

Walking A Democratic Tightrope

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That was fast. On 8 June, only 11 days after the Polish so-called ‘Lex Tusk’ was signed into force, the Commission launched an infringement procedure against Poland. For the first time, the Commission is relying on the principle of democracy in Art. 10 TEU as an autonomous plea, dropping another bombshell shortly after the first direct invocation of Art. 2 TEU in [infringement proceedings against Hungary](#) earlier this year.

This contribution discusses both the perks and potential perils of the direct enforcement of the principle of democracy in Art. 10 TEU. On the one hand, a shift from what is arguably better called ‘militant rule of law’ towards more literally EU militant *democracy* is a positive development, as it better captures the nature and range of the principles which are *de facto* under threat in several EU Member States, including Poland. On the other hand, the present infringement action illustrates the principled challenge of militant democracy to preserve the possibility of democratic regime change, all whilst not lapsing into a form of institutional conservatism. This challenge is particularly pertinent for the EU’s multi-level and pluralist democratic polity.

Lex Tusk and the Commission’s reaction

In the name of protecting Polish national security, the law at issue establishes a committee with the mandate of investigating potential Russian influence on Polish officials and ‘other public figures’ (for an elaborate analysis of the law, see [Sadurski on this blog](#)). An individual found subject to Russian influence can be banned from managing public funds for ten years. Commentaries fear that this provision could be used to weaken (or even exclude) Donald Tusk and his party Civic Platform ahead of the Polish parliamentary elections in Fall 2023 – an election which, as [Sadurski](#) argues, the incumbent Law and Justice Party (PiS) cannot afford to lose.

In this light, the nickname ‘Lex Tusk’ and the concerns this law caused in [Washington](#) and [Brussels](#) seem more than justified. While one could expect that the Commission would swiftly voice its ‘special concern’ and threaten to take action against the law, the more surprising part is that it would make this threat come true only 11 days later.¹⁾ According to its [press release](#) of June 8, the Commission holds that the new committee on investigating Russian influence “unduly interferes with the democratic process” and therefore violates the principle of democracy itself (Art. 10 TEU).

Calling a (democratic) spade a spade

What is positive about this infringement action is that the Commission finally recognises democracy as another one of its founding principles that are under threat and in whose defence the EU has a role to play. In the past, the Commission's actions against backsliding Member States, in particular those against Poland, were largely framed in terms of the rule of law. However, this has never been a fully accurate representation of the way in which the legislative changes in Poland over the past years have undermined the EU's founding principles. For example, the establishment of the Polish National Council of Media in 2016 gave the governing PiS Party significant control over the composition of the Polish public media sector, which ultimately [increased its influence over public opinion formation](#) and thus over a key component of the democratic process. Moreover, in 2017, the so-called National Freedom Institute for Civil Society Development was established to centralise the distribution of funds to civil society organisations, thereby [subjecting the latter increasingly to the political whim of the government](#). Also here, the threat of shrinking civic space and constraining actors in the public sphere goes to the heart of the principle of democracy.

Whilst both the law on the National Council of Media and on the National Freedom Institute are briefly mentioned in the Commission's 2017 [proposal for an Art. 7\(1\) TEU decision](#) against Poland, the overall proposal is exclusively centred on the rule of law as the (only) Art. 2 TEU value under threat. Similarly, the infringement procedures brought against Poland over the past years almost exclusively deal with matters of judicial independence, the latter being construed in the EU legal order as a requirement giving direct expression to the principle of the rule of law. By contrast, the latest infringement action suggests that the Commission has grown less scared of touching the hot potato of democracy and its defence. This is positive in that it demonstrates a more holistic approach to the defence of the EU legal rights and principles under threat in several Member States – or, in other words, a shift from 'militant rule of law' towards more literally 'militant *democracy*'.

However, militant democracy also brings with it important legal and normative challenges that threaten to go unnoticed amidst the general enthusiasm around the latest infringement action. The case of Lex Tusk and the broader questions around enforcing the principle of democracy in Art. 2 and 10 TEU that come with it illustrate the legal, temporal and normative tightrope any militant-democratic polity needs to walk regarding (democratic) change to its institutional order. This pertains to whether and when intervention is legitimate and the danger of foreclosing, through intervention, possibilities of legitimate institutional change.

Militant democracy and democratic reversibility: an ambiguous threshold

The concern that the sanctions provided for under the new Polish law will be used to disable the main competitor to the government party ahead of the next elections directly relates to a principle that is prominently invoked as the normative criterion

for when militant democracy is legitimate: the principle of reversibility²⁾ or democratic self-correction³⁾. The reasoning here is that, at the point where a democratic change of government through free and fair elections is no longer possible, militant-democratic interventions are permissible in order to safeguard the overall democratic nature of the polity. However, translating this abstract, theoretical threshold into a practical, legal one is inherently difficult – both generally speaking and for EU militant democracy in particular.

Bluntly put, one only knows that it is too late when it is too late – i.e. after an election in which democratic change has supposedly proven impossible. And even then, the case is not straightforward. For instance, one could argue that the Hungarian elections of 2022 are proof of the fact that the electoral level-playing field in Hungary is already [too tilted](#) to allow for genuinely democratic change – and that therefore, militant-democratic action by the EU is warranted or should ideally already have prevented this situation to begin with. However, there are also arguments that [strategic mistakes of the Hungarian opposition](#) contributed to Viktor Orbán winning another term in office, implying that the road to democratic reversibility is not yet (fully) closed. Establishing concrete legal criteria by which to assess the democratic reversibility in its Member States is thus an inherently difficult task, one which the Court of Justice will have to navigate when interpreting the principle of democracy in the context of the latter's defence.

Art. 10 TEU: a source of institutional conservatism?

There is a further, principled issue in relation to militant democracy and democratic change that is brought to the fore by the potential enforcement of Art. 10 TEU – that of institutional conservatism. In the context of militant democracy, institutional conservatism refers to the conflation of democracy and its underlying principles with the present institutional status quo, defending the latter rather than the former.⁴⁾ In this light, the wording of Art. 10(1) TEU ('The functioning of the Union shall be founded on representative democracy') could lead to equating democracy and its underlying principles with *representative* democracy – a tendency which the Court displayed in its previous case law. In [Roquette Frères](#), the Court speaks of "the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly" (para 33). Here, the Court is essentially putting the institutional cart before the democratic horse. Indirect popular participation through representation is not in and of itself a fundamental democratic principle. Rather, representative democracy, *inter alia* through the principle of 'one person, one vote', attempts at a specific institutional realisation of fundamental democratic principles, such as the principle of equality. However, a representative system is not the only (and [perhaps not even the best](#)) institutional model for doing so.

Whilst Art. 10(1) TEU is not likely to be the legal epicentre in the case of the infringement proceedings around Lex Tusk (but rather the right to stand for elections, as pointed out by [Vissers](#)), it is nevertheless illustrative for why tying the EU's defence of democracy to the direct enforcement of Art. 10 TEU warrants

caution. In particular, in light of the EU being the dynamic, indeterminate, multi-level polity that it is, EU militant democracy ought to be careful not to cut off democratic experimentalism and the inherent openness of democracy to change and take different forms across its Member States (e.g. a participatory rather than a representative model). Any militant-democratic legal framework, including that of the EU, should be designed in a way that prevents as much as possible a conflation between actions that attack the moral principles at the core of democracy altogether, and those who merely question whether present institutional models are the most suitable ones to give effect to those principles. The direct enforcement of Art. 10 TEU carries with it the in-built danger of militant democracy to catch both types of actions alike – a danger which needs to be highlighted as a matter of principle, even if there is little doubt as to which of these two categories the Polish Lex Tusk falls under.

The way ahead for EU militant democracy

At this point, we do not know yet how the Commission will spell out its democracy plea and what kind of approach the Court will take in interpreting the principle of democracy and the concrete legal obligations for Member States stemming from Art. 10 TEU (assuming this case will be referred to the Court). Therefore, this is a good time to highlight the broader normative and legal challenges that come with militant democracy and the direct enforcement of the principle of democracy in the EU legal order, for which the case of Lex Tusk might pave the way. As pointed out above, the Commission's increasing assertiveness in defending the principle of democracy as the one under threat in different ways across Member States is, in many regards, a positive development. However, if and when the Court is asked to provide a binding reading of the principle of democracy for the EU's pluralist, multi-level polity, this reading ought to be one that does not foreclose democratic change and context-specific solutions to political challenges at the national level. Defending democracy in a way that remains in line with the nature of democracy as the dynamic, ever-evolving form of self-government that it is implies walking a normative tightrope: setting a legal and temporal threshold for when change through the democratic process is no longer possible and intervention is warranted, all whilst not curtailing (even radical) changes to the institutional status quo that remain in line with the moral principles on which democracy is based.

References

- Note: In the past, the Commission has frequently been accused of doing 'Too little too late' about the violations of its founding principles in Member States like Poland.
- Note: The emphasis on reversibility as the key quality of democracy goes back to Karl Popper's *Open Society and its Enemies*. With regard to militant democracy, Issacharoff also builds his normative argument around a notion close to reversibility, namely that of renewal. See Samuel Issacharoff, *Fragile Democracies Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

- Bastiaan Rijpkema, *Militant Democracy#*: The Limits of Democratic Tolerance (Routledge 2018).
 - Patrick Nitzschner, 'On Militant Democracy's Institutional Conservatism' [2023] *Philosophy & Social Criticism* 1-21.
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