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Regime Defence Disguised as a Defence of Sovereignty: The Hungarian Defence of National Sovereignty Bill as a violation of European values

By Miriam Schuler

On 12 December 2023, Hungary passed a bill for the defence of national sovereignty which reportedly provides '[the executive with even more opportunity to silence and stigmatise independent voices and opponents.](#)' [On 1 February 2024](#), Hungary's Sovereignty Protection Office is going to start operating. The Hungarian Sovereignty Bill constitutes another harmful attack on pluralism and democracy. It has been heavily criticised not only by the [Council of Europe Commissioner for Human Rights](#) but also by countless NGOs such as the [Hungarian Helsinki Committee](#), the [European Civic Forum](#) and a coalition of over [100 Hungarian civil society organisations](#). Despite calls from *inter alia* the [European Parliament](#) to launch an infringement action against Hungary, the European Commission has to date not taken any measures. This blogpost argues that the European Commission should address the Hungarian Sovereignty bill as a clear violation of the principle of democracy under Article 2 TEU and aims to show in what respects this principle is violated.

Background

At its core, the Hungarian Defence of National Sovereignty Bill (an unofficial English translation is available [here](#)) sets up an Office for the Defence of Sovereignty. This Office is vested with wide-ranging powers to investigate activities carried out in the interests of another State aimed at influencing democratic debate and the decision-making processes of the Hungarian State and society if they could harm or threaten the sovereignty of Hungary. Further, the Office identifies and investigates organisations that use foreign funding to influence the outcome of elections or the will of the voters in Hungary. In order

to conduct and conclude its investigations, the Office for the Defence of Sovereignty shall have access not only to all data in the possession of the organisation under investigation, but equally has the power to request information from anyone related to the case under investigation. Whereas the Office itself does not have the power to issue sanctions, the Defence of Sovereignty Bill amends the Hungarian Criminal code so that an election candidate using foreign funds can face a prison sentence of up to three years.

Given the ambiguous and vague terminology used in the Bill, the Office for the Defence of Sovereignty can, as pointed out by the [Hungarian Civil Liberties Union](#), 'arbitrarily target any organisation or person it suspects of serving foreign interests and jeopardising Hungary's sovereignty'. The Bill hence does not only have a chilling effect on [media outlets](#) and [NGOs](#) which could fall under its scrutiny. Rather, '[no individual or organisation is safe from this invasive scrutiny, not even businesses, churches, trade unions, or municipalities.](#)' The Bill targets the Civil Society and the existence of an open civic space broadly and, '[\[b\]y implying that foreign interests are behind every critical position, authorities \(...\) seek to intimidate, deter and silence those who are actively engaged in public life.](#)' The fact that the Office's president, Tamás Láncki, was nominated by Orbán himself and appointed by the President, exacerbates '[concerns about of \[sic\] the independence of the body and the risk of politically motivated abuses of its authority.](#)'

With the Office's self-declared [aim](#) to ensure not only the transparency of upcoming local but also European Parliament elections, it is concerning that the Bill has thus far not been addressed by the European Commission. Whilst there is no shortage of calls for the Commission to act (see for example [here](#), [here](#) and [here](#)), there has so far been no precise analysis of which aspects of European law the Sovereignty law potentially violates. The aim of this blog post is to provide such an analysis with one caveat: Rather than analysing the Hungarian law under all potentially relevant provisions of EU law – such as the Market Freedoms which were relied on in the [lexNGO](#) and [lexCEU](#) cases – this blog post distinctly focuses on Treaty provisions that give concrete expression to the principle of democracy.

European Elections and Article 14(3) TEU

The European Court of Justice has emphasised at several occasions (see for example [here](#) and [here](#)) 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](#) at paras. 250-252), this principle is implemented in Article 14(3) TEU according to which the members of the European Parliament are to be elected in a free and secret ballot, ensuring that 'in accordance with the principle of representative democracy, (...) the composition of the

Parliament reflects faithfully and completely the free expression of choices made by the citizens of the European Union’.

Even though Union Law requires the elections to the European Parliament to be free and secret, it leaves it to each individual member state to ensure that the basic elements of a democratic society are provided for. This however means that unfair elections in Hungary are [‘a problem for the EU as a whole’](#). If a member state has dismantled the very core components of liberal democracy such as for example a free and fair electoral system and the civil and political rights intrinsic to such a democratic process, elections to the European Parliament might be held in that state, but not found to be compliant with the requirements set out in Article 14 (3) TEU. In such a case, it could be argued that that member states’ members of parliament have been elected in a procedure violating the principle of democracy and hence flaw the democratic legitimacy of the European Parliament as a whole.

The Hungarian Defence of Sovereignty Bill is likely to reach this threshold. As observed by the Heinrich Böll Foundation, the Hungarian Sovereignty Bill further exacerbates the [‘distortion of access to resources between the Hungarian government and the opposition’](#). This is because the ambiguity of the term ‘foreign funding’ in the Bill might well extend to funding received by a Hungarian political party from the European political party family that the Hungarian party belongs to. While the ruling Fidesz party is no longer member of the European People’s Party and hence does not receive such funding, it represents one of the [very few remaining resources that opposition parties in Hungary can have](#) access to and which the new Bill bars the opposition from accessing. As such, the Defence of Sovereignty Bill further exacerbates the level playing field between Fidesz and opposition parties in European elections and puts Hungary’s compliance with Article 14(3) TEU in doubt.

Municipal elections, Article 22 TFEU and the electoral rights of mobile EU citizens

According to Article 22 TFEU, ‘[e]very citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.’ Recently, AG Richard de la Tour has held that ‘Article 22 TFEU must be understood to the effect that *any* barrier to the exercise of electoral rights (...) on grounds of nationality, constitutes discrimination within the scope of the Treaties, which is prohibited’ ([here](#) at para. 77).

Given that the Hungarian Defence of Sovereignty Bill allows investigations against anyone aiming to influence the democratic debate in Hungary in the interests of another State,

the Bill could be applied against mobile EU nationals standing as a candidate in municipal elections in Hungary. Even more so, given that mobile EU citizens do not have Hungarian citizenship, they might be under a general suspicion of acting in the interest of another state and to the detriment of Hungarian sovereignty, thus potentially making them subject to investigations by the Office for the Defence of Sovereignty. Such investigations are able to stigmatise candidates, damage their reputation and undermine the public's trust, possibly amounting to an infringement of the candidate's right to equality of opportunity (on the stigmatising effect of investigations in a similar case see for example [here](#) at para. 38). As such, the Hungarian Sovereignty Bill can be said to discriminate on grounds of nationality and constitute a barrier to mobile EU citizens' electoral rights, thus infringing Article 22 TFEU.

The national democratic process, Article 10(2) TEU

The Hungarian Defence of Sovereignty Bill reminds, to a certain extent, of the Polish Russian Influence Bill which granted a newly created Commission the right to bar individuals from holding public office if they were found to be under Russian influence. It was in this context that the Commission [initiated an infringement action for a violation of the principle of democracy under Article 10 \(2\) TEU](#), arguing that the investigations carried out by the Polish committee risk to 'create grave reputational damage for candidates in elections', could 'limit the effectiveness of the political rights of persons elected in democratic elections' and, thus, 'unduly interfere[...] with the democratic process' (for an analysis of the Commission's infringement action see [here](#)).

Whereas much is left uncertain by the European Commission's infringement action, so much seems clear: Under Article 10(2) TEU the Union's democratic life '[takes place in two arenas: the Parliament and the two Councils](#).' For Member State representatives in the Council and the European Council to be 'democratically accountable' and hence sufficiently legitimized, there must be free and fair elections in the Member States. Although not being able to offer an authoritative interpretation of Article 10 TEU, the European Parliament has underlined 'that fair and free elections are among the absolute minimum standards for a functioning democracy and that *every* election process in the Union should be without undue influence and irregularities' ([here](#) at 29, emphasis added). Particularly the existence of 'a level playing field' is 'of the utmost importance to the democratic nature of our societies' ([here](#), Recital U). As such, electoral laws which challenge the principle of the of equality of the vote or which disadvantage opposition parties are considered as problematic from the perspective of the European Parliament ([here](#), Recital U and T).

Thus, for the very same reasons as above, that is the (1) distortion of the level playing field between the ruling party and opposition parties and the (2) stigmatisation of candidates as well as the creation of distrust in the electoral process, there are at least serious doubts as to the compatibility of the Hungarian Defence of Sovereignty Bill with Article 10(2) TEU.

A Democratic and Pluralistic Society, Article 10(3) TFEU, Article 12 CFR and Article 11 CFR

However, whereas the Hungarian Sovereignty Bill does have an effect on the fairness of elections and electoral rights, its actual focus lies elsewhere: The Hungarian Sovereignty Bill is aimed at shrinking civic space in Hungary, at further weakening civil society and at intimidating any individual or organisation opposing the government. It undermines the existence of a pluralist and free society as a very precondition for democracy and free and fair elections.

Whereas the Union tends to emphasise the importance of national institutions such as courts, electoral commissions, and parliaments for the protection of democracy, it also recognises that political rights and freedoms are the cornerstone of democracy. As such, the ECJ has held that the freedom of expression as enshrined in Article 11 CFR is 'an essential foundation of a pluralist, democratic society' and reflects 'the values on which the Union, in accordance with Article 2 TEU, is based' (see [here](#) at para. 31 and [here](#) at para. 93). Further, the ECJ confirmed that 'the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life' ([here](#) at para. 112) and that the importance of media freedom 'in a democratic and pluralistic society must be stressed in particular' ([here](#) at para. 57).

The same was emphasised by the European Commission in its very recent [Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes](#): The freedom of association and the freedom of assembly allow 'citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'. As such, civil society carries out a key role as 'public watchdog' and constitutes one of the essential bases of a democratic and pluralist society.

The existence of such a free and pluralistic civil society is not only relevant to national democracy. Rather, and as [previously argued](#), European democracy requires Member State democracy. According to Article 10(3), every citizen shall have the right to participate in the democratic life of the Union, to form assemblies, to exercise their right to free speech, to have access to information. It is the citizen who has a double function, who is part of the whole of European citizens, on the one hand, and part of a national people, on the

other hand (see [here](#)). Just as Courts need to be protected so that judges can exercise their duties under EU and national law, civil society as a whole needs to be protected so that citizens fulfil their role in a democracy.

If one follows the argument until this point, then one might rightly object that the provisions of the CFR, according to Article 51(1), only apply to Member States when they are implementing Union Law, and that equally, the scope of Article 10(3) TEU does not extend to so-called 'purely internal' situations. As such, one could object that even though the Hungarian Defence of Sovereignty Bill does constitute a brazen attack on civil society, it just falls outside the scope of Union law. However, this is exactly where Article 2 TEU comes in.

Civil Society as an element of democracy protected under Article 2 TEU?

Under the widely accepted theory of mutual amplification (see for example [here](#), p. 1205 et seq), specific Treaty provisions give concrete expression to Article 2 TEU and the operationalised Article 2 TEU extends the scope of these Treaty provisions to purely internal situations. Here, then, one could see Civil Society protected under a variety of provisions:

Firstly, one could argue that Article 14(3) TEU does not only require free and fair elections to the European Parliament. Rather, amplified with Article 2 TEU, this also pre-supposes that Member States guarantee the preconditions for free and fair elections such as free media, free speech, the freedom of assembly, and an open civic space more broadly.

Secondly, and in the same vein, one could argue that under Article 10(2) and 10(3) TEU the Union's democracy and Member State democracy are so heavily intertwined, that, read in light of the Member State's constitutional precommitment ([here](#) at para. 63) to respect Article 2 TEU values, Member State democracy cannot be reduced to the holding of regular elections. Rather, if civil society as the cornerstone of a liberal democracy is undermined, elections are rendered meaningless.

Thirdly, one could argue that the Hungarian Defence of Sovereignty Bill undermines the essence of fundamental rights guaranteed by Article 2 TEU so that Article 2 TEU triggers the application of the Charter and hence opens up the possibility to claim a violation of Article 11 and 12 CFR. This of course, seems slightly circular, given that one would have to establish a violation of Article 2 TEU to then apply the Charter and find a specific violation of a Charter right.

The case of the Hungarian Sovereignty Bill, however, suggests a fourth solution: The role of civil society is neither fully captured by the provisions of the CFR such as Article 11 and

12, nor of Article 10(3) TEU. This is exemplified by the Commission's Recommendation on the matter, which refers to various provisions of EU law, but cannot pinpoint how exactly civil society and civic space is protected. Equally, the provisions on free and fair elections do not fully capture the need for and relevance of civil society. A civil society needs not only be protected before elections. It is an intrinsic element of any democracy which needs to function and be protected at all times.

If, however, none of the previously mentioned provisions fully capture or protect the role of civil society, then it might be an element so central to the existence of democracy that it is directly protected by Article 2 TEU. After all, Article 2 TEU refers to democracy in a pluralist society, and the idea to enforce Article 2 TEU as a free-standing provision is not new (see [here](#)). Even though the values listed in the second sentence of Article 2 TEU (here: pluralism) have a different status than the ones listed in the first sentence of Article 2 TEU (here: democracy), and even though it seems to be agreed (see for example [here](#) in Section B) that the second sentence of Article 2 TEU cannot ascribe values to the societies of Member States, it is submitted that it can serve to further determine the substance of the Union's values enshrined in the first sentence of Article 2 TEU. In other words: It can help to determine what the Member States need to provide to put Article 2 TEU values into practice in daily life. The Commission, for example, has underlined that for Member States to not just subscribe to democracy but practice it, there is a need to guarantee 'democratic freedoms, including political pluralism' (see [here](#), p. 43). As such, and considering the vital importance of civil society for any liberal democracy, I would argue for it to be protected as one essential element of democracy under Article 2 TEU.

Conclusion

Some scholars question how much EU law has to say about democracy, questioning whether enough substance can be found in the Treaty provisions and the Common Constitutional Traditions of Member States (see for example Monica Claes [here](#), p. 69, and Vissers, [here](#)). Whereas it remains to be determined how far the EU can constrain the democratic practices of Member States, this blogpost has aimed to show that EU law does not stay totally mute when it comes to national democracy, and that at least some basic elements can be drawn from the Treaties.

Whereas, at a first glance, Treaty provisions seem to have a heavy procedural focus on elections and institutions, the Hungarian Sovereignty Bill serves as the perfect example to demonstrate that to effectively address democratic backsliding, the EU's conception of democracy must not be limited to institutional and procedural safeguards but must be anchored in the citizens and civil society itself. In light of this, and in order to fulfil its self-

imposed Democracy Action Plan, it is to be hoped that the European Commission does take action against the Hungarian Defence of Sovereignty Bill.