



UMEÅ UNIVERSITY

DEMOCRACY - THE TROJAN HORSE OR ACHILLES HEEL?

The Legal Challenges of the Far-Right in European Constitutional Democracies

Romana Crgol



Master thesis, 15 hp
Master's Programme in Constitutional Law and Human Rights, 60 hp
Spring term 2023

Acknowledgments

This thesis owes much to the people who have given me strength, courage, inspiration, and feedback over the course of the last three years.

Mpoki, thank you for your thorough supervision. Without your guidance, this thesis would not be the same, and the political theory would, eventually, prevail over the law.

Miia and Sandra, I will remain indebted for your passionate and thorough navigation from the very beginning of my academic journey. Your thought-provoking teaching and constant encouragement led me to where I am today, and that is exactly where I want to be, both as a researcher and as an individual.

Immense recognition goes to my mother, whose intellectual encouragement is irreplaceable. Without you Mom, I would be a high-school drop-out, thank you for putting up with me all these years while I was trying to find my way.

Special thanks to my father and my sister - without your unconditional support even from afar, I would have never arrived here.

To Renman, Kron, and Egić families, thank you for showing me how life in Sweden can be, and for helping me to overcome not only bureaucratic but also cultural obstacles that are standing in my way. You will never know how grateful I am, and I can only hope that one day I will be able to return the favor. Sandris, pinky swear, I will try to redeem myself with Tor Yngve.

Gorana, Margarida, and Marcus, you know the reason why your names are grouped. Thank you so much for sharing the good and bad times, and for all those library hours spent studying, laughing, and procrastinating.

To the Tenants of Drottensgatan, “We had joy, we had fun, we had seasons in the sun”. Thank you for the best student life in Lund one can wish for.

Last but not least, thanks to my Umeå family. The family I never knew I will find, let alone need. I do own a TV now.

Abstract

This thesis explores the influence of far-right parties on constitutional democracies in Europe, focusing on their adherence to human rights standards and state obligations within the European legal framework. Against the backdrop of rising electoral support for far-right parties across Europe, this thesis aims to examine the common features of far-right party programs and assess the potential consequences of their actions on human rights and democratic values. The concept of militant democracy serves as a theoretical framework, examining the tension between democratic self-preservation and the exercise of individual human rights. Using the doctrinal method, the thesis presents a systematic analysis of existing legal materials, with an emphasis on the European legislative framework developed after World War II and its impact on European constitutional democracies. By grounding the study in the theoretical framework, it seeks to identify safeguards for the efficient functioning of democracy within contemporary legal settings.

Keywords: *far-right party, democracy, constitutional democracy, militant democracy, democratic self-preservation, doctrinal method, European legislation*

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1. Introduction

1.1 Topic and Research Problem

At the dawn of World War II Joseph Goebbels proclaimed: “We enter the Reichstag to arm ourselves with democracy’s weapons. If democracy is foolish enough to give us free railway passes and salaries, that is the problem. It does not concern us”.¹ He infamously observed: “It will remain one of the best jokes of democracy that it provides its own deadly enemies with the means with which it can be destroyed”. Constitutional democracy as such allows democracy to undermine itself, or in other words, democratic fundamentalism and legalistic blindness *are*² unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city.³

As a response to the atrocities brought about by World War II the international community developed tools and established institutions meant to combat the repetition of devastation that occurred.⁴ Despite the existing mechanisms, we are, once again, witnessing unprecedented electoral support for the violent far-right entities across Europe.⁵ Europe is experiencing the rebirth of another set of legal and political debates about the nature of its democratic commitments, and as a consequence, human rights, individual freedoms, and liberties today are under enormous pressure.⁶ Increasingly in recent years, voters across Europe have turned to supporting far-right parties, whose ideological leanings promote in one way or another, xenophobic, divisive, and populist views.⁷ The far-right provides a possible solution by offering its followers an exclusive *identity*, singles out the *culprits* (the establishment), and advocates simple and expeditious solutions (throw out the foreigners, overthrow the “political class”).⁸ If one takes a brief look at the present situation in Europe, i.e., *Fratelli d’Italia* is now the most far-right government in Italy since the fascist era of Benito Mussolini.⁹ The success of *Fratelli d’Italia* has served as an inspiration to similar ideological parties throughout Europe, e.g., *Vox*, a Spanish political party that became the third most popular party in the national parliament, despite their controversial position on immigration and gender violence.¹⁰ In

¹ P. Cliteur, B. Rijpkema, ‘The Foundations of Militant Democracy’, in A. Ellian, G. Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror*, Leiden, Leiden University, p. 256

² Emphasis added. Additionally, in the original article past tense was used, but for the purposes of this thesis, it is changed to present tense, to demonstrate the contemporaneity of the argument.

³ Loewenstein, K., ‘Militant Democracy and Fundamental Rights, I’, *The American Political Science Review*, vol. 31, no. 3, 1937, p. 424

⁴ See e.g., UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 51

⁵ P. Tannous, ‘The Rise of Far-Right Parties in Europe’, *Fiker Institute*, <https://www.fikerinstitute.org/publications/the-rise-of-the-far-right-in-europe>, updated: January 2023, accessed: March 2023

⁶ P. Macklem, ‘Militant democracy, legal pluralism, and the paradox of self-determination’, *Int’l J Con Law*, vol. 4, no. 3, 2006, p. 489

⁷ G. Rachman, ‘Democracy in Europe Adjusts to the Far Right’, *The Financial Express* (<https://www.ft.com/content/8dded432-2d6d-4ee7-ad5f-1f8e7b6448f1>) updated: October 29th, 2021, accessed: May 2nd, 2023

⁸ C. Rodríguez-Aguilera, ‘The Rise of the Far Right in Europe’, *IEMed Mediterranean Yearbook 2014*, p. 178

⁹ G. Piccolino, L. Puleo, ‘Between far-right politics and pragmatism: Assessing Fratelli d’Italia’s policy agenda’, *London School of Economics* (<https://blogs.lse.ac.uk/europpblog/2022/10/06/between-far-right-politics-and-pragmatism-assessing-fratelli-ditalias-policy-agenda/>) updated: October 6th, 2022, accessed: April 4th, 2023

¹⁰ Jones, S., ‘Spain’s far-right Vox breaks through into regional government’, *The Guardian* (<https://www.google.com/search?client=safari&rls=en&q=Jones%2C+S.%2C+%E2%80%98Spain%E2%80%99>

Sweden, the far-right *Sverigedemokraterna* came to power last October, thanks to a coalition between the country's three right-wing parties.¹¹ The supremacist narrative and anti-immigration policies are at the core of the far-right parties' program, and it remains to be seen how the European and national setting will confront the rising challenges in compliance with the European human rights framework. Namely, most of the European states are signatories to the international human rights treaties that are implemented and consequently applied to their national legislation. Additionally, the states are subject to the legal human rights regime of the European Union and Council of Europe, whereas the latter sets the minimum standards of human rights protection within its member states.

Notwithstanding, the traditional manifestations of militant democracy, perceived as certain limitations on some fundamental rights and freedoms were introduced to (inter)national legislation amid World War II, to combat extremist political agendas that threaten peace, security, and democratic order.¹² The manifestations of the aforementioned concept often interfere with the exercise of individual human rights, such as freedom of expression, opinion, religion, and association, all in the name of the so-called democratic self-preservation.

The theoretical framework concerning the legal understanding of militant democracy serves as a background layer for the comprehension of current positive legislation. Through the employment of the doctrinal method, existing mechanisms of democratic self-preservation are discussed, and enriched by the sociopolitical description of positive legislation and the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of European Union (hereinafter: CJEU) case law. The focus of this thesis is, therefore, the interpretation of the aforementioned issue in the discourse of relevant international and European legislation and the concept of militant democracy.

Bearing this in mind, in this chapter, the topic and research problem are addressed as well as the research question, aims, and methodology of this thesis, including methodological challenges and delimitation. Additionally, the contribution to the existing field is addressed. Chapter two serves to outline the background and previous research which brings together the dialogue of various scholars. Chapter three is focused on the theoretical implications of the concept of militant democracy. Chapter four is focused on the analysis of the theoretical and practical implications of the research. Ultimately, chapter five serves to conclude this thesis and offers suggestions for further research.

1.2 Research Aims and Questions

Against the aforementioned contextual framework, the corresponding research aims ought to be achieved. Firstly, this study aims to examine the main common denominators of the far-right party program that shape domestic politics and their compliance with their state's obligations and European human rights standards. Secondly, the thesis aims to circumscribe different safeguards to the efficient democracy developed in the European legal setting through the concept of militant democracy.

To accomplish the posed aims the following questions must be examined:

- (1) What connotations can be attached to the far-right party?
- (2) Does the far-right pose a challenge to constitutional democracies in Europe?
- (3) How can the concept of militant democracy be understood from a legal perspective?

9s+far-right+Vox+breaks+through+into+regional+government%E2%80%99&ie=UTF-8&oe=UTF-8), March 10th, 2022, accessed: April 5th, 2023

¹¹ See R. Svensson., 'Partiernas ideologiska positioner', *Storm och stiltje*, Göteborgs Universitet, 2019

¹² P. Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination', p. 489

1.3 Methodology

The present thesis employs the black letter methodology approach, i.e., the doctrinal method. The following subsections address the prerequisites of thesis methodology. Firstly, the doctrinal method is described, as well as a brief research design for this thesis. Secondly, methodological challenges and delimitations of the present thesis are addressed.

1.3.1 The Choice of Method and Research Design

The contemporary legal architecture of nation-states is challenged by increased Europeanization and internalization of legislation. Nation-states are no longer subdued only to their constitutional frameworks. To achieve the research aims and objectives in the present thesis, while having the previously mentioned Europeanization and internationalization in mind, the black letter methodology will be employed. Black letter methodology, materialized in the doctrinal method, aims to present the law in a certain field in a way that is neutral and consistent as possible to inform the reader how it actually reads.¹³ This systematizing method describes the existing materials to make them easier for readers to understand and to make the outcomes predictable.¹⁴ Moreover, the doctrinal method is the most frequently applied, and professionally the most popular method of legal research.¹⁵ According to the Council of Australian Law Deans, doctrinal research involves rigorous analysis and creative synthesis, making connections between seemingly disparate doctrinal strands, and extracting general principles from an inchoate mass of primary materials. The very notion of ‘legal reasoning’ is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system’s simultaneous achievement of constancy and change.¹⁶ Furthermore, Ronald Dworkin emphasizes one of the important aspects of doctrinal analysis. Namely, the doctrinal analysis consists of discovering the principles that justify and bring order to the established rules which are familiar with moral conceptions and that are supported by interdisciplinary social science research by traversing fields such as economics, psychology, and political science.¹⁷

The doctrinal method in a broader sense falls under the scope of descriptive legal theory which seeks to explain what the law is, why the law is, and what are the consequences of the law. There are three principal types of descriptive legal theory. Firstly, doctrinal legal theory seeks to answer questions such as “Can these cases be elucidated by some underlying theory?”. Secondly, descriptive legal theory might be explanatory, when it attempts to explain why the law is as it is. Thirdly, descriptive legal theory concerns the consequences that are likely to follow from a certain set of rules.¹⁸

According to the presented methodology, the research design is as follows. Firstly, the international legislative framework that developed after World War II is presented, as well as its effect on the European constitutional democracies. Ultimately, constitutional democracies are grounded in the posed theoretical framework to circumscribe the possible outcomes of the democratic majority enforcing decisions that might be against state obligations and the international human rights framework, and the democratic safeguards are explained.

¹³ J. M. Smits, *The Mind and Method of Legal Academic*, Edward Elgar, 2012, p. 13

¹⁴ J. M. Smits, *The Mind and Method of Legal Academic*, Edward Elgar, 2012, p. 15

¹⁵ P. I. Bhat, ‘Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles’, *Idea and Methods of Legal Research*, Oxford Academic, online edition, Delphi, 2020

¹⁶ T. Hutchinson, N. Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’, *Deakin Law Review*, vol. 17, no. 1, 2012, p. 99

¹⁷ R. Dworkin, ‘Legal Research’, *Daedalus*, vol. 102, no. 2, 1973, p. 53

¹⁸ See more in R. Wacks, *Philosophy of Law: A Very Short Introduction*, Oxford University Press, Oxford, 2006, p. xiv

1.3.2 Methodological Challenges and Delimitation

Certain methodological challenges need to be addressed. The following methodological challenges also represent the delimitation of this thesis and are treated as such. Firstly, there is no general definition of the far-right ideology, and the observed parties that consist democratic majority in certain nation-states will be circumscribed merely by the common denominators of their current political program. Secondly, only the European nation-states will be observed, due to the familiarity with the current socio-political climate, and the European positive legislative framework. Thirdly, due to the limited scope of the thesis, the focus will be on the case law of ECtHR and the CJEU, as well as the relevant positive legislation of the Council of Europe (hereinafter: CoE) and the European Union (hereinafter: EU). Ultimately, there will be no in-depth description of the theoretical framework. The set-theoretical framework serves only as a background layer to enrich the answer to the posed research aims and objectives.

1.4 Contribution to the Existing Field

The two primary themes of the research reviewed herein, the contextual framework of the far-right and its complex relationship with democracy in the European legal context, and the national, cultural, and sociopolitical contexts of its member states, are all relevant to the present thesis.

From a human rights perspective, none of the aforementioned research reviewed the problematized legal framework surrounding the foundation stones of a democratic society in contrast with the far-right entities. The legal framework was not a relevant factor in the studies conducted in the field of social psychology or anthropology and *vice versa*. The vast majority of the reviewed studies used either ethnography, interviews, or a mix of the two, or legal interpretation or a comparative legal perspective. Hence, the present thesis places itself in a new area of research on this topic because, firstly, it approaches the topic of the relationship between democracy and far-right entities from a human rights perspective. Secondly, it discusses human rights in terms of what happens when the exercise of one freedom infringes on states' obligations and the international human rights framework. Thirdly, it analyzes different national legal, cultural, and political, contexts which serve to paint a broad picture of the state of democracy in the European context. Methodologically, this study is conducted in the field of legal research, but the human rights perspective voices over throughout the tradition of the discursive analysis of how the abuse of guaranteed democratic freedoms and rights might be manifested within society's discursive practices.

2. Background and Literature Review

This section overviews the factual background of contemporary Europe's sociopolitical climate. In addition, it provides an overview of the relevant literature, from sociological, political, and ultimately legal scholarship. Therefore, this section serves a dual purpose while structured into three subsections. Subsection one deals with general circumscription of the current situation, yet bearing in mind the historical occurrences that reflect contemporaneously. Additionally, the relevant definitional framework is set. Furthermore, section two dwells on the legal background and the limitations that are set on certain fundamental rights and freedoms. Due to the comprehensibility aspect, section two is divided into two subsections. The first one addresses the CoE, and the second the EU's legislative framework. Ultimately, the sections serve to set the present thesis in the field of human rights research.

2.1 United in Diversity

United in diversity is the motto of the European Union, and it signifies how Europeans have come together [...] to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions, and languages.¹⁹

Europe that we know today was built upon the heritage of the two devastating wars that reshaped the collective understanding of human rights, freedoms, and liberties. Nonetheless, post-War Europe had to change the very concept of democracy, to prevent the devastation brought by the war. The six years of siege and carnage incinerated approximately 60 million souls, among them 6 million Jews, as a part of the Third Reich's antisemitic politics. Namely, on March 5th, 1933, in the hopes of using its incumbency and the machinery of state to obtain the two-thirds majority required to legally change the constitution, the new Third Reich regime called for new elections.²⁰ The *Nationalsozialistische Deutsche Arbeiterpartei* (hereinafter: *NSDAP*) did not win a majority, but by the Enabling Act, the newly elected Reichstag granted Hitler all the dictatorial powers.²¹ Nearly two years before the said democratic elections, Hitler described the rule of a democratic majority in the following fashion: "So, it is only natural that when the capable intelligences of a nation, which are always in minority, are regarded only as of the same value as all the rest, than genius, capacity, the value of personality are slowly subjected to the majority and this process is then falsely named the rule of people. For this is not the rule of people, but in reality, the rule of stupidity [...]. Rule of the people means rather that a people should allow itself to be governed and led by its most capable individuals, those who are born to task, and not that a chance majority which is inevitably unsuited [...] should be permitted to administer all spheres of life."²² Eventually, Hitler and *NSDAP* used democratic tools to build state machinery that represented everything but democracy.

National socialism and fascism, as forms of emotional politics that rely on and abuse constitutional rights and democratic processes,²³ left Europe in ruins, reduced to a total state of confusion. Mere reconciliation seemed almost impossible, let alone that one was able to imagine that the morally exhausted peoples of Europe, the everlasting friends and/or foes, joined together for a common organization. The far-right entities needed to be defeated once

¹⁹ 'EU Motto', *An official EU website*, https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en, accessed: May 5th, 2023

²⁰ R. Stackleberg, S. A. Winkle, *The Nazi Germany Sourcebook: An Anthology of Texts*, Routledge, New York, 2002, p. 123

²¹ R. Stackleberg, S. A. Winkle, *The Nazi Germany Sourcebook: An Anthology of Texts*, Routledge, New York, 2002, p. 123

²² R. Stackleberg, S. A. Winkle, *The Nazi Germany Sourcebook: An Anthology of Texts*, p. 113, source: Hitler's speech to the Industry Club in Düsseldorf, January 27th, 1932

²³ A. Sajó, 'Militant Democracy and Emotional Politics', *Constellations*, vol. 19, no. 4, 2012, p. 565

and for all, in the name of democratic self-preservation, because it was a common agreement²⁴ - without efficient democracy, rebuilding Europe economically, politically, and culturally would not be possible. Hence, before digging deeper into the current European sociopolitical climate, the definitional framework for what constitutes a far-right entity is required. Notwithstanding, there is no consensus on the definition of the far-right entity. According to Goodwin, far-right entities reject the principle of human equality and hence are hostile towards immigrants, minority groups, and rising ethnic and cultural diversity.²⁵ Alikiviadou builds up on that and states that far-right movements violate human rights and fundamental freedoms, such as non-discrimination, and reject principles such as equality and human dignity.²⁶ She further elaborates that far-right movements exploit rights and freedoms [i.e., expression, association, and assembly] to pursue and achieve their discriminatory and, at times, violent goals.²⁷ On the other hand, Rydgren argues that radical right parties and movements share an emphasis on ethnonationalism rooted in myths about the past.²⁸ Their programs are directed toward strengthening the nation by making it more ethnically homogeneous and—for most radical right-wing parties and movements—by returning to traditional values.²⁹

Notwithstanding, the early development of the EU adopted Jean Monnet's neo-functional philosophy involving political elites but leaving ordinary citizens largely isolated from the integration process.³⁰ This occurrence led to the increased enforcement of populism by the political parties since the latter, according to Elchardus and Spruyt, emphasize the difference and distance between straight-thinking 'ordinary people' and the distant, unworldly, even corrupt elite (or establishments, intellectuals, experts, etc.).³¹ Despite this everlasting desire for Europe that is united in its diversity, the goal does not seem achieved. In the past decades, we are witnessing the grand re-entrance of far-right entities on the European stage, dissatisfied with society, politics, and economics.³² On that notion, the issue of the right of freedom of expression and its pertinent freedoms and rights has been repeatedly raised in legal scholarship and the human rights community. It is increasingly disputed when it comes to far-right rhetoric which, according to some authors, tends to normalize the neo-Nazi discourse, by re-branding their rhetoric into fresh-faced propaganda packaged and presented in the form of light-hearted entertainment, humor, and satire.³³ Populist, nationalist, and reactionary movements are gaining influence by challenging democracy based on the rule of law, free media, as well as human rights and freedoms.

In September 2022 the populist far-right won big in the Italian political election: *Fratelli d'Italia* became the first party in Italy with 26 percent of national preferences, and the leader Giorgia Meloni emerged as the upcoming "most radical right prime minister after

²⁴ Europe's founding fathers sought to 'foster a distinctive European identity to replace warring national identities'. (in S. Douglas-Scott, *Constitutional Law of European Union*, Harlow, Pearson Longman, 2002, p. 5)

²⁵ M. Goodwin, *Right Response: Understanding and Countering Populist Extremism in Europe*, The Royal Institute of International Affairs, London, 2011, p. 12

²⁶ N. Alikiviadou, *The Far-Right in the International and European Law*, New York, Routledge, p. 8

²⁷ N. Alikiviadou, *The Far-Right in the International and European Law*, p. 9

²⁸ J. Rydgren, 'The Radical Right: An Introduction', in J. Rydgren (ed.), *The Oxford Handbook of the Radical Right*, New York, Oxford University Press, 2018, p. 1

²⁹ J. Rydgren, 'The Radical Right: An Introduction', in J. Rydgren (ed.), *The Oxford Handbook of the Radical Right*

³⁰ S. Douglas-Scott, *Constitutional Law of European Union*, p. 480

³¹ M. Elchardus, B. Spruyt, 'Populism, Persistent Republicanism and Declinism: An Empirical Analysis of Populism as Thin Ideology', *Government and Opposition*, vol. 51, no. 1, p. 113

³² Due to the limited scope of this thesis, the focus is on the current situation, but that does not imply that the far-right entities have disappeared after World War II. On the contrary, they were very present and loud.

³³ See Askanius, T., 'On Frogs, Monkeys, and Execution Memes: Exploring the Humor-Hate Nexus at the Intersection of Neo-Nazi and Alt-Right Movements in Sweden', *Television and New Media*, vol. 22, no. 2, 2021, p. 148

Mussolini”.³⁴ Even though Meloni denies any relationship of the contemporary *Fratelli d'Italia* program with fascism, scholarship thoroughly clarifies it. Namely, in one of her more famous speeches, Meloni appears to distance herself from fascism when talking about “instrumental allegations”, and directly stating that she has never had sympathy for any anti-democratic regime, including fascism. However, Pietrucci claims that her stated rejection is followed by an excursus about the evil of the various totalitarianism that has “torn Europe apart”, and not just Italy, observing that totalitarianism has caused horrors and crimes in “most of the European states,” implying that fascism as an Italian phenomenon is not comparatively worse than other historical totalitarianism that emerged in “most European states”.³⁵ Furthermore, Pietrucci emphasizes that this way Meloni places fascism in a pool of other totalitarianism that has created horrors everywhere in Europe, and by that minimizes the impact of historic fascism and Italy which is partially inconsistent with the “conscious historicization” of the 1900s that she claims *Fratelli d'Italia* has developed over time about Italy’s fascist heritage.³⁶³⁷

In October 2022, Sweden’s far-right also gained the majority in the parliament which correlates to the successful re-branding of *Sverigedemokraterna*’s rhetoric and symbolism. *Sverigedemokraterna*, a right-wing populist party once politically *verboden* because of the ties to the neo-Nazis at its founding in 1988, is now one of the largest parties in the Swedish parliament.³⁸ It has effectively fashioned a narrative linking the surge of predominantly Muslim immigrants to a perception of an uptick in violent crimes and perceived strains of the prized Swedish welfare system.³⁹ It took years of electoral evolution in a state like Sweden to gain this amount of support. In 2006, the party even changed its logo from a flaming torch to an ostensibly harmless flower.⁴⁰ In terms of ideology, they define themselves as a nationalist party that combines ideas about social justice with traditional conservative values.⁴¹

The situation regarding electoral support in the rest of the European states is no better. For example, the relationship between Hungary⁴² and Poland⁴³ with far-right ideologies has

³⁴ P. Pietrucci, ‘Neofascist ”Thugs,” Pandemic Protests, Populisms: Giorgia Meloni’s Cerchiobottismo and the Rise of Fratelli d’Italia During the Pandemic’, *Javnost - The Public*, vol. 30, no. 1, 2023, p. 51

³⁵ P. Pietrucci, ‘Neofascist ”Thugs,” Pandemic Protests, Populisms: Giorgia Meloni’s Cerchiobottismo and the Rise of Fratelli d’Italia During the Pandemic’, p. 61

³⁶ P. Pietrucci, ‘Neofascist ”Thugs,” Pandemic Protests, Populisms: Giorgia Meloni’s Cerchiobottismo and the Rise of Fratelli d’Italia During the Pandemic’, p. 61

³⁷ See more in S. Ventura, *Giorgia Meloni e Fratelli d’Italia: Un partito personalizzato tra destra estrema e destra radicale*, Friedrich-Ebert-Stiftung Italia, 2022 (available at: <https://library.fes.de/pdf-files/bueros/rom/19659.pdf>)

³⁸ D. L. Tomson, The Rise of Sweden Democrats: Islam, Populism and the End of Swedish Exceptionalism, in *Brookings*, (<https://www.brookings.edu/research/the-rise-of-sweden-democrats-and-the-end-of-swedish-exceptionalism/>) updated: March 25th, 2020, accessed: May 8th, 2023

³⁹ D. L. Tomson, The Rise of Sweden Democrats: Islam, Populism and the End of Swedish Exceptionalism

⁴⁰ The burning flames are also *Fratelli d’Italia*’s logo and its symbolism has often been disputed. See more in T. Jones, ‘Fratelli d’Italia’s Burning Flame - why the medium is the message for Giorgia Meloni’, *Engelsberg Ideas*, September 23rd, 2022, available at: <https://engelsbergideas.com/notebook/fratelli-ditalias-burning-flame-why-the-medium-is-the-message-for-giorgia-meloni/>, accessed: May 8th, 2023

⁴¹ See more on the *Sverigedemokraterna*’s ideology and program in D. L. Tomson, The Rise of Sweden Democrats: Islam, Populism and the End of Swedish Exceptionalism, and J. Rydgren, S. van der Maiden, ‘The radical right and the end of Swedish exceptionalism’, in *European Political Science*, vol. 18, 2019, pp. 439 - 455

⁴² See more in P. Karl, ‘Creating a New Normal: The Mainstreaming of Far-Right Ideas Through Online and Offline Action in Hungary’, in (eds.) M. Fielitz, N. Thurston, *Post-Digital Cultures of the Far-Right: Online Actions and Offline Consequences in Europe and the US*, [transcript] Political Science, vol. 71, Verlag, 2019, pp. pp. 67 - 78; See heading 2.2.2: ‘European Union’, p. 12

⁴³ See more in R. Pankowski, ‘The Internationalisation of Nationalism and the Mainstreaming of Hate - The Rise of the Far-Right in Poland’, *Transform! Europe*, <https://www.transform-network.net/en/publications/yearbook/overview/article/transform-yearbook-2018/the-internationalisation-of-nationalism-and-the-mainstreaming-of-hate-the-rise-of-the-far-right-in/>, updated: March 1st, 2022, accessed: May 18th 2023; See heading 2.2.2: ‘The European Union’, p. 12

been of scholarly interest for many years, especially since the situation started to deteriorate with the recent judicial and electoral scandals in both respective states. In reality, the distance between the parliamentary democratic majority that falls under the scope of what we perceive as a far-right entity, and the far-right underground is worryingly short. As Potter emphasized, seasoned neo-Nazis call on their followers to cast their ballots for parties whose logos are decorated with harmless flowers and ticks, rather than the established iconography of far-right militancy.⁴⁴

2.2 Let's Talk About the Law

Plato argued that when there are no barriers to freedom, the consequences are that it loses its meaning and results in moral superficiality and anarchy.⁴⁵ Locke believed that to ensure a cohesive and secure society, people should give up a part of their freedom to ensure common well-being,⁴⁶ and Voltaire claimed that a right carried too far becomes injustice.⁴⁷ It seems like the reason to legitimately restrict one's freedoms and rights was always in the thought of legal philosophers and jurists. Notwithstanding, after World War II, the European community developed a substantial amount of legislation that legitimately restricts certain freedoms and rights. The question is when, how, and why, particular freedoms and rights can be restricted by positive legislation.

According to Sajó, constitutional law is about setting limits to the government that it is ready to abuse its powers, especially by setting limits to these powers through the division of competencies and by establishing fundamental rights.⁴⁸ Hence, one needs to create grounds to prevent the abuse of freedoms and rights in European constitutional systems, bearing in mind their interdependency with international and European human rights frameworks. Sajó also emphasized the following considerations as conditions for finding an abuse: (1) harm; (2) unreasonable use of right; (3) imbalance between the advantage resulting from the rights use and the harm caused; (4) unreasonable reliance on facts that enable the use of rights.⁴⁹

To further illustrate Sajó's conceptualization, one can resort to the famous tripartite test developed by the ECtHR. Namely, interferences with certain freedoms are legitimate only if (1) they are prescribed by law; (2) pursue a legitimate aim; **and** (3) are necessary in a democratic society.⁵⁰

In the following subsections, the legislative framework of the Council of Europe and the European Union is further addressed to provide more substantial information on the fundamental, democratic, rights and freedoms and their limitations.

2.2.1 The Council of Europe

The CoE was born from the ashes of World War II with its founding members committing to a future that respected human rights and fundamental freedoms.⁵¹ Before tackling the European Convention on Human Rights (hereinafter: ECHR) and its enforcement mechanism, ECtHR, which lies at the epicenter of this section, it is noteworthy to mention one more important CoE body.

⁴⁴ N. Potter, *Mapping the Europe*, Friedrich Ebert Stiftung, 2022, p. 2, available at: <https://library.fes.de/pdf-files/bueros/stockholm/19155.pdf>, accessed: May 8th, 2023

⁴⁵ N. Alkiviadou, *The Far-Right in International and European Law*, p. 36

⁴⁶ N. Alkiviadou, *The Far-Right in International and European Law*, p. 36

⁴⁷ A. Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', in A. Sajó (ed.), *Abuse: The Dark Side of Fundamental Rights*, Eleven International Publishing, Utrecht, 2006, p. 29

⁴⁸ A. Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', p. 43

⁴⁹ A. Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', p. 42

⁵⁰ See more in J. Gerards, 'How to improve the necessity test of the European Court of Human Rights', *International Journal of Constitutional Law*, vol. 11, no. 2, 2013, pp. 466 - 490

⁵¹ N. Alkiviadou, *The Far-Right in International and European Law*, p. 129

Firstly, the Venice Commission,⁵² as an advisory body of the CoE, provides legal advice to its member states on democracy, human rights, and the rule of law. Among other important “soft-law” sources regarding the protection of fundamental rights and freedoms, the Venice Commission issued the Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures that prescribe that everyone has the right to associate freely in political parties, but that limitations might be imposed by the ECHR.⁵³ The guidelines thoroughly describe when and how can these limitations be enacted.⁵⁴ Additionally, the explanatory guide which clarifies the aim of establishing a set of common principles for all the CoE member states is included.⁵⁵

Finally, it goes without saying that both of the aforementioned bodies rely mostly on the ECHR, “a constitutional instrument of the European public order”.⁵⁶ The ECHR entered into force in 1953, and all of the contracting parties, i.e., all of the CoE member states, are obliged to secure the rights and freedoms contained therein. It provides a system of judicial redress resulting in binding judgments,⁵⁷ and as such has been described as the “most comprehensive and developed system for supranational human rights protection”.⁵⁸ Due to the limited scope of the present thesis, only certain provisions of the ECHR that ought to provide answers to the research questions are addressed.

On that notion, freedom of expression, association, and assembly is considered to be the foundation stones of democracy, while the prohibition of abuse of rights is one of the characteristics of the ECHR, that is intertwined with the background concept of fundamental freedoms and rights.

Namely, in *Handyside v. UK*,⁵⁹ the ECtHR ruled that freedom of expression, as prescribed by Article 10 of the ECHR, constitutes one of the essential foundations of such a [democratic] society and is one of the basic conditions for its progress and the development of every man.⁶⁰ In the same judgment, ECtHR further emphasized that the freedom of expression applies not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock, or disturb the State or any sector of the population.⁶¹ Indeed, freedom of expression is considered to be one of the fundamental human rights, the pillar of contemporary democratic society. Despite freedom of expression being regarded as the foundation stone of liberal democracy⁶², it is not an absolute category. Freedom of expression can be limited and/or restricted on certain occasions. The ECHR stipulates that “the exercise of these freedoms, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law* and are *necessary for a democratic society*.”⁶³ Moreover, it is important to mention that the right to freedom of

⁵² The official name of the Venice Commission is the European Commission for Democracy Through Law.

⁵³ See more in European Commission for Democracy Through Law, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, Strasbourg, January 10th, 2000, CDL-INF (2000) 1

⁵⁴ European Commission for Democracy Through Law, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, p. 5

⁵⁵ European Commission for Democracy Through Law, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, p. 6-8

⁵⁶ *Loizidou v. Turkey*, App. No. 15318/89 (ECtHR, 23 March 1995), para 75

⁵⁷ N. Alkiviadou, *The Far-Right in International and European Law*, p. 129

⁵⁸ I. Hare, J. Weinsten, *Extreme Speech and Democracy*, Oxford University Press, Oxford, 2011, p. 4

⁵⁹ *Handyside v. UK*, App. No. 5493/72 (ECtHR, 7 December 1976)

⁶⁰ *Handyside v. UK*, para 49

⁶¹ *Handyside v. UK*, para 49

⁶² *Handyside v. UK*, para 49

⁶³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10, para. 2; Emphasis added.

expression is often grouped with freedom of association and peaceful assembly.⁶⁴ They have intertwined in that respect for freedom of expression being a fundamental criterion that enables several other freedoms and rights to be enjoyed, such as the aforementioned freedoms of association and assembly.

Additionally, it is important to mention Article 17 of the ECHR which concerns the prohibition of abuse of rights. The said article stipulates that nothing in the ECHR can be interpreted as implying for any state, group, or person any right to engage in any activity or perform any act *aimed at the destruction of any other rights and freedoms* set [...] or at their limitation to a greater extent provided by the ECHR.⁶⁵ To exemplify this rather perplexed provision, in *Garaudy v. France*,⁶⁶ the applicant was found guilty of disputing the existence of the Holocaust in his book. The ECtHR stated that the negation or revision of historical facts of this type calls into question the values which underlie the fight against racism and anti-Semitism and are likely to “seriously disturb public order” and that “such acts are incompatible with democracy and human rights because they infringe the rights of others”.⁶⁷ Therefore, the application was found inadmissible since Garaudy could not rely on the provisions of Article 10 of the ECHR **due to** Article 17 which was, according to ECHR drafters, intended to be a bulwark against a democracy’s capacity to surrender to fascist rule.⁶⁸ However, in *Vajnai v. Hungary*, ECtHR ruled that Vajnai, the Vice-President of the Workers’ Party who was a speaker at a lawful demonstration in central Budapest wore a five-pointed red star – both a communist symbol and the symbol of the international workers’ movement. Consequently, Vajnai was convicted of the offense of wearing a totalitarian symbol. ECtHR noted that the disclosed evidence *did not demonstrate an actual or even remote danger* of disorder triggered by the public display of the red star in Hungary.⁶⁹ A similar line of reasoning was applied in *Jersild v. Denmark*. Jersild was a journalist who made a documentary containing extracts from interviews with the “*Greenjackets*”, who made abusive and derogatory remarks about immigrants and other ethnic groups in Denmark. Consequently, he was convicted of aiding and abetting in the dissemination of racist remarks. The ECtHR concluded that the documentary as a whole *did not aim to propagate racist views and ideas* but to inform the public about a social issue.⁷⁰ When it comes to freedom of association, which often refers to a movement that could be “deeply undemocratic” the ECtHR acknowledged the legitimacy of the concept of “democracy capable of defending itself”⁷¹ and went a step further in the *Refah Partisi and Others v. Turkey*⁷² where the following was emphasized in a manner that the state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standard of the Convention and democracy.⁷³ However, the application of Article 17 is quite incoherent when it comes to the freedom of

⁶⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 11

⁶⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 17; Emphasis added.

⁶⁶ *Garaudy v. France*, App. No. 65831/01, (ECtHR 16 December 1998)

⁶⁷ *Garaudy v. France*, para 4; Emphasis added.

⁶⁸ P. Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’, *Constellations*, vol. 19, no. 4, 2013, p. 480

⁶⁹ *Vajnai v. Hungary*, App. No. 33629/06, (ECtHR 8 July 2020); Emphasis added.

⁷⁰ *Jersild v. Denmark*, App. No. 15890/89, (ECtHR 23 September 1994)

⁷¹ *Vogt v. Germany*, App. No. 17851/91, (ECtHR 2 September 1996), para 51, para 59

⁷² The *Refah Partisi* is just one of the judgments whereas the ECtHR took a similar stance in the very early years of ECHR, the European Commission upheld West Germany’s ban on the German Communist Party, thereby extending the reach of Article 17 to permit a member state to enact militant measures to preclude democracy’s capacity to surrender to communist rule.

⁷³ *Refah Partisi and Others v. Turkey*, App. No. 41340/98, 41342/98, 41343/98 et al., (ECtHR 13 February 2003), para 102

association and assembly. For example, in *Socialist Party and Others v. Turkey*, the ECtHR stated that it is the essence of democracy to *allow diverse political programs* to be proposed and debated, even those that call into question the way the State is currently organized, provided that they do not harm democracy itself.⁷⁴ Conclusively, the prohibition of abuse of rights suggests that a state might be entitled to act in a militant manner, toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description.⁷⁵

2.2.2 The European Union

The EU is a supranational political and economic union of 27 member states. The specific nature of the EU translates into a multilayered legislative framework concerning human rights protection, due to the different development stages of the EU structure(s).⁷⁶ Before tackling the influence of the Charter and the CJEU's case law on the limitations of fundamental rights and freedoms, a short overview of human rights protection and its limitations is provided through the discussion of certain TEU provisions.

Namely, Article 2 of the Treaty on the European Union (hereinafter: TEU) provides that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.⁷⁷ However, Article 7 of the TEU was developed to promote a dignified and equitable rule of law to ensure a functional democracy.⁷⁸ It holds that in the event of a clear risk or a serious breach by a member state of the values referred to in Article 2, the Council will hear the position of the state in question and possibly address the recommendation to it as a means of overcoming that risk.⁷⁹ Alikiviadou claims that Europe is currently experiencing breaches, or risk thereto, of the core values enshrined in Article 2 TEU due to the social, political, constitutional, and/or financial developments in member states, including, but not limited to, Hungary and Poland,⁸⁰ and the constitutional shocks brought by the respective governments.⁸¹ Sadurisk writes that Article 7 seemingly fills a gap in the EU's human rights protection through its preventive and sanctioning mechanisms.⁸² In the vast majority of literature, Article 7 has been often disputed for a variety of reasons. For example, the actors involved in the process are the member states, the Parliament, and the Council, but not the CJEU, which indicates the very political nature of the prescribed mechanisms.

⁷⁴ *Socialist Party and Others v. Turkey*, App. No. 20/1997, 804/1007 (ECtHR 25 May 1998), para 51, emphasis added.

⁷⁵ P. Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination', p. 495

⁷⁶ Shütze differentiates the protection of fundamental rights and freedoms on the following three levels: the 'unwritten' bill of rights or human rights as general principles, the 'written' bill of rights or the Charter of Fundamental Rights, and the 'external' bill of rights, the ECHR. However, due to the limitations of the present thesis, the development stages will be disregarded, and case law and relevant EU legislation will be examined in its entirety. See R. Shütze, *European Constitutional Law*, Cambridge, Cambridge University Press, 2nd edition, 2016, pp. 430 - 470

⁷⁷ European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, Article 2

⁷⁸ N. Alkiviadou, *The Far-Right in International and European Law*, p. 203

⁷⁹ N. Alkiviadou, *The Far-Right in International and European Law*, p. 203

⁸⁰ See p. 6

⁸¹ N. Alkiviadou, *The Far-Right in International and European Law*, p. 203

⁸² W. Sadurisk, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider', *Sydney Law Journal*, vol. 10, no. 1, p. 1

Additionally, this article is one with far-reaching consequences and punitive nature,⁸³ and it is unclear when and how can be employed.⁸⁴

On the other hand, the Charter brings together the fundamental rights of everyone living in the EU, and it was introduced to bring consistency and clarity to the rights established at different times and in different ways in the EU's member states. The Charter sets out a full range of civil, political, economic, and social rights based on the fundamental rights and freedoms recognized by the ECHR, the constitutional traditions of member states, and the other international conventions to which the EU or its member states are parties.⁸⁵ The fundamental freedoms and rights are prescribed similarly to those that arise from the ECHR,⁸⁶ and the Charter have the same legal value as the Treaties. However, the limitations are stipulated differently given the EU prerogatives. Nevertheless, Shütze emphasized that every legal order protecting fundamental rights recognizes that some rights can be limited to safeguard the general interest.⁸⁷ The Charter makes that very clear in Article 52 when stipulating that any limitation on the exercise of the rights and freedoms [...] must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.”⁸⁸ Article 52, therefore, follows the classical ECtHR tripartite test, but given the EU prerogatives, the requirement *provided by law* does not require direct democratic legitimation for interferences with fundamental rights but rather insists on liberal demand that all such interferences are rooted in the generally applicable norm.

On that notion, the CJEU, as the EU's enforcement mechanism, takes inspiration both from the constitutional traditions of its member states,⁸⁹ and international treaties for the protection of human rights.⁹⁰ Analogously, the existing limitations in the (inter)national system are applied by the CJEU. In *Nold v. Commission*, the CJEU clarifies that human rights are “far from constituting prerogatives”, and that they may be subjected to “limitations laid down in accordance with the public interest”.⁹¹ Hence, each restriction must be proportionate to the public interest pursued.⁹² However, according to the ‘essential core’ doctrine, any limitation of human rights - even proportionate ones - must never undermine the ‘very substance’ of a fundamental right.⁹³ This sets an *absolute* limit to all governmental power by identifying an ‘untouchable’ core within a human right.⁹⁴ The ‘essential core’ doctrine was confirmed in the

⁸³ M. Kuijer, ‘Fundamental Rights Protection in the Legal Order of the European Union’, (eds.) A. Lazowski, S. Blockmans, *Research Handbook on the EU Institutional Law*, Edward Elgar, Cheltenham, 2016, p. 231

⁸⁴ See more in N. Alkiviadou, *The Far-Right in International and European Law*, pp. 203 - 214; B. Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’, *LSE ‘Europe in Question’ Discussion Paper Series (LEQS)*, vol. 79, 2014

⁸⁵ ‘What is the Charter of Fundamental Rights of European Union?’, *Equality and Human Rights Commission*, <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union>, updated: August 2nd, 2021, accessed: May 19th, 2023

⁸⁶⁸⁶ Shütze argues that the Charter aimed to codify the existing fundamental rights, not to create “new ones”. R. Shütze, *European Constitutional Law*, p. 422

⁸⁷ R. Shütze, *European Constitutional Law*, p. 446

⁸⁸ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art. 52, para 1

⁸⁹ *Stauder v. City of Ulm*, Case 26/69, [1969], ECR 419, para. 7, *Internationale Handelsgesellschaft*, Case 11/70, [1970], ECR 1125, para. 4

⁹⁰ *Nold v. Commission*, Case 4/73, [1974], ECR 491

⁹¹ *Nold v. Commission*, para. 14

⁹² *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979], ECR 3727, para. 23

⁹³ R. Shütze, *European Constitutional Law*, p. 437

⁹⁴ R. Shütze, *European Constitutional Law*, p. 437

Zambrano case,⁹⁵ which rose some eyebrows in the legal scholarship, and was subsequently heavily criticized by scholars for being an expression of a proactive court.⁹⁶ For example, Martinico and Russo claim that the construction of an essential core of fundamental rights is thus the product of judicial construction which closely resembles a sort of ‘homogeneity clause’, and the imminent risk exists that judicial construction of “untouchable core” might impact the dialectic existing between the constitutional structures of the member states.⁹⁷ They describe *Zambrano* judgment as a “muscular” judgment that depicts a militant conception of the role of the CJEU concerning their interventionist attitude towards the ‘essential core’.⁹⁸

3. Theoretical Framework

In the following section, Loewenstein’s viewpoint on militant democracy will be further elaborated, as it is taken as a starting theoretical perspective for this thesis. His concept of militant democracy is highly applicable since it directly addresses the developed safeguards against the possibility of authoritarian rule in constitutional democracies. Subsequent sections will discuss the theoretical implications of militant democracy and the legality and compliance with the rule of law of constitutional democracy to act in an anti-democratic manner to combat threats to its very existence. Firstly, the origins of the concept of militant democracy will be addressed. Secondly, the theoretical understanding of the posed democratic dilemma will be addressed through legal and political lenses. The aforementioned subsections are utilized to answer the research question and explain the influence of militant democracy on constitutional democracy, the rule of law, and the European human rights framework.

3.1 The Origins of Militant Democracy

Before leaping into the depths of the manifestations of militant democracy, one must be acquainted with the definition and the origins of the concept. According to some authors, militant democracy can be defined as a form of constitutional democracy authorized to protect civil and political freedoms by preemptively restricting their exercise.⁹⁹ The roots of the concept of military democracy can be traced back to the German émigré scholar Karl Loewenstein.

In his two essays on militant democracy written at the dawn of World War II, Loewenstein emphasized that if democracy does believe in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.¹⁰⁰ Democracy must abandon its passive, apathetic attitude and undertake action against parties that threaten its survival. Democracy should no longer be pacifist; it should become militant.¹⁰¹ Accordingly, to resist the autocratic threat, democracy needs to become militant, and the pacifist stance towards democracy needs to be abolished.

⁹⁵ *Zambrano v. Office national de l’emploi*, Case C-34/09, [2011], ECR-I-1177

⁹⁶ The ‘essential core’ doctrine was also heavily disputed in the *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister of Transport, Energy and Communications and others*, Case C-84/95, [1996], ECR I-3953, and *Kadi and Al Barakat International Foundation v. Council and Commission*, Case C-402/05P, [2008], ECR-I-6351

⁹⁷ G. Martinico, A. M. Russo, ‘Is the European Union a Militant Democracy? The Perspective of the Court of Justice in *Zambrano* and *Kadi*’, in *European Public Law* 21, vol. 21, no. 4, 2015, p. 671

⁹⁸ G. Martinico, A. M. Russo, ‘Is the European Union a Militant Democracy? The Perspective of the Court of Justice in *Zambrano* and *Kadi*’, p. 676

⁹⁹ See P. Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’, *Constellations*, vol. 19, no. 4, 2013, p. 575

¹⁰⁰ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 432

¹⁰¹ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, II’, *The American Political Science Review*, vol. 31, no. 4, p. 755–784

The first essay is focused on the deep circumscription of fascism as a universal political technique that threatens the democratic order. Constitutional government is defined as the rule of law, which guarantees rationality and calculability of administration while preserving a definite sphere of private law and fundamental rights.¹⁰² Dictatorship, on the other hand, means the substitution for the rule of law of legalized opportunism in the guise of *raison d'état*.¹⁰³ Accordingly, in the long run, no government can rely only on force or violence, the cohesive strength of the authoritarian state is rooted in emotionalism, which thus has supplanted the element of legal security in the constitutional government.¹⁰⁴ Despite national differences, the similarities of the fascist movements in the various democratic countries are so striking as to be betoken.¹⁰⁵ The programmatic and ideological ingredients are surprisingly uniform: hatred towards communism and its kin, Marxism and socialism, and antisemitism.¹⁰⁶ Recruits are usually drawn from the depressed middle classes, from some sections of the intelligentsia, and most of all from youth with a fair sprinkling of retired army officers and disgruntled politicians.¹⁰⁷ Fascism, in one form or another, covers [1937] more areas and peoples in Europe than are still faithful to constitutional government, and its pattern of political organization presents a variety of shades.¹⁰⁸ Without being nominally fascist, all of these states are authoritarian to the extent that the group in power controls public opinions as well as the machinery of government.¹⁰⁹

In the second essay, Loewenstein is illustrating some versions of the concept that developed in various European states immediately before the Second World War. He provides a summary of anti-fascist legislation according to which many democracies have resorted to statutory precautions and legislative defense.¹¹⁰ Ultimately, Loewenstein concluded that European democracy has overstepped democratic fundamentalism and risen to militancy, fire is being fought with fire.¹¹¹

However, in both of the essays, Loewenstein circumscribed militant democracy only theoretically, without further engagement in the practical implications of the so-called “fortified soft spots” of democracy, i.e., freedom of expression, association, and assembly. Loewenstein indirectly addresses the vulnerability of democracy in a three-folded way. Firstly, democracy is vulnerable because, structurally, it is governed by compromise. Secondly, the opponents are granted constitutional freedoms such as freedom of expression (manifested in the ability to freely disseminate propaganda), and freedom of assembly and association (manifested in freedom to organize and demonstrate to fulfill the anti-democratic goals). Finally, democracy allows organized parties to access the elections, and ultimately – win those elections.

Contemporaneously, George van der Bergh, a Dutch jurist was developing his very own concept of military democracy. Unlike Loewenstein, van der Bergh engaged in a discussion of actually forbidding political parties with undemocratic tendencies and devoted attention to the legal justification of the concept of militant democracy.¹¹²

¹⁰² K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 418

¹⁰³ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 418

¹⁰⁴ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 418

¹⁰⁵ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 421

¹⁰⁶ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 421

¹⁰⁷ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 421

¹⁰⁸ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 417

¹⁰⁹ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, p. 417

¹¹⁰ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, II’, p. 644

¹¹¹ K. Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, 656

¹¹² See more in B. Rijpkema, ‘Militant Democracy beyond Loewenstein: George van der Bergh’s 1936 Inaugural Lecture’ in (eds) A. Elia, B. Rijpkema, *Political Science, Law and Philosophy*, Philosophy and Politics, vol. 7, Springer, 2018

Conclusively, the core idea that both Lowenstein and van der Bergh presented is that democracies can and should protect themselves from the ideas and movements that are deeply undemocratic and whose goal is to use the freedoms provided by democracies to destroy democracy itself.¹¹³

3.2 The Democratic Dilemma

Karl Popper reframed Plato's "paradox of democracy": the possibility that a majority may decide that a tyrant should rule¹¹⁴ with the so-called "paradox of tolerance". He sent a warning: unlimited tolerance leads to the disappearance of tolerance,¹¹⁵ and emphasized that one should be intolerant against intolerance when the intolerant denounces all arguments.¹¹⁶ Popper's statement extends the concept of militant democracy, according to which the success of fascism is based exactly on its perfect adaptation to democracy.¹¹⁷ As Loewenstein already mentioned: under the cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally.¹¹⁸

Furthermore, Schmitt provided solid juridical grounds for the "state of exception".¹¹⁹ The state of exception is enforced when a sovereign action becomes a way for sovereigns to use the constitution and legal ways to do - basically - whatever they want to do. Schmitt differentiates constitutional core and constitutional law.¹²⁰ On that basis, he creates his version of militant democracy where emergency powers, in the state of exception, may be called upon to justify a restriction of democratic freedoms in violation of ordinary constitutional law, as long as the political core of the constitution itself is defended.¹²¹ Given his infamous decision to join the Nazi Party, Schmitt seems to be an unlikely exponent of the concept of militant democracy, but the relevance of his "state of exception" concept regarding militant democracy cannot be disregarded.

As the concept rejuvenated and tickled academic imagination at the verge of the 20th century, Agamben decided to revisit both Schmitt and Loewenstein, in a more philosophical than legal fashion, when stating that it is as if juridical order contained an essential fracture between the position of the norm and its application, which, in extreme circumstances can create a zone in which application is suspended, but the law remains in force.¹²² In essence, Agamben agrees with Schmitt and adds that this is a sovereign ban whereby the law suspends itself so that it can change and be adaptive to things that happen. Notwithstanding, Schmitt thinks the link between democracy and sovereignty in a form of a state of exception, is something desirable, while Agamben disagrees, but they are both in agreement that this is how sovereign power in every constitutional democracy works.

Finally, it is important to emphasize Kelsen's contribution to this democratic dilemma. Namely, when democracy attempts to safeguard itself from anti-democratic entities, it is no

¹¹³ E. Kulenović, N. Blanuša, 'Hate Speech, Contentious Symbols and Politics of Memory: Survey Research on Croatian Citizens' Attitudes', *Croatian Political Science Review*, vol. 55, no. 4, 2018, p. 184

¹¹⁴ K. Popper, *The Open Society and its Enemies*, New York, Routledge, 2015, p. 602

¹¹⁵ K. Popper, *The Open Society and its Enemies*, p. 546

¹¹⁶ K. Popper, *The Open Society and its Enemies*, p. 602

¹¹⁷ K. Loewenstein, 'Militant Democracy and Fundamental Rights, I', p. 423

¹¹⁸ K. Loewenstein, 'Militant Democracy and Fundamental Rights, I', p. 423

¹¹⁹ Additionally, in *Political Theology* Schmitt wrote that all law is situational law and that a regular situation must be created, and the sovereign is he who definitely decides if this situation is actually effective. (C. Schmitt, *Political Theology: four chapters on the concept of sovereignty*, Chicago and London, Chicago University Press, 2005, p. 18)

¹²⁰ See C. Schmitt, *Legality and Legitimacy*, Duke University Press, Durham and London, 2004

¹²¹ See C. Schmitt, *Legality and Legitimacy*, Duke University Press, Durham and London, 2004

¹²² G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford, 1998, p. 31

longer a democracy.¹²³ In the Kelsian sense, the concept of militant democracy in its essence is already anti-democratic, and should not be enacted throughout the (inter)national human rights framework. However, in the post-World War II scholarship, even Kelsen recognized that fascism and national socialism have been destroyed as political realities, their ideologies have not disappeared and still directly, or indirectly counteract the democratic creed.¹²⁴ However, he remained a strong opponent of the disputed concept when describing the procedure as a specific method of creating and applying the social order that constitutes the community. The procedure is the criterion of the political system that is called democracy, [...] and the method of creating the order within a political system is always regulated by the order itself if the order is the legal order.¹²⁵

¹²³ P. Cliteur, B. Rijpkema, 'The Foundations of Militant Democracy', 2012, p. 41

¹²⁴ H. Kelsen, 'Foundations of Democracy', *Ethics: An international journal of social, political, and legal philosophy*, vol. 66, no. 1, 1955, p. 1

¹²⁵ H. Kelsen, 'Foundations of Democracy', p. 3

4. Analysis

The analysis is divided into two parts according to the themes that correspond to the research aims and questions as well as the theoretical framework. In the first part, the common denominators of far-right parties are explored by examining the programs of two specific parties, namely, the Swedish *Sverigedemokraterna* and Italian *Fratelli d'Italia*. Both parties emphasize nationalism, conservative values, and anti-immigration policies while presenting themselves as defenders of their respective nations. The comparison between far-right parties today and those before World War II is noted, acknowledging that the modern far-right programmes are more democratic but still share characteristics that raise concerns. The first part of the analysis highlights the need to protect democracy from the influence of far-right parties and their nationalist agendas. The second part is focused on the application of militant democracy in contemporary European settings. The concept is explored through the lens of positive legislation and case law from CoE and the EU. Specific measures, such as Article 17 of the ECHR, Article 7 of the TEU, and Article 52(2) of the Charter are discussed as examples of legal measures inspired by militant democracy. Overall, the analysis underscores the need to understand and implement the “militant democracy’s toolkit” in order to protect democracy from the far-right parties and their potential threats.

4.1 The Common Denominators

As previously emphasized, there is no uniform definition of what constitutes a far-right entity, or a far-right political party.¹²⁶ However, to understand the relationship between democracy and the far-right, the far-right entity needs to be reduced to certain common denominators. The far-right parties of *Fratelli d'Italia* and *Sverigedemokraterna*¹²⁷ are set as examples, and for that reason, their characteristics are analyzed in the present thesis.

On the one hand, in their program, *Sverigedemokraterna* describe themselves as a socially conservative party with a nationalist background that values conservative, social-welfare values.¹²⁸ *Sverigedemokraterna* “needs Sweden to stop taking in more asylum seekers to Sweden [...] and see more immigrants return to their native countries”.¹²⁹ They believe that “the Swedish welfare system should be for Swedish citizens [...], and that migrants need to be employed before qualifying for Swedish welfare”.¹³⁰ They want a safe society when emphasizing that they will never “bow to Islamism or any other form of extremism, because Sweden is a land of democracy and equality”.¹³¹

On the other hand, *Fratelli d'Italia*’s program calls for defending “Europe’s classical and Judeo-Christian historical and cultural roots and identity”.¹³² The program is centered on “the national interest and homeland, economic growth, and the defense of Italian families’ purchasing powers”.¹³³ Furthermore, the program promises “to stop the migrants who arrive in boats from North Africa”, while simultaneously encouraging “the return of Italians (and people of Italian origin) from abroad”.¹³⁴

¹²⁶ See heading 2.1.: United in Diversity

¹²⁷ See heading 2.1.: United in Diversity

¹²⁸ This is what we want, *Sverigedemokraterna*, <https://sd.se/english/>, updated: September 2022, accessed: May 23rd, 2023

¹²⁹ This is what we want, *Sverigedemokraterna*

¹³⁰ This is what we want, *Sverigedemokraterna*

¹³¹ This is what we want, *Sverigedemokraterna*

¹³² Il programma *Pronti per risollevare l'Italia*, *Fratelli d'Italia*, (https://www.fratelli-italia.it/wp-content/uploads/2022/08/Brochure_programma_FdI_qr_def.pdf), updated: September 2022, accessed: May 23rd, 2023, p. 37

¹³³ Il programma *Pronti per risollevare l'Italia*, *Fratelli d'Italia*, p. 5

¹³⁴ Il programma *Pronti per risollevare l'Italia*, *Fratelli d'Italia*, p. 32

When the political programs of the two parties are read together, certain commonalities inevitably emerge. First and foremost, both *Sverigedemokraterna* and *Fratelli d'Italia* devote attention to their nationalist position toward Europe. They acknowledge the European community and accept the imposed legislation, but their program emphasizes the prosperity of the Swedish and Italian citizens. Their agenda is conservative, with a strong anti-immigration policy in the background, hidden under promised economic growth and tax reforms that aim to help a “proper” citizen, or better to be said, national of the country. Secondly, apart from the very similar program rhetoric, *Sverigedemokraterna* and *Fratelli d'Italia* share one more thing - symbolism. Namely, as previously mentioned, the flaming torch is still present as *Fratelli d'Italia*’s logo, while *Sverigedemokraterna* 2006 appropriately transformed their long-standing flaming torch into *hepatica nobilis*, an innocent blue flower. By doing so, they aimed to detach themselves from the national-socialist roots they have been marked with. The symbolism of the flaming torch is thoroughly discussed in scholarship since it represented fidelity to the ideals of fascism, and *Sverigedemokraterna* needed to change it to step away from the historical heritage they are denying so fondly. On the other hand, *Fratelli d'Italia*, even though often questioned for their logo, decided to keep it, but award it different historical meaning and understanding. Thus, both *Sverigedemokraterna* and *Fratelli d'Italia* actively deny their historical roots, while trying to deflect and suppress the memory of the atrocities that have happened during World War II.¹³⁵ Lastly, it is important to mention the electoral support for both parties in societal terms. Namely, extensive research concerning “who is the average voter” was conducted for both of the parties in question.¹³⁶ According to this research the target group of voters is quite similar for both parties and falls under the scope of an average “populist writer” as described by Elchardus and Spruyt.¹³⁷ Namely, the voters are mainly “the ordinary people”, “the normal folk”, disappointed in the current political climate. However, who constitutes “the normal folk” in accordance with the *Sverigedemokraterna* and *Fratelli d'Italia*’s electoral support? Both surveys depict a voter to have a lower level of education, and to be between medium and low income. However, the age span of an average voter in both surveys differs. Either it is a very young population (18-26), or moderately old (45-60).

Bearing this in mind, what is of interest to the present thesis is the comparison between the far-right parties today and the far-right before World War II. It is not a surprise that their programs are more democratic than the program e.g., *NSDAP*.¹³⁸ However, the parallel cannot be disregarded. The political program embraces nationalism and voices the superiority of one nation above others. It denies multiculturalism and disregards certain freedoms and rights that are perceived today as human dignity. In its essence, the *NSDAP* program is more than radical in comparison to the presented *Sverigedemokraterna* or *Fratelli d'Italia*’s program, yet the urge to protect the nationals and the nation-state is worrying if one ought to remember the atrocities and devastation brought by to peoples of Europe and the world. And it all started with a simple political program. Plus, the electoral support in the 1920s and 1930s Germany shared similarities with the electoral support that put both *Sverigedemokraterna* and *Fratelli d'Italia*’s pedestal. As Loewenstein wrote - the recruits are usually drawn from the depressed middle classes, some sections of the intelligentsia, and most of all from youth.¹³⁹

¹³⁵ See heading 2.1: United in Diversity

¹³⁶ See more in J. Martinsson, ‘Sweden Democrats: An Anti-Immigration Vote’, *Fondation pour l’innovation politique*, <https://www.fondapol.org/app/uploads/2020/06/131-suede-democrates-gb-2019-07-11-web-3.pdf>, September 2018, accessed: May 15th, 2023; Il profilo dell’elettorato di Fratelli d’Italia nell’analisi dell’Istituto Demopolis: chi sono gli elettori di Giorgia Meloni, *Istituto Nazionale di Ricerche*, <https://www.demopolis.it/?p=10613>, updated: October 2022, accessed: May 18th, 2023

¹³⁷ See heading 2.1: United in Diversity

¹³⁸ R. Stackleberg, S. A. Winkle, *The Nazi Germany Sourcebook: An Anthology of Texts*, p. 64

¹³⁹ See heading 3.1: The Origins of Militant Democracy, p. 15

Finally, if one was to determine the connotations that are attached to the far-right parties, based on the exemplary case of *Sverigedemokraterna* and *Fratelli d'Italia* the following conclusion would emerge. Firstly, far-right parties are rooted in ethnonationalism, and they evidently oppose multiculturalism through their aggressive approach to migration policies. Their programs are centered around the protection and safety of the national citizens and the preservation of conservative values. Their electoral support is similar regardless of the quite different cultural, economic, social, and political placement of Sweden and Italy on a broader European map. Their political programs are inherently different from their historical counterparts, e.g., the *NSDAP* program, but they possess characteristics that allow parallels to be drawn. However, democracy today is not the same democracy that it was a couple of decades ago, and as such, contemporary constitutional democracy likes to think that it has learned to protect itself from anti-democratic movements. The question is: which tools can today's European constitutional democracy utilize to protect itself from the far-right parties and their influence?

4.2 Militant Democracy Applied

In one of his many essays on militant democracy, Sajó asked how militant democracy regard - and responds to - political emotionalism.¹⁴⁰ He continues by saying that militant democracy as such is not a general theory and practice of the protection of human rights, but a set of measures directed against radical emotionalism.¹⁴¹ Karl Loewenstein, the founder of militant democracy considered fascism to be an ultimate form of emotional politics.¹⁴² However, even though fascism is perceived as an ultimate form of emotional politics, populism is not far behind. Or to put it in Sajó's words: Emotional politics is not an exclusively fascism-related scenario. There are trends in contemporary politics that are based on emotionalism, especially of the religious and often ethnic (nationalistic) sort.¹⁴³

For the purposes of this thesis, the concept of militant democracy is perceived in a narrow, legalistic way, and it is regarded as both a set of preventive and corrective legal measures that aim to place restrictions on rights and on the democratic process for democratic/constitutionalist well-being. Thus, the focus is on the positive legislation that was inspired by militant democracy. To clarify the simple Saint-Just formula that lies in the center of the concept of Loewenstein's militant democracy there is no freedom for enemies of freedom,¹⁴⁴ in a concrete, legal fashion, one needs to take a look in the direction of previously described institutions and their enforcement mechanisms, namely, the Council of Europe and the European Union. The concept of militant democracy became part of the post-World War II constitutional landscape when it offered certain restrictive techniques that serve the ultimate goal of democratic self-preservation. Nonetheless, as Sajó writes, these techniques were inherited in the contemporary constitutional democracy without being aware of their roots,¹⁴⁵ which contemplates the very understanding and implementation of these measures. Namely, if legislators or the judiciary are not aware of the reasons and circumstances of the available restrictive measures, their application could be easily extended. Thus, firstly the analysis of the Council of Europe is provided, and by the same line of reasoning, the European Union analysis follows.

To illustrate, Article 17 of the ECHR is noticeably inspired by the very concept of militant democracy. The right is abused if it is used for an impermissible purpose, namely, the

¹⁴⁰ A. Sajó, 'Militant Democracy and Emotional Politics', p. 562

¹⁴¹ A. Sajó, 'Militant Democracy and Emotional Politics', p. 562

¹⁴² See heading 3.1: The Origins of Militant Democracy, p. 15

¹⁴³ A. Sajó, 'Militant Democracy and Emotional Politics', p. 564

¹⁴⁴ A. Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', p. 52

¹⁴⁵ A. Sajó, 'Militant Democracy and Emotional Politics', p. 565

destruction of other convention rights,¹⁴⁶ i.e., no State, group, or a person, can engage in *any activity* or perform *any act* aimed at the destruction of any of the rights and freedoms set therein.¹⁴⁷ In plain words, Article 17 suggests that a state *might* be entitled to act in a militant manner toward states, individuals, associations, or organizations that aim to destroy rights and freedoms. Notwithstanding, the ECHR also provides safeguards from the extension of the abuse of rights clause as prescribed in Article 17. Namely, Article 18 stipulates the limitations on the use of the restriction of rights. It is emphasized that the restrictions permitted under the ECHR cannot be applied for any purpose other than above stated purposes,¹⁴⁸¹⁴⁹ stipulated by the aforementioned article. Nonetheless, if one takes a closer look at the ECtHR case law, it becomes obvious that they fail to stipulate any criteria for determining whether an organization or association fits the description.¹⁵⁰ Additionally when it comes to political parties' dissolution and prohibition, Venice Commission's Guidelines¹⁵¹ clarify when and how limitations and restrictions might be enacted. The Guidelines are a long arm of the restrictions prescribed by Article 11(2) and are inasmuch inspired by the very concept of militant democracy.

Bearing in mind the complexity of determining the definitional framework of the far-right party,¹⁵² and the fact that not all far-right parties fall under the scope of the parties that *aim to destroy* democracy, that comes as no surprise.

Furthermore, the concept of militant democracy concerning freedom of expression is also palpable in Article 10(2) of the ECHR. Therefore, freedom of expression might be limited by the tripartite test that aligns with the previously described Sajó's reasoning on the applicability of purposive grounds for a finding of abuse of rights.¹⁵³ To exemplify, when Article 10 is adjudicated in conjunction with Article 17, the application is often found inadmissible as manifestly ill-founded. In the case of *Šimunić v. Croatia*,¹⁵⁴ the applicant, a famous footballer was shouting "*Za dom spremni*"¹⁵⁵ during a national representation match in Iceland. Thus, no violation of Article 10 was found since the ECtHR found that particular expression "irrespective of its original Croatian literally and poetic meaning, has been used as an official greeting of the Ustashe movement and totalitarian regime of Independent State of Croatia."¹⁵⁶

Finally, from the restrictions prescribed in Article 10(2) and Article 11(2), one can conclude that militant democracy is enabled when prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. Nevertheless, the incoherent ECtHR case law presented in this, and the previous section demonstrates the ambiguity of the utilization of the militant democracy's "toolkit". Since there is no uniform definition of what constitutes hate speech or a far-right party, or an anti-democratic party, the former does not surprise.

When it comes to political parties' dissolution and prohibition, Venice Commission's Guidelines clarify when and how limitations and restrictions might be enacted. The Guidelines

¹⁴⁶ A. Sajó, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness', p. 53

¹⁴⁷ ECHR, Article 17

¹⁴⁸ ECHR, Article 18

¹⁴⁹ See more on the application of Article 18 concerning freedom of association as prescribed by Article 11 in *Navalnyy v. Russia*, App. No. 29580/12 (ECtHR 15 November 2018); and freedom of expression as prescribed by Article 10 in *Miroslava Todorova v. Bulgaria*, App. No. 40072/13 (ECtHR 19 October 2021)

¹⁵⁰ See e.g., *Vajnai v. Hungary*; *Refah Partisi and Others v. Turkey*; *Socialist Party and Others v. Turkey*

¹⁵¹ See heading 2.2.1: Council of Europe

¹⁵² See heading 5.1: The Common Denominators; See heading: 2.1: United in Diversity

¹⁵³ See heading 2.2.1: Council of Europe

¹⁵⁴ *Šimunić v. Croatia*, App. No. 20373/17

¹⁵⁵ *Za dom spremni* salute is linked to the *Sieg Heil* salute. It was used during the period of the Independent State of Croatia which was, according to some authors, the most brutal and most sanguinary satellite regime in the Axis sphere of influence during World War II. The salute originates from the 16th century, and it was used in many famous operas before World War II.

¹⁵⁶ *Šimunić v. Croatia*, App. No. 20373/17, (ECtHR 9 March 2017), para 36

are a long arm of the restrictions prescribed by Article 11(2) and are inasmuch inspired by the very concept of militant democracy.

Given the close relationship between the CoE and the EU, the concept of militant democracy is inasmuch present both in its positive legislation and the case law of the CJEU. Nevertheless, several of the provisions need a closer examination to ground them within the concept of militant democracy.

First and foremost, Article 7 of the TEU can be considered as equally inspired by militant democracy as the aforementioned Article 17 of the ECHR. Even the mere wording of the provision subsumes the acquired militant nature. Namely, the European Council [...] *may* determine the existence of a *serious and persistent breach* by a Member State of the values referred to in Article 2¹⁵⁷¹⁵⁸, [...] and *may* decide to *suspend* certain rights deriving from the application of Treaties.¹⁵⁹ Human dignity, freedom, democracy, equality, the rule of law, and respect for human rights are, therefore, awarded an additional safeguard as provided by Article 7 and its inherently punitive nature. However, as Alikiviadou and Bugarič wrote, it is unclear under which circumstances the said Article can be employed,¹⁶⁰ which once again leaves the individual with the uncertainty of the reach of one more tool in the militant democracy's toolkit.

Secondly, the Charter contains rights that correspond to rights guaranteed by the ECHR, and the meaning and scope of the rights are the same as the ECHR rights.¹⁶¹ The Charter might provide more extensive protection, given the fact that the ECHR provides a minimum standard of freedom and rights protection. Hence, freedom of expression, association, and assembly, are protected in the same fashion as by the ECHR. Notwithstanding, the provision regarding the three freedoms¹⁶² does not contain a paragraph itself that prescribes when, why, and how these freedoms can be limited. Yet, the restrictions prescribed in Article 52 stipulate that they must be *provided by law*, [...] only if they are *necessary* to meet the objectives of general interest [...] or the need to protect the rights and freedoms of others.¹⁶³ The scope of Article 52 is reiterated by the CJEU in *Karlsson and Others v. Sweden*. Namely, the judgment states that it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, [...] provided that those restrictions correspond to objectives of general interest [...], and do not constitute, about the aim pursued, disproportionate and unreasonable interference undermining the very substance of these rights.¹⁶⁴ As demonstrated, the character of Article 52 appears not to have as a militant character as Article 17 of the ECHR which stipulates the prohibition of abuse of rights. Notwithstanding, it is noteworthy how the CJEU case law interprets the aforesaid article. Unlike Article 17 where the mere wording implies its militant connotations, Article 52 needs to be read in conjunction with the CJEU's case law to understand the implications of the concept within the Charter, and by that the EU's primary legislation in its entirety.

When discussing the CJEU concerning militant democracy, it is important to comprehend its role in safeguarding the principles and values of the EU, including democracy. The CJEU plays a crucial role in interpreting and applying EU law, including fundamental rights, and ensuring the uniform application of EU law across member states. However, the CJEU is known for its active and interventionist approach to interpreting EU law, particularly

¹⁵⁷ See heading 2.2.2: The European Union

¹⁵⁸ European Union, *Consolidated version of the Treaty on European Union*, Art. 7 para 2; Emphasis added.

¹⁵⁹ European Union, *Consolidated version of the Treaty on European Union*, Art. 7 para 3; Emphasis added.

¹⁶⁰ See heading 2.2.2: The European Union

¹⁶¹ European Union, *Charter of Fundamental Rights of the European Union*, Art. 52, para 3

¹⁶² European Union, *Charter of Fundamental Rights of the European Union*, Art. 11 concerning freedom of expression; Art. 12 concerning freedom of assembly and association

¹⁶³ European Union, *Charter of Fundamental Rights of the European Union*, Art. 52, para 1

¹⁶⁴ *Karlsson and Others v. Sweden*, C-292/97, [2000], ECR

in cases involving fundamental rights.¹⁶⁵ It has often been seen as proactive in expanding the scope and protection of fundamental rights within the EU legal framework.¹⁶⁶ As previously mentioned, some scholars have characterized the CJEU's approach as "militant" or "muscular" in defending democratic principles and fundamental rights within the EU.¹⁶⁷

¹⁶⁵ See heading 2.2.2: The European Union

¹⁶⁶ See heading 2.2.2: The European Union

¹⁶⁷ See heading 2.2.2: The European Union

5. Concluding Remarks

The research aims of this thesis were to examine the main common denominators of the far-right party programs that shape domestic politics and their compliance with their state's obligations and European human rights standards (1), and to circumscribe different safeguards to the efficient democracy developed in the European legal setting through the concept of militant democracy (2). The guiding research questions were:

- (1) What connotations can be attached to the far-right party?
- (2) Does the far-right pose a challenge to constitutional democracies in Europe?
- (3) How can the concept of militant democracy be understood from a legal perspective?

The analysis showed that the topic raised in the present thesis is complex and multifaceted since it addresses the legal challenges posed by the far-right parties and movements within European constitutional democracies. Hence, it is important to approach the issue with sensitivity and recognize that the perspectives on the topic might vary. The present thesis focuses on the human rights perspective and the preservation of individual fundamental freedoms and rights as grounded in the CoE's and the EU's legislative framework and case law of its enforcement mechanisms.

On the one hand, democracy is a system designed to ensure citizen participation, protect individual freedoms and rights, and provide a framework for peaceful governance. However, democracy is not immune to challenges. The far-right parties characterized by nationalist, populist, and often authoritarian tendencies, certainly pose one. Historically, we have witnessed that the far-right has the potential to exploit democratic institutions and fundamental freedoms and rights. The legal challenge arises when a far-right party gains political power through democratic means. While democracy provides an avenue for political participation, the rise of extremist groups within the democratic system raises questions on how to address their influence and potential influence on institutions and policies.

The analysis demonstrated that despite the existing legislation that prohibits or limits the anti-democratic party programs, it remains hard to determine what is "anti-democratic" in a particular case. The ECtHR's case law eschews presenting a definitional framework, and it adjudicates on a case-to-case basis. That approach is more than understandable, but it flinches the responsibility of the ECtHR to assure the somewhat uniform application of the relevant freedoms and rights enshrined in the ECHR. It is noteworthy that the same rationale concerning the freedom of association and assembly can be analogously applied to the freedom of expression. As much as there is no definition of what constitutes an "anti-democratic" party, there is no definition of what constitutes hate speech which, in its essence, represents the limitation on the freedom of expression by Article 10(2). The case law is incoherent, but again for a (seemingly good) reason. Namely, freedom of expression is not guaranteed only for the potential dissemination of "favorable ideas", but also to those which can potentially "shock" or "disturb" the public. Additionally, the freedoms and rights guaranteed by the Charter are interpreted and applied in the same way as the corresponding ECHR freedoms, but their limitations are stipulated differently. The CJEU, in accordance with the EU's primary legislation in its entirety, determines the scope of the limitations on human rights. The presented case law demonstrates the similarities, but also the differences among the CJEU's and ECtHR's approach.

However, both of the enforcement mechanism, as well as the provided legislative framework of both entities relies heavily on the concept of militant democracy that was originally introduced as a set of measures aimed at countering radical emotionalism in politics. Today, it is seen as a means of preserving democracy by placing restrictions and limitations on

the freedoms and rights that are perceived as the foundation stones of the democratic society, such as freedom of expression, association, and assembly. The militant democracy toolkit shaped the ECHR and the Charter, and it allowed the possibility of “democratic self-preservation” through legal means. Yet, militant democracy must be observed and applied with utter care, so the infringement of one’s right is not, or should not, be deemed as disproportionate. Both the CoE and the EU incorporate elements of militant democracy in their legislative frameworks and the case law of their enforcement mechanisms. The CoE’s focus on human rights, democracy, and the rule of law, as well as the ECHR, contribute to the implementation of the militant democracy principles. Through its foundational principles and legal mechanisms such as Article 7 of the TEU and the CJEU’s jurisprudence in conjunction with Article 52(2) of the Charter, the EU also upholds and safeguards democratic values.

Ultimately, the question of whether democracy is a Trojan horse or Achilles’ heel concerning far-right parties depends on how effectively societies and legal systems respond to the posed challenges. By upholding democratic values, promoting social cohesion, and addressing the existence and urgency of the legal challenges posed by the far-right, European democracies can strengthen their resilience and ensure the continued protection of individual rights and democratic ideals. Efforts to combat legal challenges of the far-right within the European constitutional framework should focus on striking a balance between preserving democratic principles, individual rights protection, and the prevention of dissemination of harmful ideologies. This may involve enacting legislation to address legal gaps by strengthening the regulatory framework. Additionally, the promotion of civic education and critical thinking are crucial to foster an inclusive dialogue to counter the appeal of the far-right parties and their ideologies.

5.1 Suggestions for Further Research

The following research suggestions aim to deepen the understanding of far-right parties, their ideologies, and the challenges they pose to democracy. By exploring these areas, the scholarship could contribute to the development of effective strategies and policies to safeguard democratic values and institutions in the face of the far-right threat. Hence, the present thesis serves merely to scrape the bottom of the barrel regarding the relationship between the far-right parties and the European constitutional democracies. In further research, the comparative analysis of far-right parties could be expanded *beyond* the two circumscribed parties. Including other prominent European far-right parties would aid in identifying common denominators and variations in their programs, ideologies, and electoral support. Furthermore, digging deeper into the historical context by examining the far-right parties before World War II considering their programs, ideologies, and electoral support would benefit the investigation of the effectiveness and limitations of the legal measures inspired by militant democracy in the post-World War II period. That could be achieved by case-to-case analysis of when the measures were applied and the evaluation of their impact on the democratic process and fundamental freedoms and rights. Ultimately, the long-term implications of the rise of the far-right parties on democratic institutions, social cohesion, and European integration could be examined.

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