

Militant Democracy, Populism, Illiberalism

Thinking EU Militant Democracy beyond the Challenge of Backsliding Member States

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EU militant democracy – an approach beyond member states’ democratic backsliding – the EU as a first case of transnational democratic self-defence – the EU’s democratic legitimacy – national and supranational threats to EU democracy – instruments and enforcement of EU militant democracy – comparison to national militant democracy – problems of effectiveness

INTRODUCTION

Similar to the origins of the ‘mother concept’ of militant democracy itself, the interest in approaching the EU through the lens of militant democracy has arisen from the political exigencies of the day. Just as Karl Loewenstein was concerned with how to defend young and fragile European democracies against the rise of fascism, most authors studying the EU and militant democracy are concerned with how to respond to the phenomenon of democratic regression in EU member states like Hungary and Poland. However, this approach yields an incomplete picture of how militant democracy translates to the EU. Most importantly, the existing literature does not capture the complexity of militant democracy as applied to the EU, a non-state polity with its own legal and political peculiarities.

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European Constitutional Law Review, 18: 385–411, 2022

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doi:10.1017/S1574019622000220

Starting from the latter as well as the conceptual characteristics of militant democracy, this paper takes a novel approach to the question of how militant democracy translates to the EU. The paper attempts to complement existing analyses and set the agenda for developing a proper account of EU militant democracy. The purpose is to build a genuine bridge between the study of militant democracy and the legal and political scholarship on the EU, which is cross-fertilising in that it yields novel insights about both.

After explaining the background of how militant democracy came to be applied to the EU, the paper sets out some conceptual characteristics of militant democracy for subsequent analysis. The paper examines the shortcomings within the current literature on EU militant democracy, all ensuing from the contingent problem of backsliding member states, and argues for the need for a different analytical approach. First, the paper derives the general translatability of militant democracy to the EU from EU law on the one hand and normative political theory on the other. Following this, it provides an inventory of the EU's legal and institutional mechanisms for defending its democratic legitimacy vis-à-vis actual and potential threats at both the national and supranational levels. The paper analyses whether and to what extent those mechanisms reflect the characteristics of militant democracy as currently understood. While EU militant democracy is found to display both parallels and differences compared to (national) militant democracy as we know it, its complexity in any case goes beyond the reigning-in of backsliding member states.

MILITANT DEMOCRACY AS APPLIED TO THE EU – SOME INITIAL OBSERVATIONS

Broadly defined, the concept of militant democracy refers to the idea that a democracy may defend itself against internal erosion by way of a rights-restrictive legal regime.¹ The concept became prominent in European legal and political practice during the period of the Cold War, while the historical and intellectual roots of military democracy can be traced to the Weimar-era. The German legal and political intellectual Karl Loewenstein first coined the term as he observed inter-war European democracies under totalitarian (notably fascist) assault. Later, it became associated with a legal and political doctrine of assertive (and restrictive) democratic self-defence against totalitarian political actors and ideologies during the era of the Cold War.² As Bourne and Rijkema explain

¹J-W. Müller, 'Militant Democracy', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2018) p. 1253.

²K. Loewenstein, 'Autocracy Versus Democracy in Contemporary Europe, I', 29(4) *American Political Science Review* (1935) p. 571; K. Loewenstein, 'Autocracy Versus Democracy

in the introduction to this Special Section, militant democracy has more recently regained academic and political traction in the context of counter-terrorism as well as populist and illiberal threats to contemporary democracies in Europe and beyond.

The latter is directly linked to the recent interest in approaching the EU in terms of militant democracy. Jan-Werner Müller, as one of the first authors to apply the concept of militant democracy to the EU, was motivated by the question of whether and what role the EU should play regarding democratic backsliding and illiberal tendencies in its member states.³ While Müller was originally also troubled by a constitutional crisis in Romania, it is Hungary and Poland that are currently considered the main member states of concern.⁴ The decidedly illiberal policies of the Hungarian and Polish governments – including the erosion of judicial independence and of a pluralist media landscape, the distortion of the electoral playing field and excess influence over educational institutions and civil society organisations – challenge the EU's commitment to liberal-democratic values that lay at its foundation and serve as guiding principles for its external relations.⁵ According to the democracy-monitoring NGO Freedom House, Hungary and Poland are examples of how '[e]lected leaders in Europe and Eurasia *are undermining the very institutions that brought them to office, rejecting democratic norms and promoting alternative systems of authoritarian governance*'.⁶ Freedom House no longer classifies Hungary as a democracy and attributes part of the blame to the EU's passivity in the face of its member states' democratic regression.⁷

in Contemporary Europe, II', 29(5) *American Political Science Review* (1935) p. 755; K. Loewenstein, 'Militant Democracy and Fundamental Rights, I', 31(3) *American Political Science Review* (1937) p. 417; K. Loewenstein, 'Militant Democracy and Fundamental Rights, II', 31(4) *American Political Science Review* (1937) p. 638. For a critical analysis of Loewenstein's rather radical views and his influence in promoting his idea of militant democracy in post-War Europe, see U. Greenberg, 'Individual Liberties and "Militant Democracy": Karl Loewenstein and Aggressive Liberalism', in U. Greenberg, *The Weimar Century. German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press 2014).

³J-W. Müller, 'Defending Democracy within the EU', 24(2) *Journal of Democracy* (2013) p. 138; J-W. Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?', 22 *Revista de Estudios Políticos* (2014) p. 141.

⁴Note: Proceedings under Art. 7 TEU are ongoing against both Hungary and Poland, while several infringement proceedings on grounds of breaches of the rule of law and other EU founding values are being or have been initiated against them.

⁵Art. 2 TEU and Art. 3(5) TEU.

⁶Z. Csaky, 'Nations in Transit. The Anti-Democratic Turn' (Freedom House 2021), (<https://freedomhouse.org/report/nations-transit/2021/antidemocratic-turn>), visited 9 August 2022. Emphasis added.

⁷Ibid.

In light of such assessments, it appears intuitive to apply the concept of militant democracy to the EU's challenge in containing backsliding member states. However, this also leads to the fact that all existing approaches to EU militant democracy equate it with precisely this challenge. Whether authors are solely interested in the EU as a militant democracy⁸ or touch upon the EU briefly in more general accounts of militant democracy,⁹ they typically only focus upon the question of whether and how the EU should defend its values and its practical functioning against democratic regression in member states. In a recent piece by Scheppele et al., for example, the authors explicitly frame their proposal for systemic infringement proceedings in terms of militant democracy.¹⁰ However, Scheppele et al. use the concept of militant democracy as a mere label to emphasise that the EU needs to engage in more decisive self-defence against recalcitrant member states.

While linking militant democracy and the EU seems to have become more common then, the link between the two is confined to the literature on member states' democratic backsliding and therefore tends to remain superficial. We can of course content ourselves with using the concept of militant democracy, in an EU context, as a mere umbrella term for studying the (important) questions of why and how the EU should take action against illiberal member state governments. However, there are good reasons why scholars of both militant democracy and EU studies should not do so. For one, there is the intriguing intellectual puzzle offered by militant democracy beyond the state, in relation to which further research has constantly been called for.¹¹ When Capoccia professed that '[u]nderstanding the

⁸See *inter alia*: Müller, *supra* n. 3; S.R. Larsen, 'The European Union as "Militant Democracy"?', 232(15) *iCourts Working Paper Series* (2021); C. Walter, 'Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy', in A. Ellian and B. Rijpkema (eds.), *Militant Democracy – Political Science, Law and Philosophy*, vol 7 (Springer International Publishing 2018); T.V. Olsen, 'Liberal Democratic Sanctions in the EU', in A. Malkopoulou and A. Kirshner (eds.), *Militant Democracy and its Critics. Populism, Parties, Extremism* (Edinburgh University Press 2019) p. 150. G. Martinico and A.M. Russo, 'Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi', 21(4) *European Public Law* (2015) p. 659.

⁹See *inter alia* B. Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance* (Routledge 2018); M.R. Maftéan, "'Fighting Fire with Fire": A Normative Exploration of the Militant Democracy Principle' (2018) (https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&ccd=&ved=2ahUKEwiZiqSDhen4AhV2m_0HHYSdCTEQFnoECAIQAAQ&url=http%3A%2F%2Fwww.etd.ceu.edu%2F2018%2Fmaftéan_miles.pdf&usq=AOvVaw0xt9wQrHsPscYwND_TxtCM), visited 9 August 2022.

¹⁰K.L. Scheppele et al., 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law* (2021) p. 1.

¹¹See *inter alia* Rijpkema, *supra* n. 9 and Müller, *supra* n. 1.

conditions and the modes by which militant institutions might develop at the EU level constitutes an important domain for future research',¹² it seems that he saw the value of this research also in questioning whether and how militant democracy translates to a supranational, decidedly non-state polity.

Taking a broader approach to militant democracy in an EU context additionally allows us to think beyond present day crises within the EU. As this paper argues, if we are concerned with the EU's protection and self-preservation, we should be wary of an 'availability bias' in the study of EU militant democracy. The present threat of member states' democratic regression might not be the only conceivable challenge to the EU's democratic order. Neither might it be the only case of EU action and legal instruments following a militant-democratic logic. Conversely, not all EU instruments and policies aimed at the defence of its democratic legitimacy might be accurately understood in terms of militant democracy, at least not in the same way that we understand militant democracy operating in a national context.

Hence, the current approach to EU militant democracy is insufficient. When starting from an empirical contingency such as the backsliding of specific EU member states, other (and arguably prior) questions as to how militant democracy with its conceptual characteristics manifests and changes in the context of a decidedly non-state polity like the EU, with its own legal, political and institutional peculiarities, remain unasked and unanswered by default. As the remainder of this paper will demonstrate, the current approaches lead to a partly inaccurate and in any case incomplete picture of EU militant democracy as being either 'for' or 'against' its member states and their national democracies. Yet, in order to analyse existing approaches to EU militant democracy in greater depth, we need to first take a step back and engage more closely with the concept of militant democracy itself. The following section sets out some conceptual characteristics of militant democracy that enable us to better understand the assumptions behind the current application of militant democracy to the EU, and to identify potential flaws and gaps in the latter.

MILITANT DEMOCRACY – CONCEPTUAL CONSIDERATIONS

From Loewenstein until the present, definitions and uses of the term 'militant democracy' have varied significantly in terms of scope and specificity. While some authors focus upon the banning of political parties, arguably its most controversial tool, others define the means and targets of militant democracy in more general

¹²G. Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation', *9 Annual Review of Law and Social Science* (2013) p. 207 at p. 220.

terms.¹³ Moreover, both descriptive and normative cases have been made for subordinating militant democracy to – or indeed replacing it with¹⁴ – more comprehensive categories such as ‘defensive democracy’. The latter extends beyond rights-restrictive legal measures and comprises policies aimed at increasing the stability and resilience of a democratic polity in a broader sense.¹⁵ The aim of preserving a democratic polity and rendering it resilient against undemocratic actors is the common thread uniting the different uses of the term militant democracy as well as the calls to replace it. However, this comes with the dangers of concept-stretching and conflation.¹⁶ A narrower understanding of militant democracy and its instruments provides for a sharper analytical lens¹⁷ – one that is particularly warranted when studying how militant democracy manifests in a novel legal and political context, such as that of the EU.

Following a narrow understanding of militant democracy, the legal restriction of fundamental political rights for defending democracy represents its core characteristic (i.e. any form of restriction on fundamental rights or political participation rights granted under the legal order of the militant-democratic polity in question, notably restrictions on freedom of expression, association and assembly).¹⁸ Importantly, such rights restrictions are to be considered internal, which is to say targeted at constituents of the polity engaged in militant-democratic defence. It is this characteristic that gives rise to the much-debated ‘democratic paradox’, i.e. the question of whether and to what extent a democratic polity denounces its principles and hence its legitimate authority when adopting a rights-restrictive approach towards its own constituents.¹⁹

Pre-emptive or preventive action is generally considered a further, albeit ambiguous, characteristic of militant democracy. Militant democracy is supposed to target anti-democratic actors before they obtain a position of sufficient power

¹³For the former see Rijpkema, *supra* n. 9. For the latter see Capoccia, *supra* n. 12.

¹⁴For a principled critique of militant democracy, see A. Malkopoulou and L. Norman, ‘Three Models of Democratic Self-Defense’, in Malkopoulou and Kirshner (eds.), *supra* n. 8.

¹⁵S. Rummens and K. Abts, ‘Defending Democracy: The Concentric Containment of Political Extremism’, 58 *Political Studies* (2010) p. 649. See also Capoccia, *supra* n. 12.

¹⁶A.K. Bourne and F. Casal Bértoa, ‘Mapping “Militant Democracy”: Variation in Party Ban Practices in European Democracies (1945–2015)’, 13 *EuConst* (2017) p. 221.

¹⁷Note: Such narrow understanding of militant democracy in an academic context stands in a certain contrast to its use in political discourse and communication. For instance, references to ‘militant democracy’ (or its German equivalent of ‘*wehrhafte Demokratie*’) have become more frequent recently in the context of Russia’s invasion of Ukraine and the question of how European democracies ought to react to it.

¹⁸Note: This understanding of militant democracy is expressed along similar lines by Capoccia, *supra* n. 12, p. 207: ‘the use of legal restrictions on political participation and expression to curb extremist actors in democratic regimes’.

¹⁹Müller, *supra* n. 1.

to seriously harm or even dismantle the democratic nature of a polity.²⁰ At the same time, a certain level of anti-democratic action is generally considered necessary to evidence such subversive ambition and render militant democracy a legitimate and proportionate answer.²¹ Hence, the exact meaning of ‘pre-emptive’ with regard to militant-democratic action remains debated both in empirical and normative terms. Generally speaking, ‘pre-emptive’ in the context of militant democracy means ‘before it’s too late’. Yet, whether that point is already reached when anti-democratic actors have made it to the centre of the polity’s institutions or only when they have also gained sufficient influence in political decision-making remains a matter of debate in militant democracy theory and subject to a case-by-case assessment in practice.²² In the European legal space, it is notably the European Court of Human Rights which has set a certain minimum standard of militant democracy regarding the imminence of anti-democratic threats and the tipping point for legitimate intervention.²³

Some further observations on the concept of ‘militant democracy’ are important for the purpose of this paper. One is that the term ‘militant democracy’ is used in the literature to refer to two different but interlinking elements. First, militant democracy denotes the *practice* of defending democracy, or the very fact that rights-restrictive and pre-emptive action is being taken against anti-democratic political actors.²⁴ Second, ‘militant democracy’ is used as a name (or label) for the *polity* – hitherto understood as a democratic state – which engages in acts of self-defence or, at least, whose laws provide for this possibility. Most definitions of militant democracy (more or less explicitly) link these two meanings in that the *purpose* of militant-democratic action is perceived in the *self-defence* of the polity that engages in such action.²⁵ Moreover, the notion of

²⁰Ibid., p. 1253: ‘Militant democracy refers to the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime’.

²¹G. Molier and B. Rijpkema, ‘Germany’s New Militant Democracy Regime: *National Democratic Party II* and the German Federal Constitutional Court’s “Potentiality” Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II’, 14 *EuConst* (2018) p. 394.

²²Ibid.

²³ECtHR 13 February 2003, Nos. 41340/98 et al., *Refah Partisi (the Welfare Party) and other v Turkey*. For an analysis, see P. de Morree, ‘Militant Democracy in the Context of the ECHR’, in P. de Morree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016) p. 225. For a more general account of the conception of democracy within the ECHR legal order, see also R O’Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press 2020).

²⁴Capoccia, *supra* n. 12.

²⁵Consider e.g. the definition provided by Rovira Kaltwasser: ‘Militant democracy can be defined as a type of liberal democratic regime that is characterised by the provision and employment of legal

the militant-democratic polity importantly connects the normative and descriptive dimensions of the concept. Militant *democracy* is not to be equated with the mere self-preservation of any polity, let alone political incumbent.²⁶ Depending on one's normative anchoring, democracy is perceived as one of or the key foundation of public authority in the militant-democratic polity, hence legitimising its existence and self-defence to begin with.²⁷

The understanding of militant democracy adopted in this paper is that of the rights-restrictive and preventive self-defence of a polity against its own constituents where they (threaten to) undermine that polity's democratic order. While this definition remains descriptive regarding the practice of militant democracy (it does not make any claim as to whether rights-restrictive and preventive action is the most desirable or effective form of democratic self-defence), it is normative regarding the polity that can engage in militant-democratic practice. The latter does not comprise any self-declared democracy, but only those that meaningfully adhere to democratic principles and are governed by democratic processes.²⁸ Importantly for the purposes of this paper, the present definition does not exclude that militant democracy may also apply to polities beyond the state.

MEMBER STATE-CENTRIC APPROACHES TO EU MILITANT DEMOCRACY: THE INSTRUMENTAL VS THE INTRINSIC VIEW

The predominant focus on the challenge of backsliding member states and the EU's corresponding tools for action (primarily Article 7 TEU²⁹) has resulted in either distorted or incomplete perceptions of what EU militant democracy consists of. First, some authors have effectively separated the *practice* of militant-democratic defence from the *polity* of the EU, thereby representing the EU as a mere extra layer of legal and institutional safeguards serving the ends of defending national democracy. Second, some authors have framed EU militant

mechanisms that seek to protect the regime from challenges to its continued existence by curtailing the rights of those who allegedly aim to overturn democracy by using democratic procedures': C.R. Kaltwasser, 'Militant Democracy Versus Populism', in Malkopoulou and Kirshner (eds.), *supra* n. 8.

²⁶Note: This normative condition does not, of course, shield the concept of militant democracy from abuse in practice.

²⁷In this light, Thiel suggests that the study of militant democracy ought to focus on 'stabilized constitutional democracies': M. Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate 2009) p. 6.

²⁸Note: Otherwise, militant democracy would be nothing else than repressive action by an authoritarian regime.

²⁹Note: Art. 7 TEU provides for determining a 'serious and persistent breach' (or the risk of such) by a member state of the values listed in Art. 2 TEU. On these grounds, Art. 7(3) TEU *inter alia* allows for suspending a member state's voting rights in the Council.

democracy as the self-defence of supranational democracy and its institutions against its member states and against member states only.

In his analysis of whether and how the concept of militant democracy has internationalised, Walter conceives the EU as merely an additional institutional layer meant to ‘support and strengthen’³⁰ national militant democracy. While Walter considers Article 7 TEU to be the ‘most elaborate form of militant democracy outside national constitutional law’,³¹ he still conceives the polity to be protected as exclusively national in nature: ‘Since their targets [of Article 7 TEU and the Commission’s Rule of Law Framework] are the national constitutional structures of EU member states, they constitute an *international instrument designed for defending democracy at the domestic level*’.³² Walter concludes that EU militant democracy only steps in once national militant democracy in the member states has failed. This is also echoed in Maftean’s general account of militant democracy. Referring again to Article 7 TEU, he finds that ‘[t]he judicial practice in the EU had developed a transnational model of militant democracy that can be applied *against Member States who fail to adequately address anti-democratic action*’.³³

Both authors group together the EU on the one hand and the European Convention on Human Rights with its European Court of Human Rights on the other hand under the umbrella concept of ‘transnational militant democracy’ – and in both cases, the ostensible purpose of ‘transnational militant democracy’ is perceived in the protection of democracy at the national level.³⁴ While Rijpkema has a more nuanced understanding of the differences between the EU and the European Court of Human Rights in defending democracy, he also ultimately concludes that the objective of EU militant democracy rests exclusively upon the defence of national democracy:

In case of the EU, however, it is not a question of supervising the execution of militant democracy [as it is regarding the European Court of Human Rights], but rather of its *own ‘militant democracy measures’*, which can be effectuated *against Member States with the aim of protecting democracy there*.³⁵

The broader picture that emerges from these views is that of the EU as one in several regional integration organisations engaged in protecting and defending

³⁰C. Walter, ‘Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy’, in A. Ellian and B. Rijpkema (eds.), *Militant Democracy – Political Science, Law and Philosophy*, vol 7 (Springer International Publishing 2018) p. 79 at p. 93-94.

³¹Ibid., p. 90.

³²Ibid., p. 90. Emphasis added.

³³Ibid., p. 39.

³⁴See Walter, *supra* n. 30. See also Maftean, *supra* n. 9, p. 39-46.

³⁵Rijpkema, *supra* n. 9, p. 157. Emphasis added.

democracy in its member states.³⁶ It is important to recognise and articulate the implicit understanding of democracy and the resulting perception of the EU's legal and political nature that underlie these views. Walter's, Maftean's and Rijkema's conceptualisation of EU militant democracy reflects their understanding of liberal democracy as both normatively and practically speaking limited to the national level. This understanding is explicitly articulated by Ginsburg in his analysis of the relationship between democracy and international law:

[...] *liberal democracy is a feature of national political order, which can be promoted, defended or undermined by international legal institutions. It is not a feature of international legal order, nor can it be, given the inherent pluralism about ways of organising government that is constitutive of international legal systems.*³⁷

This view has important implications for whether and to what extent the concept of militant democracy can be translated to the transnational level in the first place. If we take as a given the normative and practical impossibility of democracy in international legal and political orders, the conceptual characteristic of militant democracy as the *self-defence* of a democratic polity cannot by default apply to regional integration organisations – because they do not, indeed cannot possibly, constitute democratic polities in their own right. Consequently, if the EU retains a purely instrumental function in the defence of national democracy, that puts into question whether we could call it a 'militant democracy' to begin with. One might rather have to speak of 'militant democracy by the EU' or of 'the EU engaging in militant-democratic practice', which is to say the EU acting as an additional bolster to member states' democratic defence mechanisms in a way similar to other regional integration organisations.

Such an instrumental view might be accurate regarding e.g. the Organization of American States or the African Union, which are explicitly concerned with the protection of democracy (or arguably rather political stability)³⁸ in their respective member states and do not make a claim to constituting a form of transnational democracy.³⁹ However, it seems odd not to engage with the question of democratic self-defence regarding the EU as by far the most advanced form of regional integration – one that can rather straightforwardly be deemed a polity of its own

³⁶T Ginsburg, *Democracies and International Law* (Cambridge University Press 2021). Note: A total of ten regional integration organisations have treaty clauses related to democracy, whilst some have even adopted distinct 'Democracy Charters': *ibid.*, p. 22.

³⁷*Ibid.*, p. 290. Emphasis added.

³⁸*Ibid.*

³⁹Note: For an overview and evaluation of how different regional integration organisation engage in the defence of democracy, *see ibid.*, Ch. 4.

right with distinct features of democratic government.⁴⁰ The ex ante exclusion of an element of self-defence when applying the concept of militant democracy to the EU thus represents a weakness of the instrumental view of EU militant democracy.

There are a number of authors sceptical about a purely instrumental view of EU militant democracy, attributing to the latter a more intrinsic function of self-defence. However, this view is also derived from Article 7 TEU and the contingent challenge of backsliding member states. *Inter alia* Müller, Larsen and Wagrandl observe that Article 7 TEU, as the main official tool for responding to backsliding members states, cannot be made sense of if the exclusive purpose of EU militant democracy is the defence of democracy at the national level.⁴¹ Given that the main sanction provided for under Article 7(3) TEU is the suspension of a member state's voting rights in the Council, they argue that Article 7 TEU is better perceived as a form of *cordon sanitaire*, shielding EU-level decision-making processes from member state governments that have taken an illiberal turn.⁴²

As Wagrandl remarks, the logic of Article 7 TEU fits poorly with the idea that EU-level militant democracy is 'nothing but a tool in securing liberal democracy at home'.⁴³ He argues that 'the suspension of voting rights makes sense only *if the EU is perceived as a common democratic sphere, which is militant of its own right*'.⁴⁴ Against this background, Wagrandl introduces the useful distinction between 'militant democracy gone transnational' (referring to the European Court of Human Rights) and 'transnational democracy gone militant' (referring to the EU). The latter concept is meant to reflect that militant democracy, in an EU-context, is subject to a significant transformation: 'it does not protect national democracies, but the transnational democracy which the countries of Europe have established'.⁴⁵

In diagnosing this conceptual and normative transformation, Wagrandl's analysis hints at broader questions of whether and how militant democracy unfolds in the novel setting of a supranational, non-state polity. However, by retaining a narrow focus on backsliding member states and the instrument of Article 7 TEU, Wagrandl himself stops short of answering them. As this section has

⁴⁰Note: These features will be discussed more elaborately in the subsequent section of this paper.

⁴¹U. Wagrandl, 'Transnational Militant Democracy', 7(2) *Global Constitutionalism* (2018) p. 143; S.R. Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021); Müller, *supra* n. 3.

⁴²Wagrandl, *supra* n. 41, p. 158; Larsen, *supra* n. 8, p. 142; Müller, *supra* n. 1, p. 144. Müller here describes Art. 7 TEU as imposing a 'moral quarantine' on the member state in breach.

⁴³Wagrandl, *supra* n. 41, p. 160.

⁴⁴*Ibid.* Emphasis added.

⁴⁵*Ibid.*, p. 157. Emphasis added.

demonstrated, the starting point of backsliding member states has led to an implicit decoupling of the militant-democratic practice from the polity in an EU-context. Moreover, by squarely locating the democratic structures to be defended at the national level, the question of the EU's *self*-defence is side-lined. By contrast, the authors that do raise the question of the EU's self-defence conceive of it narrowly as directed only against its member states.

Therefore, while all of the aforementioned authors make interesting and valuable observations regarding the EU's reaction to backsliding member states and the legal instruments in play, these observations need to be embedded into a more comprehensive conceptualisation of EU militant democracy, its normative foundations as well as its legal and practical manifestations. In order to grasp the complexity of the EU's democratic self-defence, a different approach is needed that starts from the key characteristics of both militant democracy as a concept and the EU as a polity. As a first step, the following section argues for the *prima facie* applicability of militant democracy to the EU, whilst avoiding the empirical bias of member states' democratic regression.

EU MILITANT DEMOCRACY – THE POLITY

As emphasised in the conceptual section of this paper, 'militant democracy' is not just about the self-preservation of any polity, but of one that can be meaningfully considered democratic. Regarding the EU, it remains disputed whether democracy should be perceived as its legitimising principle to begin with, and if so, whether the EU sufficiently lives up to democratic standards.⁴⁶ Indeed, as highlighted in the previous section, other regional integration organisations that engage in democracy enforcement vis-à-vis their member states have not been conceptualised as (militant) democracies, either.⁴⁷ Hence, one might question whether militant democracy is an appropriate conceptual lens through which to approach the EU to begin with. The EU's particular political nature and its oft-decried 'democratic deficit' might rather make it a novel, transnational case of 'those who need militant democracy cannot [legitimately] have it'.⁴⁸ Instead

⁴⁶Note: For instance, Neyer argues that justice and not democracy is the proper normative yardstick for the European Union: J. Neyer, 'Justice Not Democracy: Legitimacy in the European Union', 48(4) *JCMS* (2010) p. 903.

⁴⁷For an overview of democracy enforcement in Regional Integration Organisations, see C. Closa, *Securing Compliance with Democracy Requirements in Regional Organizations*, vol 1 (Oxford University Press 2017).

⁴⁸C. Möllers, referred to in Müller, *supra* n. 3. Möllers rather describes the danger of abuse of militant democracy in a non-consolidated democracy here (due to a lack of safeguards and popular support), yet this legitimacy conundrum can arguably be extended to any polity with doubtful democratic credentials.

of presupposing (or imposing) the applicability of militant democracy to the EU in light of member states' democratic regression and the urgency of countering the latter, one thus needs to take a step back and look at both the legal and normative foundations that allow for understanding the EU as a militant democracy in the sense of both the polity and the practice. It is argued that one can derive the applicability of militant democracy to the EU in a more systematic, principled manner from EU law on the one hand and normative political theory on the other.

First, from the perspective of EU law, the EU can be considered as having a 'value-based legal order [*werthafte Rechtsordnung*]' in which democracy features prominently.⁴⁹ Core principles of liberal-democratic government such as the rule of law, fundamental rights and democracy itself are part of the EU's founding values as listed in the TEU and of the criteria necessary for joining the Union to begin with.⁵⁰ The postulation that 'the functioning of the Union shall be founded on the principle of representative democracy'⁵¹ is reflected *inter alia* in the EU's directly elected parliament, featuring as one of its two co-legislators. Moreover, principles of democratic governance such as accountability and transparency are enshrined in Title II TEU. Citizens can control EU institutions and their decision-making (Article 14 TEU), they can contest EU decisions before the Court of Justice (Article 19 TEU) and they have a right to transparent information on EU decision-making (Article 11 TEU). The EU additionally features elements of participatory democracy, including the European Citizens Initiative and more recently the Conference on the Future of Europe.⁵² Taken together, these features demonstrate that democracy and its principles are central to legitimising political authority at the EU-level – which, as will be argued, is more decisive for legitimising militant democracy than shortcomings in their institutional realisation to date.

Adding to this a more principled, normative stance, democracy can be seen as the key principle that legitimises the exercise of political authority by *any* polity, be it national or transnational. The basic standard of democratic legitimacy as suggested in this paper is that the citizens of a given polity need to be able to

⁴⁹M. Klamt, *Die Europäische Union als Streitbare Demokratie. Rechtsvergleichende und Europarechtliche Dimensionen einer Idee [The European Union as a Militant Democracy. Comparative and European Law Dimensions of an idea]* (Herbert Utz Verlag 2012).

⁵⁰Art. 2 TEU, Art. 49 TEU and the Copenhagen Criteria as set out in the European Council Conclusions of 21-22 June 1993, (<https://www.consilium.europa.eu/media/21225/72921.pdf>), visited 9 August 2022.

⁵¹Art. 10(1) TEU.

⁵²The European Citizens Initiative is based on Art. 11(4) TEU and Art. 24(1) TFEU. For the Conference on the Future of Europe, see 'Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe Engaging with citizens for democracy – Building a more resilient Europe' (2021) OJ C 91I.

perceive themselves as both the authors and addressees of the rules which are binding upon them.⁵³ Rather than a pre-existing (ethnic) demos, it is the joint subjection to binding rules that need to be (generally and reciprocally) justified to their subjects.⁵⁴ This normative demand can only be fulfilled through democratic procedures in which citizens are the free and equal co-authors of said rules.⁵⁵

Regarding the EU, this idea is captured by Pernice's normative conception of the EU as *Verbund* (in English 'composite').⁵⁶ Pernice considers the formally autonomous legal orders of the EU and its member states as being brought together into a fundamentally interdependent 'constitutional whole' with EU citizens as the legitimising subjects (*Legitimationssubjekte*) of this order.⁵⁷ In this sense, the EU is both grounded in and reliant upon the normative force of the democratic process:

Only where the actors which take part in the law-making process are legitimised through and controlled by democratic procedures in the member states and on the European level, does the European Union fulfil the preconditions under which public authority will be accepted.⁵⁸

At this stage of the integration process, the EU can reasonably be perceived as a polity in its own right which issues binding rules and directly exercises public authority over its political subjects, indeed its own citizens. EU institutions, be it directly or through national institutions, issue 'decisions and acts which must be implemented and obeyed even if one does not, as implementer or obedient citizen, need to agree with these decisions'⁵⁹ – and quite simply, where there is such political authority, it needs to be legitimised.⁶⁰ Normatively speaking, democracy is the key principle for legitimising public authority. Mirroring this, EU law itself codifies a democratic normative yardstick not only for its member states, but also for EU-level procedures.

⁵³J. Habermas, *Between Facts and Norms* (MIT Press 1996).

⁵⁴R. Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (Columbia University Press 2007); R. Forst, *Legitimacy, Democracy, and Justice*, vol 1 (Oxford University Press 2017). For his considerations on the EU in light of democratic justice, see R. Forst, 'Justice, Democracy and the Right to Justification: Reflections on Jürgen Neyer's Normative Theory of the European Union', in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart Publishing 2015) p. 227.

⁵⁵Ibid. See also Habermas, *supra* n. 53.

⁵⁶I. Pernice, *Der Europäische Verfassungsverbund [The European Constitutional Compound]* (Nomos 2010).

⁵⁷Ibid.

⁵⁸Ibid., p. 678. Author's translation.

⁵⁹L.M.F. Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) p. 4.

⁶⁰M. Hesselink, 'Towards a Critical Theory of Justice in European Private Law' (forthcoming).

At the same time, there is abundant and well-founded criticism that current EU-level processes are insufficient (and insufficiently democratic) to live up to this normative demand.⁶¹ This doubtlessly poses a key problem to the EU's political legitimacy more generally and the legitimacy of militant-democratic self-defence in particular. However, it would at the same time be a self-defeating logic if the legitimacy and by analogy the democratic self-defence of a polity were contingent upon an optimal functioning of its institutions in practice.⁶² In this regard, Kirshner rightly warns against a tendency in militant democracy studies to stylise the virtues, but also the flaws of a real-world democratic polity in the context of its self-defence.⁶³ Otherwise, Möllers's militant democracy conundrum that 'those who need it cannot [legitimately] have it' would apply to all imperfect democracies, be they national or transnational.⁶⁴

Indeed, any such inference would be paradoxical in that it would put the quest for political reform of the EU and its (much needed) democratisation on inherently shaky ground. Militant democracy, after all, is not only about the aversive dimension of a polity positioning itself against what it is not. It is just as much about defending democracy's inherent qualities of reversibility, self-reflexion and self-correction.⁶⁵ The process of regularly reviewing the organisation of a democratic society and reforming a polity's rules and institutions where they do not (or no longer) live up to the normative demands of democracy, however, can only be legitimised and realised via democratic processes themselves, through which citizens can understand themselves as the authors and addressees of any such reform.⁶⁶ If, in this light, arguably inevitable imperfections in real-world democratic institutions and processes are invoked against their defence-worthiness, then this would amount to a doubtful form of democratic fatalism.

Therefore, this paper argues that applying militant democracy to the EU is generally compatible with an understanding of democracy as a normative characteristic and legitimising principle of a *polity* that engages in *self-defence* by

⁶¹J.H.H. Weiler, 'Part II. Living in a Glass House: Europe, Democracy and the Rule of Law', in C. Closa et al. (eds.), *Reinforcing Rule of Law Oversight in the European Union* (EUI Working Papers RSCAS 2014/25) (https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence), visited 9 August 2022.

⁶²A. Sangiovanni, 'Debating the EU's Raison d'Être: on the Relation between Legitimacy and Justice', 57(1) *JCMS* (2019) 13.

⁶³A.S. Kirshner, *A Theory of Militant Democracy. The Ethics of Combatting Political Extremism* (Yale University Press 2014).

⁶⁴Möllers, as referred to in Müller, *supra* n. 3.

⁶⁵See *inter alia*: K. Popper, *The Open Society and Its Enemies* (Princeton University Press 2013) p. 120; S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015); Rijpkema, *supra* n. 9. The self-reflexive qualities of democracy are particularly stressed by Forst, *supra* n. 54.

⁶⁶Habermas, *supra* n. 53.

way of *militant-democratic practice*. Now it is time to have a closer look at the latter. As argued above, the previous focus on backsliding member states and Article 7 TEU presents an overly narrow picture of EU militant democracy. The following section therefore looks at potential threats to the EU's democratic order stemming from both the national and the supranational level. It engages in an inventory of EU legal instruments that are responding to such threats, evaluating whether and to what extent they can be understood in terms of militant democracy. In doing so, it also reflects on parallels and differences between EU militant democracy and militant democracy as known from the state level. This exercise sheds new light on both our conceptual understanding of militant democracy as well as the challenges and particularities of militant democracy in an EU-context.

EU MILITANT DEMOCRACY – THE PRACTICE

Legal tools for threats from the national level

While Article 7 TEU already features prominently in existing scholarship on EU militant democracy, considering this mechanism in light of the conceptual characteristics of militant democracy as defined in this paper yields further insights. The provision for stripping a member state of 'certain rights deriving from the application of the Treaties'⁶⁷ indeed reflects the militant-democratic logic of *self-defence* by the EU, rather than directly remedying democratic ills at the member state level. While Article 7 TEU is often mistakenly reduced to the suspension of a member state's voting rights in the Council, it is this legal possibility that most clearly reflects the restriction of fundamental political rights characteristic of militant democracy. Although member states at the international level arguably do not have a 'right to have rights' in the classical sense,⁶⁸ voting rights in the Council can still be considered fundamental political rights of the member states (albeit derivative of those of their citizens) under the EU legal order. At the same time, the logic of a mere rights *suspension* and its temporary nature make Article 7 TEU resemble more of a *cordon sanitaire*.⁶⁹ Interestingly, in the literature on national militant democracy, a *cordon sanitaire* imposed on for example an extremist party in parliament is not considered a 'nuclear option', but a rather mild tool of democratic self-defence and sometimes even an explicit alternative to militant democracy.⁷⁰

⁶⁷Art. 7(3) TEU.

⁶⁸T. Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7', *Res Publica: A Journal of Moral, Legal and Political Philosophy* (2022) p. 1.

⁶⁹Müller, *supra* n. 1.

⁷⁰Bourne and Casal Bértoa, *supra* n. 16.

Moreover, the fact that the European Council composed of member states' Heads of State and Government is responsible for the decision-making under Article 7 TEU reflects an element of peer-review in EU militant democracy.⁷¹ While peer-review is not unknown to militant democracy at the national level (and not per se perceived as negative),⁷² its in-built dilemmas such as the dangers of horse-trading and political abuse seem to be exacerbated in an EU context.⁷³ Looking at Article 7 TEU in practice, the procedures against both Poland and Hungary are *de facto* on hold. This has been attributed to issue linkages, package deals and political calculations by different member states.⁷⁴ While on paper Article 7 TEU represents the militant-democratic characteristic of rights-restrictive action against a polity's own constituents, the way it has been used in practice is more reflective of the dynamics of politics in a (mere) international organisation. Member states, protective of their sovereignty, are cautious not to step on a fellow state's toes because they might one day find themselves in a position vulnerable to retaliation.⁷⁵ The EU's particular political nature therefore seems to inhibit the effectiveness of its militant democracy measures, particularly when measures are directed against member states and involve elements of peer review.

Another legal instrument that *prima facie* follows the logic of restricting member states' rights under EU law on the grounds of breaching democratic values is the recently introduced Regulation establishing a conditionality mechanism for the protection of the EU's budget (Budget Conditionality Regulation).⁷⁶ Both the rights restriction and the nature of the breach that can lead to it are more narrowly circumscribed than in the case of Article 7 TEU. The Budget Conditionality Regulation provides for the suspension or termination of payments, or reduction of economic advantages under EU financial instruments. However, it does so only where a breach of the rule of law is considered to affect the EU's financial interests and sound management of its budget in a sufficiently direct manner.⁷⁷

⁷¹J.-W. Müller, 'The Problem of Peer Review in Militant Democracy', in U. Belavusau and A. Gliszczynska-Grabias (eds.), *Constitutionalism under Stress* (Oxford University Press 2020) p. 259.

⁷²*Ibid.*, at p. 263. Müller invokes the German example, where the motion for banning a party needs to be initiated by the German Bundestag, the government or the federal states, i.e. ultimately by other political parties against one of their peers.

⁷³*Ibid.*

⁷⁴For this argument, see R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union', 52 *Government and Opposition* (2017) p. 211.

⁷⁵Ginsburg, *supra* n. 36.

⁷⁶Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020], OJ L 433I.

⁷⁷*Ibid.*, Art. 6.

The deprivation of funding is also a tool of militant democracy at the national level and is generally considered a milder alternative to party-banning, as it does not give rise to the same degree of ‘democratic dilemma’ as the restriction of fundamental political rights. Funding conditionality can be considered a distinct manifestation of a ‘legitimacy paradigm’ in the use of militant democracy.⁷⁸ Where the banning of an anti-democratic party is for some reason considered unfeasible or disproportionate, the deprivation of funding is an alternative way for a polity and its institutions to deny a seal of approval to the former’s goals – effectively signalling that ‘We may not stop your actions altogether, but we won’t pay for them either’. Regarding Hungary and Poland, this logic could be observed in the legislative process and political debates around the Budget Conditionality Regulation and its eventual adoption in the context of the EU’s Multiannual Financial Framework and its Recovery and Resilience Facility.⁷⁹

However, looking closer at the legal text of the Budget Conditionality Regulation, it ultimately represents a mechanism for ‘protecting the EU budget via the rule of law’ rather than ‘protecting the rule of law via the EU budget’.⁸⁰ This logic was echoed in the Advocate General’s Opinion as well as in the Court’s judgment after Hungary and Poland challenged the Regulation’s validity.⁸¹ Contrasting the Regulation with Article 7 TEU, the Court explicitly states that the (legal) objective of the Regulation is not to penalise breaches as such of the EU’s founding values or even just the rule of law specifically.⁸² While the political aim arguably still consists in the EU’s self-defence, the Budget Conditionality Regulation represents a narrowly circumscribed and legalistic instrument for this purpose – one that at best indirectly reflects the objective of defending *democratic* principles.

Another EU instrument which has been increasingly used to defend democratic principles is infringement proceedings. The European Commission reserves the right to initiate such proceedings when any part of a member state’s state apparatus has breached EU law.⁸³ In recent years, infringement actions have developed

⁷⁸G. Bligh, ‘Defending Democracy: New Understanding of the Party-Banning Phenomenon’, 46(5) *Vanderbilt Journal of Transnational Law* (2013) p. 1321. See also Molier and Rijpkema, *supra* n. 21.

⁷⁹Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility OJ L 57.

⁸⁰A. Baraggia and M. Bonelli, ‘Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges’, 23(2) *German Law Journal* (2022) p. 131.

⁸¹ECJ 16 February 2022, Cases C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:97. The Court declared the Regulation valid and dismissed the charges brought by Hungary and Poland in their entirety.

⁸²*Ibid.*, para. 119.

⁸³Art. 260 TFEU.

into the *de facto* main (and arguably most effective) instrument to respond to national laws and policies that are perceived as incompatible with the EU's founding values.⁸⁴ While a majority of those 'value-related infringement proceedings' concern the undermining of judicial independence, cases targeting for example Hungarian laws which impose strict financing requirements for NGOs and higher education institutions can be perceived as extending the range of democratic principles defended.⁸⁵

At the same time, infringement actions initiated by the Commission reflect the ambiguous nature of militant democracy in a polity in which the enforcer of militant-democratic measures is both normatively and practically dependent on, indeed in a sense inseparable from, the target. The fact that the main objective of infringement proceedings is to remedy the legal breach in question shows how crucial the integrity of national law and institutions is for both the legitimacy and the practical functioning of the EU's democratic and legal order.⁸⁶ The imposition of financial sanctions in the context of infringement proceedings is a last resort, still aimed at bringing the member state back on track. Infringement proceedings are thus not about restricting fundamental political rights, and they have a more remedial character than militant democracy classically understood. The member state in breach can be considered as an 'ill' limb that cannot be cut off but instead must be cured because, while it impedes the health (i.e. democratic legitimacy) of the EU's body as a whole, practically speaking the EU needs it to walk. Member state institutions need to be perceived as EU institutions as well, and the EU crucially depends on them and their loyalty for the implementation of its policies, the enforcement of its laws and its system of judicial review.⁸⁷

Arguably, this partly explains the oft-decried hesitancy of the Commission to initiate value-related infringement actions to begin with and its adherence to the European Council's (unlawful) embargo on the Budget Conditionality Regulation until the Court of Justice's judgment on its validity.⁸⁸ The Commission appears to engage in a form of 'anticipated compliance' towards member states, wary not to

⁸⁴See e.g. M. Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', 18(1) *EuConst* (2022) p. 30.

⁸⁵Note: An internal note from the Commission has been leaked in which the Commission lists the array of what it calls 'values-related infringement proceedings' that have been initiated against Hungary, (<https://www.asktheeu.org/en/request/6115/response/19716/attach/html/6/st14022.en18.pdf.html>), visited 9 August 2022.

⁸⁶Art. 260(1) TFEU.

⁸⁷Art. 4(3) TEU.

⁸⁸For a critique of the European Council Conclusions and the Commission's adherence to them, see K.L. Scheppele et al., 'Compromising the Rule of Law while Compromising on the Rule of Law', *Verfassungsblog*, 13 December 2020, (<https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>), visited 9 August 2022. Note: As mentioned above, the Court dismissed the challenges by Hungary and Poland against the Regulation in their entirety

antagonise them on issues of democracy and the rule of law because that might impede the effectiveness of EU law in all kinds of other, more day-to-day policy areas.⁸⁹ The way in which infringement proceedings as a tool of EU militant democracy unfold in practice points towards the fact that the EU's peculiar political nature and its institutional dynamics by default impede the former's effectiveness.

Unlike the classical understanding of militant democracy, the Budget Conditionality Regulation, infringement proceedings and ultimately also Article 7 TEU are of a reactive rather than pre-emptive nature.⁹⁰ The EU's accession process, on the other hand, has a more distinctly preventive character.⁹¹ The Copenhagen Criteria and their requirements in terms of democracy and rule of law indicate the intention to protect the EU polity from potentially non-democratic political forces on its inside. Yet, the very notion of *accession* conditionality implies that it does not involve restrictive measures against political actors who are already the Union's constituents. An accession process including democratic conditionality therefore does not mirror the classical logic of militant democracy as the defence against internal threats to democracy stemming from a polity's own constituents. At the same time, it represents a crucial self-defence mechanism for a transnational polity like the EU, which is based on membership (or constituency) by accession and is generally speaking more open and dynamic than the political community of a democratic state.

The aforementioned examples of EU militant democracy shed new light on the ambiguity of pre-emption as a characteristic of militant democracy. As mentioned above, whether and how pre-emptive militant democracy at the national level really is and should be is a whole debate of its own. However, the point where instruments for defending the EU's democratic order against threats from the member state level crucially differ from national militant democracy is that member states, perceived as one part of the EU's constituents,⁹² automatically and by default have representatives in EU institutions and can influence the EU's political agenda to a significant extent, especially in areas of unanimity.

in its judgment of 16 February 2022, *supra* n. 81. The Commission eventually triggered the conditionality mechanism against Hungary in April 2022.

⁸⁹P. Bárd and D. Kochenov, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU', 1 *European Yearbook of Constitutional Law* (2019) p. 243.

⁹⁰Note: In this regard, the fact that Art. 7(1) TEU (which provides for determining a 'clear risk of a serious breach') is called the 'preventive arm' of Art. 7 TEU is somewhat misleading.

⁹¹See Art. 49 TEU and European Council, *Conclusions of the Presidency*, 21-23 June 1993 ('Copenhagen Criteria').

⁹²J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible', 21 *European Law Journal* (2015) p. 546.

The same does not apply to national militant democracy, which, in the case of an anti-democratic party, is designed to and in principle is capable of keeping such a party out of a position where it could exercise significant political power. EU militant democracy thus differs significantly from its national counterpart at both the temporal and institutional point of application. This stands in tension with the *prima facie* preventive logic of militant democracy and represents a further challenge for the effectiveness of EU militant democracy.

Lastly, while the expulsion of a member state is not a legal option, it is interesting to note that if it were introduced,⁹³ it could be perceived as a much more radical measure than existing instruments of national militant democracy. If we take EU citizenship as the 'fundamental status' that the Court of Justice declared it to be,⁹⁴ one could argue that expelling a member state equals the *de facto* denaturalisation of an entire people in relation to the EU. By contrast, the sharpest weapon of militant democracy at the national level – the party ban – stops short of disenfranchising, let alone denaturalising, that party's voters.

Legal tools for threats at the supranational level

Potential threats to the EU's democratic legitimacy at the supranational level and the corresponding tools to respond to them have so far been neglected in the study of EU militant democracy. Again, this can be attributed to the saliency of backsliding member states and the perceived absence of similarly grave threats to the EU's democratic order from other actors and institutional channels. However, an instrument for sanctioning breaches of the EU's founding values also exists for parties in the European Parliament. Regulation 1141/2014, dealing with the statute and funding of European political parties and their foundations, establishes an independent 'Authority' which may deprive a European party or party family of EU funding⁹⁵ and even de-register it.⁹⁶ Furthermore, on the same grounds of non-compliance with the EU's founding values in its programme or internal party structure, the initial registration of a European party can be refused.⁹⁷ Those sanctions can be applied for and imposed by the Authority based on a breach

⁹³See e.g. Theuns, *supra* n. 68.

⁹⁴Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

⁹⁵Regulation 1141/2014 on the statute and funding of European Political Parties and European Political Foundations, OJ EU L 317/1, November 4, 2014, and amended by Regulation 2018/673, Art. 27(2-4). For an analysis, see J. Morijn, 'Responding to "Populist" Politics at EU Level: Regulation 1141/2014 and Beyond', 17 *International Journal of Constitutional Law* (2019) p. 617.

⁹⁶*Ibid.*, Art. 10. De-registration first and foremost means that the party in question loses legal personality (Art. 16) and support through EU financial means (Art. 27).

⁹⁷Art. 3(2)(c) of the European Parties Regulation establishes respect for the EU's founding values as a condition for registration.

of either European law (i.e. the values set out in Article 2 TEU, but also formal and organisational criteria as set out in Regulation 1141/2014) or national law. This shows that democratic legitimacy in the EU depends on and is to be defended at two legal and political levels.⁹⁸

EU measures to counter potential threats arising in the European Parliament display distinct parallels to national militant democracy ‘as we know it’. The provision of de-registering a party resembles the party ban, a prototype tool of national militant democracy. With the possibility of refusing a party’s registration, the European Parties Regulation features an element of pre-emption, which is also part of the militant-democratic arsenal at the national level.⁹⁹ Moreover, the option to withdraw or limit funding under the European Parties Regulation again reflects a ‘legitimacy paradigm’ in the practice of EU militant democracy. The EU as the militant-democratic polity can withdraw a seal of approval and financial support for a party perceived as hostile to its founding values, making it harder for the latter to successfully advance its political agenda.

While the EU’s legal tool for responding to democratic threats from the European Parliament reflects the logic of militant democracy on paper, the use of de- and non-registration of European parties appears less ‘militant’ in practice and displays interesting differences to militant democracy at the national level. The Authority has thus far de-registered three European parties (Alliance for Peace and Freedom, Alliance of European National Movements, Europa Terra Nostra).¹⁰⁰ Furthermore, it refused the registration of two parties and one political foundation (European Alliance of Freedom and Democracy, Alliance for Peace and Freedom, Idées & Traditions Européenes).¹⁰¹ With the exception of the European Alliance of Freedom and Democracy, all of these parties can be placed on the political far-right. However, all of the decisions were made on purely formal ground, more precisely because the parties in question did not fulfil the requirements regarding the minimum number of member-parties from at least one-fourth of different member states.¹⁰² By contrast, the Authority never followed up on an attempt by two EU law professors to trigger sanctions against

⁹⁸Art. 10 and Art. 16(3) of the European Parties Regulation, above n 95. An application can be made either by the EP, acting on its own initiative or following a reasoned request from a group of citizens (Art. 10(3)) or by a member state (Art. 16(3)).

⁹⁹Bourne and Casal Bértoa, *supra* n. 16.

¹⁰⁰The respective legal decisions can be found at (<<https://www.appf.europa.eu/appf/en/applications/applications-not-approved>>), visited 9 August 2022.

¹⁰¹The respective legal decisions can be found at (<<https://www.appf.europa.eu/appf/en/parties-and-foundations/removed-from-the-register>>), visited 9 August 2022.

¹⁰²For the legal reasoning, see e.g. Decision of the Authority for European Political Parties and European Political Foundations of 29 August 2018 to remove Alliance of European National Movements from the Register (2018/C 417/05) OJ C 417.

the European Peoples Party on ideological grounds, accusing it of breaching the EU's founding values in Article 2 TEU by tolerating Viktor Orbán's Fidesz in its midst.¹⁰³ While the possibility of banning a party for not meeting certain formal requirements is also present in national militant democracy, the actual number of party bans on formal grounds as opposed to concerns about a threat to democracy remains fairly small.¹⁰⁴

The *de facto* confinement of non- and de-registration of European parties to formal grounds can be interpreted in different ways. On the one hand, it could be considered as a (positive) instance of restraint and proportionality in the absence of an imminent threat. It appears that the Authority and other EU institutions have thus far not perceived any need to contain European parties on ideological grounds – be it because the party itself was considered too small to implement any anti-democratic views to a meaningful extent,¹⁰⁵ or because of the still limited institutional powers of the European Parliament to begin with.¹⁰⁶ On the other hand, one could take the practice of 'EU party banning' as further proof for a tendency to approach threats to the EU's democratic legitimacy more indirectly via formal and procedural legal avenues. As found previously regarding infringement proceedings and the logic of the Budget Conditionality Regulation, the practical application of the European Parties Regulation reflects a preference on the part of EU militant democracy's enforcers to remain on solid, more technical EU law grounds, avoiding the more vague, ideological terrain of democratic principles and values.

One of those main enforcers of EU militant democracy, especially with regard to the aforementioned instruments used to contain threats at the national level, is the European Commission. However, the Commission – as part of both the EU legislature (it holds the exclusive right to legislative initiative)¹⁰⁷ and the executive – also represents a supranational institutional channel through which the democratic order of the EU could potentially be undermined. In this regard,

¹⁰³A. Alemanno and L. Pech, 'Holding European Political Parties Accountable – Testing the Horizontal EU Values Compliance Mechanism', *Verfassungsblog*, 15 May 2019, (<https://verfassungsblog.de/holding-european-political-parties-accountable-testing-the-horizontal-eu-values-compliance-mechanism/>), visited 9 August 2022.

¹⁰⁴Bourne and Casal Bértoa, *supra* n. 16.

¹⁰⁵Note: Such reasoning underpinned the decision of the German Federal Constitutional Court in 2017 to reject a ban of the far-right party NPD. See BVerfG 17 January 2017 2 BvB 1/13, *NPD*. For an analysis, see Molier and Rijpkema, *supra* n. 21.

¹⁰⁶Note: One might also argue that the still limited powers of the European Parliament are undermining the EU's democratic legitimacy in and of themselves. See e.g. Habermas, *supra* n. 53.

¹⁰⁷Art. 17(2) TEU.

‘What if the Commission goes rogue?’ is an interesting (albeit rather hypothetical) question to look at in the context of EU militant democracy.¹⁰⁸

The corresponding mechanism, while partly of a preventive character, is better understood as a form of regular checks and balances than an instrument of militant democracy. Pursuant to Article 17(7) TEU, the European Parliament elects the Commission president. Furthermore, prior to taking office, the composition of the Commission as a whole is subject to a vote of approval by the European Parliament. Therefore, it has evolved as a custom that the European Parliament’s responsible committees hold approval hearings with each designated Commissioner. Moreover, the European Parliament has the right to dismiss the Commission as a whole by way of a motion of censure.¹⁰⁹ Yet, these mechanisms do not reflect the militant-democratic characteristic of restricting fundamental political rights that are prior to or independent of the political office of the Commission. Rather, they showcase the different legal nature and logic of checks and balances on the one hand and militant democracy instruments on the other hand.

As opposed to militant democracy, the law of checks and balances does not involve the restriction of fundamental political rights, but only of those that are explicitly linked to a political mandate or office. A further difference can be perceived in the legal nature of the rules of checks and balances and of militant democracy respectively. Checks and balances are generally applicable to actors of any political leaning sitting in a given institution at a given time, the aim being to prevent them from disproportionately accumulating political power.¹¹⁰ Checks and balances are therefore more about counteracting any kind of *behaviour* or *actions* that undermine institutional balance and the separation of powers, with the political leaning or ideology motivating such behaviour being (at least in theory) irrelevant. Militant democracy measures, on the other hand, are targeted precisely at a democracy-undermining ideology and actions motivated by such

¹⁰⁸Note: One could at least in theory imagine the Commission making anti-democratic policy proposals. This would probably require at least a majority of anti-democratic or illiberally minded Commissioners to be appointed to begin with, who then give up the College’s culture to decide by consensus and push through their illiberal policy agenda instead.

¹⁰⁹See Art. 17(8) TEU and Art. 234 TFEU. Art. 247 TFEU accords the same possibility to the Council.

¹¹⁰Note: In this regard, militant democracy in its practical development has moved somewhat closer to regular checks and balances. Militant democracy is not (or no longer) about preventing the presence of anti-democrats in legislative and executive positions altogether, as this is often considered a disproportionate rights restriction. Rather, the potential within a given political constellation to realise their anti-democratic agenda plays a decisive role for whether and when militant-democratic instruments are deployed. An example for this reasoning can be found in *Refah*, *supra* n. 23.

ideology.¹¹¹ Checks and balances instead aim at safeguarding the separation of powers as well as the integrity of political institutions and office-holders in a more general sense, not only against anti-democratic threats. This is also visible in the EU and in the case of the Commission. For instance, the European Parliament's refusal of the French and Romanian Commissioner-Designates in 2019 was due not to their attitudes on democracy, but to concerns about personal integrity and economic conflicts of interest.¹¹²

At the same time, the case of the Commission also indicates an overlap between militant democracy and regular checks and balances concerning the preservation of the democratic legitimacy of a polity and its institutions. As early as 2004, the rejection of the Italian Commissioner-nominee Rocco Buttiglione over his homophobic views can be perceived as a defence of liberal-democratic values.¹¹³ When rejecting the Hungarian Commissioner-designate Laszlo Trocsanyi in 2019 – as well as now-Commissioner Oliver Varhélyi in a first hearing – MEPs were explicitly concerned with their political views, suspecting a lack of independence from Viktor Orbán and his illiberal ideology.¹¹⁴ One can therefore conclude that, while there are no distinct militant democracy measures for defending the EU's democratic legitimacy against potential threats from inside the Commission, EU inter-institutional checks and balances can be and have been employed for the same purpose.

CONCLUSION

This paper has taken a novel approach to the question of whether and how militant democracy translates to the EU. The current literature, which takes member states' democratic regression as a contingent analytical starting point for the study of EU militant democracy, has led to skewed inferences and unduly limits our understanding of it. This paper took a step back, deriving the *prima facie* translatability of militant democracy to the EU from EU law on the one hand and normative political theory on the other. Moreover, it analysed a number of

¹¹¹Note: There are differences between countries whose militant-democratic laws provide for banning a party on grounds of both anti-democratic ideology and actions or on grounds of actions only. These different approaches are an important issue in normative debates on militant democracy: Bourne and Casal Bértoa, *supra* n. 16.

¹¹²The hearing protocols and recordings of all candidates for the 2019 European Commission can be accessed at (<https://www.europarl.europa.eu/news/en/hearings2019/commission-hearings-2019>), visited 9 August 2022.

¹¹³DW staff, 'Italian EU Commissioner Rejected for Conservative Views' *Deutsche Welle* 12 April 2004, (<https://www.dw.com/en/italian-eu-commissioner-rejected-for-conservative-views/a-1358915>), visited 9 August 2022.

¹¹⁴See the hearing protocols, *supra* n. 112.

existing EU mechanisms responding to actual and potential threats to the EU's democratic order from both the national and the supranational level, with a view to whether and in what regard they differ from the characteristics of militant democracy as hitherto known from a national context.

It was found that the EU's legal instruments reflect the characteristic of rights-restrictive and pre-emptive self-defence to varying extents. Regarding threats stemming from the member state level, the Budget Conditionality Regulation, infringement proceedings and ultimately also Article 7 TEU are (in practice) of an ex-post or reactive rather than pre-emptive nature. Moreover, narrowly circumscribed financial sanctions are more prominent in EU militant-democratic practice than the restriction of fundamental political rights. Importantly, EU militant democracy vis-à-vis its member states also differs from militant democracy at the national level regarding the temporal and institutional point of application. While militant democracy is generally meant to keep perceived threats out of political power to begin with, the analysed EU measures apply to *member* states, which by default have representatives in the EU's institutions and can influence their political agenda to a significant extent. In turn, accession conditionality represents an important form of democratic self-defence of a transnational polity – a mechanism that does not, however, involve political rights restrictions of a polity's own constituents and that has no equivalent in national militant democracy.

EU instruments for potential threats stemming from the European Parliament provide for the de- and non-registration of European political parties, displaying parallels to familiar militant democracy instruments such as the party ban. Yet, these measures have been enforced against far-right European parties only on formal grounds. This can be interpreted as a positive sign of restraint in the absence of a genuine threat, or as the hesitance of the enforcers of EU militant democracy to leave solid legal ground for a more value-laden terrain. Lastly, a reflection on potential threats ensuing from the European Commission illustrated how checks and balances and militant democracy differ in legal nature, but can overlap in the goal of defending the legitimacy of a democratic polity and the integrity of its institutions.

On a more general level, the findings of this paper point towards a tension between the EU's characteristics as a polity and the logic of militant democracy. While the EU can *prima facie* be conceptualised as a militant democracy (and as the first transnational one of its kind, given that it displays both the elements of militant-democratic practice and a self-defending polity), other characteristics of the EU seem to stand in a contradictory relationship with the logic of militant democracy, posing distinct obstacles for the decisive use of militant democracy instruments in practice. The EU's lack of ultimate coercive powers and its *de facto* dependence on member state authorities for implementing and enforcing EU law,

and for the exercise of the EU's political authority more generally, favour a political culture of compromise and consensus over more antagonistic politics of conflict and confrontation, the latter being entailed in militant democracy by default. On the one hand, the EU seems in keeping with Jan-Werner Müller's observation that: '[...] politicians might not be political enough in the case of anti-democratic challenges. These potential problems are not specific to the European level, but they might be exacerbated once one shifted beyond the framework of a particular nation-state'.¹¹⁵ On the other hand, many tools of EU militant democracy (notably those directed against its member states) at the same time seem to be overly political in that their decisive and effective use in practice is inhibited by the EU's inter-institutional power dynamics and the political contingencies of the day.

Given the limited space, this paper was only able to touch upon the surface of the key questions regarding EU militant democracy. Offering an alternative to current approaches and broadening the picture of EU militant democracy, it sets the agenda for developing a fully-fledged account of EU militant democracy – one which should, in any case, go beyond the current cases of backsliding member states. Notably the issue of militant democracy in a supranational, multi-level polity with contested democratic legitimacy warrants deeper and more principled consideration. Moreover, the challenges for militant democracy in a supranational legal order characterised by legal and constitutional pluralism need to be further disentangled. Lastly, it will be important to explore whether, for the legitimacy and effectiveness of the EU's self-defence, changes to current EU instruments and the institutional culture behind their enforcement are warranted.



¹¹⁵J.-W. Müller, *Constitutional Patriotism* (Princeton University Press 2007) p. 115.