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## Why the EU should care about national elections

*By Miriam Schuler*

On Sunday, Poland held the '[most consequential elections since 1989](#)'. Arguably, these elections did not only decide on the next Polish government. Rather, the elections also appeared to be a possibly final vote on European values, and whether the Polish government adheres to them. While at the time of writing, [it seems like the opposition led by Donald Tusk can declare victory](#), the European Union will pay a close look not only at the elections but also at their aftermath. This is because, as many authors have described in detail (see for example [here](#) and [here](#)), the PiS government has passed several laws and reforms that put into question the fairness of the election, and, consequently could put into doubt not only the democratic legitimacy of the newly elected Polish government but also of the Polish representatives in the European Council and Council, and those institutions as a whole. But should the European Union really only care about national elections insofar as its own institutions are concerned? This piece aims to critique such an institutional approach to Member State democracy and proposes instead to develop a citizen-centred conception of democracy.

### 1. Background

One of the leading arguments of why the European Union should in fact defend democratic standards against Member States is that the legitimacy of the European Council as well as of the Council of the European Union depends on the legitimacy of the governments of the Member States. According to Article 10(2) TEU, the European Council's and Council's legitimacy flows from the Member States' representatives, who in

turn, must be legitimized and accountable in a democratic way, at the national level, in order to supply these European institutions with the legitimacy derived from the peoples of the Member States. The impact of a democratically illegitimate Member State government is hence not limited to its domestic sphere but also taints the democratic legitimacy of the European Council and the Council. If the Member States' representatives in the European Council and the Council are not democratically legitimated, the whole body is considered democratically defective. 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](#).

At first glance, linking national democracy and Union democracy within the Council makes a lot of sense. First, this logic is somewhat suggested by Article 7(3) TEU which – in case of a serious and persistent breach of the Article 2 TEU values by a Member State – enables the Council, *inter alia*, to suspend the voting rights of the defiant Member State in the Council. It follows from this that at least one of the reasons to defend Article 2 TEU against the Member States is self-serving or, as [Theuns put it, 'inoculative'](#) – the purpose being to prevent a backsliding government to influence Council decisions. Second, this seems to be reinforced by the Court's reasoning in the [Portuguese Judges](#) case, where it confirmed that, because of their pivotal role in the preliminary reference procedure under Article 267 TFEU, national courts must comply with EU standards of judicial independence. In other words, national courts are 'double agents', fulfilling a domestic as well as an EU function which cannot be separated from each other. When it comes to democracy, a lot of scholars (see, for example, [here](#), [here](#) and [here](#)) now argue that pursuant to Article 10(2) TEU the same logic applies to Member State governments: '[A government cannot be "democratically accountable" at the European level if it governs autocratically at home.](#)' Lastly, the European Commission's [latest infringement action against the Polish Law on Russian influence](#) seems to confirm this logic. While the Commission's reasoning remains ambiguous, the legal basis is clearly spelled out: a violation of the principle of democracy under Articles 2 and 10 TEU.

## 2. Why Article 10(2) TEU is not the new Article 19 (1) 2<sup>nd</sup> subparagraph TEU

Article 10 TEU does not contain much reference to national democracy. Rather, it is concerned with democracy on the EU level. As such, Article 10(2) TEU makes clear that the Union's democratic life '[takes place in two arenas: the Parliament and the two Councils.](#)' On this basis, it is at least arguable that European democracy necessitates Member State democracy. Without free and fair elections in the Member States, the Member State representatives in the Council are not sufficiently legitimized. Without free and fair

elections to the European Parliament, which are administered by the Member States, the members of the European Parliament are not sufficiently legitimized. Following this logic, national democracy is a derivative of European democracy. In other words, Member States must be democratic, so that the EU stays democratic.

But does Member State democracy only matter to the EU as long as it is itself affected by it? A thought experiment might help to address this question. Imagine a Member State abolishes national elections and becomes a dictatorship. However, to secure its membership in the European Union, that Member State continues to organise free and fair elections to the European Parliament. Within its government, the Member State sets up a 'European Committee' consisting of members which represent the Member State within the Council and the European Council. The European Committee is freely and fairly elected by the people of the Member State. It has no internal powers or competences but represents the Member State externally in the European institutions. In this thought experiment, the Union institutions are arguably not affected by the Member State's turn to authoritarianism. Yet, internally, the citizens of that Member State live in an autocracy.

This leads us to the question what democracy is about – the institutions or the people. Of course, the democratic legitimacy of the Union's institutions matters. And indeed, the Union's legitimacy flows from the Member States. But when this serves as the sole justification to defend democracy against its member states, it is worth asking what the EU is defending – its own democratic legitimacy or the rights of its citizens?

Indeed, [\[t\]he ideal of democracy primarily refers to the interests and rights of individual citizens](#). Upon closer inspection, this logic can also be found in Article 10(2) TEU. As Krappitz and Kirst explain, Article 10(2) TEU ensures that Member State governments vest the EU with input legitimacy from their individual national people. Usually, [\[i\]nput legitimacy is provided, in parliamentary systems, through an expression of political will, usually by way of election of parliamentarians and is, via a so-called chain of legitimacy \(Legitimationskette\), passed on to government](#). In parliamentary systems, this means that [\[t\]here must be an uninterrupted chain of democratic legitimacy between the people, exercising their democratic rights in an election, via their national Parliament through to the national government \(...\); in presidential systems, the legitimacy is directly provided by the people to the president](#). So, at its core, Article 10(2) TEU is not about governments. Rather, it is about the people of a Member State having control – via a chain of legitimacy – over the Council and the European Council. This clarifies: democracy is neither solely about the existence of institutions nor about representation. It is about the people and their inalienable rights. In its [Rule of Law Conditionality judgment](#) (at para. 309), the Court alludes to this when it states 'that the Council's decisions [must be] sufficiently representative of both the Member States and the population of the European Union.' At the centre of Article 10(2) is thus not a government, it is the specific people of a Member

State that must be represented in the Council's decisions. To return to our thought experiment, a 'European Committee' as detailed above would split the concept of the people of a Member State up: into democratically represented citizens on the EU level, and into oppressed citizens on the national level. But neither democracy nor citizens' rights can be split up. Without a public and political space in the member state the active and passive right to vote for said 'European Committee' would be meaningless. The 'European Committee' from our thought experiment would thus not comply with Article 10(2) TEU.

Then, however, if we think within the logic of the *Portuguese Judges* case, it is not the national government which is a 'double agent' of national and EU law. A national government – even though it is represented in the Council and the European Council – is always a national government, fighting for national interests. Its nature does not change just by virtue of it being represented in an EU body. The real double function is the one of the people; being part of the whole of European citizens, on the one hand, and being part of their national people, on the other hand. There is no democracy – neither on the national nor on the supra-national level – without citizens and citizens' rights. Rather than anchoring the need for national democracy in the 'democratic health' of the Council under Article 10(2) TEU, it should be anchored where it emanates from: the people.

### **3. European Democracy and Member State Democracy: A community of citizens**

When we discuss the result of Polish elections, as well as their fairness, we should keep in mind that we are debating a people's future. We are debating whether they are treated equally, we are debating which rights they are able to enjoy, and we are debating whether they still get a say over their future, their life, and their rights.

One might object that these are questions that the EU has no say over; that they are outside the scope of EU law. But first, it is accepted that the guarantees of Article 2 TEU – specifically, democracy, the rule of law, the respect for human rights - apply to ['any act by any member state irrespective of any other link to EU law'](#). Second, I would like to recall that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' (see [here](#) at para 42).

It is hardly a new idea to understand the substance of Union citizenship rights as the rights and principles enshrined in Article 2 TEU (see [here](#) for the proposal to define this "substance" with reference to the essence of fundamental rights enshrined in Article 2 TEU). This idea seems to have been revived in the ECJ's [Rule of Law Conditionality judgment](#) where it stated in paragraph 126 that 'compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving

from the application of the Treaties to that Member State'. In analogy to this, I would argue that Member State compliance with the values contained in Article 2 TEU is not only a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State, but also a condition for EU citizens to enjoy their rights guaranteed by Article 20 TFEU. Arguably, to fully enjoy the citizenship rights granted by Article 20 TFEU, a EU citizen must fundamentally expect that the Member States comply with EU law, the fundamental rights recognized by EU law and respects the values enshrined in Article 2 TEU. If, however, a Member State questions the equality of all citizens by establishing '[LGBT-ideology free zones](#)' or if a Member State heavily curtails the rights of the opposition by engaging in unfair gerrymandering and by restricting the rights of the opposition to speak in parliament, citizens identifying with the targeted groups might, for example, be deterred from exercising their right of free movement in that Member State. More precisely, Article 20(2)(b) TFEU expressly guarantees EU citizens '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'. If, however, democracy in that Member State is undermined, EU citizens are actively prevented from exercising their citizenship rights guaranteed in the Treaties.

Second, one might object that the EU is still an intergovernmentalist organization. Where there is no European demos, European democracy cannot be based on the people but only on governments. However, I would respond that the deficit on the supranational level cannot serve as a justification to only defend a 'deficient' or narrower conception of democracy on the national level. In other words, just because there exists no European demos should not be the reason for why the EU does not focus on and protect its citizens when defending democracy. Moreover, a citizen-based conception of democracy can be traced back in the Treaties, for example in Article 10(3) TEU – which confers upon citizens the right to participate in the democratic life of the Union – and Article 9 TEU which stipulates the principle of equality of citizens.

#### **4. Conclusion**

This post has attempted to question why the European Union should care about anti-democratic tendencies in Member States. In this respect, many scholars have called to instrumentalise Article 10(2) TEU, arguing that the requirement of Member State representatives in the European Council and Council being democratically accountable, links European and Member State democracy, and consequently provides a basis for the EU to 'intervene' when national elections do not meet democratic standards. Irrespective of the fact that the EU's options to 'intervene' are limited, and of the difficulty to define

when exactly national elections do not meet democratic standards, it is doubtful that Article 10(2) is the right basis to address democratic backsliding in Member States.

While it is true that European democracy and Member State democracy are inherently intertwined, this post has shown that the logic of Article 10(2) TEU would suggest that national democracy is a derivative of European democracy so that it can only be defended by the EU, if the EU's institutions themselves are affected by the backsliding Member State. While this logic might fit in well with the *Portuguese Judges* ruling, it calls into the question the universality of the value of democracy and the constitutional pre-commitment of Member States. Pursuant to Article 2 TEU, democracy is a foundational value of the Union which the Member States need to respect not only in situations that transcend to the supranational level, but also in purely internal cases. It is a value they have committed to respect when joining the Union and which ultimately serves to protect the rights of EU citizens.

The author thus suggests not to anchor the requirement for Member States to be democratic in Article 10(2) TEU which ultimately only concerns the European institutions but instead to anchor the EU's defence of democracy in its commitment to protect its citizens. At a first glance, this seems a thought experiment without any real consequences. However, this piece has shown that the requirement to connect Article 2 TEU with another more precise provision in the Treaties might put into question the universality of Article 2 TEU values and hence can serve as an argument in favour of a stand-alone application of Article 2 TEU. Moreover, it extends the reach of the principle of democracy in the Member States and makes it applicable to a wider scope of situations. It separates democracy from Member State governments and their 'democratic accountability' and re-roots it in citizenship, potentially providing another argument for the legitimacy of the EU's defence of its common values in the Member States.