time, a value common to the member states. This means that member states, when acceding to the Union must have achieved a ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’ (European Council, Copenhagen 21-22.06.1993, Conclusions of the Presidency, DOC/93/3; see also Article 49 TEU) and that, after accession, they cannot regress in in such a way as to bring about a reduction in the protection of Article 2 values (see CJEU here, para. 63, for the rule of law). In my view, Article 2 TEU does not only mark the severity of the breach but does have another scope and content than Article 10 TEU. Whereas Article 10 TEU explicitly only governs the functioning of democracy in the Union, reading it in light of Article 2 TEU helps us to connect Union democracy to member state democracy. In other words: Article 2 TEU widens the scope of Article 10 TEU.

**Conclusion**

This blog post has considered different readings of the Commission’s recent infringement action against Poland. This author has shown that the scope of the principle of democracy under Article 2 TEU should be interpreted widely, recognizing that democracy in the EU presupposes democracy in its member states. At the time of writing, however, it is uncertain whether this is the view taken by the European Commission. Rather, much ambiguity surrounds the substance of the Commission’s complaint against Poland and, as a result, the consequences that this action may have for the enforcement of the principle of democracy in the EU are yet unclear.
Nevertheless, it is submitted that the infringement action can be seen as taking a meaningful step forward: for the first time, the Commission invokes a violation of the principle of democracy vis-à-vis a member state, and, consequently, gives the CJEU the opportunity to concretise the democratic standards that member states are obliged to respect as a matter of EU law.

Given that prior to this, democracy – especially a democratic and pluralistic law-making process - seemed to be framed as an element of the rule of law (i.e. in Article 2(a) of the Rule of Law Conditionality Regulation (EU) 2020/2029), the Commission now rightly takes democracy seriously and seems to enforce it as a principle connected to but separate from the rule of law. Especially in light of an Article 2 TEU infringement action launched against Hungary for violating LGBTIQ-rights, the Commission appears to have started taking all Article 2 TEU values seriously, thereby broadening the scope of value enforcement against member states.

One question however remains unresolved: Whereas it seems that the Commission is now open to enforcing Article 2 TEU as a free-standing provision in some cases, it has in its latest infringement case against Poland reverted back to operationalising Article 2 TEU with another treaty provision (here: Article 10 TEU). The new infringement action thus demonstrates that the EU’s value enforcement is still very much in development and many questions are yet to be answered by the European Court of Justice.