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Militant Democracy as a 'Legal Irritant'. The Electoral Case Law of the Romanian Constitutional Court and the Western Constitutional Tradition of the Rule of Law*

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CONTENTS: 1. Introduction: Setting the Stage. - 2. 'Militant Democracy' in Comparative Perspective: A Rationalisation Mechanism within the Democratic Constitutional State? - 2.1. Militant Democracy in Post-War Europe: Conceptual Bases, Rationale, and Instruments. - 2.2. Militant Democracy Reaches the Romanian Legal Order: An Overview- - 2.3. Militant Democracy in the Case Law of the ECtHR: A Rights-Based Approach. - 3. 'Legal Irritants' as a Lens for Identifying "Perturbations": Evolutionary Dynamics of the Rule of Law in the Romanian Legal Order. - 3.1. The Perturbatory Dynamics of 'Legal Irritants'. - 3.2. The Law's "Binding Arrangements" with the Romanian Political System: Implications for the Meaning of 'Militant Democracy' Within and Beyond the Host Legal Order. - 3.3. Triggering the "Perturbations": The Application of Militant Rationale During the Presidential Elections. - 4. Conclusion: Normative Implications for the Romanian Legal Order and Beyond.

1. Introduction: Setting the Stage

In 2024-2025, the Romanian Constitutional Court (Curtea Constituţională a României, CCR) became the central actor in an unprecedented electoral sequence marked by intense political contestation, drawing on arguments that recall 'militant democracy' – a classical twentieth-century European doctrine. Beginning with the exclusion of a presidential candidate and culminating in the annulment of the first round of the presidential election, the CCR's rulings redefined eligibility standards and significantly affected the electoral process. As is well known, the re-run ultimately resulted in the election of Mr Nicuşor Dan.

The CCR's electoral case law never explicitly engages with the terminology of 'militant democracy', yet the general motivation is ultimately aimed at defending the democratic foundations of the Romanian state.[1] In this context, these rulings raised

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novel legal challenges and concerns about the capacity of constitutional interpretation to produce destabilising consequences. Against this background, the paper addresses the following question: how can the CCR's measures be conceptually framed using the analytical tools of comparative law, and how can comparative studies account for the unexpected consequences of judicial interpretations that extend beyond the Constitution's original design? More broadly, to what extent might such interpretations affect the alignment of the Romanian legal order with the substantive conception of the rule of law rooted in the Western constitutional tradition – one that encompasses the protection of (political) pluralism and fundamental rights? How, in turn, might this reshape the broader understanding of the rule of law within that tradition, potentially reconstructing original meanings across the European legal space?

This paper suggests that the notion of 'legal irritant', in the sense proposed by Gunther Teubner,[2] provides a useful framework, as it describes an external norm incorporated into a host legal order to serve a specific function – typically, to foster a degree of convergence of meaning across different legal orders. Importantly, this notion highlights how such incorporation, rather than integrating smoothly and fulfilling its intended function, may instead trigger "perturbations" and gradual processes of reconstruction within the host legal order.

Within the broader phenomenon of 'legal transplants' or 'constitutional migrations',[3] and even in connection with the integrative function traditionally attributed to constitutional interpretation,[4] the notion of 'legal irritant' is particularly useful in that it foregrounds the possibility that a received concept or doctrine may generate unexpected consequences – including what Teubner described as "wild perturbations"[5] – within the host legal order, and simultaneously produce

[1] Notably, the challenge to Ms Şoşoacă's candidacy expressly argued that a presidential candidate is bound to observe the State's democratic character and foundational values, the lack of such attachment being "sanctioned" – by unconstitutionality for parties, and by ineligibility for presidential candidates – without infringing their constitutional rights. See CCR, Ruling No. 2/2024, 5 October 2024, *Monitorul Oficial* no. 1003, 8 October 2024, para. 6.

[2] G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, in *Modern Law Review*, vol. 61, 1/1998, p. 11 ff., esp. p. 18. On the category, see V. Perju, *Constitutional Transplants, Borrowing, and Migrations*, in M. Rosenfeld – A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 1304 ff., esp. p. 1309-1310. See also, more generally on Gunther Teubner's contribution to comparative legal studies, R. Scarciglia, *Metodi e comparazione giuridica*, 3rd ed., Padova, 2021, p. 162-163, and the reference to the pioneering article on 'legal irritants' at p. 213.

[3] See V. Perju, *op. cit.*, p. 1306-1308. In this paper, the terms 'transplants' and 'constitutional migrations' are used interchangeably.

[4] Still, the category of 'legal irritants' remains compatible with these constitutional theory notions, since they share similar rationales – at least early in their application – namely facilitating the extraction of an institution's legal meaning within a specific legal order. See, from different constitutional traditions, L.H. Tribe, *American Constitutional Law*, III ed., New York, esp. p. 30-80; K. Hesse, *Die normative Kraft der Verfassung*, Tübingen, 1959.

[5] G. Teubner, *Legal Irritants*, cit., p. 12.

reconfigurations of binding relationships between law and politics and broader reconstructions of meaning with regards to the original doctrine.[6] This paper's central argument is that 'legal irritant' captures, both analytically and normatively, the recalibration of law/politics relations produced by the application of militant-democracy reasoning in Romania during the 2024-2025 presidential election, along with the attendant shifts of meaning observed in this case study – thereby supporting broader conclusions about the legal meaning of this doctrine across Europe.

As is well known, 'militant democracy' defines the set of instruments aimed at protecting the democratic order by limiting specific freedoms of actors who oppose basic democratic principles and take concrete action to subvert them.[7] This doctrine refers to "a form of defence of the Constitution, […] when measures are taken to suppress those (usually collective) forms of ideological and political dissent which clearly do not share the values underpinning the Constitution and seek to undermine it".[8] In functional terms, the notion seeks to foster a convergence of meaning across legal orders, specifically around the foundational democratic values of the post-war constitutional state. Although the instruments (and their sources of law) available under the various legal orders differ significantly, the comparative experiences across Europe reveal at least a partial convergence in the underlying logic of democratic self-defence.

Convergence here refers not to uniformity or identical thresholds,[9] but to a widely shared understanding that, in exceptional circumstances and subject to legal safeguards, democratic systems may protect their fundamental principles against actors seeking to undermine them through democratic means. Put normatively, the function of 'militant democracy' – typically in post-authoritarian contexts – is to rationalise, through legally codified instruments, the management of potential threats to democracy arising from within the legal order itself, thereby addressing a central

[6] 'Legal irritant' is not treated here as intrinsically opposed to broader theories of legal transplants or constitutional migrations, since in line with current comparative law research the latter may themselves involve reinterpretation, adaptation and transformation within the host legal system. E.g., M. Siems, *Legal Transplants: An Interdisciplinary Approach*, Oxford, 2026, also situating 'legal irritants' within that debate. From this perspective, "[t]ransplants generally 'work' even if they are modified in their host environment" (p. 2). See also D. Dworniczak – D. Nowacka – C. Paulesu, M. Siems – O. Ucarer, *The Notion of Legal Transplants Beyond the Anglosphere: Decentring the Debate*, in *Transnational Legal Theory*, vol. 16, 3/2025, p. 357 ff.

[7] For an overview of the doctrine's origins and surrounding debates, see A. S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*, New Haven-London, 2014; R. Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, in *Michigan Journal of International Law*, vol. 29, 1/2007, pp. 49 ff., and *infra* in Section 2.

[8] F. Furlan, *Introduzione*, in A. Bardusco – F. Furlan – M. Iacometti – C. Martinelli – G.E. Vigevani – M.P. Viviani Schlein, *Costituzioni comparate,* 3rd ed., Torino, 2013, p. 17 (author's transl.).

[9] On the issue of 'comparability' in comparative legal studies, and how it presupposes a minimum degree of (cultural) homogeneity – understood as a point of contact, typically the liberal-democratic foundations of the legal order – that may encompass both convergences and divergences, see R. Scarciglia, *op. cit.*, p. 145.

paradox of the liberal-democratic state: how to guarantee its own normativity through democratic means.[10]

The developments of 2024-2025 in Romania invite reflection on whether militant democracy may extend beyond its typical scope: a self-defence generally applied against systemic, imminent, anti-democratic threats posed from within the legal order by collective actors. In this respect, the case points to a shift in the subjective scope of application of the militant rationale, from collective actors to individuals, without the prior codification that would have fixed its preconditions and the procedural guarantees flowing from them. The implications of this shift become all the more pressing as the structural fragmentation and individualisation of many contemporary societies,[11] the crisis of the party State system – that is, the weakening of parties as the main channel through which citizens' political will is formed and expressed[12] – and the digitalised public sphere increasingly favour personalised forms of politics.[13] It is here that the relevance of 'legal irritant' becomes clear: the effects of such an application are not exhausted by the legal outcome of the case, but extend to the terms on which the legal and political systems are coupled – the status of the President is further politicised rather than settled into its constitutionally assigned role, and the electoral-review function of the CCR mutates, in practice, into a substantive supervision of the conditions under which democracy is respected. More broadly, the case may reflect a wider transformation in the understanding of the rule of law within contemporary constitutional democracies, and the risk that its substantive dimension is pursued at the expense of the formal guarantees on which it necessarily rests.

Against this background, one can briefly recall the key events.[14] On 5 October 2024, ruling on a challenge brought under Law No. 370/2004 on the election of the

[10] This paradox is famously captured by the Böckenförde's dilemma, according to which the "the liberal, secularized state is nourished by presuppositions that it cannot itself guarantee" (E.-W. Böckenförde, *State, Society and Liberty. Studies in Political Theory and Constitutional Law* [1976], New York /Oxford, 1991, p. 45), and by Karl Popper's related 'paradox of tolerance', according to which unlimited tolerance may ultimately lead to the destruction of tolerance itself (K. Popper, *The Open Society and Its Enemies*, London, 2019 [1945], vol. I, p. 117 and n. 4 to Chapter seven).

[11] W. L. Bennett – A. Segerberg,*The Logic of Connective Action*, in *Information, Communication & Society*, vol. 15, 5/2012, p. 739 ff.

[12] See, more generally, *Parteienstaatlichkeit - Krisensymptome des demokratischen Verfassungsstaats? Die öffentlichrechtliche Anstalt: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Freiburg i. Ue/CH vom 2. bis 5. Oktober 1985*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 44, 1986, with contributions of M. Stolleis, H. Schäffer, R. A. Rhinow, K. Lange and R. Breuer, available at: https://doi.org/10.1515/9783110905885 (last accessed: 9 July 2026); S. Gambino, *Il ruolo dei partiti politici e la legge elettorale, fra storia costituzionale del Paese e attualità*, in *Rivista AIC*, 2/2013; M. Salvador Martínez (ed), *Derecho de partidos en Europa. Origen, evolución y retos en perspectiva comparada*, Madrid, 2025.

[13] See, e.g., I. McAllister, *The Personalization of Politics* in R.J. Dalton – H.-D. Klingemann (eds), *The Oxford Handbook of Political Behavior*, Oxford, 2007, p. 571 ff.

[14] The precise sequence of developments is discussed below in Section 3.3.

President of Romania[15] against the Central Electoral Bureau's (BEC) decision registering Ms Diana Iovanovici-Şoşoaca's candidacy,[16] the CCR annulled that decision and thereby excluded her from the presidential race, holding that her public conduct was incompatible with the constitutional identity of the Romanian State.[17] The ruling marked a notable departure from the Court's prior case law.[18]

Importantly, the CCR did not establish the underlying facts through an adversarial procedure, treating the anti-democratic conduct of Ms Şoşoacă as "notorious".[19] The CCR characterised that conduct in general terms – a systematic, persistent and prolonged course of public declarations, positions and expressed convictions contrary to constitutional values, combined with participation in certain public events – which it held to amount not to political debate or electoral positioning but to a constantly anti-democratic and antisemitic discourse, "*inciting the alteration of the*

[15] *Legea privind alegerea Preşedintelui României*, republished in *Monitorul Oficial* No. 650, 12 September 2011.

[16] The BEC (*Biroul Electoral Central*) is an administrative electoral authority which verifies whether candidacies meet the 'substantive and formal conditions' set out in Law No. 370/2004, registering those that do and rejecting those that do not (Art. 29(1)). It functions only during the electoral period and ceases its activity once the process concludes. Its composition and tasks are established by the same law and include centralising the election results, determining the elected candidate, and submitting the documentation required for validation of the presidential mandate to the CCR. Its acts are administrative in nature and subject to electoral litigation. Registration or rejection is effected by decision within a maximum of 48 hours of the lodging of the candidacy (Art. 29(2)) and may be challenged before the CCR within 24 hours of the expiry of that period. Standing to challenge lies with candidates, political parties, organisations of citizens belonging to national minorities, political alliances, electoral alliances and voters; challenges are made in writing and lodged directly with the Court, which rules within two days of registration, its decisions being final, communicated forthwith to the BEC and published in the *Monitorul Oficial al României*, Part I (Art. 31(1)-(2)).

[17] CCR, Ruling No. 2/2024, cit., mentioning explicitly the "constitutional identity" of the State and of the society (para. 37).

[18] Dissenting Judge Scântei held that the Court could not, by interpreting its own competence, establish new eligibility conditions leading to a prohibition on standing, and that the majority had converted an objective electoral review into a subjective one – verifying a candidate's conduct, acts and statements – without the guarantees specific to the right to a fair trial.

[19] CCR, Ruling No. 2/2024, cit., para. 60-62 ("Este de notorietate faptul că, prin discursul său constant…"). The referral set out (paras. 7-14) conduct such as a proximity to the Russian Federation (attendance as guest of honour at Russian Embassy receptions, including after her election to the European Parliament; an apology to the Embassy over a protest concerning the Fântâna Albă massacre; statements that there is more democracy in Russia than in Romania); advocacy of withdrawal from NATO and the EU, together with calls for the annexation of Ukrainian territory and for Romanian neutrality, in a context in which Euro-Atlantic integration is constitutionally enshrined; and incidents involving the assault and deprivation of liberty of Rai Uno journalists in 2021 and the blocking of a vaccination centre in Iaşi county. A second applicant appended a further list, including antisemitic and legionary attitudes and "friendship" with Russia, likewise treated as "notorious" facts "requiring no proof" (para. 22). The Court expressly grounded its conclusion on the facts as described by the applicants (para. 63).

democratic foundations of the State and the breach of the constitutional order"[20] through its call for the removal of essential guarantees of the State's fundamental values and choices, namely EU and NATO membership.

On 6 December 2024, the CCR annulled the first round of the presidential elections through a reasoning that, while formally grounded in electoral integrity and foreign-interference concerns, clearly displayed elements reminiscent of militant-democratic logic. More specifically, the CCR held that through the exercise of the "constitutional and democratic review of the electoral process, the Court fulfils its duty to ensure the observance of the procedure for the election of the President of Romania", the "ultimate objective" of this duty being that of "*restor[ing] […] confidence in the democratic legitimacy of public authorities*", in the "legality and fairness of the elections" and "dispel[ling] any suspicion similar to the elements identified in this case". In this way, "the electoral rights of citizens (the right to vote and the right to be elected) and *the foundations of the constitutional order are protected*" – both considered by the CCR as "*essential premises for maintaining the democratic nature of [Romania] as a State governed by the rule of law*".[21]

These decisions opened new legal questions and intensified existing political tensions, culminating with the resignation of President Klaus Iohannis in February 2025 and the assumption of interim presidential duties by then-Senate President Ilie Bolojan.[22] Notably, as preparations for the new elections unfolded, the BEC excluded Mr Călin Georgescu from standing in the re-run elections on the basis of the CCR's earlier reasoning. This decision was subsequently upheld by the CCR on 11 March 2025.[23]

The CCR's rulings, along with the ensuing events, set the stage for the decisive second-round vote held on 18 May 2025, in which Mr Nicuşor Dan secured 53.60% of the vote amid a record turnout of 64.72%, defeating the ultranationalist candidate Mr George Simion.[24] Although Mr Simion initially accepted the result, he soon

[20] CCR, Ruling No. 2/2024, cit., para. 60 (emphasis added). Furthermore, the Court indicates that "[s]uch conduct raises the question of the use of constitutional institutions and procedures with a view ultimately to negating constitutionally regulated requirements, principles and values" (ibid.) – a typical militant rationale.

[21] CCR, Ruling No. 32/2024, 6 December 2024, *Monitorul Oficial* No. 1231, para. 21 (emphasis added).

[22] Later, under President Dan, Mr Ilie Bolojan was nominated for the position of Prime Minister. According to Article 85 RC, "[t]he President of Romania designates a candidate for the post of [PM] and appoints the Government on the basis of a vote of confidence from Parliament". The Government formation thus reflects the constitutional aim of enhancing democratic legitimacy by involving the President and Parliament, who are both popularly elected authorities. However, the PM relies entirely on parliamentary confidence. See B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, Oxford-Portland, 2016, p. 113. See in more detail *infra* Section 3.2.ii).

[23] Ruling No. 7, of 11 March, available in Romanian at: https://www.ccr.ro/wp-content/uploads/2025/03/Hotarare_7_2025.pdf (last accessed: 9 July 2026).

[24] Specifically, 11,641,866 voters out of 17,988,218 registered (see official data available at https://prezenta.roaep.ro/prezidentiale18052025/pv/results, last accessed: 9 July 2026).

contested its validity. On 20 May 2025, he filed a legal challenge with the CCR, and his political supporters organised mass protests, claiming that the electoral process had been compromised by digital manipulation and foreign (European) interference. Importantly, Mr Simion's legal arguments closely echoed the reasoning previously employed by the CCR in promoting democratic self-defence, thereby illustrating some of the conundrums of these judicial interventions.

Initially, the swearing-in of President Dan on 26 May 2025 appeared to mark a moment of relative constitutional stabilisation within Romanian political life: a moment that could have, symbolically at least, offered an opportunity for the "two Romanias" to move toward reconciliation after the deep divisions exposed by the presidential elections.[25] However, the CCR's recourse to a motivation that evokes the conceptual features of 'militant democracy' invites a retrospective critical reassessment. This assessment should account for the troubling effects associated with the Court's use of a militant reasoning that, within the Romanian constitutional order, is traditionally applicable to political parties – not individuals – and is subject to specific guarantees as developed in the case law of the European Court of Human Rights (ECtHR).

The CCR's rulings therefore raise an important normative question: does the expansive use of militant reasoning within the domestic legal order ultimately contribute to consolidating the democratic foundations of Romania's constitutional reality, in line with the original rationale of democratic self-defence, or does it simultaneously trigger systemic tensions, from a rule-of-law perspective, through the progressive extension of CCR's competences beyond their traditional boundaries? To address this question, the paper situates its research questions within the expanding scholarship on the contemporary "terrain for militant democracy",[26] understood as the use of measures aimed at countering actors perceived as subverting democratic principles both within and beyond traditional electoral channels. Within these broader areas of analysis, such as electoral monitoring, religious mobilisation, foreign interference and digital platforms and 'democratic regression' in Central and Eastern Europe,[27] this paper focuses on the scope of militant measures in relatively young

[25] It should be noted already at this point that one year after the swearing-in of President Nicuşor Dan, the Romanian political landscape remains marked by institutional tensions, including a motion of confidence against the Government led by Ilie Bolojan and renewed debates concerning the role of the President in the current constitutional framework.

[26] J.-W. Müller, *Militant Democracy*, in M. Rosenfeld – A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, cit., p. 1253 ff., esp. p. 1255-1256, 1263-1266. See also J. de Miguel Bárcena, *Pasado y presente de la democracia militante (con especial referencia al caso español)*, in *Revista Vasca de Administración Pública*, 122/2022, p. 17 ff., esp. p. 33 ff.

[27] See, e.g., M. Coli, *The Role of the European Union in Protecting Democracy through Legislation: The Case of Disinformation*, in *European Papers-A Journal on Law and Integration*, 1/2026, p. 81; T.V. Olsen – J. Tuovinen, *Between militant democracy and citizen vigilantism: Using citizens' assemblies to keep parties democratic*, in *Global Constitutionalism*, vol. 13, 3/2024, p. 535 ff.; G. Colocrese, *Il dialogo tra la Corte costituzionale della Romania e la Commissione europea nel contrasto alla disinformazione elettorale online*, in *Nuovi Autoritarismi e*

democracies, from a historical perspective.[28] More specifically, the paper argues that the CCR's application of a militant rationale during the 2024-2025 presidential elections arguably facilitated an expansion of its institutional role, which may in turn contribute to a gradual shift from the Western constitutional tradition of the rule of law, particularly as regards the role of courts in protecting political pluralism and fundamental rights.[29]

Three features of the Romanian legal order, developed in Section 3.2, frame the analysis: a constitutional tradition built on the extensive incorporation of Western models; a semi-presidential system placing a directly elected President at the intersection of law and politics; and a Constitutional Court established in 1992 without a settled domestic practice of centralised review, which has since assumed an expanding role in electoral matters. Together these help account for the "perturbations" of the 2024-2025 presidential elections.

The paper proceeds as follows. Section 2 sets out the conceptual features of 'militant democracy' and examines the European constitutional experiences that have incorporated it: Germany, Italy and France, emblematic of the post-war "first wave" of democratisation; Portugal and Spain, illustrating the transitions of the 1970s; and Romania, within the post-communist wave in Central and Eastern Europe. It then considers the doctrine's limits in light of the "common denominator" reflected in the ECtHR's case law, which arguably reveals converging conceptions of democratic self-defence in the European legal space: militant measures apply primarily to political parties rather than individual candidates, operate only as last-resort tools, and remain subject to specific procedural guarantees. Section 3 introduces 'legal irritants' as a particular manifestation of broader processes of legal transplantation and shows how the concept illuminates the CCR's application of militant reasoning in 2024-2025 presidential elections. Section 4 concludes on the normative implications for the

Democrazie: Diritto, Istituzioni e Società, vol. 7, 1/2025, p. 185 ff.; J.F. Sánchez Barrilao, *El impacto de la Inteligencia Artificial en los procesos democráticos*, in *Revista de Derecho Constitucional Europeo*, 43/2025 available at: https://www.ugr.es/~redce/REDCE43/articulos/01_BARRILAO.htm (last accessed: 9 July 2026); O. Pollicino – P. Dunn, *Intelligenza artificiale e democrazia: opportunità e rischi di disinformazione e discriminazione*, Milano, 2024. 'Democratic regression' refers to the process by which key elements of a constitutional democracy are eroded incrementally rather than abruptly dismantled (A. Buratti, *Western Constitutionalism: History, Institutions, Comparative Law*, Cham, 2023, p. 289). On its global dimension, see F. Zakaria, *The Rise of Illiberal Democracy*, *Foreign Affairs*, vol. 76, 6/1997, p. 22 ff. For further discussion, see S. Suteu, *Democratic Backsliding and Comparative Constitutional Soul-Searching in Europe*, in *Constitutional Studies*, vol. 11, 1/2025, p. 115 ff.; G. Halmai, *Illiberalism in East-Central Europe*, in A. Sajó – R. Uitz – S. Holmes (eds), *Routledge Handbook of Illiberalism*, London, 2021, p. 813 ff; R. Tarchi, *Le "democrazie illiberali" nella prospettiva comparata: verso una nuova forma di stato? Alcune riflessioni di sintesi*, *DPCE online*, vol. 44, 3/2020, p. 4155 ff.; A. von Bogdandy – P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, 2015.

[28] E.g., R. Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, cit., describes militant measures as particularly associated with transitional constitutional contexts.

[29] For the theoretical framework within which this tradition can be understood, see *infra* in Section 2.1.

substantive understanding of the rule of law and its trajectory within the Romanian legal order and beyond.

2. *'Militant Democracy' in Comparative Perspective: A Rationalisation Mechanism within the Democratic Constitutional State?*

The comparative survey that follows aims to set the Romanian case against the background of the constitutional experiences through which 'militant democracy' took shape and consolidated across Europe during the 20th century. Reconstructing the doctrine's rationale, instruments, and limits, together with the "common denominator" reflected in the case law of the ECtHR, provides the baseline against which the CCR's electoral reasoning can be assessed. Two features bear emphasis for this case study: democratic self-defence, as codified in the RC, applies primarily to political parties and it operates only as a measure of last resort, subject to strict conditions and procedural guarantees. Against this background, this paper examines the doctrine's expansion during the 2024-2025 presidential elections.

It is axiomatic in comparative constitutional law that the legal recognition of social pluralism lies at the heart of the evolution from the liberal to the democratic state.[30] Accordingly, this model frames pluralism both as a precondition for the legitimacy of post-war constitutions and as a guiding objective of democratic constitutionalism, helping to structure the defining elements of the Western constitutional tradition. Crucially, pluralism also draws its normative force from the regular, effective possibility of a change in political direction, secured through free and competitive elections.[31] More generally, this model is grounded in democratic legitimacy, the protection of fundamental rights and minorities, and the openness of constitutional texts[32] both to their concretisation by the legislature in the day-to-day functioning of the state and to their interaction with supranational and international legal orders.

Yet "the freedoms people have become so fond of require the perpetuation of the democratic system, including fundamental rights and freedoms and […] the endurance of the rule of law".[33] In this framework, the rule of law, understood in its "thick" (substantive) sense, emerges as a structural component of democratic

[30] A. Buratti, *Western Constitutionalism*, cit., p. 201, 319-320. For an account of twentieth-century legal thinking on the relationship between order and pluralism, see M. Croce - M. Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati*, Stanford, 2020, p. 200.

[31] See, e.g., M. Azpitarte Sánchez, *Constitución del pluralismo y método jurídico*, in *Teoría y Realidad Constitucional*, 21/2008, p. 447 ff.

[32] A. Buratti, *Western Constitutionalism*, cit., p. 260.

[33] M. Thiel, *Introduction*, in Id. (ed.), *The "Militant Democracy" Principle in Modern Democracies*, New York, 2009, p. 1 ff., esp. p. 1.

constitutionalism.[34] This understanding refers not only to the liberal, formal notion of the binding force of law for both state bodies and citizens – with emphasis on the administration, judicial independence,[35] and the primacy of the Constitution within the hierarchy of sources of law – but also to the democratic legitimacy required for the enactment of binding norms through representative institutions.

Equally important, this constitutional model entails the protection of political opposition and minorities through fundamental rights and judicial guarantees,[36] thus closely intertwining with the inclusive premises of post-war constitutionalism: "[t]he democratic state['s founding principle] is *that sovereignty resides with the people* […] The [democratic state] is a *representative* state, but, unlike the liberal state, it is [a] *pluralist* […] *constitutional* state. […] The concept of the *rule of law* is also evolving. The liberal conception […] is […] superseded by that of legality in a *substantive* sense".[37]

Originally codified in the German Basic Law, 'militant democracy' must be assessed in light of the mutual coexistence and reinforcement between pluralism and the rule of law, pluralism being both the premise and goal of post-war democratic constitutions. Against this background, this doctrine's success or limits as a constitutional category – originally designed to protect democracy from those who radically oppose it from within the legal order[38] – depend to a significant extent on constitutional practice. It is worth recalling that limits on the political freedoms of associations and individuals constitute limitations on political pluralism itself, and should therefore be applied only as a measure of last resort, given that pluralism is not merely "tolerated" within the constitutional state but shapes the foundational structure of the democratic legal order.[39] So understood, it is not an alternative to pluralism but a constitutional device designed to manage the paradox of defending democracy without compromising its core, thus avoiding becoming, in turn, a mechanism for the exclusion of minorities or ordinary political disagreement.

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[34] See P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *The rule of law and the separation of powers*, 2017, p. 95 ff. As is well known, the concepts of 'rule of law', *Rechtsstaat*, *état de droit* and *stato di diritto* are closely related but not equivalent. See, among many others, P. Ridola, *Dallo stato di diritto allo stato costituzionale*, in A. Somma – A. Fusaro – G. Conte – V. Zeno-Zencovich (eds), *Dialoghi con Guido Alpa*, Roma, 2018, 459 ff. For a recent reconstruction of the classic 'rule of law'/*Rechtsstaat* opposition, see A.E. Galeotti, *Two interpretations of the Rule of Law*, in B. Faedda (ed), *Rule of Law. Cases, Strategies and Interpretations*, Ronzani, 2021, p. 67 ff. On the rule of law as a pillar of modern constitutionalism, including globally: R. Bifulco, *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, in *Rivista AIC*, 4/2014, p. 1 ff.

[35] E.S. Tănăsescu, *The Independence of Justice as Proxy for the Rule of Law in the EU: Case Study – Romania*, in *Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società*, vol. 3, 1/2021.

[36] A. Buratti, *Western Constitutionalism*, cit., p. 198.

[37] M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, 8th ed., Torino, 2022, p. 68, 73-74 (author's trans).

[38] Indeed, "[t]he idea of a 'militant democracy' deals with internal threats" (M. Thiel, *Comparative Aspects*, in Id. (ed.), *The "Militant Democracy" Principle in Modern Democracies*, cit., p. 38).

[39] On the relationship between tolerance and militant democracy, see *infra* in Section 2.1.

2.1. Militant Democracy in Post-War Europe: Conceptual Bases, Rationale, and Instruments

'Militant democracy' is typically linked to a set of constitutional mechanisms designed to defend the democratic order against radical threats[40] arising from within the legal order. The notion refers to "the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying [democracy]."[41] The term was first coined in the mid-1930s by the German political scientist Karl Loewenstein,[42] at a time when authoritarian movements were emerging within democratic systems,[43] although the concept's historical roots are often traced back to the Weimar Republic's collapse. While it remains debated among scholars whether Weimar possessed the legal instruments to resist anti-democratic forces, it is certain that the framers of the Grundgesetz (GG) adopted a proactive approach as regards the protection of democratic values.[44]

Certainly, whatever the concept's historical origins may be – whether rooted in the Weimar experience or not and, if so, to what extent – there is a shared assumption that this tragic experience left a lasting imprint on the development of the Federal Republic of Germany and, more generally, on constitutional democracies in post-war Europe. Thus, 'militant democracy' becomes a legal doctrine with diverse manifestations across post-war European legal orders, specifically in those emerging from phases of authoritarian rule to democratic government.[45]

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[40] B. Iancu, *Militant Democracy and Rule of Law in Three Paradoxes: The Annulment of the Romanian Presidential Elections, Hague Journal on the Rule of Law*, 2025, p. 1 ff. (esp. 1).

[41] J.-W. Müller, *Militant Democracy*, cit., p. 1253.

[42] K. Loewenstein, *Militant Democracy and Fundamental Rights I*, in *American Political Science Review*, vol. 31, 3/1937, p. 417 ff.; K. Loewenstein, *Militant Democracy and Fundamental Rights II*, in *American Political Science Review*, vol. 31, 4/1937, p. 638 ff. Another significant intellectual figure in the foundational development of militant democracy (*streitbare Demokratie* or *wehrhafte Demokratie* – a concept invoked by the German Federal Constitutional Court in the mid-1950s) was the sociologist K. Mannheim (see J.-W. Müller, *Militant Democracy*, cit., p. 1258).

[43] J.-W. Müller, *Militant Democracy*, cit., p. 1253.

[44] Nevertheless, Carl Schmitt's critique of parliamentary decision-making and his concept of 'defence of the Constitution' are commonly noted among the intellectual roots of this doctrine: *Legalität und Legitimität,* München-Leipzig, 1932, and *Der Hüter der Verfassung,* Tübingen, 1931. As A. Berthout (*La démocratie militante. Étude comparée d'une doctrine constitutionnelle*, "Collection des Thèses", No. 226, Bayonne, 2026, p. 27) shows, the link between the Weimar Republic and militant democracy long drew little attention in German scholarship, the Republic having been dismissed as "neutral" towards its enemies – a myth propagated by the Bundesverfassungsgericht from the 1950s. Under the influence of Christoph Gusy's work (*Weimar - die wehrlose Republik?*, Tübingen, 1991), critical studies have since relativised that narrative.

[45] J.-W. Müller, *Militant Democracy*, cit., p. 1254. Contrast this with the United States (US) model, described in M. Tushnet, *United States of America*, in M. Thiel (ed.), *The "Militant Democracy" Principle in Modern Democracies*, New York, 2009, p. 358 ff., esp. 358. For a comparison between the two approaches, see R. Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, in *Michigan Journal of International Law*, cit., p. 52 ff.

In a sense, the doctrine seeks to articulate in rational terms the idea that constitutional systems may employ universal responses – such as legal categories or instruments – to respond democratically to the enduring challenge authoritarianism poses to the foundational principles of the legal order.[46] Perhaps for this reason, this doctrine is sometimes also referred to as "defensive democracy" or "fighting democracy".[47]

Yet, as noted, this notion builds on the inherent tension between the political need to protect the constitutional order and the constitutional imperative of preserving the fragile consensus on which it rests: absent enforceable sanctions, constitutional authority may depend on a broad, shared acceptance of the Constitution as a precondition for its legitimacy.[48] The legal framework of militant democracy should therefore operate with restraint, especially towards movements that have gained substantial sociopolitical support, lest it contribute to the very instability it seeks to prevent. Its inner normative dynamics will often require tolerating unresolved ideological conflicts and maintaining constitutional ambiguities – not weaknesses, but potentially essential conditions for democratic resilience. Its functioning thus depends not only on codified mechanisms preventing the abuse of democratic infrastructure for authoritarian ends, but also on its capacity to address, through openness and ambiguity, the complex interaction between the legal order, its political reality, and societal cohesion.[49]

The *Weltanschauung* underpinning 'militant democracy' holds that core democratic values warrant legal protection, including through a defensive logic where such protection is expressly provided for in the Constitution or by statute. The doctrine thus rests on a substantive understanding of democracy, as opposed to a purely formal conception based on the procedural recognition of a state's "democratic" character and the occurrence of elections.[50] The substantive model seeks

[46] On the tendency of intellectuals to "grasp […] the world as a whole, explaining it entirely and offering universal solutions to its problems", cf. V. Havel, *Preface: Karl Popper's* The Open Society and its enemies *in the contemporary global world*, in K. Popper, *The Open Society and Its Enemies*, cit., p. xiv.

[47] J.-W. Müller, *Militant Democracy*, cit., p. 1253.

[48] D. Grimm, *Constitutionalism: past, present, and future*, Oxford, 2016, p. 138.

[49] Ibid. In this sense, tolerance may be regarded as the obverse of militant measures, which explains its natural invocation when delineating the contours of the doctrine under review: see G.H. Fox, G. Nolte, *Intolerant Democracies*, *Harvard International Law Journal*, 36, 1995, 1 (as referred to in J.-W. Müller, *Militant Democracy*, cit., p. 1254).

[50] To illustrate this point, see G.H. Fox, G. Nolte, *Intolerant Democracies*, in *Harvard International Law Journal*, vol. 36, 1/1995, p. 1 ff. (esp. p. 14, 16). Due to the abstractness critique of both models, the authors further distinguished between two types of democracies: tolerant (or passive) and militant (or active). The difference, they argued, lies in whether the constitution allows changes that could abolish or alter democratic institutions (ibid., p. 24). By classifying state practice in this way, four types of democracies were identified: tolerant procedural, militant procedural, tolerant substantive, and militant substantive, reflecting how states combine either a tolerant or militant approach with a procedural or substantive conception of democracy (p. 22). For the scholarly debate addressing this proposal, see P.E.

instead to ensure political and social pluralism, thereby enabling citizen participation and underpinning state legitimacy.[51] From this perspective, its central assumption is that the legal order must not only be established through democratic means, but must also retain some capacity for constitutional self-preservation, ensuring that its foundational principles cannot be exploited to undermine it.

It bears noting that 'militant democracy' differs from the 'state of exception' not only in its purpose, but also in its underlying dynamics, duration and institutional actors.[52] The latter is traditionally associated with emergency decisionism, referring to an extraordinary situation in which the executive or sovereign authority is empowered to suspend temporarily the ordinary operation of the legal order, in response to severe threats to the state's existence or security. Its logic is temporally limited and often related to external or existential dangers, defined by the displacement of ordinary legality through executive political decision-making. 'Militant democracy', by contrast, allows for no such suspension: it aims at preserving the democratic system through codified means, operating under a previous recognition of these means by specific sources of law (constitutional or statutory), and is typically "activated" against domestic actors under judicial supervision.[53] While the state of exception is thus executive-driven, extraordinary, temporary and reactive, militant democracy is a last-resort, preventive mechanism embedded within the democratic order.[54]

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de Morree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights*, Cambridge/Antwerp, 2016, p. 157 ff.

[51] For a classical account of this conception in the context of the German democratic order, see K. Hesse, *Escritos de Derecho Constitucional*, trad. P. Cruz Villalón – M. Azpitarte Sánchez, Madrid, 2012 (esp. p. 137 ff.). On the connection between the constitutional state, democracy, and pluralism in postwar German scholarship, see E. Fraenkel, *Deutschland und die westlichen Demokratien*, Stuttgart, 1964.

[52] See A. Ellian – G. Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror*, Dordrecht, 2012. Cf., however, M. Thiel (ed), *Wehrhafte Demokratie. Beiträge über die Regelungen zum Schutze der freiheitlichen demokratischen Grundordnung*, Tübingen, 2003, for an account of a broader approach to areas associated with this doctrine. Moreover, e.g., L. Pegoraro, *Para una clasificación dúctil de la democracia militante*, in *Revista Vasca de Administración Pública*, 96/2013, p. 193 ff., observes that the defence to oppression emanating from the people through the right of resistance, together with the suspension of the Constitution in order to defend it, responds to logics that are in part distinct from those of militant democracy. As is well known, the right of resistance is provided for by only a small number of Constitutions, such as the German Basic Law. On the right of resistance, see A. Buratti, *Dal diritto di resistenza al metodo democratico*, Milano, 2006.

[53] It is worth recalling at this point the relevance of the notion of 'abuse of rights' for the purposes of this paper. See, e.g., D. Bifulco, *L'abuso del diritto costituzionale. Un'ipotesi di lavoro*, in *Costituzionalismo.it*, 2/2018, p. 55 ff.

[54] See also, in this sense, A. Gatti, *La democrazia che si difende. Studio comparato su una pratica costituzionale*, Padova, 2023, p. 16-18. Some authors have argued that the emergency logic has already followed a path of normalisation within the constitutional state, notably in the post-9/11 anti-terrorism context. See, e.g., the notion of 'counter-terror state' by A. Sajó, *From Militant Democracy to the Preventive State?*, in *Cardozo Law Review*, 27/2006, p. 2255 ff. On the blurring of the spheres of "normalcy" and (permanent) "exception", this time in relation to the climate emergency, see R. Bifulco, *Rule of Law and Climate Emergency*, in *federalismi.it*, 5/2025, p. I-XV. When distinguishing between a state of exception and

Given the diverse European experiences, the notion of militant democracy may best be understood through a two-level approach distinguishing between (i) the common rationale underlying the democratic protection of the legal order, and (ii) the specific instruments through which different frameworks give effect to that rationale. Within the second level, a further distinction may be drawn according to whether those instruments are introduced by the Constitution or by statute. In the first case, they tend to take the form of a constitutional sanction – such as the dissolution of a party or the forfeiture of rights – rather than a criminal or administrative one. Where the militant rationale is given effect at the statutory level, the sanction more frequently assumes a criminal form and, importantly, remains open to legislative adaptation to contingent circumstances.

A further distinction concerns the subject against whom these instruments are directed. While democratic self-defence is typically aimed at collective actors – most visibly through the banning of parties and associations – positive law at times reaches the subversive individual directly. Yet scholarship has shown that what is addressed is rarely individual subversive activity as such, but the individual's activity as a member of a subversive organisation. Protection against individualised actors has thus been characterised mostly as an indirect protection against organised subversion, assuming two principal forms. Less commonly, it excludes the individual from political life through abuse-of-rights mechanisms – which in any event rest on a specific due process principle and are found only in German law and the ECHR. More often, it criminalises certain forms of participation in subversive organisations, typically by penalising those who maintain or reconstitute a prohibited one, thereby rendering the prohibition effective.[55] In both cases, the individual is reached only through a framework establishing beforehand the criteria against which anti-democratic conduct is to be assessed – whether the due process guarantees of the first form or the criminal process of the second.

At a first and more general level, legal scholars often address 'militant democracy' with the aim of determining whether there exists a substantive democratic core excluded from the outset from reform or transformation. This understanding is particularly characteristic of the Western legal tradition, especially after the Second World War. Yet the notion captures something more precise than the mere establishment of a liberal-democratic form of state: were that more expansive understanding of "protected democracy" to prevail, "democracies are always more or

militant democracy, one should also examine the role of the secret services in cases involving militant measures. The Romanian case is particularly illustrative, as the secret services became involved amid concerns about alleged foreign interference in the electoral process. Notably, their report was first declassified and only afterwards cited by the CCR in its reasoning, serving as a legal argument within the broader militant rationale that ultimately led to the annulment of the first round of the presidential elections.

[55] A. Berthout, *La démocratie militante*, cit., esp. p. 433.

less militant".[56] The question thus focuses on whether a substantive democratic core is protected by the Constitution,[57] without equating the identification of a militant legal order with its mere inclusion in the post-war wave of democratic constitutionalism.

The second level of analysis identifies the specific instruments available within the legal order, asking whether their codification takes place in the Constitution or in statutory law. Mechanisms designed to defend democracy have been codified in different forms across jurisdictions, often reflecting the specific legacies of the totalitarian regimes that preceded them. From a comparative perspective, these variations are best understood within the broader historical trajectory of democratisation in Europe: the development and institutionalisation of self-defence have unfolded through successive waves of change, from the post-war constitutional settlements to the democratic transitions of the 1970s and, finally, the post-communist transformations in Central and Eastern Europe. The following analysis therefore adopts a historically informed comparative approach, examining selected legal orders as representative of these phases in order to highlight how militant instruments have been articulated, adapted and at times reinterpreted within distinct constitutional contexts.[58]

The German experience is regarded as the typical model, serving as an "introduction for the comparison" or the "current constitutional crystallization" of the notion.[59] The GG expressly identifies the instruments of democratic self-defence.[60]

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[56] O. Pfersmann, *Shaping Militant Democracy: Legal Limits to Democratic Stability*, in A. Sajó (ed.), *Militant Democracy*, Utrecht,
2004, p. 47 ff, esp. p. 53.

[57] See, e.g., M. Klamt, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, in F. Bruinsma – D. Nelken (eds), *Explorations in Legal Cultures*, Den Haag, 2007, p. 133 ff., esp. p. 137.

[58] More generally, on the historical method in comparative constitutional law, see V.C. Jackson, *Comparative Constitutional Law: Methodologies*, in M. Rosenfeld – A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, cit., p. 54 ff., defined as a means for identifying "'genetic' forms of connections between systems, based on the influence one has on the development of another". The author also highlights a certain "degree of skepticism about strong claim of 'transplants'" when scholars engage in broader research on the circulation of ideas (p. 58). In Italy, see P. Ridola, *Comparazione e storia, Scritti di storia costituzionale comparata*, Naples, 2022: "the study of history provides [for the constitutionalist and the comparative scholar] a reservoir of methods, knowledge and critical judgement [so that] the jurist's horizon is not asphyxiated by abstract conceptual constructs, but rather expands to embrace the development of law as an experience, with an eye to the past, to the 'space of experience' (*spazio di esperienza*) [...] and the 'horizon of expectations' (*orizzonte di aspettative*) that the present allows the eye to glimpse" (*Dedica*). Finally, on the possibility to combine different methods in comparative law: R. Scarciglia, *op. cit.*, p. 130.

[59] M. Klamt, *Militant Democracy and the Democratic Dilemma*, cit., p. 135.

[60] The GG rejects axiological relativism by recognising that certain fundamental principles underpin the democratic coexistence of the political community established after 1949 and cannot be abolished. Article 79(3) designates as unamendable those provisions affecting "the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20" – namely the constitutional protection of human dignity and basic rights,

Article 21(2) establishes that parties seeking, by their aims or the behaviour of their adherents, to undermine or abolish the free democratic basic order or to endanger the existence of the Republic shall be unconstitutional. Uniquely in the comparative landscape, Article 18 foresees the forfeiture of basic rights, where these are used to "combat the free democratic basic order".[61]

Germany thus provides for two typical instruments restricting pluralism: the banning of political parties and the limitation of fundamental rights in cases of abusive exercise. The competent authority is the Bundesverfassungsgericht (BVerfG),[62] an arrangement designed to prevent governing parties from banning competitors in order to limit opposition or actively undermine pluralism.[63] Two features are worth

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the republican form of government, representative democracy, the rule of law, and the separation of powers. Besides establishing this 'eternity clause' (*Ewigkeitsgarantie*), Article 20(4) recognises the right of "any German […] to resist any person seeking to abolish this constitutional order, if no other remedy is available". The English translations of all referenced constitutions are available at: https://www.constituteproject.org.

[61] "Whoever abuses the freedom of expression [in particular the freedom of the press, the freedom of teaching, of assembly, of association, the privacy of correspondence, posts and telecommunications, the rights of property or the right of asylum] in order to combat the free democratic basic order shall forfeit these basic rights […]". One should also refer to Article 17 ECHR and, finally, to Article 25(3) of the Greek Constitution ("[t]he abusive exercise of rights is not permitted"), though the latter lacks a procedure for the forfeiture of an individual's political rights in cases of abuse. See, e.g., D. Bifulco (*op. cit.*, p. 65-66), who finds in the ECHR provision a further illustration of the "bidimensional" (subjective and objective) nature of the category of abuse of rights.

[62] The power to initiate party-ban proceedings before the BVerfG is reserved, under § 43 (Bundesverfassungsgerichtsgesetz, BVerfGG), to the Bundestag, the Bundesrat, and the Federal Government (and, for regionally confined parties, the respective Land government). For its part, the power to seek forfeiture of basic rights under Article 18 GG is reserved, under § 36 BVerfGG, to the Bundestag, the Federal Government or a Land government. The German legal order also provides for the banning of associations under Art. 9(2) GG and the *Vereinsgesetz* (Associations Act); unlike party bans, these are imposed by the executive – through an administrative decree based on intelligence and police evidence – and reviewed by the administrative courts. See recently the COMPACT case, in which the Federal Administrative Court (BVerwG) overturned the federal ban of COMPACT-Magazin GmbH: BVerwG, Urteil vom 24 June 2025, 6 A 4.24. For a critical commentary, see C. Möllers, J. Tabbara, *Die COMPACT-Entscheidung des Bundesverwaltungsgerichts: Pressefreiheit schlägt Vereinsverbot?*, in *JuristenZeitung*, 81, 2026, p. 656 ff.

[63] J.-W. Müller, *Militant Democracy*, cit., 1253. One should recall the contributions of E. Bulla, *Die Lehre von der streitbaren Demokratie*, in *Archiv für öffentliches Recht*, 98/1973, p. 340 ff, and J. Lameyer, *Streitbare Demokratie contra Terrorismus?*, in *ZRP*, 2/1978, p. 49 ff., engaging critically with the scope of *streitbare Demokratie*. In its Order of 22 May 1975 (BVerfGE 39, 334, the *Extremistenbeschluss*), the Court read the notion to encompass the civil servant's duty of loyalty under Art. 33(5) GG, holding that the state may require *Beamte* to actively stand up for the free democratic basic order (see also G. Brinkmann, *Militant Democracy and Radicals in the West German Civil Service*, in *The Modern Law Review*, vol. 46, 5/1983, 584-600). This scholarship also questioned whether 'militant democracy' could appropriately extend to the violent terrorism of the Red Army Faction. On the loyalty duty, see also ECtHR [GC], 26 September 1995, *Vogt v. Germany*, No. 17851/91, and ECtHR, 29 November 2022, *Godenau v. Germany*, No. 80450/17; more generally, J. Krüper, *Entscheidungsanmerkung (BVerfG, Urt. v. 17.1.2017 – 2 BvB 1/13)*, in *Zeitschrift für das Juristische Studium*, 3/2017, p. 365 ff., esp. p. 366.

underlining. First, both instruments are entrenched at the constitutional level. Second, their primary effect is a constitutional rather than a strictly criminal sanction – the unconstitutionality of the party or the forfeiture of fundamental rights, both operating through autonomous procedures deriving directly from the GG.[64] Criminal law nonetheless retains in Germany a supplementary role, since the reorganisation or continuation of a banned party is itself an offence, serving to render the constitutional prohibition effective.[65] This legal order may thus be understood as the pole at which militant democracy operates principally, though not exclusively, through a constitutional rather than a criminal logic.

Until today, only two parties have been banned under Article 21(2) GG: the Socialist Reich Party (*Sozialistische Reichspartei*, SRP) in 1952[66] and the Communist Party of Germany (*Kommunistische Partei Deutschlands,* KPD) in 1956.[67] Also instructive is the case of the National Democratic Party of Germany (NPD, renamed *Die Heimat* in 2023), which the BVerfG declined to ban in 2017, an earlier attempt having failed on procedural grounds in 2003. While acknowledging that the party's objectives were fundamentally opposed to the free democratic basic order, the Court introduced a "potentiality" requirement, unrecognised in earlier case law and developed in the light of the ECtHR's: a party may be deemed unconstitutional only where there are concrete signs that it is effectively capable of achieving its anti-democratic aims.[68]

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[64] The BVerfG has dismissed at the admissibility stage all four applications brought before it under Art. 18 GG, since it assesses the actual danger the individual poses to democracy already at that point (A. Berthout, *La démocratie militante*, cit., p. 432).

[65] Ibid., 430-431; 446-447. Under the Title "Endangering democratic state under rule of law", Articles 84 and 85 of the German Criminal Code (Strafgesetzbuch, StGB) criminalise, respectively, the continuation of a political party declared unconstitutional by the BVerfG and the violation of a ban on forming an organisation, thereby reinforcing the effectiveness of the constitutional prohibition.

[66] BVerfG, Urteil vom 23 Oktober 1952, 1 BvB 1/51.

[67] BVerfG, Urteil vom 17 August 1956, 1 BvB 2/51. The party's challenge before the European Commission of Human Rights (freedom of expression and association) was rejected, the Commission finding that advocating a socialist-communist society through proletarian revolution was incompatible with the functioning of democratic institutions: EComHR, 20 July 1957, *German Communist Party v. Germany*, Appl. No. 250/57.

[68] A 2017 reform of Art. 21 GG introduced alternative militant instruments, most notably the exclusion of anti-constitutional parties from public funding, allowing such actors to be sanctioned even absent a realistic prospect of political success. On the evolution of militant democracy in Germany, see G. Molier, B. Rijpkema, *Germany's New Militant Democracy Regime*, in *European Constitutional Law Review*, vol. 14, 2/2018, p. 394 ff., and U. Backes, *Banning Political Parties in a Democratic Constitutional State*, in *Patterns of Prejudice*, vol. 53, 1/2019, p. 67 ff. The tightening of the ban threshold has increased the salience of lesser militant instruments, as the ongoing AfD controversy illustrates. On 2 May 2025 the *Bundesamt für Verfassungsschutz* classified the party as a "confirmed right-wing extremist endeavour" (*gesichert rechtsextremistische Bestrebung*), a classification provisionally prohibited by the Administrative Court of Cologne, which found strong suspicion of anti-constitutional aims but not the certainty required: VG Köln, Beschluss vom 26 February 2026, 13 L 1109/25 (interim; main case 13 K 3895/25 pending). See, among others, A. De Petris, *Le armi legittime della democrazia: perché applicare il Parteiverbot contro l'AfD*, in *Costituzionalismo.it*, 3/2025, esp. p. 136 ff.

Importantly, the gravity of the instrument entrenched in Article 21(2) GG is also reflected in the procedural safeguards accompanying it: "[t]he prohibition of a political party […] is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has […] [t]he highest degree of legal certainty, transparency, predictability and reliability is therefore required […] [that party] […] is given its possibly final opportunity before the [BVerfG] to counter the submission[s] […] [and] to present its position freely".[69]

Beyond this principle of due process – which also follows from the BVerfG's role as a fact-finding instance in party-ban proceedings, where, unlike in typical constitutional-complaint cases, the Court must first establish the relevant factual record[70] – a further distinctive feature of the German model is the presence of institutions specifically designed to safeguard democracy against all forms of ideological extremism, absent from the Italian and French constitutional frameworks. In these legal orders, the clauses protecting democracy in its substantive sense refer only to the republican principle in more general terms. These systems thus remain, at their core, largely "open democracies", at least insofar as they do not codify specific mechanisms of defence against ideological extremism, whether of the left or the right.[71]

Italy and France may therefore be situated closer to the opposite pole, both as regards the source of law in which the militant instrument originates – constitutional or statutory – and the type of sanction it entails (constitutional or criminal/administrative). Even where a constitutional provision supplies the underlying basis, as with Italy's Transitional Provision XII, the operative instruments of democratic self-defence have developed gradually through statutory (criminal) law, the legislature thus being able to adapt to successive perceived threats.

Indeed, the Italian Constitution of 1948 protects the republican principle and is explicitly antifascist, without adopting an anti-extremist model of militant democracy.[72] Article 139 excludes the republican form of government from constitutional amendment, establishing a substantive limit that may be invoked against the legislature in the context of constitutional revision.[73] Article 49 recognises the right of every citizen "to freely establish parties to contribute to determining national policies through democratic processes". This does not, however, amount to a general prohibition of parties seeking to subvert democracy, nor does it provide a clear legal basis for the criminal sanctioning of parties or individuals pursuing national policy

[69] BVerfG, Urteil vom 17 January 2017, 2 BvB 1/13, para. 405.

[70] J. Krüper, *op. cit.*, p. 365.

[71] The terminological consequences of this fact are signaled below in Section 2.2, building on J.-W. Müller, *Militant Democracy*, cit., p. 1261.

[72] For an overview of the Italian experience related to militant democracy, see S. Ceccanti – F. Clementi, *Italy: Militant Democracy in Italy. A Path between Rules and Politics*, in M. Thiel (ed), *The "Militant Democracy" Principle*, cit., p. 209 ff.

[73] See Corte Costituzionale, judgments Nos. 1146/1988 of 15 December (*Considerato in diritto* No. 2.1) and, more recently, 125/2025 of 21 May (*Considerato in diritto* No. 5.2.1.)

through undemocratic means.[74] Article 18, by contrast, prohibits "secret associations and those which, even indirectly, pursue political aims through organisations of a military character". Article 54 establishes the duty of all citizens to be loyal to the Republic and to uphold the Constitution and the law, and requires those entrusted with public functions to fulfil them with discipline and honour, taking an oath where provided by law – the oath functioning as a symbolic expression of the Constitution's democratic nature.

Most importantly – and distinctively within the comparative landscape – the Transitional and Final Provisions of the Constitution expressly prohibit the reconstitution of the Fascist Party and restrict the political participation of former fascist officials. More specifically, Transitional Provision No. XII provides that "[i]t shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party. Notwithstanding Article 48 [right to vote], the law established, for not more than five years from the implementation of the Constitution, temporary limitations to the right to vote and eligibility for the leaders responsible for the Fascist regime".

This provision constitutes an exception to the principle of political pluralism enshrined in Articles 18 and 49 and reflects the anti-fascist ethos underpinning the constitutional text.[75] Although formally placed among the Transitional and Final Provisions, the prohibition in its first paragraph is, by scholarly consensus, not transitory but of full normative force.[76] From its inception in the debates of the Constituent Assembly to subsequent practice, moreover, the clause has generally been construed narrowly, referring to fascism as a historically specific phenomenon rather than as a general basis for banning any organisation seeking to abandon democratic principles. The Fascist Party was thus dissolved, and its reorganisation prohibited, not only or primarily because of its potential to endanger democracy or its recourse to violence, but because of its specific ideological character. This historically bounded interpretation, coupled with the absence of explicit constitutional provisions rendering all anti-democratic parties unlawful or depriving individuals of constitutional rights used to combat the liberal democratic order, has led the Italian experience to be described as an "open" or "non-protected" democracy.[77]

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[74] M. Klamt, *Militant Democracy and the Democratic Dilemma*, cit., p. 144.

[75] R. Bin – S. Bartole, *Commentario breve alla Costituzione*, 2008, 510. This provision finds its roots in earlier legal measures such as Royal Decree-Law (*Regio Decreto-Legge*) No. 704 of 2 August 1943, Lieutenant Legislative Decree (*Decreto Legislativo Luogotenenziale*) No. 195 of 26 April 1945, and Article 17 of the Treaty of Peace of Paris of 10 February 1947. Article 49 of the Italian Constitution reflects the Constituent Assembly's intention to position political parties outside the formal structure of the State apparatus, enabling them to serve as a link between the State and the community; see P. Ridola, *Partiti politici*, *Enciclopedia del Diritto*, XXXII, Milano, 1982, 74, p. 113.

[76] Cf. P. Barile, *Libertà di manifestazione del pensiero*, *Enciclopedia del Diritto*, XXIII, Milano, 1973, p. 469, n. 309.

[77] A. Golia Jr., *L'antifascismo della Costituzione italiana alla prova degli spazi giuridici digitali. Considerazioni su partecipazione politica, libertà d'espressione online e democrazia (non) protetta in CasaPound c.*

Transitional Provision No. XII was implemented through the so-called *Scelba* Law,[78] which defined the circumstances amounting to reorganisation of the Fascist Party (Article 1) and introduced criminal offences such as the apology of fascism (Article 4) and fascist demonstrations (Article 5). Although the ban in Provision No. XII encompasses the whole legal order and not only the criminal sphere,[79] reorganisation under Article 1 is deemed to exist when

> "an association or movement pursues anti-democratic aims typical of the fascist party, glorifying, threatening or using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or denigrating democracy, its institutions and the values of the Resistance, or engaging in racist propaganda, or directs its activities towards the glorification of representatives, principles, facts and methods of the aforementioned party, or carries out external manifestations of a fascist nature".[80]

The Corte Costituzionale upheld the constitutionality of this legislation in several decisions,[81] holding that Provision No. XII allows the legislature to prohibit not only the party's reorganisation in the strict sense but also conduct creating a concrete danger of such reorganisation through the political methods characteristic of fascism.[82] With respect to the apology of fascism, the Court likewise required a concrete danger: to constitute an offence, the apology must be capable of promoting the reorganisation of the banned party.[83] This restrictive reading has left the *Scelba* Law with limited practical effect, to the point that some scholars have spoken of the substantial desuetude of

Facebook e Forza Nuova c. Facebook, *federalismi.it*, 18/2020, 134-181, esp. 137-138 (see also the doctrinal reconstruction developed in this paper).

[78] Law No. 645 of 20 June 1952, subsequently amended by Law No. 152 of 22 May 1975.

[79] Corte cost., Judgment No. 74 of 1958, 6 December 1958: "[q]uesta disposizione pone sì un divieto, ma ciò non deve indurre nell'errore di farla considerare quasi come un divieto penale, […] le norme penali sono venute successivamente" (*Considerato in diritto*).

[80] On the constitutional legacy of the Resistance and anti-fascism in the Italian republican order, see, *inter alia*, F. Cortese – S. Rossi – C. Caruso, *Immaginare la Repubblica: mito e attualità dell'Assemblea costituente*, Milano, 2018; B. Pezzini – S. Rossi (eds), *I giuristi e la Resistenza: Una biografia intellettuale del Paese*, Milano, 2016; F. Cortese, *Liberare e federare: L'eredità intellettuale di Silvio Trentin*, Firenze, 2016; M. Fioravanti – A. Buratti, *Introduzione: Altri luoghi e altre figure della cultura politica italiana nella stagione della Costituente*, in Id. (eds), *Costituenti ombra: Altri luoghi e altre figure della cultura politica italiana (1943-1948)*, Roma, 2010, p. 18 ff.

[81] See, e.g., Corte cost., Judgments Nos. 1 of 1957, 26 January 1957; 74 of 1958, 6 December 1958; 15 of 1973, 7 February 1973 and 254 of 1974, 7 November 1974.

[82] R. Bin – S. Bartole, *Commentario breve alla Costituzione*, cit., p. 510.

[83] "Come risulta dal contesto stesso della legge 1952 […] [l]'apologia del fascismo, per assumere carattere di reato, deve consistere non in una difesa elogiativa, ma in una esaltazione tale da potere condurre alla riorganizzazione del partito fascista. Ciò significa che deve essere considerata non già in sé e per sé, ma in rapporto a quella riorganizzazione, che è vietata dalla XII disposizione" (Corte cost., Judgment No. 1 of 1957, cit., *Considerato in diritto*, para. 7).

Provision No. XII, recognising in it a primarily declaratory function affirming the foundational principles on which the Republic rests.[84]

The Italian case is instructive in showing how militant democracy may operate primarily through criminal offences rather than through the Constitution – even where those offences are established by statute to give effect to the constitutional prohibition in Provision No. XII.[85] Since the Constitution supplies no operative militant instrument beyond that historically bounded prohibition, democratic self-defence in its specifically antifascist form has been carried out largely at the statutory level, through a combination of criminal offences and administrative dissolution, notably under the *Scelba* and *Mancino* laws.[86] The severity of these sanctions and their intrusive effect on fundamental rights have, however, contributed to the perception of Provision No. XII as a derogatory rule, an exception within the otherwise open and pluralistic framework of the Constitution.[87] The resulting tension has surfaced whenever the courts, and the Constitutional Court in particular, have been called upon to systematise the "micro-system" formed by Articles 21, 18 and 49 together with Provision No. XII.[88]

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[84] R. Bin – S. Bartole, *Commentario breve alla Costituzione*, cit., p. 512. One notable application concerned the *Movimento politico Ordine Nuovo*, dissolved in 1973 for reconstituting the Fascist Party (Rome Tribunal, 21 November 1973; Criminal Court of Cassation, 5 December 1977; Council of State, Section IV, 21 June 1974, No. 452). As the authors note, convictions remained rare and were generally limited to local or minor groups. Alongside the *Scelba* Law, the legal framework was strengthened through measures targeting racial discrimination and hate-based violence, notably Law No. 654 of 1975, as amended by Law No. 205 of 1993 (*Mancino* Law) and Law No. 85 of 2006, which prohibits organisations promoting incitement to racial, ethnic, national or religious discrimination or violence (Article 3).

[85] A. Berthout, *La démocratie militante*, cit., p. 87.

[86] Dissolution in its "ordinary" modality takes an administrative form, ordered by the Minister of the Interior, conditioned on a prior criminal or administrative court finding of the organisation's fascist (or racist) character: "non si può trascurare di osservare che il provvedimento ex art. 3, 1° comma, legge [*Scelba*], non postula necessariamente una sentenza penale di condanna, essendo sufficiente la presenza di una sentenza, dalla quale risulti l'accertamento della fattispecie" (Council of State, Section IV, 21 June 1974, No. 452, para. 5). Given the criminal nature of the relevant offences, in practice the prior finding is primarily criminal. As a "second" modality, in extraordinary cases of necessity and urgency, the Government may order dissolution and confiscation of assets by decree-law, without a prior court finding. Importantly, the Council of State clarified that the Minister's dissolution decree in the first modality is not an unreviewable political act (*atto politico*) but a bound administrative act inspired by political motives connected to State security, and therefore reviewable before the administrative judge (para. 1). See G. Donato, *Un vecchio problema per (una) Forza Nuova: lo scioglimento delle organizzazioni neofasciste tra giudici e governo*, in *Consulta Online*, 3/2021, p. 1021 ff., esp. p. 1031.

[87] M. Bon Valsassina, *Profilo dell'opposizione anticostituzionale nello stato contemporaneo*, in *Rivista trimestrale di diritto pubblico*, 3/1957, p. 531 ff. (esp. p. 569 ff.).

[88] A. Golia Jr., *L'antifascismo della Costituzione italiana alla prova degli spazi giuridici digitali,* cit., esp. p. 139.

Moving to the French constitutional experience, 'militant democracy' has rarely been framed as a distinct category in legal scholarship.[89] Although the Constitution lacks a dedicated militant vocabulary, the republican principle – unamendable under Article 89(5)[90] – has historically shaped measures against actors whose ideologies were perceived as incompatible with the republican model of civic integration, most recently in the context of Islamist terrorism [91]

Notably, constitutional provisions on political parties, such as Article 4,[92] do not establish banning procedures; the rules governing dissolution of parties and associations are set out at the legislative level instead.[93] Moreover, dissolving subversive organisations has long been construed as an administrative police measure, thereby excluding constitutional considerations relating to the protection of the political system[94] and precluding a primary constitutional sanction of the kind found in Germany.

Against this background, France has two legal routes for dissolving a political party, but scholarship has emphasised that only one is readily activated in practice[95] –

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[89] A. Berthout, *La démocratie militante*, cit., esp. p. 15-18, noting how, until recently, French scholarship had devoted very few works specifically to the subject, notwithstanding that foreign scholars and the ECtHR do not hesitate to describe French positive law as embodying a certain form of militant democracy. Similarly, C.-L. Buis, *France*, in M. Thiel (ed.), *The "Militant Democracy" Principle*, cit., p. 75 ff., esp. p. 76, notes that the closest French equivalent may be '*démocratie capable de se défendre*'. Scholarly interest has grown recently, e.g., M. Aït-Aoudia, *Limiter le pluralisme politique pour protéger la démocratie: Les paradoxes de la «démocratie militante»*, in *Revue française de science politique*, vol. 74, 4/2024, p. 633 ff.; Ch. Parent, *La démocratie militante et la défense de l'ordre constitutionnel liberal*, in E. Cartier – M. Ubéda-Saillard – R. De Bellescize, *Résistance du droit et droit de la resistance*, Bruylant, 2023, p. 133 ff.; V. Gazagne-Jammes, *Le 'républicanisme militant', une certaine conception de la démocratie militante française. Réflexions autour du projet de loi confortant le respect des principes républicains*, in *Revue des droits et libertés fondamentaux,* 2021, p. 1 ff.

[90] From a temporal perspective, the constitutional amendment procedure may not be initiated or continued in situations involving a threat to territorial integrity (Article 89(4)), the exercise of the President's extraordinary powers under Article 16, or during an interim presidency under Article 7(11).

[91] C.-L. Buis, *France*, cit., p. 84, 97 ff.

[92] "Political parties and groups shall contribute to the exercise of suffrage […] be formed and carry on their activities freely […] respect the principles of national sovereignty and democracy […] Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation".

[93] A. Berthout, *La démocratie militante*, cit., esp. p. 32 ff., 323 ff.

[94] Most notably the Act of 10 January 1936 (*Loi du 10 janvier 1936 sur les groupes de combat et milices privées, Journal officiel de la République française* – JORF – of 11 January 1936) now repealed but reproduced almost verbatim into Article L. 212-1 of the Internal Security Code (*Ordonnance no. 2012-351 du 12 mars 2012 relative à la partie législative du code de la sécurité intérieure*, JORF No. 0062 of 13 March 2012, text No. 3). On this provision, see R. Rambaud, *La loi du 10 janvier 1936 sur les groupes de combat et milices privées (article L. 212-1 du code de la sécurité intérieure): l'arme de dissolution massive*, in *Revue des droits et libertés fondamentaux*, 20/2015.

[95] The first, little used owing to the slowness of the procedure, is judicial dissolution, pronounced by the civil courts under the 1901 Law on the freedom of association (A. Berthout, *Between Legal Deficiencies and Political Restraint: The Prohibition of Political Parties in France*, in *MIP – Zeitschrift für*

the administrative dissolution introduced by the Act of 10 January 1936. The mechanisms for dissolving political parties and ordinary associations are identical, so the former enjoy no distinct procedural protection, and every dissolution of a political party since 1958 has rested on this administrative route. Dissolution must be pronounced by decree by the Council of Ministers – that is, by the President and the Prime Minister, acting on information supplied by the Minister of the Interior. The decree must state its reasons and may be adopted only after the party's leaders have submitted their observations; its legality can then be challenged before the *Conseil d'État*, ruling at first and last instance.[96]

As regards the grounds for dissolution, these were initially conceived as a prohibition of (violent and paramilitary) means rather than of anti-republican organisations as such; yet successive additions after 1945, and again in 2021, have progressively shifted the underlying philosophy from a defence against violent activities towards a defence against (political) ideas.[97] Broadened grounds combined with a loose procedure have made the banning of parties legally easy, which explains why no fewer than seven parties have been dissolved under the Fifth Republic – invariably small formations without significant electoral support, at least until the dissolution of the fundamentalist Catholic party Civitas in October 2023.[98] Yet the ease of the legal mechanism stands in inverse relation to the political readiness to deploy it.[99] The decision rests with the executive and is thus exposed to the suspicion of partisanship – the risk that a ban will be seen as a mere move against a party opposing the incumbent majority – a difficulty compounded by the prospect of annulment before the *Conseil d'État*. To this political reticence, which scholarship counts alongside such factors as the two-round majority voting system used in presidential and legislative elections and characterises as a "kind of safety valve for democracy", is added a constitutional uncertainty: whether entrusting the executive with the power to ban a political party is consistent with the freedom Article 4 confers upon it.[100]

During the second wave of transitions to democracy in Southern Europe in the 1970s, militant instruments were introduced particularly in Portugal and Greece,[101] both legal orders deeply shaped by recent experiences of authoritarian rule. The Portuguese case is especially illustrative. Article 46(4) of the Constitution prohibits

Parteienwissenschaften, *Sonderausgabe „Das Parteiverbot in Deutschland und Europa"*, 2/2024, p. 183 ff., esp. p. 185).

[96] Ibid.

[97] Ibid., p. 186. The additions after 1945 extended to organisations promoting collaboration with the Third Reich or disseminating racist ideas, while the 2021 reform added the provocation of violent actions against property.

[98] Ibid., p. 183-184. On Civitas, see *Décret du 4 octobre 2023 portant dissolution d'une association*, JORF No. 0231 of 5 October 2023; upheld by the *Conseil d'État* in Decision No. 489498 of 30 December 2024, FR:CECHR:2024:489498.20241230.

[99] A. Berthout, *Between Legal Deficiencies and Political Restraint*, cit., p. 186-187.

[100] Ibid.

[101] F. Furlan, *Introduzione*, in A. Bardusco *et al.*, *Costituzioni comparate,* cit., p. 17.

"[a]rmed associations, military, militarised or paramilitary-type associations and organisations that are racist or display a fascist ideology" – a provision inserted in the original 1976 text and amended in 1997 to include "racist" organisations. Portugal thus operates a single, unified constitutional prohibition targeting specific categories of associations and organisations, encompassing both political parties and "ordinary" associations, enforced by the Constitutional Court under a special procedure established by ordinary legislation. Distinctly militant and stemming directly from the Constitution, it largely aligns with the original idea of post-authoritarian militant democracy. Unlike the German model, however, the Portuguese regime focuses more narrowly on specific types of associations and organisations, especially those connected to "fascist ideology".[102]

Among the democratic transitions that unfolded across Europe in the 1970s, the Spanish experience is especially instructive for present purposes. Unlike Portugal or Greece, Spain's militant tendencies emerged gradually within a well-established democratic system, primarily through statutory law and judicial interpretation concerning political parties. Spain thus offers a valuable case for examining how militant attitudes can evolve at the level of constituted powers, while generating tensions with the pluralist principles underpinning democratic constitutionalism.

Taking as a comparative axis the constitutional/statutory character of militant instruments, Spain follows a statutory pattern. At the constitutional level, Article 22 provides that "associations which pursue ends or use means legally defined as criminal offences are illegal" and prohibits secret and paramilitary associations.[103] Militant regulation has instead developed at the legislative level, initially through criminal legislation and subsequently through the specific regime governing political parties.

Article 6 of the Constitution establishes political parties as "essential instruments" for the "expression of political pluralism" and political participation, requiring them to operate democratically both internally and in their activities. The regime governing parties as associations – which do not hold the status of state bodies[104] – was first laid down by Law 54/1978 on Political Parties, a pre-constitutional

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[102] See G. de Almeida Ribeiro, *As Good as It Gets: Party Bans and Democratic Militancy, VerfBlog,* 30 March 2024, available at: https://verfassungsblog.de/as-good-as-it-gets/ (last accessed: 9 July 2026). More generally on the Portugal experience of militant democracy, see M. Klamt, *Militant Democracy and the Democratic Dilemma*, cit., p. 147 ff.

[103] The stringent amendment requirements in Articles 166-169 might be viewed as militant-democracy instruments, but this paper follows L. Pegoraro (*Para una clasificación dúctil de la democracia militante*, cit., p. 196) for whom formal revision requirements belong primarily to the classical mechanism of constitutional rigidity, designed to defend – juridically, alongside constitutional review of legislation – the Constitution as the supreme norm of the legal order.

[104] Tribunal Constitucional, Judgment No. 10/1983 of 21 February 1983, legal ground (FJ) No. 3. More generally, see J.C. Duque Villanueva – J.L. Requejo Pagés, *Artículo 6*, in M. Rodríguez-Piñero Bravo Ferrer – Mª.E. Casas Baamonde, *Comentarios a la Constitución Española. Tomo I*, Madrid, 2018, p. 96 ff.

statute introducing a simple procedure for their free formation, later replaced by Organic Law 6/2002 of 27 June on Political Parties (LOPP).[105]

The LOPP mainly introduced two innovations. First, it affirmed the political parties' responsibility to respect democratic principles (Article 9(1)). Secondly, it established the competences and procedures for the judicial outlawing of parties failing to comply with these principles. Article 9(2) lists the general requirements (a, b, c) determining such non-compliance: a party shall be declared illegal only when "its activities violate democratic principles, particularly when they seek to undermine or destroy the system of freedoms or render the democratic system impossible or eliminate it", "systematically violating fundamental freedoms and rights, promoting, justifying or exonerating attacks against the life or integrity of persons". The decisive point, as both the statute's preamble and the Tribunal Constitucional (TC) emphasise, is that the object of sanction is a party's systematic illegal activities, not its ideology, provided the latter is pursued by peaceful means. "Consequently", the TC held, "no room is left for what has been termed 'militant democracy'".[106]

In Judgment No. 48/2003 on the constitutionality of the LOPP, the TC rejected the claims of unconstitutionality concerning the Law's illegalisation and dissolution mechanisms, and elaborated on the dual nature of parties within the democratic order.[107] According to the TC, the LOPP was the first regulation of political parties within the constitutional State, replacing transitional legislation that reflected Spain's shift from authoritarianism to democracy and focused narrowly on party creation and registration; the new law instead addressed the need to protect a pluralist party system from threats such as violence or illegality. The Court noted that Spain's "constitutional maturation" (*maduración constitucional*) called for more detailed regulation of party structure, organisation and functioning.[108] Although critics claimed the 2002 statute was a *lex ad hoc* aimed at banning Batasuna,[109] the TC dismissed that reading: legislation

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[105] *Boletín Oficial del Estado* No. 154 of 28 June 2002.

[106] Tribunal Constitucional, Judgment No. 48/2003 of 12 March, FJ 10 (author's transl.). Article 9(3) of the LOPP further specifies the conducts that are to be interpreted only in relation with the general clause of Article 9.2 (ibid.).

[107] "[W]hilst [political parties] once operated in opposition to the State, […] the model of democratic state [has] inevitably introduced into the legal framework a typical tension arising from their dual role as instruments for the realisation of the subjective right of association, on the one hand, and as necessary channels for the functioning of the democratic system, on the other" (ibid., FJ 5, author's transl.)

[108] Ibid., FJ 14.

[109] On 27 March 2003, the Spanish Supreme Court (TS) outlawed Herri Batasuna, Batasuna, and Euskal Herritarrok for violating Article 9.3 of the LOPP, finding that they supported and complemented the activities and objectives of the terrorist organisation ETA; although Spain does not adhere to a German-style militant-democracy model, it rejects violence as a method of political action (STS, 27 March 2003, 66-68). This was upheld by the TC on 16 January 2004 (Judgments Nos. 5 and 6/2004). For commentary, see E. Vírgala Foruria, *La STS de 27 de marzo de 2003 de ilegalización de Batasuna*, in *Teoría y Realidad Constitucional*, 12-13/2003, p. 609 ff.; A. Hinarejos Parga, *La prohibición de partidos políticos como mecanismo de defensa del Estado*, in *Teoría y Realidad Constitucional*, 10-11/2002, p. 469 ff. The TC has

may arise from a particular case, but its constitutionality hinges on its overall content, not its motive, the test being objective conformity with the constitutional order rather than the political circumstances of enactment.[110]

Dissolution does not operate through a single channel in the Spanish legal order. Alongside the *sui generis* procedure introduced by the LOPP in 2002 – entrusted to a Special Chamber (*Sala especial*) of the Tribunal Supremo under Articles 10(5) and 11(2) – there subsists an older, properly criminal route, dating from 1978 and still in force, in which the ordinary criminal judge may dissolve a party engaging in the offences of unlawful association under Articles 515 and 520 of the Penal Code (CP). Article 5(1) of Law 54/1978 had already established this channel: "[t]he suspension and dissolution of political parties may only be ordered by a decision of the competent judicial authority" when "(a) [they are found to] have committed acts constituting an unlawful association under the Criminal Code".[111]

Under Article 515 CP, "unlawful association" (*asociación ilícita*) covers five categories: associations formed to commit an offence, or promoting its commission once constituted; armed bands and terrorist organisations or groups; associations that, even where their aim is lawful, use violent means or means that alter or control personality to achieve it; paramilitary organisations; and those promoting or inciting discrimination, hatred or violence against persons or groups on grounds such as ideology, religion or belief, ethnicity, race or nation, sex, sexual orientation, family situation, illness or disability.[112] Though this route formally carries the prohibition of specific associations, it was never once used to dissolve a party in more than two decades.[113] Spain thus exemplifies a statutory model in which the criminal law provides a sanction while the militant instrument actually used migrates to a specially designed judicial procedure,[114] itself open to legislative adjustment through qualified majorities

explicitly held that the Spanish constitutional order does not recognise a militant democracy comparable to the German model, since it lacks an unamendable normative core that could serve as an autonomous parameter of legal correctness (Judgment No. 48/2003, FJ 7). The ECtHR upheld the ban in *Herri Batasuna and Batasuna v. Spain*, Judgment of 30 June 2009, Applications Nos. 25803/04 and 25817/04, as "necessary in a democratic society" (§ 94).

[110] TC, Judgment No. 48/2003 of 12 March, cit., FJ 14.

[111] On the two dissolution procedures, see A. Berthout, *La démocratie militante*, cit., 338 (the criminal route under Art. 5.1(a) of Law 54/1978, maintained by Art. 10(4) LOPP together with Arts. 515 and 520 of the Criminal Code). See also, more generally, L. Subiela, *Still Alive? Party Bans in Spain*, in *MIP – Zeitschrift für Parteienwissenschaften*, *Sonderausgabe „Das Parteiverbot in Deutschland und Europa"*, 2/2024, p. 202 ff.

[112] E.g., A. Berthout, *La démocratie militante*, cit., p. 155-156, reading Article 515 CP together with Article 9 LOPP as a minimum ideological control over parties, despite the official position – of both the government and the TC – that the regime reaches only activities, not ideas.

[113] See ibid., p. 338-339, noting that, in practice, the criminal route proved to be ineffective against subversive parties.

[114] As the statute itself explains, the LOPP of 2002 assigns dissolution to the Special Chamber of the TS (under Art. 61 of *Ley Orgánica del Poder Judicial*) because of the constitutional importance of political parties and the gravity of decisions declaring them illegal, reserving so consequential a matter

(both the criminal legislation and the LOPP being *leyes orgánicas* subject to absolute majorities under Article 81 of the Constitution).

To conclude, this comparative overview shows that European constitutional systems have incorporated militant instruments in diverse ways, shaped by distinct historical experiences and traditions. Despite differences in formulation, these mechanisms share a common rationalising function: addressing radical threats to the democratic legal order arising from within – a commonality that has contributed to a convergence in the meaning of the doctrine in the post-war period. Yet while the militant rationale converges, the mode of its legal realisation diverges along a constitutional/statutory axis, with a corresponding difference in the type of primary sanction involved. Where the instruments are constitutionally anchored, as in Germany and Portugal, democratic self-defence tends to operate as a constitutional sanction – the unconstitutionality of a party or the forfeiture of rights – imposed by a constitutional court, with criminal law playing a largely supplementary role in rendering that provision effective. Where they are primarily introduced by statute, as in Italy, France and Spain, criminal and/or administrative law tends to carry the militant response – alongside a special procedure before the Supreme Court, as in Spain – and the regime remains open to further legislative adaptation. Constitutional entrenchment lends militant measures durability, stabilising their content, actors, scope and guarantees, whereas statutorily regulated militancy renders them more adaptable to contingent "threats" and more open to concrete, case-by-case interpretations by ordinary courts. Against this background, the following subsection examines how the doctrine was received and institutionalised in Romania from the 1991 Constitution onwards – a system formally belonging to the first group, which is precisely what makes the CCR's electoral turn so significant for the aims of this paper.

2.2. Militant Democracy Reaches the Romanian Legal Order: An Overview

We have seen that numerous countries – particularly in post-authoritarian settings – have incorporated elements of militant democracy into their legal frameworks, even if not always under that designation.[115] Furthermore, the militant or non-militant character of a legal order also reflects a foundational decision about how

for a body that – by its composition, gathering the President of the TS and representatives of all its Chambers – effectively functions as a "reduced plenary" enjoying a status of supremacy over the ordinary Chambers. Through this Chamber the law channels a specific, preferential, single-instance judicial process, initiable only by the Public Prosecutor and the Government (the latter possibly at the request of Congress or the Senate), structured to reconcile legal certainty and the right of defence with the need for speed, and yielding a judgment that is unappealable save for *amparo* before the TC and immediately enforceable on notification. Art. 12 then sets out the effects of dissolution: the immediate cessation of all party activity, a presumption that any successor formation continuing the banned party is fraudulent and cannot proceed, and the opening of a patrimonial liquidation whose net proceeds are devoted to social or humanitarian purposes.

[115] J.-W. Müller, *Militant Democracy*, cit., p. 1254.

past experiences shape the present and future of a community's sociopolitical life,[116] and can thus be seen as an expression, within the democratic constitutional framework, of collective memory – particularly in polities that turned to democracy through means other than a consensual or pacted transition. Fundamental decisions expressing a desire to break with a specific authoritarian past – whether of the far right or the far left – can be framed in terms of 'negative republicanism', as in the Italian case, understood as the "self-definition of the militant democratic order in contrast to a specific authoritarian past, in a way that differs markedly from the abstract and quasi-universal German [anti-extremist] approach".[117]

Nevertheless, militant democracy may also reflect a community's projected self-image – one open to all political possibilities, so long as they respect the democratic consensus and operate within the rule of law. In this sense, "[i]n Germany [there is], above all, a programmatic concept of democracy – a general direction, a model of society".[118] Though grounded in the historical experience of totalitarianism, this legal order remains forward-looking, operating within a broad 'anti-extremist' rather than 'negative republican' framework and safeguarding democracy against both right- and left-wing extremism, regardless of the particular totalitarian experience the community has endured.[119]

A similar anti-extremist logic informed the post-1989 constitutional transformations[120] across "Central and Eastern Europe, the Baltic region, and the Balkans" (CEEBB).[121] This is a legally diverse yet converging regional landscape: the countries it encompasses share a trajectory marked by relatively recent adherence to liberal-democratic constitutionalism, often preceded by earlier and short-lived episodes of such alignment. Romania belongs to this group, where complex political and institutional transitions have been further complicated by historically rooted ethnic heterogeneity that continues to affect constitutional stability. The democratisation wave beginning in 1989 led these emerging legal orders to incorporate self-defence instruments, albeit with varying trajectories and timeframes, in a context where 'militant democracy' appears closely linked to democratic transition and the consolidation of constitutional democracy – the shift from non-democratic forms of state (socialist, authoritarian, theocratic, etc.) to liberal-democratic systems grounded in core values such as the separation of powers and the protection of fundamental

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[116] On how the specific legacy of past authoritarianism influenced the choice of militant instruments in the various European legal orders, see M. Klamt, *Militant Democracy and the Democratic Dilemma*, cit., esp. p. 150 ff.

[117] J.-W. Müller, *Militant Democracy*, cit., 1261, building on P. Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties*, in S. Avineri - Z. Sternhell (eds), *Europe's Century of Discontent: The Legacies of Fascism, Nazism and Communism*, Jerusalem, 2003.

[118] A. Gatti, *op. cit.*, p. 238 (author's transl.).

[119] J.-W. Müller, *Militant Democracy*, cit., p. 1260.

[120] P.E. de Morree, *Rights and Wrongs under the ECHR*, cit., p. 156.

[121] See A. Di Gregorio, *Premessa del curatore*, in Id. (ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, Milano, 2019, p. VII).

rights.[122] Lastly, taking a cultural perspective on how democratic self-defence is integrated into post-authoritarian legal orders,[123] other scholars have identified a further common element in the constitutional grammar of the texts drafted immediately after the fall of the Soviet bloc: stemming from the shared legacy of dictatorship, it is most clearly manifested in the explicit acknowledgement of political parties within those foundational texts.[124]

This broader regional pattern also shaped Romania's post-communist constitutional design. The 1991 RC stands as both a legal break with the totalitarian past and a product of it.[125] Emerging from the violent collapse of the Ceauşescu regime in December 1989 – the bloodiest regime change in Eastern Europe that year – the new constitutional order faced two challenges: restoring liberal-democratic traditions interrupted since 1947 and making sense of that violence while rapidly aligning with the principles of Western constitutionalism, particularly its substantive rule-of-law standards. These challenges, together with the provisions regulating political parties and codifying militant instruments, are best understood in light of Peter Siani-Davies' historical reconstruction, grounded in the premise that "[t]he centrality of the revolution of December 1989 to recent Romanian history is indisputable. It provided a base for the subsequent post-communist reforms and has remained a powerful political symbol within domestic discourses".[126]

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[122] A. Di Gregorio, *Le transizioni alla democrazia nei paesi dell'Europa centro-orientale, baltica e balcanica*, in Id. (ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, cit., 21. Although cf. A. Sajó, *Militant Democracy and Transition towards Democracy*, in Id. (ed.), *Militant Democracy*, The Hague, 2004, p. 209 ff., esp. p. 215-217). Lastly, one should also bear in mind Frankenberg's notion of the "learning sovereign", first coined by H. Brunkhorst (*Demokratie und Differenz: Vom klassischen zum modernen Begriff des Politischen*, Frankfurt am Main, 1994, p. 199). This concept links democratic legitimacy to the people's capacity to learn from historical experience and remain open to new information, thereby distinguishing democracy from authoritarianism (G. Frankenberg, *The Learning Sovereign*, in A. Sajó (ed.), *Militant Democracy*, cit., p. 113 ff.).

[123] On the suitability of this approach to the CEEBB area: A. Di Gregorio, *Premessa del curatore*, cit., VII. For the different methods in comparative constitutional studies, with attention to the meaning of the cultural method, see M.-S. Kuo, *Four Matters of Interpretation: The Constitutional Phenomenon in Comparative Studies*, in *Oxford Journal of Legal Studies*, vol. 45, 2/2025, p. 301 ff. (esp. p. 318-321).

[124] "There is actually a close link between historical developments and constitutional outcomes that express a democratic legal culture. The reaction to history is to a certain degree obvious. […] [t]hese provisions do not only express the important status of political parties […] [but] also lead to consequences in the real political process […]" (M. Klamt, *Militant Democracy and the Democratic Dilemma*, cit., 151). With different variations, the power to assess the constitutionality of political parties is attributed, e.g., to the constitutional courts of Bulgaria (Article 149(5)), Croatia (Article 125), the Czech Republic (Article 87(j)), the Republic of Moldova (Article 135(h)), Poland (Article 188(4)), and Slovenia (Article 160). See a brief overview of selected courts in B. Iancu, *Militant Democracy and Rule of Law in Three Paradoxes*, cit., at n. 28.

[125] See, more generally, B. Iancu, *Continuitate şi ruptură în constituţionalismul românesc. De la Regulamentele Organice şi până în prezent,* Bucureşti, 2025.

[126] P. Siani-Davies, *The Romanian Revolution of December 1989*, Ithaca, 2005, p. 2.

The author identifies three broad, conflicting "myths" that emerged in the months and years following Ceauşescu's fall: 'revolution', '*coup d'état*' or 'popular uprising'.[127] These narratives functioned as political accounts claiming to present the "truth" about December 1989, thereby acting as tools of both legitimisation and exclusion. Their coexistence shows that the democratic transition did not create a unified understanding of the break with the authoritarian past under the 1991 RC. Although the institutional framework of constitutional democracy strengthened gradually after 1989, the wider sociopolitical memory of the transition still reflected conflicting views on democratic legitimacy and political pluralism. These historical dynamics also form part of the broader context in which later interpretations of democratic self-defence evolved.

As is well known, the revolution began in Timişoara on 15 December 1989 as a small-scale protest that quickly escalated into mass demonstrations met with violent repression. Within a week, protests had spread to Bucharest and other cities; on 22 December, Ceauşescu fled the Central Committee building by helicopter, leaving a political vacuum immediately filled by the National Salvation Front (*Frontul Salvării Naţionale,* NSF) led by Ion Iliescu, and the days that followed brought fighting against alleged "terrorists" – widely believed at the time to be members of the dreaded *Securitate* – and the summary trial and execution of Nicolae and Elena Ceauşescu on 25 December.

The first of the three myths, the official revolutionary narrative, portrayed the NSF as the legitimate embodiment of the popular uprising, granting it a special mandate to safeguard the transition: Iliescu and the new leadership proclaimed the events a "revolution", grounding their right to rule in their claim to embody the will of the people. Political opponents challenged this version, pointing to inconsistencies in the Front's account and suggesting it had seized power through manipulation rather than a genuine revolutionary mandate.

The Decree-Law of 31 December 1989 authorised the creation of political parties and civic organisations,[128] enabling the re-emergence of traditional parties such as the National Peasant Party (NPP), the National Liberal Party (PNL), and the Romanian Social Democratic Party (PSDR) – though into a political field shaped by the NSF's dominance.[129] In January 1990, the NSF abandoned its initial rhetoric of consensus politics – an umbrella arrangement under which parties would operate within the Front's framework – and declared its intention to compete in future

[127] Ibid., esp. p. 5, 269.

[128] Decree-Law No. 8 on the Registration and Functioning of Political Parties and Civic Organisations in Romania.

[129] Before the 1989 events, the Communist Party of Romania (*Partidul Comunist Român*) enjoyed a constitutionally guaranteed monopoly on political power. It was therefore the sole legal party and the central authority in public life. See, e.g., Article 3 of the 1965 Constitution: "In the Socialist Republic of Romania, the leading political force of the entire society is the Romanian Communist Party" (author's transl.)

elections as a political party. This fractured the initial anti-Ceauşescu coalition and intensified competition with the second myth, the *coup d'état* thesis promoted by the traditional parties, which portrayed December 1989 as a premeditated seizure of power by elements of the communist elite, possibly with foreign support. The third myth, the popular uprising narrative, was widespread among students, civic activists, and segments of the media: the people had risen in good faith to overthrow dictatorship, but the revolution had been "hijacked" in its aftermath, with the NSF monopolising power in a manner reminiscent of the old regime. Street demonstrations, including violent confrontations in January 1990, reinforced this perception.[130]

Importantly, in its early phase, Romanian multi-party politics suffered from an acute need for a political project for the Romanian state, given that most political forces, old and new, defined themselves almost exclusively through a shared anti-communist stance. This common denominator, while symbolising the rupture with the past, did not generate a diversity of coherent programmes or ideologies. Political pluralism thus existed formally but lacked the genuine plurality of visions necessary for a mature democratic system. The NSF's parliamentary majority after the May 1990 elections, together with its executive control, blurred the separation of powers and limited the opposition's ability to shape constitutional design, leaving early Romanian democracy formally pluralistic while the Front effectively monopolised political initiative.

The three myths were competing political resources.[131] They shaped how pluralism was understood and operationalised in the early years of Romania's democracy, and they explain, in part, why the 1991 RC enshrines the free formation of political parties as an expression of pluralism while also incorporating militant democracy clauses. This sets the stage for a closer look at the specific mechanisms through which this doctrine operates in the Romanian constitutional framework.

For the purposes of this paper, the focus is only on the preventive instruments addressing potential threats to the State from within, as these represent the core features of democratic self-defence. In particular, the analysis examines the (ab)use of political rights and channels – or rights closely connected to the political system – to subvert the democratic order, features that define the doctrine's scope as originally envisaged by many post-authoritarian legal orders in Europe.[132]

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[130] P. Siani-Davies, *op. cit.*, *passim.*

[131] Ibid., esp. p. 269.

[132] For criminal sanctions, see also Government Emergency Ordinance (GEO) No. 31/2002, which bans fascist, Legionary, racist, or xenophobic organisations, symbols, and acts, and prohibits the cult of people who committed genocide, war crimes, or crimes against humanity. GEO No. 31/2002 has been amended several times, notably in 2006, 2015, and 2025. The most recent reform, Law No. 241 of 23 December 2025, was adopted after the post-presidential-election crisis. These 2025 amendments greatly strengthen Romania's legal framework against fascist, Legionary, racist, xenophobic, and antisemitic activities. A brief discussion of this reform is presented in Section 3.3.

First, the democratic legal order is established and protected by Article 1(3) RC, which defines Romania as a democratic and social state governed by the rule of law and sets out its supreme values: "[h]uman dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed".[133] The references to "the ideals of the Revolution" and the "democratic traditions of the Romanian people" were introduced only in the 2003 revision, more than a decade after the Constitution's adoption, and have primarily declaratory force.[134] Both aim to outline a post-communist constitutional culture, serving as a "common denominator" for interpreting the legal orders' basic values.[135] However,

> "[a]t least [in terms of] constitutional practice, one of 1989 ideals was not reflected: […] a total break with the totalitarian past, including forbidding former members of the higher communist political structures to occupy public positions […] was never achieved […]. [T]here has been no coherent public, nor even academic, discourse regarding what pre-communist constitutional tradition might mean. Even the [CCR], since 2003, has made very few references to these traditions."[136]

From a broader perspective, Article 8 RC links political pluralism to the role of political parties, establishing that: "(1) Pluralism in the Romanian society is a condition and guarantee of constitutional democracy. (2) Political parties shall be constituted and […] pursue their activities in accordance with the law. They contribute to the definition and expression of the political will of the citizens". This recognition is linked to the parties' obligation to 'respect national sovereignty, territorial integrity, the rule of law and constitutional democracy'. Therefore, Article 8 guarantees diversity among political actors while establishing substantive limits on their activities, excluding organisations whose objectives contradict these principles.

Turning to the concrete militant instruments, Article 40(2) RC prohibits political parties or associations whose aims or activities contradict core constitutional values. More specifically, those who "by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania" "shall be unconstitutional". In practice, this empowers the judiciary to deny legal recognition to entities whose programmes are incompatible with the democratic constitutional framework. In Romania, registering a political party is not a mere formality, unlike in Austria or

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[133] See also M. Balan, *Deciziile politice fundamentale ale constituantului roman*, in *Analele Ştiinţifice ale Universităţii Alexandru Ioan Cuza din Iaşi, seria Ştiinţe Juridice*, vol. 56, 1/2013, p. 17 ff.

[134] I. Muraru – E.S. Tănăsescu, *Articolul 1. Statul Român*, in Id. (eds), *Constituţia României. Comentariu pe articole*, 3rd ed., Bucureşti, 2022, p. 17.

[135] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 28.

[136] Ibid., p. 28-29.

Norway; it guarantees that parties satisfy legal requirements.[137] Under Chapter IV of Law 14/2003,[138] registration is decided by the Bucharest Tribunal (Tribunalul Bucureşti) following a public hearing at which the Public Ministry is heard, with appeal to the Bucharest Court of Appeal (Curtea de Apel Bucureşti). A party acquires legal personality on the date the application is definitively accepted, whereupon it is entered into the Register of Political Parties.

Finally, Article 146(k) empowers the CCR to determine the constitutionality of political parties. As in the German system, this safeguards democracy procedurally by ensuring that only an independent court can dissolve or ban parties, preventing the executive from using such measures to eliminate legitimate opposition. Romanian scholars view the Court's role as both preventive and corrective: halting anti-democratic forces before they take root, and sanctioning parties that act unconstitutionally.[139] The Court has exercised this power only once, in Decision No. 272/2014, dismissing the referral as inadmissible because it was filed by an individual rather than by the bodies specified in the Constitution and concerned an organisation of national-minority members, whereas Article 146(k) applies solely to political parties.[140]

In conclusion, democratic self-defence was embedded in the Constitution itself, though its procedural framework was developed mainly with regard to political parties. Romania thus belongs to the constitutionally entrenched group of democratic self-defence, under Articles 1(3), 8, 40(2), and 146(k), channelled primarily through a constitutional sanction – the CCR's finding of a party's unconstitutionality – alongside administrative controls at the point of registration, themselves bound by the limits established in the ECtHR's case law. Section 3 will show how, during the 2024-2025 presidential elections, a doctrine conceived for political parties came to be directed at an individual candidate, through an expansive reading of the applicable legislation that in practice sanctions presidential candidates with an intensity comparable to that envisaged by the RC for political parties. The Romanian model may thus have shifted towards a more contingent understanding of militant measures – one more typical of statutory regimes, which in any case require prior legislative intervention and respect for the principle of due process. However, the national framework must also be read in light of the broader European human-rights context. The next section summarises

[137] B. Selejan-Guţan, *Articolul 8. Pluralismul şi partidele politice*, in I. Muraru – E.S. Tănăsescu (eds), *Constituţia României. Comentariu pe articole*, cit., p. 83.

[138] Law No. 14 of 9 January 2003 on Political Parties, republished in *Monitorul Oficial* No. 408 of 10 June 2015.

[139] B. Selejan-Guţan, *Articolul 8. Pluralismul şi partidele politice*, cit., p. 83.

[140] I. Muraru – E.S. Tănăsescu, *Articolul 146. Atribuţii*, in Id., *Constituţia României. Comentariu pe articole*, cit., p. 1336.

this case law and the constraints the Convention system places on militant measures within Council of Europe member states.[141]

2.3. Militant Democracy in the Case Law of the ECtHR: A Rights-Based Approach

Past experiences shape legal orders, since constitutional meaning emerges from the interaction between the text and the broader sociopolitical context. The Romanian case study illustrates this point from the earliest stages, and raises a crucial question within the European system of human-rights protection: is the "organic rejection"[142] of communist parties in post-communist legal orders "necessary in a democratic society"? The ECtHR examined this question in *Partidul Comuniştilor (Nepecerişti) and Ungureanu v Romania*,[143] where it rejected any automatic link between communist affiliation and incompatibility with democratic society.[144]

The case concerned a refusal to register a communist party, which Romanian authorities claimed violated Decree-Law No. 8/1989. They argued that the applicants promoted a political model linked to the former totalitarian regime, incompatible with the post-1989 constitutional framework. The Court held that the refusal infringed the applicants' right to freedom of association under Article 11(1) ECHR. It then examined whether the interference could be justified under Article 11(2) as "necessary in a democratic society" to safeguard the democratic order. Such justification requires a "pressing social need" and proportionality to legitimate aims. The Court recalled that a political party may campaign for changes to the State's constitutional structures only if the means employed are legal and democratic, and the proposed change aligns with fundamental democratic principles.[145]

More specifically, the claim that a "pressing social need" exists rests on three points: (i) plausible evidence that the risk to democracy is sufficiently imminent; (ii) the leaders' acts and speeches are imputable to the political party and (iii) those actions and speeches together show a clear model of society promoted by the party that is

[141] See also the *Guidelines on Political Party Regulation*, issued jointly by the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights and the European Commission for Democracy through Law, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), CDL-AD(2010)024.

[142] B. Selejan-Guţan, *Article 8. Pluralismul şi partidele politice*, cit., p. 84.

[143] ECtHR, App. No. 46626/99, Judgment of 3 February 2005.

[144] Notwithstanding the earlier ECommHR's decision in App. No. 250/57, cit., declaring inadmissible, under Article 17 ECHR (prohibition of abuse of rights), the German KPD's challenge following its 1956 dissolution by the BVerfG. See *supra* in Section 2.1.

[145] App. No. 46626/99, cit., § 46.

incompatible with a democratic society. The analysis must also take into account the historical context in which the party was denied registration.[146]

The Court held that dismissing a party solely because of its links to the former communist regime constitutes a breach of Article 11 ECHR. While acknowledging Romania's history of totalitarian communism, the Court ruled that such a past alone cannot justify curtailing political pluralism. Since the party's statutes and programme revealed no indication that it would incite violence, rebellion, or reject democracy, the Court found no legitimate basis for denying registration. Consequently, the Court unanimously determined that the national authorities had violated Article 11 by preventing a democratically oriented party from participating in public debate.[147] Equally important is the Court's emphasis on the pluralistic foundations of democracy within the Convention system:

> "[O]ne of the […] characteristics of democracy [is] the possibility of […] dialogue, without recourse to violence, […] even when [issues] are irksome or disturbing […] there can be no justification for hindering a political group […] solely because it has criticised the country's constitutional […] order and sought a public debate in the political arena […] the Court [refuses that…] Romania cannot allow the emergence of a new communist party to form the subject of a democratic debate".[148]

At the same time, the Romanian case study brings to the fore the role of historical and contextual arguments in the ECtHR's scrutiny – both aspects widely observed by now by legal scholars, and understood as a "'practice of contextual interpretation' that makes use of historical references to reconstruct cases and to provide the reasoning for judicial decisions".[149] But how precisely did history shape the Court's reasoning in the Romanian case study? More specifically, what part does the legacy of totalitarian communism play when Member States employ militant practices against political actors who promote a communist ideology?

A close reading of the judgment reveals that the Court was prepared to take into account the historical background of cases before it, as it noted in the instance of Romania's experience of totalitarian communism. However, the Court also observed that "context cannot by itself justify the need for the interference, especially as

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[146] This criterion is not confined to cases with a communist past: the ECtHR framed it as a general standard applicable to any anti-democratic party: *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], App. Nos. 41340/98 and 3 others, §§ 102-104 (and App. No. 46626/99, cit., § 48).

[147] Ibid., §§ 51-61.

[148] App. No. 46626/99, cit., § 55.

[149] A. Buratti, *Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights*, in G. Repetto (ed.), *The Constitutional Relevance of ECHR in Domestic and European Law. An Italian Perspective*, Antwerp-Cambridge-Portland, 2013, p. 173 ff., at p. 173 (building on L. Bégin, *L'internationalisation des droits de l'homme et le défi de la "contextualization"*, in *Revue interdisciplinaire d'études juridiques*, vol. 53, 2004, p. 64 ff.). More generally, see R. Uitz, *Constitutions, Courts and History. Historical Narratives in Constitutional Adjudication*, Budapest-New York, 2005.

communist parties adhering to Marxist ideology exist[ed] in a number of countries that are signatories to the Convention".[150] Therefore, according to the Court, "a measure as drastic as the refusal of the application to register […] as a political party, before its activities had even started, is disproportionate to the aim pursued and consequently unnecessary in a democratic society", thus amounting to a violation of Article 11 ECHR.[151]

However, not all historical legacies carry the same "weight" in the ECtHR's case law. Buratti demonstrates that this is especially clear in an early set of cases where the Convention provision the Court relies on, together with the broader judicial language used, sharply limits the scope for public debate and for multiple interpretations of history.[152] Specifically, in cases concerning Holocaust denial, the Court has often shifted its scrutiny from Article 10 (freedom of expression) to Article 17 ECHR (abuse of rights), thereby avoiding a proportionality assessment. The exceptional recourse to Article 17 – though increasingly rare in European judicial reasoning – acts as a categorical barrier in these cases, preventing denialist narratives from being framed as protected speech and thereby excluding them from public debate and from the reconstruction of a nation's collective memory. This judicial approach, adopted by the ECtHR, reflects the view that Holocaust denial narratives contradict events measured "against the objective canon of historical facts that are definitively clear and no longer the object of historical investigation".[153]

A second line of case law further clarifies this point. Unlike denialist speech, which falls under Article 17 as an abuse of the rights, the Court has, in other cases, reaffirmed the central role of Article 10 (freedom of expression). It has therefore carried out a typical balancing exercise, giving space and priority to plural interests when the facts of the case warrant it. The judgment in *Fatullayev v. Azerbaijan*[154] exemplifies this approach: it holds that even statements that "offend, shock or disturb the State or any sector of the population" (§ 86) remain protected, because pluralism and tolerance are essential to a democratic society. In such cases, the Court's reliance on Article 10 reopens the arena for debate, allowing competing historical interpretations to be evaluated through open discussion rather than categorical prohibition. Thus, the Court's differentiated application of Articles 10 and 17 shapes the historical narrative within Member States and delineates the outer boundaries of democratic debate.[155]

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[150] ECtHR, *Partidul Comunişţilor (Nepecerişti) and Ungureanu v. Romania*, cit., § 58.

[151] Ibid., §§ 60-61.

[152] A. Buratti, *Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights*, cit., p. 187-188.

[153] Ibid., p. 184-187.

[154] ECtHR, App. No. 40984/07, Judgment of 22 April 2010.

[155] A. Buratti, *Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights*, cit., p. 186.

Furthermore, the Court's judicial scrutiny appears to vary depending on the specific totalitarian legacy of the Member State. In this sense, the case law suggests that "communist ideology is not a threat on [an] equal footing with Nazism".[156] This distinction again becomes visible, in doctrinal terms, in the choice of the applicable Convention provision (Article 10 or Article 17) and in the judicial reasoning employed (that is, the corresponding openness – or lack thereof – of the ECtHR to balance conflicting rights and interests).

As in the case law concerning Holocaust denial, in cases involving Nazism the Court tends to deem militant measures justified primarily on the basis of the activities' mere content, without assessing whether the applicant poses a plausible threat to democracy, thus recalling a line of reasoning grounded in the abuse of rights of Article 17 rather than in the protection of the pluralistic grounds of freedom of expression under Article 10. Such different legal framing is highly relevant because, while scrutiny under Article 10 preserves the logic of pluralism, Article 17 embodies a logic of pre-emptive exclusion of different interpretations of the collective past: "democracy, which in the perspective of [A]rt. 17 is an asset to be protected against [historical denial], in that of [A]rt. 10 is the foundation for the freedom of historical research".[157]

This approach, which mirrors a line of reasoning that treats National Socialism as a categorical threat to democracy and excludes the possibility of a balancing exercise by the Court, is evident in cases concerning sanctions imposed on specific leaders of Austrian organisations.[158] In these cases, the applicants argued that they were discriminated against as adherents of National Socialism, since no equivalent sanctions were imposed on members of other political groups, thus invoking Article 14 ECHR. However, both the European Commission of Human Rights (EComHR) and the Court held that the difference in treatment had an "objective and reasonable justification", or that the measures were "necessary in a democratic society",[159] in light of Austria's historical experience with Nazism and the danger this ideology may pose to the society.

The central finding in these cases was that "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17. There is therefore no appearance of discrimination contrary to Article 14 of the Convention".[160] It is also worth stressing that the applicants' complaints under Article 10 were considered

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[156] P.E. de Morree, *Rights and Wrongs under the* ECHR, cit., p. 48.

[157] A. Buratti, *Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights*, cit., p. 186-187.

[158] European Commission of Human Rights, *B.H., M.W., H.P. and G.K. v. Austria*, Application No. 12774/87, Decision of 12 October 1989; European Commission of Human Rights, *Ochensberger v. Austria*, App. No. 21318/93, Decision of 2 September 1994; ECtHR, *Schimanek v. Austria*, App. No. 32307/96, Decision of 1 February 2000.

[159] EComHR, *Ochensberger v. Austria*, cit., § 1; ECtHR, *Schimanek v. Austria*, cit., § 2c.

[160] EComHR, *B.H., M.W., H.P. and G.K. v. Austria*, cit., § 2.

manifestly ill-founded, as there was "no indication that the applicants had been convicted for purposes other than activities inspired by National Socialist ideas".[161] In these circumstances, the Court found that "it derive[d] from Article 17 that the applicant's conviction was necessary in a democratic society within the meaning of […] Article 10", since "the freedom of expression guaranteed under […] the Convention may not be invoked in a sense contrary to Article 17".[162]

By contrast, as previously shown in the Romanian case study, when confronted with expressions involving totalitarian communist legacies, the ECtHR generally operates within the framework of Article 10 ECHR, thus indirectly upholding the relevance of contextual assessment and pluralistic judicial scrutiny. This asymmetry reflects the differentiated treatment of historical threats embedded in the Court's case law, stemming from its tendency to assess cases in light of the specific pasts of the Member States: resorting to Article 17 in cases related to Nazism, and to Article 10 in cases concerning communism. Moreover, when addressing the legacies of communist totalitarianism, the ECtHR places considerable weight on the timing of militant measures and on the time elapsed since the communist reality remained in the collective past. Crucially, the Member State must prove the existence of a "real and present" risk of a new communist dictatorship when practicing militant-democracy measures.

In addition to the Romanian case study, the Court's broader approach to militant measures by Member States against the communist ideology in democratic contexts is further illustrated by the judgment in case *Vajnai v. Hungary*,[163] concerning the public wearing of the five-pointed red star, a contested symbol banned in Hungary. During a lawful demonstration, the applicant – then vice-president of the Hungarian Workers' Party – wore the star and was later convicted for displaying a totalitarian symbol in public. The Court was not convinced that the symbol was intended to justify or propagate totalitarian oppression, finding it instead a "symbol of lawful left-wing political movements".[164]

Importantly, the Court held that Article 17 did not apply, as the case could not be characterised as an abuse of rights. This contradicted the Government's argument that the red star symbolised "totalitarian ideas and practices directed against the Convention's underlying values" and that all totalitarian ideologies – including Bolshevism – "should be treated on an equal footing with Nazism" and "their expression should thus be removed from the protection of Article 10". Furthermore, the Court found a violation of Article 10, holding that the national measure was disproportionate to the aims of preventing disorder and protecting the rights of others.[165] Crucially, the Court stressed that "almost two decades have elapsed since

[161] Ibid., § 2.
[162] ECtHR, *Schimanek v. Austria*, cit., § 2c.
[163] ECtHR, App. No. 33629/06, Judgment of 8 July 2008.
[164] Ibid., § 25.
[165] Ibid., § 22, 26, 58.

Hungary's transition to pluralism", that since then the country had become a stable democracy and an EU Member State, and that "there was no evidence of a 'real and present danger' of restoring a communist dictatorship".[166]

The ECtHR's jurisprudence offers an external oversight tool for scrutinising domestic militant-democracy practices from a human-rights perspective and establishes a conceptual framework for defining the notion within the European legal space. In this way, it also transforms militant democracy from an anti-totalitarian response moulded by history and geopolitical imperatives into a more narrowly defined doctrine grounded in human-rights protection.

To be sure, the scope and limits of militant democracy as reflected in the ECtHR's case law are best understood by considering the historical origins and development of the concept. Europe's tragic experience with National Socialism profoundly shaped the birth and evolution of the international system of human rights protection and the ECHR itself. The *travaux préparatoires* show that the drafters were driven by the fear of a resurgence of Nazism on the continent and the development of communism in Western Europe.[167] This origin partly anchors the notion in the historical contingency of post-war experiences, while maintaining the role of the Council of Europe as a complementary, supranational layer of protection to that already existing at the domestic level.

Shaped by the Cold War's well-defined context, the doctrine originally operated within a conceptual universe split into two opposing categories – democracy and totalitarianism – serving to shield the former from clearly identified threats such as Nazism, fascism, and communism. After the Soviet Union collapsed and Central and Eastern European states transitioned to democracy, however, the Court received many claims from new democracies seeking to justify militant measures by reference to their totalitarian communist pasts. While acknowledging transitional realities, it consistently stressed that such measures could be justified only for a limited time, and that a history of dictatorship does not automatically legitimise ongoing severe restrictions on political rights: militant democracy was thus redefined as a temporally bounded, proportionate tool rather than an existential defence mechanism. As the historical distance from the Second World War and the Cold War has increased, identifying those opposing democracy has become more complex, in part due to the fragmentation of the traditional "enemies" once situated within a clear separation between democratic and totalitarian legal orders.[168] Perhaps this also explains why the ECtHR's interpretation

[166] Ibid., §§ 34, 49. See also A. Gliszczyńska-Grabias – G. Baranowska, *The European Court of Human Rights on Nazi and Soviet Past in Central and Eastern Europe*, in *Polish Political Science Yearbook*, vol. 45, 2016, p. 117 ff.

[167] P.E. de Morree, *Rights and Wrongs under the ECHR*, cit., p. 42-43.

[168] J.-W. Müller, *Militant Democracy*, cit., p. 1255. On the ECtHR's focus on 'existential', totalitarian-type threats and its weaker equipment against the subtler erosion of democracy, see A. Zysset, *Responding to Authoritarian Populism at the European Court of Human Rights*, Cambridge, 2026, p. 14.

of democratic self-defence has recently shifted to wider and more diffuse areas of "threats", such as religious extremism or security-based restrictions.[169]

Notwithstanding the difficulty of achieving a clear consensus on the precise scope and conditions of application of militant democracy,[170] its specific instruments – codified within domestic legal orders, such as the prohibition of political parties or the forfeiture of rights – together with the case law of the ECtHR, provide valuable tools for outlining the main conceptual features of this doctrine.[171] More specifically, in the Convention system, democratic self-defence allows states to impose preventive restrictions on anti-democratic actors, provided that such restrictions remain functionally oriented towards preserving pluralism and structurally constrained by human-rights guarantees.

3. *'Legal Irritants' as a Lens for Identifying "Perturbations": Evolutionary Dynamics of the Rule of Law in the Romanian Legal Order*

We have seen that militant democracy, in its typical understanding, was conceived as a defensive constitutional tool directed primarily at collective political actors whose programmes or activities aim at dismantling the democratic order from within.[172] The ECtHR's rights-based scrutiny further shapes the scope of this notion in Europe: while it does not prescribe specific militant instruments, it requires that they remain oriented towards the safeguarding of democracy, be proportionate, and be reserved for situations in which there is plausible evidence of a sufficiently serious – and, where relevant, sufficiently imminent – threat to democratic society.

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[169] P.E. de Morree, *Rights and Wrongs under the ECHR*, cit., p. 157, 183, 260. Particularly illustrative in this respect is the well-known case *Refah Partisi (The Welfare Party) and Others v. Turkey*, cit., esp. § 123). See also P. Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe*, 17 August 2010, available at SSRN: http://dx.doi.org/10.2139/ssrn.1660649 (last accessed: 9 July 2026).

[170] For instance, according to J.-W. Müller, *Militant Democracy*, p. 1255, these dilemmas arise from two main sources. First, many political philosophies offer differing reasons for either militant or non-militant responses to anti-democratic threats. Second, varying historical experiences shape how countries assess the risk of democratic collapse. B. Iancu illustrates this by describing the recent Romanian case as an example of "Eastern-style authoritarian liberalism." (*Militant Democracy and Rule of Law in Three Paradoxes*, cit., p. 25). Examining the trajectory of the rule of law in East Central Europe immediately after the democratic transitions, see A. Sajó and V. Losonci, *Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?*, in D. Greenberg – S.N. Katz – M.B. Oliviero – S.C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York-Oxford, 1993, p. 321 ff.

[171] See, e.g., on the category linked to the EU, G. Martinico – A.M. Russo, *Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi*, *European Public Law*, vol. 21, 2015, p. 659 ff.

[172] See also, in this sense, S. Tyulkina, *Militant Democracy. Undemocratic Political Parties and Beyond*, New York, 2015, p. 19.

One of the main difficulties of this doctrine therefore lies in identifying the threshold of "danger":[173] at what point does democratic self-defence respond to a real and imminent threat, and when might it instead extend to a mere restriction of unpopular or controversial views of the opposition (whoever that may be)? Militant democracy thus risks shifting from a limited, preventive, and last-resort doctrine into a means of discretionary enforcement by relevant actors within the national landscape.

The events surrounding the 2024-2025 presidential elections in Romania have revived debates on the meaning, purposes and tools of militant democracy in Europe. In this context, the CCR effectively reinterpreted and extended the logic of self-defence beyond the instruments expressly provided for in the Constitution, applying specific measures to individual candidates rather than to collective political actors. The Romanian experience therefore raises the broader question of whether, and under what conditions, militant rationale may be mobilised outside its traditional field of application, at the discretion of independent, unelected bodies of the state, even when such measures are not expressly foreseen by the Constitution or by statutory law. Against this background, the next subsection looks at the Romanian case study in light of 'legal irritants', an analytical lens that emerged to address some of the limitations of 'legal transplants'.[174]

3.1. The Perturbatory Dynamics of 'Legal Irritants'

In a well-known contribution published in 1998, Gunther Teubner advanced the notion of 'legal irritants' in order to observe the interactions between a legal system and elements external to it, thereby reframing the classic debate between the "rejection" and "integration", as well as the sharp dichotomy between "contextualism" and "autonomy" in contemporary comparative law.[175] In this context, according to Alan Watson's original formulation,[176] 'legal transplants' refer to the borrowing of legal rules – or, more specifically, legal ideas – across jurisdictions. This process is made possible by the relative autonomy of law from its broader social and cultural environment.[177]

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[173] Ibid., 30. For the broader debate, see, e.g., P.E. de Morree, *Rights and Wrongs under the ECHR*, cit., p. 178 ff.

[174] See *supra* n. 1.

[175] Ibid., p. 12-17.

[176] A. Watson, *Legal Transplants*, 2nd ed., Athens, 1993; Id., *Legal Transplants and European Private Law*, in *Electronic Journal of Comparative Law*, vol. 4, 4/2000; Id., *Reception of Law*, in *The American Journal of Comparative Law*, vol. 44, 2/1996, p. 335 ff. As noted by L.A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations*, in *The International Lawyer*, vol. 34, 3/2000, p. 1055 ff., at p. 1055, this was not the first occasion on which Watson addressed the issue of legal transplants. The foundations of his theory can already be found in several writings from the 1960s onwards (at n. 69). For an overview, see W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, in *The American Journal of Comparative Law*, vol. 43, 4/1995, p. 489 ff., at n. 1.

[177] V. Perju, *op. cit.*, p. 106.

Teubner's theoretical proposal built upon this existing metaphor,[178] insofar as it acknowledges both the dynamic and transformative (or evolutionary) potential of legal discourses and the autonomy of the legal system vis-à-vis other arenas of social life. Indeed, the transplant metaphor remained relevant to Teubner's theoretical reformulation, as the latter also presupposes the possibility of the movement of legal rules or ideas across jurisdictions and addresses the question of the law's ability to influence societal realities.[179] In this sense, 'legal irritants' engages with a central debate in comparative law over the past decades, namely the conditions under which legal transfer may occur and the factors that determine the degree of transferability of legal rules or institutions.[180]

However, Teubner's conceptual contribution shifts the centre of gravity of this debate. According to a different analytical logic than that underlying the dynamics of legal transplants as formulated by Watson, Teubner argues that 'legal irritant' illustrates how, once introduced into a host order, a foreign norm activates the internal dynamics of the receiving system and "trigger[s] a whole series of new and unexpected events".[181] Rather than remaining confined to the status of an adopted rule ("integrated", as it would be according to the original logic of legal transplants), the foreign norm stimulates processes of reconstruction within the existing structures of the host legal order. In particular, the 'legal irritant' compels the legal system to reinterpret its own categories, rearticulate its internal distinctions, and recalibrate its relationship with other social spheres.[182]

In other words, the foreign norm becomes a "fundamental irritant" within the host order[183] and thus a key driver of legal evolution, transforming – or at least interacting fundamentally with – the existing "binding arrangements".[184] In normative

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[178] G. Teubner, *Legal Irritants*, cit., p. 15-16.

[179] Although this occurs through dynamics typical of societal constitutionalism – a systematic approach later developed by the author – see G. Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in C. Joerges, I.-J. Sand – G. Teubner (eds), *Constitutionalism and Transnational Governance*, Oxford, 2004, p. 3 ff. More generally: G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, 2012; A. Golia Jr. – G. Teubner, *Societal Constitutionalism (Theory of)*, *Encyclopedia of Contemporary Constitutionalism*, Cham, 2021, p. 1 ff.

[180] O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *Modern Law Review*, vol. 37, 1974, p. 1 ff. On the "spectrum" of law's embeddedness, at one end of which transplantation becomes impossible according to Kahn-Freund, see also W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, cit., 495. More recently, for the continuing relevance of legal transplants in contemporary comparative scholarship, see M. Siems, *Legal Transplants: An Interdisciplinary Approach*, cit., *passim*.

[181] G. Teubner, *Legal Irritants*, cit., p. 12.

[182] Ibid., p. 12, 19-21.

[183] Ibid., p. 12.

[184] Teubner refers to "binding arrangements" as "[l]aw's […] ties to society" (p. 18), thereby clarifying how law relates to other social systems. More specifically, this notion "attempt[s] to grasp what happened to the social ties of law in the great historical transformation from embeddedness to autonomy" (p. 17). Teubner advances four theses concerning law's contemporary ties to society: 1) "they are no longer comprehensive, but are highly selective and vary from loose coupling to tight

terms, the host legal order does not merely align with or mechanically receive the original model, as some classical or integration-oriented accounts of legal transplants might suggest,[185] but produces a whole new meaning for the borrowed rule, according to its own internal dynamics and the existing interactions between the legal system and the other subsystems. Hence Teubner's definition: "[they are] an outside noise which creates wild perturbations in the interplay of discourses […]. 'Legal irritants' cannot be domesticated [,] [rather they] unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change".[186]

In the following, this paper undertakes the task of illustrating "what kind of transformation of meaning"[187] the notion of militant democracy underwent in the aftermath of the CCR's intervention during the presidential elections of 2024-2025. It proceeds from the assumption that this originally "alien" notion was incorporated into the Romanian order during the turbulent democratic transition of the 1990s. At the moment of its codification within that legal system, however, its potential to activate a "perturbing" trajectory remained largely latent.

'Militant democracy' within the host legal order, however, rather than being integrated with its original meaning – namely, as referring to "threats" to a substantive understanding of democracy arising from within the political community, and conceived as a mechanism to counter the dismantling of democracy by collective political actors – produced, when applied by the CCR, a "wild perturbation" that fundamentally altered the existing relationship between law and politics within the Romanian legal order. At the root of this lies the fact that the doctrine has been operationalised through constitutional interpretation against individual actors in presidential elections. The migration of the concept thus transforms the existing "binding arrangements" between the political and legal systems in Romania, while simultaneously altering the original meaning of the notion itself.

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interwovenness"; 2) "they are […] connected to diverse fragments of society"; 3) "they are now established via difference [not identity]"; 4) "they evolve […] in the conflictual interrelation of two or more independent evolutionary trajectories" [as each system translates external pressures into its own language, and the interaction produces frictions, tensions and reinterpretations] (p. 18). See also, on the concept of "binding arrangements", G. Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, in *Cardozo Law Review*, vol. 13, 1992, p. 1443 ff.

[185] See, however, P. Legrand, who denies the very possibility of legal transplants on the ground that legal rules are inseparable from their culturally embedded meaning. Since meaning cannot travel intact, the purported transplant is necessarily transformed in the receiving context, rendering convergence illusory (*The Impossibility of Legal Transplants*, in *Maastricht Journal of European and Comparative Law*, vol. 4, 1997, p. 111 ff.). By contrast, A. Watson, while recognising that legal rules undergo modification in transmission, argues that foreign transplants remain a central mechanism of legal evolution, given the relative autonomy of law from its social and cultural environment (A. Watson, *Legal Transplants*, *passim*). See, on these aspects of the debate, V. Perju, *op. cit.*, p. 1309.

[186] G. Teubner, *Legal Irritants*, cit., p. 12.

[187] Ibid.

Before turning to the concrete sequence of events through which democratic self-defence unfolded as a 'legal irritant' during the presidential elections, consideration must be given to the institutional environment within which this irritation took place.[188] Following Teubner's approach, the effects of a 'legal irritant' depend on the specific "binding arrangements" linking the legal system to other social subsystems – that is, the historically stabilised patterns through which law interacts with other spheres of social communication. In the Romanian case, the relevant arrangements are those connecting the legal system with the political system, and they exhibit several structural features that shape how this doctrine is reconstructed within the domestic legal order.

Furthermore, these perturbatory effects cannot be understood solely at an abstract level, but must also be situated within the institutional and political frameworks through which militant reasoning was operationalised. Three elements are particularly noteworthy in the Romanian case study: (i) the centrality of legal transplants in the evolution of domestic constitutionalism; (ii) the *de facto* political role of the President of the Republic within the semi-presidential system of government; and (iii) the CCR's institutional positioning within the presidential electoral process. Together, they reveal that, rather than leading to the rejection of the doctrine or its smooth absorption with its original meaning,[189] this doctrine operates as a form of 'mutual irritation' – a reciprocal perturbation between the legal and political systems generated through their co-evolutionary interaction.[190]

3.2. The Law's "Binding Arrangements" with the Romanian Political System: Implications for the Meaning of 'Militant Democracy' Within and Beyond the Host Legal Order

Each of these elements shaped the reception and subsequent reconfiguration of 'militant democracy' in Romanian constitutional practice, and are examined in turn below. First, Romania's constitutional evolution must be situated within a longer history of legal transplants, where the recurrent incorporation of Western models was expected to function as a strategy of rapid modernisation and external legitimation, while at the same time producing a tension between the institutional "forms" and their adaptation – often partial or distorted – within domestic sociopolitical "substance".[191] This tradition provided the structural channels through which foreign rules and legal

[188] At this stage, it is also worth clarifying that the claim advanced here does not require endorsement of the broader systems-theoretical premise that functional differentiation and global legal communication have displaced nationally embedded legal systems in favour of a transnational communicative network in which states operate merely as regional nodes. The argument can be sustained independently of that epistemological commitment.

[189] Namely, as referring to "threats" to a substantive understanding of democracy arising from within the political community, and conceived as a mechanism to counter the dismantling of democracy by collective political actors.

[190] G. Teubner, *Legal Irritants*, cit., p. 12, 17-18.

[191] B. Selejan-Guțan, *The Constitution of Romania: A contextual analysis*, cit., p. 26-27.

ideas may enter the host legal order, where they are subsequently reconstructed within existing "binding arrangements" between the legal and political subsystems.

Second, attention must be paid to the Romanian semi-presidential framework and to the role of the President of the Republic as a directly elected symbol of national unity, which has in practice been politicised, thereby putting further pressure on the "irritant" effects of militant democracy rationales in this arena. In such a setting, the interpretative shift from party-focused militant measures to candidate-centred exclusions acquires more delicate constitutional implications, as interventions affecting individual contenders may transform the core dynamics of political competition and thus fundamentally alter the law's existing binding arrangements with the political system.

As this latter move has been brought about through constitutional interpretation, this section finally turns to the institutional positioning of the CCR within the post-1989 architecture. The Court is not only entrusted with traditional counter-majoritarian review but also occupies a position unusually close to the electoral process, being assigned functions such as the supervision of presidential elections and the confirmation of their results under Article 146(f) RC. This configuration intensifies the interaction between law and politics and creates conditions in which the CCR may be drawn into politically sensitive disputes and interpret its powers expansively, with relevant consequences for rule-of-law requirements and the evolutionary patterns of the Romanian legal order.

i) Legal Transplants within the Romanian Constitutional Evolution

Notwithstanding some pre-existing elements of liberal-democratic domestic tradition, the Romanian constitutional evolution has historically been shaped by the extensive use of foreign transplants.[192] This has led some authors to identify a "classical contradiction",[193] with continuing implications for the country's politico-constitutional life – particularly, for present purposes, in relation to the *de facto* "politicisation" of the President of the Republic and the CCR within Romania's semi-presidentialism.[194]

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[192] M. Guţan, *The Challenges of the Romanian Constitutional Tradition*, in *Giornale di storia costituzionale*, vol. 25, 1/2013, p. 223 ff.; B. Iancu, *Romania – The Vagaries of International Grafts on Unsettled Constitutions*, in A. Albi – S. Bardutzky (eds), *National constitutions in European and global governance: Democracy, rights, the rule of law: National reports*, The Hague, 2019, p. 1047 ff., esp. p. 1048-9 and n. 4. For a – pre-communist, communist, and post-communist – periodisation of Romanian development, see B. Selejan-Guţan, *The Constitution of Romania: A Contextual Analysis*, cit., p. 2, respectively: the 1866, 1923 and 1938 constitutions (pre-communist or "the rise and fall of liberal constitutionalism"); 1948, 1952 and 1965 (communist); and 1991 (rev. 2003). See also G. Sbârnă (ed), *Constituţiile României. Studii*, Târgovişte, 2012.

[193] B. Selejan-Guţan, *The Constitution of Romania: A Contextual Analysis*, cit., p. 26, 29.

[194] "[Some] evolutions […] can be understood [through the] contradiction […] between the [constitutional transplant's] mechanisms and outcomes, and its presumed goals […] [in modern Romania] […] [transplant] was determined by the weak sociopolitical and economic context, [then it] became a central feature. [Even today], the 'importing mindset' explains a certain inconsistency in the

It is against this background that the "absorption" of foreign concepts and doctrines, in particular that of militant democracy, shall be observed in the Romanian case study. Constitutionalism here evolved largely through the repeated incorporation of models from Western Europe, although domestic institutional development also occurred. Romanian political elites viewed the adoption of Western constitutional patterns as a means of rapid modernisation: from the nineteenth century until at least the 1923 Constitution,[195] they were seen as political means that would help to embed liberal constitutional principles into Romanian political life.[196]

Certainly, legal transplants have also served an important function of external legitimation. At the same time, however, this pattern of borrowing generated a structural tension. Reforming elites frequently assumed that incorporating external models would automatically transform the Romanian sociopolitical structure, whereas

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Romanian constitutional identity. […] [In the post-communist period] […] borrowing […] from the West was the main trend. [Given the] importing mindset and […] the rebirth of the older inferiority complex [and] the urgent need for international legitimisation […], recourse to [transplant] was once more inevitable" (ibid., p. 30).

[195] The 1923 Constitution, adopted on 29 March in the aftermath of the territorial expansion following the Great Union of 1918, reorganised the framework of "Greater Romania". This enlarged state brought together Transylvania, Banat, Bukovina, and Bessarabia with the pre-war Kingdom of Romania (Wallachia, Moldavia, and Dobrogea). Building on the institutional structure of the 1866 Constitution, the 1923 fundamental law proclaimed a "unitary and indivisible national state" (Article 1), reaffirmed the separation of powers and parliamentary government under a constitutional monarchy, and introduced universal male suffrage alongside an extensive catalogue of civil rights and liberties. Legislative power was exercised jointly by the King and a bicameral Parliament, while executive authority formally remained vested in the monarch but was exercised through ministers politically responsible for royal acts.

Notably, for the first time in Romanian constitutional history, the Constitution expanded the judicial powers of the High Court of Cassation and Justice: Article 103 entrusted it with the competence to review the constitutionality of laws and to declare inapplicable those contrary to the Constitution. This may have built upon an earlier practice of constitutional review predating the 1923 Constitution, particularly the 1922 judgment of the Court of Cassation and Justice recognising the power of ordinary courts to disapply unconstitutional legislation – often described as the *Romanian Marbury v. Madison* case and as an early European reception of the American model of diffuse judicial review. See C. Pistan, *Giustizia costituzionale e potere giudiziario. Il ruolo delle corti costituzionali nei processi di democratizzazione ed europeizzazione*, in A. Di Gregorio (ed), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, cit., p. 295 ff., esp. p. 297-299.

[196] See M. Guţan, *Constituționalism și import constituțional în România modernă: proiectul de Constituție de la 1848 al lui Mihail Kogălniceanu*, in *Studia Politica: Romanian Political Science Review*, vol. XI, 2/2011, p. 227 ff. E.g., Kogălniceanu's 1848 constitutional draft during the 1848 revolutionary movement in Moldavia, aimed at the separation of powers, civil liberties, and representative government, adapted to local conditions; though the 1848 projects were not institutionalised, they shaped the constitutional vocabulary of the Romanian elite. After the 1859 union of Moldavia and Wallachia under Alexandru Ioan Cuza, institutional modernisation accelerated: Cuza governed under the 1858 Paris Convention, then in 1864 introduced by plebiscite the Statute Developing the Paris Convention, concentrating executive authority and provoking the opposition that led to his 1866 abdication. The elites then installed a foreign prince, Carol of Hohenzollern-Sigmaringen, as "*Domnitor*", and a constitutional assembly drafted the 1866 Constitution, largely inspired by Belgium's 1831 Constitution.

in practice the transplantation of Western models often produced significant discrepancies with the political realities in which they were implemented.[197]

This dynamic is reflected in the Romanian evolution through the theory of 'forms without substance' (*forme fără fond*).[198] This debate has traditionally been tied to the adoption of the 1866 Constitution, widely seen as Romania's first modern constitution. Enacted during Carol I's reign and modelled on Belgium's 1831 Constitution, it created a hereditary constitutional monarchy and introduced the core tenets of nineteenth-century liberal constitutionalism: representative government, separation of powers, and a list of civil liberties. Yet it also concentrated substantial powers in the monarch's hands and restricted political participation through a census-based electoral system. Because it leaned heavily on Western models, critics in the late nineteenth century argued that the framework reproduced institutional "forms" without the sociopolitical "substance" needed for them to function effectively: institutions had been adopted faster than the underlying conditions required for their appropriate operation.

The constitutional history of Romania thus demonstrates a pattern in which institutional structures struggle to integrate into society, owing to tensions between the design of institutions and the prevailing sociopolitical realities.[199] Yet, comparative scholarship has emphasised that a constitutional framework is most effective when it resonates with the values and structures of the society it serves: where models are perceived primarily as external imports rather than as arrangements rooted in the local context, their integration into domestic practice often remains incomplete.[200] Adoption through institutional borrowing may therefore involve adaptation and reinterpretation, allowing foundational principles – such as political pluralism and the rule of law – to take on specific configurations within the receiving constitutional order.

The post-1989 democratic transition in Central and Eastern Europe illustrates this dynamic particularly clearly. In Romania, moving from a socialist state to a liberal-democratic legal order required reintroducing institutions and principles historically linked to Western constitutionalism, as well as creating new ones traditionally

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[197] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 26-27.

[198] The theory of "forms without substance" in Romania was first formulated by Titu Maiorescu in 1868. See T. Maiorescu, *În contra direcţiei de astăzi în cultura română* (1868), in Id., *Critice*, Bucureşti, 1989, p. 122 ff.

[199] B. Iancu, *The Evolution and Gestalt of the Romanian Constitution*, in A. von Bogdandy – P.M. Huber – S. Ragone (eds), *The Max Planck Handbooks in European Public Law*, Oxford, 2023, p. 493 ff., at p. 496. Further on the historical context of the theory of "forms without substance" in nineteenth-century Romanian constitutionalism, see ibid., p. 500-502.

[200] See A. Di Gregorio, *Le transizioni alla democrazia nei paesi dell'Europa centro-orientale, baltica e balcanica*, in Id. (ed), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, cit., p. 8-9. On the issue of autochthony in constitution-making processes, understood here as opposed to the unilateral imposition of a constitution, particularly at the level of drafting the foundational text, P.C. Oliver, *Autochthonous Constitutions*, in R. Wolfrum – F. Lachenmann – R. Liivoja (eds), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, online ed., 2017.

associated with its typical architecture, such as a centralised Constitutional Court model. Democracy was thus re-established as the framework needed to sustain political pluralism after decades of communist single-party rule, so that the revival of democratic life was closely tied to the re-legitimation of pluralism as a core organising principle. Within the present constitutional framework, pluralism occupies a central normative position, recognised as a foundational principle of the democratic state under Article 8 RC.

More generally, however, the early years of post-communist transitions in CEEBB countries were marked by what comparative scholarship has described as an "exasperated political pluralism":[201] a rapid proliferation of political parties, high electoral volatility, institutional instability, and the broader restructuring of political systems following the collapse of authoritarian rule. The constitutionalisation of pluralism thus restored political competition, but it also generated an especially fragmented form of pluralist politics, typical of many post-communist democracies.[202]

Against this broader background, the incorporation of democratic self-defence into Romania's legal system can be seen as part of this longer tradition of transplantation: the idea entered the domestic legal order through the adoption of Western doctrines designed to safeguard democratic pluralism and the substantive foundations of the constitution. Yet, in a framework already marked by an "exasperated political pluralism" capable of destabilising the political system, the CCR's application of militant reasoning may generate new tensions, also with consequences for the protection of political competition.

ii) The Centrality of the Presidential Office at the Intersection of Law and Politics

The semi-presidential system and the *de facto* protagonism of the Presidential office constitute the arena in which the irritant effects most clearly materialised. To recall, semi-presidentialism is mainly defined by the duality of (typically parliamentary and presidential) elements present at the same time within the institutional structure: on the one hand, the Government's political responsibility before Parliament; on the other, the President of the Republic's direct popular election and autonomous constitutional powers.[203] Such an arrangement gives rise to a dual executive in which the Head of State is not limited to symbolic duties but can actively shape the political

[201] A. Di Gregorio, *Le Costituzioni*, in Id. (ed), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, cit., p. 49 ff., esp. p. 53.

[202] Although cf., E.-S. Tănăsescu, *Despre identitatea constituţională şi rolul integrator al Constituţiei*, in *Curierul Judiciar*, 5/2017, explicitly linking political pluralism to the identity of the RC, based on Articles 1(3), 8 and 152(1).

[203] M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, cit., p. 186. On the original definition, see M. Duverger, *Le concept de régime semi-présidentiel*, in Id., *Les régimes semi-présidentiels*, Paris, 1986, p. 7 ff.

direction (*indirizzo politico*) of the state.[204] Direct election, in turn, grants the presidency strong democratic legitimacy, political visibility, and symbolic centrality – especially in systems marked by fragmented party competition and unstable parliamentary majorities.

The 1991 RC adopted the institutional structure of France's Fifth Republic, establishing a dual system that pairs a directly elected President with a Government accountable only to Parliament. However, from the outset of the constituent process, Romania aimed to diverge from the French model by rationalising and limiting the presidential powers, hoping to resolve the issue of "a directly elected but less powerful President" and thus creating a formally "weak" presidency.[205] The drafters specifically aimed to sidestep the authoritarian risks of the communist era and the structural flaws of parliamentarianism that had marked Romania before and after World War I. To this end, they made the Head of State directly elected, so the office would not be decided in an opaque manner through contingent parliamentary majorities (e.g., secret parliamentary deals). They also limited the executive's ability to dissolve the legislature, thereby safeguarding constitutional stability and institutional balance. The result was a mixed system in which a President chosen by universal suffrage must coexist – and often compete – with a powerful Parliament.[206]

The duality also appears inside the executive. The President shares power with the PM, whom he or she appoints after a vote of confidence that must be approved by an absolute majority of members from both chambers sitting together (Articles 85 and 61 RC).[207] Importantly, the 2003 constitutional reform expressly excluded any presidential possibility to dismiss the Prime Minister (PM) under Article 107(2). This change thus rejected earlier presidentialist readings, influenced by the French model, that had granted the Head of State that authority.[208]

Under the RC, the President is elected through universal, equal, direct, secret, and freely expressed suffrage, guaranteeing the office's democratic legitimacy (Article 81(1)). The Constitution establishes a two-round electoral system. A candidate wins in

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[204] F. Lungo, *Il capo dello Stato*, in A. Di Giovine – A. Algostino – F. Longo – A. Mastromarino, *Lezioni di diritto costituzionale comparato*, Firenze, 2017, p. 201 ff., 212.

[205] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 101. The aim of curbing presidential dominance relative to the French Fifth Republic was driven in the RC by the country's recent experience with dictatorship (V. Perju, *op. cit.,* 1314). Moreover, in contrast to France, which has shifted toward a more presidential system, post-communist countries typically incorporate parliamentary features into their semi-presidential frameworks. See M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, cit., p. 193.

[206] I. Muraru – E.-S. Tănăsescu, *Drept constituţional şi instituţii politice*, 16 ed., vol. II, Bucureşti, p. 267.

[207] This explicit confidence in the RC contrasts with the implicit mechanism outlined in Article 49(1) of the 1958 French Constitution (this is highlighted by M. Benedetti, *Il semipresidenzialismo in Romania tra teoria e prassi: dalla Costituzione del 1991 agli accordi di rotazione del Primo ministro, fino all'anno elettorale 2024*, in *federalismi. it*, 5/2025, p. 28 ff., esp. p. 31).

[208] Ibid., p. 32.

the first round only if they secure a majority of the votes cast by all registered voters (Article 81(2)). If no majority is achieved, a runoff is held between the two candidates who received the most votes in the first round; the one who obtains the highest number of valid votes in the second ballot is declared elected (Article 81(3)). To prevent excessive concentration of power, the Constitution also limits any individual to no more than two presidential terms, consecutive or not (Article 81(4)). Crucially, the results of the presidential elections must be validated by the CCR, which ensures that the electoral process is regular and constitutional (Articles 82(1) and 146(f)). Only after this validation can the elected candidate assume office by taking the constitutional oath before a joint session of the Chamber of Deputies and the Senate (Article 82(2)).[209] Lastly, according to Article 83(1) RC, a President serves a five-year term that begins when the oath is taken. Article 83(2) ensures institutional continuity by allowing the incumbent to remain in office until the successor is sworn in. Article 83(3) permits an extension of the presidential term through an organic law, but only under extraordinary circumstances such as war or disaster.

The President's constitutional status is assisted by guarantees that preserve the office's neutrality and independence. Article 80(1) RC requires the President to represent the Romanian State and to act as the safeguard of the national independence and the country's unity and territorial integrity. The Constitution also entrusts the Head of State with ensuring the observance of the Constitution, the proper functioning of public authorities, and the mediation between the state's powers and between the state and society (Article 80(2)). These provisions illustrate a broader trend seen in many post-socialist Central and Eastern European constitutions, where the presidency is viewed not only as a representative body but also as a "factor of national unification" that can maintain coherence in fragmented political systems.[210] Accordingly, the RC gives the Head of State a *supra partes* role designed to protect the unity and continuity of the constitutional order.

To reinforce this neutral integrative stance, Article 84(1) states that, during the term, the President may not belong to a political party or hold any other public or private office. Because the President is expected to embody the entire polity, presidential elections take on a symbolic and plebiscitary character that goes beyond ordinary parliamentary contests. Importantly, these provisions reflect the drafters' intention to configure the Presidency as a neutral institution rather than a partisan political actor. Yet constitutional practice has often diverged from this ideal. As has been observed, "[t]he living constitution confirmed the dangers of semi-presidentialism: on the one hand, the excessive personalization of political power, due

[209] "I solemnly swear that I will dedicate all my strength and the best of my ability to the spiritual and material welfare of the Romanian people, that I will respect the Constitution and the laws of the country, and that I will defend democracy, the fundamental rights and freedoms of the citizens, and the sovereignty, independence, unity, and territorial integrity of Romania. So help me God!"

[210] J. Sawicki, *Le forme di governo*, in A. Di Gregorio (ed), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, cit., p. 159 ff., esp. p. 162, 180.

to the high political legitimacy of the President and, on the other hand, the inner conflict between the two parts of the executive [especially in cohabitation cases]".[211] In this regard, the 2003 constitutional reform is especially important for grasping the "binding arrangements" between law and politics in Romania. By extending the presidential term from four to five years, the reform desynchronised the electoral cycles of the President and Parliament, in contrast to the 2000 French constitutional reform, which aimed to synchronise them. This institutional decision structurally raised the chances of cohabitation, thereby strengthening the dualistic nature of Romania's semi-presidential executive.[212]

Although the President's powers are formally described as powers of guarantee and coordination, they confer substantial influence over the political system and have often led to the politicisation of the office in practice.[213] An important peculiarity of the Romanian system thus lies in the tension between the constitutional mandate that the Head of State remain neutral and the political reality: "in practice [it] has often assumed an active role in politics ('player-president'), rather than the 'referee' role attributed by the Constitution".[214] The presidency has always been the main focus of competition among party elites, and Presidents continue to play a central role within their "presidential parties" by shaping party leadership, forming coalitions, making governmental appointments, and setting electoral strategy,[215] functioning as an autonomous actor whose influence on the political system extends well beyond the electoral process. Yet the contest for the office is formally detached from party, whatever the partisan reality of the office once occupied. The presidential candidate stands, constitutionally speaking, as an individual, whereas the militant instruments available in the Romanian legal order – Article 40(2) RC, Article 146(k) RC, the registration requirements of the Law on Political Parties – are all addressed to collective actors. Presidential elections are therefore an arena in which the Constitution's militant apparatus has, in principle, no addressee.

The partisan reality of the office, though it does not alter this constitutional position, is nonetheless worth setting out, since it explains why the presidency is so intensely contested. It is most apparent during the formation of a government. When no party wins an absolute majority in parliament, the President's authority to appoint the PM becomes overtly political. However, absolute majorities are structurally rare in

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[211] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 102.

[212] M. Benedetti, *Il semipresidenzialismo in Romania tra teoria e prassi,* cit., p. 30.

[213] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 30. The President may consult the Government on urgent national matters and may participate in or preside over Government meetings on foreign policy, defence, and public order (Articles 86-87 RC); may address Parliament on the principal political issues of the nation and call consultative referendums on matters of national interest (Articles 88 and 90); and holds significant competences in foreign affairs and national defence (Articles 91-92).

[214] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 30.

[215] M. Benedetti, *Il semipresidenzialismo in Romania tra teoria e prassi,* cit., p. 38.

Romania's political system. Coalition governments are the norm, while single-party administrations remain exceptional because of the electorate's fragmented social and ethnic composition and the design of the electoral system. No party has ever secured an autonomous parliamentary majority; the PSD has generally obtained only a relative majority, though large enough to remain a dominant force in Romanian politics.[216] As a result, the defining feature of Romanian semi-presidentialism is the triangular relationship among the parliamentary majority, the Government, and the President.[217] Depending on whether the Head of State shares the same political camp as the parliamentary majority or belongs to an opposing coalition, the President may act as a facilitator, an arbiter, or even a quasi-oppositional actor.

Beyond government formation, the President holds significant legislative and constitutional-review powers that can shape the political process. While the Head of State does not have legislative initiative nor participates in the adoption of Government ordinances, Article 77 RC permits the President to ask Parliament, once, to reconsider a law before it is promulgated. In addition, the President can trigger *a priori* constitutional review under Article 146(a) and refer constitutional disputes between public authorities to the CCR under Article 146(e). These tools enable the presidency to intervene at critical junctures in the process of norm formation, underscoring the President's capacity to influence political outcomes even within the formally parliamentary orientation of the constitutional system.[218]

Until now, the specific features of the Romanian constitutional framework and its "binding arrangements" between law and politics have been examined, particularly

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[216] Benedetti observes that Romanian constitutional practice has not established a convention that gives the party with a relative majority a preferential right to form the government. The period after the 2004 elections illustrates this clearly: although the Social Democrats and their allies won the election, President Traian Băsescu used his strong popular mandate to steer coalition talks and help create a liberal-conservative majority. Only when one party holds an absolute majority does Article 103(1) RC meaningfully limit presidential discretion, obliging the President to consult that party and, in practice, acknowledging its right to govern (ibid., p. 36-37; 39-40).

[217] M. Balan, *Instabilities and Conflicts of Jurisdiction: Parliament, President, and Government in Romania*, in A. Lorenz – D.M. Mariş (eds), *Politics and Society in Romania. Societies and Political Orders in Transition*, Wiesbaden, p. 145 ff.

[218] The principal constitutional check on presidential activism is the stringent regulation of the dissolution power. Article 89 RC allows dissolution only after consulting the Presidents of both chambers and the parliamentary group leaders, and only if Parliament cannot form a government within sixty days and after at least two rejected investiture votes; dissolution may occur only once per year, and is prohibited during the final six months of the presidential term and in times of war, mobilisation, siege, or emergency. This sharply distinguishes the Romanian model from the Weimar antecedent, which is widely seen as the first historical precursor of semi-presidentialism. In the Weimar Republic, the Reich President could dissolve Parliament with broad discretion under Article 25 and combine that power with the emergency authority granted by Article 48, thereby destabilising the constitutional order and accelerating its presidentialisation. Cf., M. Fioravanti, *Mortati a Weimar*, in C. Mortati, *La costituzione di Weimar*, Milano, 2019 [1946], p. VI-XXII, and the classical study of C. Mortati, *Lezioni sulle forme di governo*, Padova, 1973, p. 199 ff..

in relation to semi-presidentialism. Within this framework, applying militant rationale to individual candidates to the Presidential office becomes particularly problematic. Democratic self-defence has traditionally been conceived as a set of exceptional tools aimed mainly at collective actors, especially political parties, whose programmes or activities might concretely undermine the democratic constitutional order. In Romania, however, these tools impact an office that holds direct democratic legitimacy and is constitutionally tasked with representing national unity, yet has become increasingly politicised in practice. In such a context, the CCR's expansion of militant reasoning could change not only the conditions of electoral competition but also the broader equilibrium among political pluralism, constitutional adjudication, and democratic legitimacy.

Moreover, this evolution should be viewed in the context of wider changes in contemporary constitutional democracies, especially the shifting balance of powers, tied to the overall expansion of executive authority and the increasing personalisation of politics.[219] In semi-presidential systems like Romania, the effect is intensified by the Presidency's direct democratic legitimacy. Consequently, the Head of State tends increasingly to appear as the immediate interpreter of the popular will, strengthening plebiscitary logic. Against this backdrop, the present case study bears significance beyond the Romanian legal order. The broad reinterpretation of militant democracy in the context of presidential elections within a geopolitically strategic European state may reshape the concept of democratic self-defence across Europe, while simultaneously enlarging judicial discretion and heightening perceptions of political exclusion. Accordingly, the events surrounding the 2024-2025 elections sparked strong populist counter-discourses, in which many political actors portrayed the annulment as proof of elite meddling in democratic choice, and the exclusion of candidates as judicial activism aimed at voters.[220]

These institutional characteristics make Romania a particularly fertile ground for turning 'militant democracy' from a typical transplantation of a doctrinal category into a 'legal irritant'. Incorporating this rationale within a semi-presidential framework, in which the President stands at the centre of the intersection between law and politics, can produce an autonomous reinterpretation of democratic self-defence and a broader transformation of the doctrine's meaning and scope. The CCR's use of militant reasoning in presidential elections may have thus redefined the relationship between law and politics within Romania, with implications reaching beyond the domestic boundaries of the host legal order.

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[219] A. Buratti, *Western Constitutionalism*, cit., p. 319-320.

[220] See only J.D. Vance, *Speech at the Munich Security Conference*, 14 February 2025, available at https://movimentoeuropeo.it/images/documenti/JD_Vances_full_speech_on_the_fall_of_Europe.pdf (last accessed: 9 July 2026). One should also recall Romanian slogans such as "Turul doi înapoi" ("Bring back the second round") which draws precisely upon the perception that judicial intervention had interrupted the ordinary democratic process in Romania.

iii) The CCR's Institutional Positioning and Evolving Powers

Constitutional interpretation is the institutional mechanism through which the doctrine was reconstructed, with a potential expansion of the CCR's competences in the defence of the democratic legal order and a broader transformation of meaning beyond the host legal order. In the democratic transitions that followed the collapse of socialist regimes in Central and Eastern Europe, courts assumed a role that frequently exceeded the classical counter-majoritarian function traditionally associated with centralised review of legislation. In these legal orders, constitutional adjudication became at once an instrument of democratic consolidation, institutional stabilisation, and legitimation. As some authors have noted, comparative-law arguments and the widespread reception of the centralised model of review were decisive in shaping the Romanian system, although its incorporation here was initially "a truncated one".[221]

Indeed, Romania entered the post-1989 transition without a stable legal tradition of centralised constitutional review. Although the 1866 Constitution proclaimed constitutional supremacy, the interwar "*Romanian Marbury v. Madison*" experiment failed to crystallise into a lasting tradition, while decades of totalitarian rule subsequently eliminated any autonomous practice of constitutional adjudication.[222] Consequently, with its establishment in 1992, the CCR emerged as a "court without a history",[223] compelled not only to safeguard constitutional supremacy but also to construct its own institutional legitimacy within a legal culture historically unfamiliar with concentrated review of legislation. Against this background, the CCR was established as a specialised judicial body entrusted with the review of legislation and operating independently from the ordinary judicial system.[224]

However, and more importantly for the purposes of this paper, alongside its "classical" counter-majoritarian function, the CCR was also assigned directly by the Constitution several 'ancillary tasks',[225] most notably the oversight of presidential election results under Article 146(f). These institutional characteristics have shaped, in

[221] B. Selejan-Guţan, *The Constitution of Romania: A contextual analysis*, cit., p. 24.

[222] See *supra* n. 201.

[223] This expression has been employed with regard to the Italian Constitutional Court, in E. Cheli, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri*, Bologna, 1996, 31. For an account of this episode, see A. Sperti, *Constitutional Courts, Media and Public Opinion*, Oxford, 2023, p. 172.

[224] Pursuant to Articles 142 and 143 RC, the CCR is composed of nine judges appointed for a non-renewable nine-year term: three by the Chamber of Deputies, three by the Senate, and three by the President of the Republic. Constitutional judges must hold a higher legal qualification, possess a high level of professional competence, and have at least 18 years' experience in either legal practice or higher legal education.

[225] T. Ginsburg, *Beyond judicial review: Ancillary powers of constitutional courts*, in Id., *Institutions and public Law: Comparative approaches*, New York, 2005, 225 ff.; T. Ginsburg – E. Zachary, *Ancillary powers of constitutional courts*, in *Texas Law Review*, 87/2008, p. 1431 ff.

part, the Court's engagement with democratic processes and continue to influence its trajectory.[226] At the same time, the CCR became heavily exposed to politicisation.[227]

In the broader regional context, the CCR reflects a more general phenomenon characteristic of post-communist countries in Central and Eastern Europe: the constitutionalisation of electoral oversight through its transfer to independent constitutional courts.[228] This development should, however, be considered within the wider trajectory of electoral oversight in European legal history. More specifically, in public law theory, the overarching objective of electoral oversight – a process comprising a variety of steps unified by a single function – is to ensure the democratic renewal of constitutional bodies,[229] whether parliaments or heads of state.

Historically, electoral oversight emerged – particularly in the English model – as a form of parliamentary self-protection against the executive, and especially the monarch, culminating in Parliament's jurisdiction over the validity of its own composition.[230] From the late nineteenth century onwards, however, a broader trend towards judicialisation began to emerge, following Georg Jellinek's early reflections and their implementation in the Austrian experiment, which transferred electoral jurisdiction to the Constitutional Court and, after the Second World War, extended it to parliamentary, presidential, and local elections as well as instruments of direct democracy.[231]

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[226] More specifically, the CCR exercises abstract and concrete review of legislation, electoral jurisdiction, the resolution of constitutional conflicts between public authorities, and other politically sensitive functions, such as opinions on presidential suspension and the unconstitutionality of political parties.

[227] B. Selejan-Guțan, *The Constitution of Romania: A contextual analysis*, cit., p. 24. On the tension between counter-majoritarian adjudication and democratic deliberation, and the risks of the 'juridification' of politics, see M. Loughlin, *Against Constitutionalism*, Cambridge, 2022 (esp. p. 105-108).

[228] L. Pegoraro, *Chi controlla le elezioni? L'insegnamento delle nuove democrazie e la lezione per l'Europa*, in R. Toniatti – M. Magrassi, *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e confronti europei e comparati*, Padova, 2011, p. 197 ff., esp. p. 215.

[229] Ibid., p. 211. In Italian scholarship, it is important to recall the works on electoral systems and electoral oversight by F. Lanchester, *Sistemi elettorali e forme di governo*, Bologna, 1981; and G. Milani, *Le giurisdizioni costituzionali come giurisdizioni elettorali: analisi comparata di un modello di giustizia elettorale*, in *federalismi.it*, 1/2023, p. 155 ff. Finally, on the electoral-system design as an instrument of democratic self-defence, see T. van der Meer – B. Rijpkema, *Militant Democracy and the Minority to Majority Effect: on the Importance of Electoral System Design,* in *European Constitutional Law Review,* vol. 18, 3/2022, p. 511 ff.

[230] This tradition dates back to the establishment of Parliament in 1295 and gradually developed through the classical evolution of English constitutionalism, which gave rise to the first form of parliamentary government in Europe. The Bill of Rights of 1689 recognised both the principle of free elections to the House of Commons and the prerogative of the representative assembly to judge the validity of elections. Parliamentary jurisdiction over the assessment of its own composition was definitively established by the Parliamentary Elections Return Act of 1695 (A. Di Chiara, *La verifica dei poteri dei parlamentari europei. Profili costituzionali*, Milano, 2024, p. 21).

[231] Jellinek's elaborations first found expression in Article 31 of the Weimar Constitution, which established an electoral tribunal – composed of members elected by the Reichstag and members of administrative courts – entrusted with reviewing the regularity of electoral operations and disputes

These historical developments certainly reflect an underlying rationale. Once Parliament no longer required protection against the monarch – having become an independent body within the European nation-state – a different form of oversight emerged, centred on the fairness of elections: a technical activity carried out by neutral third parties, whose task is to ensure that no irregularities ("*patologie*") arise in the conduct and outcome of elections. In this sense, electoral oversight has been "neutralised".[232]

However, this understanding was not necessarily linked to the broader idea of defending the democratic legal order. This latter conception of electoral oversight has instead emerged more recently, particularly in post-communist countries following the latest wave of democratic transitions in Europe, where the function has been entrusted to constitutional courts. This development has produced a second trend towards the "constitutionalisation" of electoral oversight, intrinsically connected to the procedural safeguarding of free elections and ultimately to the democratic foundations of the State. The same transformation can also be observed from the perspective of the sources of law: insofar as the function of overseeing the elections – in this case, the presidential elections – is attributed to the Constitutional court directly by the Constitution rather than by "mere" legislation, precisely because such attribution is not regarded as a mere partisan choice in the day-to-day life of the democratic State.[233]

As regards the concrete manifestations of this function, in Romania the prevailing understanding refers to the CCR's review of "activities, behaviours and attitudes".[234] In this respect, it differs significantly from the typical function of centralised review of legislation: the latter concerns norms enacted by the legislator and consequently embodies a characteristically counter-majoritarian function, aimed at protecting minorities against the decisions of the contingent political majority as expressed through statutory law.

Perhaps even more clearly than its counter-majoritarian function, the oversight of presidential elections places the Constitutional Court in closer interaction with the

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capable of affecting the validity of a parliamentary mandate. The first legal order in which these ideas were concretely implemented, however, was Austria, where a law of 6 February 1919 introduced constitutional jurisdiction over elections through an electoral court composed of members of the Constitutional Court, the Administrative Court, and the Supreme Court. Article 141 of the Austrian Constitution of 1920 subsequently transferred these functions directly to the Constitutional Court; following the Second World War, the model was extended to parliamentary, presidential, and local elections, as well as referendums and instruments of direct democracy, thereby contributing to the recognition of a "right to the regularity of elections at every level" (A. Di Chiara, *op. cit.*, 110 ff; drawing on J. Luther, *La giurisdizione costituzionale sul contenzioso elettorale politico in Germania e Austria*, in *Quaderni costituzionali,* 3/1990, p. 532 ff., p. 546-547 with regard to the extension of electoral oversight to all levels of elections).

[232] L. Pegoraro, *Chi controlla le elezioni? L'insegnamento delle nuove democrazie e la lezione per l'Europa*, cit., p. 216.

[233] Ibid., p. 216, 219.

[234] I. Muraru – E.S. Tănăsescu, *Articolul 146. Atribuţii*, in Id. (eds), *Constituţia României. Comentariu pe articole*, cit., p. 1313.

dynamics of political alternation and the direct democratic legitimacy of the Head of State. As seen above, the President's dual position – exercising functions connected to the safeguarding of constitutional order and institutional and societal mediation, while deriving legitimacy from universal, equal, direct, and secret suffrage – highlights the intense political sensitivity surrounding presidential elections within the Romanian legal order and, consequently, the heightened relevance of electoral oversight by the CCR in this domain.

Eligibility for the office of President is governed by a combination of constitutional and statutory requirements. Under Articles 37 and 40(3) RC, candidates must be Romanian citizens domiciled in Romania, entitled to exercise political rights, and at least 35 years old by election day. Article 81(4) RC further limits the office to a maximum of two mandates, which may be consecutive. Law No. 370/2004[235] adds the requirement of support from at least 200,000 voters (Article 4(2)), while Law No. 196/2022 introduced additional restrictions barring persons definitively convicted of intentional criminal offences from standing as candidates.[236]

Within this institutional setting, the CCR exercises oversight over presidential elections pursuant to Article 146(f) RC, as further regulated by Articles 37-38 of Law No. 47/1992[237] and Law No. 370/2004. While the BEC[238] registers or rejects candidacies and electoral signs in the first instance, the Court is competent to rule on challenges to those decisions, to oversee compliance with electoral procedures throughout the country, and to confirm and validate the election results. Following the completion of voting, this supervisory function also extends to ruling on requests for the annulment of the elections in cases of fraud liable to alter the attribution of the mandate.[239]

The CCR's case law in this field prior to the 2024 electoral year shows that requests for annulment have generally been grounded in allegations of irregularities concerning the conduct of voting procedures, the management of permanent or supplementary electoral lists, or unlawful electoral campaign activities – all commonly

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[235] Law on the Election of the President of Romania, republished in *Monitorul Oficial al României*, Part I, No. 650 of 12 September 2011, as subsequently amended.

[236] Law No. 196/2022, published in *Monitorul Oficial al României*, Part I, No. 668 of 4 July 2022. In particular, persons who, at the date of submission of their candidacy, have been definitively sentenced to a custodial penalty for an intentionally committed offence shall be prohibited, unless rehabilitation, post-conviction amnesty, or decriminalisation has intervened.

[237] Law on the Organisation and Functioning of the Constitutional Court, republished in *Monitorul Oficial al României*, Part I, No. 807 of 3 December 2010.

[238] See *supra*, n. 16.

[239] Under Art. 52(1) of Law 370/2004, "[t]he [CCR] shall annul the elections result [if] it establishes that the poll [or] the ascertaining of the elections result has taken place by fraud liable to modify the allotment of the mandate [or] the order of the candidates who may participate in the second round. […] [T]he Court shall order the voting on the second Sunday of the date of the annulment of the elections result."

subsumed under the broader notion of 'electoral fraud'.[240] In adjudicating such claims, the Court consistently held that, although irregularities may arise during an electoral campaign, the validity of the elections depends on their seriousness and overall extent, having regard to Article 24(1)-(2) and Article 32(6) of Law No. 370/2004.[241] More precisely, the Court held that "[t]he election may be annulled only if the voting and the determination of the results were conducted fraudulently, and this is likely to alter the allocation of the mandate or […] the order of the candidates eligible to participate in the second round […]the request to annul the elections must be motivated and accompanied by the evidence on which it is based".[242]

The CCR's oversight of electoral activities carries significant implications, given its role in granting access to an office with strong democratic legitimacy at the intersection of law and politics. A semi-presidential framework centred on a politically influential Head of State, an evolving electoral jurisdiction, and the extension of militant reasoning from collective actors to individual candidates together created fertile conditions for the dynamics described in this paper as a form of 'legal irritant'. The following section examines how the CCR applied this reasoning during this electoral process, and the new tensions this created for the substantive understanding of the rule of law within the Western constitutional tradition.

3.3. Triggering the "Perturbations": The Application of Militant Rationale During the Presidential Elections

The second round of the re-run presidential elections, held on 18 May 2025, temporarily brought a sense of restored constitutional normality to Romania's semi-presidential republic. The results were broadly welcomed by national and EU institutions, segments of civil society, the media,[243] and for a few hours during the night

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[240] M. Enache – Ş. Deaconu – V. Bărbăţeanu, *Sistemul electoral şi referendumul în jurisprudenţa Curţii Constituţionale,* Bucureşti, 2022, p. 147-158.

[241] Ibid., p. 156.

[242] Ruling No. 30/2004 of the CCR, 3 December 2004 (para. 5, author's trans.). In the same ruling, the CCR drew on the definition of 'electoral fraud' set out in Article 32(6) of Law No. 373/2004 on the Election of the Chamber of Deputies and the Senate, under which the term refers to: "[a]ny illegal act [that occurs] before, during, or after the conclusion of voting, or during the counting of votes and the preparation of official records [resulting] in the distortion of the voters' will and the creation of advantages manifested in the form of additional votes and seats for a party, a political alliance, an electoral alliance, or an independent candidate" (author's transl.).

[243] The result was interpreted by several European institutions, political actors, and media outlets as confirming Romania's continued adherence to a pro-European constitutional and geopolitical orientation. See, e.g., *Reuters*, "EU leaders relieved after centrist Dan wins Romanian presidency", 19 May 2025, available at: https://www.reuters.com/world/europe/eu-leaders-relieved-after-centrist-dan-wins-romanian-presidency-2025-05-19/; *Le Monde*, "Le soulagement des pro-européens après la victoire de Nicusor Dan", 19 May 2025, available at https://www.lemonde.fr/international/article/2025/05/21/en-roumanie-les-ressorts-de-la-victoire-

of 18-19 May, political tensions appeared to ease after Mr George Simion – Mr Dan's main opponent in the second round – briefly acknowledged the outcome "as a clear expression of the Romanian people's will".[244] This moment of political calm, however, proved short-lived. Just two days later, the darker aspects of the "paradoxes of militant democracy"[245] re-emerged in Romanian public life, when Mr Simion applied for annulment of the May 2025 presidential elections and called for mass demonstrations to contest the CCR's confirmation of Mr Nicuşor Dan as President.

Mr Simion is a prominent figure in Romanian politics. He leads the far-right Alliance for the Union of Romanians (AUR) and serves as a member of the Chamber of Deputies. He recently played a leading role in the successful motion of no confidence against PM Bolojan's government, voted on in Parliament on 5 May 2026 and carried by 281 votes – well above the required threshold of 233. Bolojan has since continued as acting PM under Article 110(4) RC. In defending the motion, Mr Simion also called for the restoration of the constitutional order that would have obtained had the CCR not annulled the second round of the original elections.

At least between October 2024 and May 2026, a series of events unfolded that illustrate the perturbatory dynamics captured by the concept of 'legal irritant'.[246] By application of 20 May 2025, Mr Simion requested that the CCR declare the 2025 Romanian presidential electoral process vitiated by serious irregularities and legal violations which, taken cumulatively, allegedly undermined the fundamental requirements of democratic elections. The applicant sought either annulment of the entire process or, in the alternative, invalidation of the second round of the May 2025 presidential elections. In support, he alleged that the electoral process had been fundamentally compromised by the manipulative and unlawful deployment of digital technologies – specifically, that voters' choices had been distorted and the principle of equal opportunity among candidates violated through the non-transparent use of social media and artificial intelligence in breach of electoral legislation, as well as through campaign financing from undeclared sources, including online.

The legal reasoning advanced in Mr Simion's application closely mirrored that employed by the CCR in its landmark Ruling No. 32 of 6 December 2024, annulling the first round of presidential elections. At the declarative level, the application aligns

surprise-de-nicusor-dan-au-second-tour-de-la-presidentielle_6607584_3210.html (last accessed: 9 July 2026).

[244] "I would like to congratulate my opponent, Nicuşor Dan, on winning the election; this was the will of the Romanian people. I thank the more than 5 million Romanians who placed their trust in me" (author's transl.): declaration as reported by *Digi24* on 19 May 2025, available at: https://www.digi24.ro/alegeri-prezidentiale-2025/george-simion-a-recunoscut-ca-a-pierdut-alegerile-prezidentiale-in-fata-lui-nicusor-dan-sper-ca-v-am-reprezentat-cu-cinste-3246801 (last accessed: 9 July 2026).

[245] As early identified in the Romanian context by B. Iancu, *Militant Democracy and Rule of Law in Three Paradoxes*, cit. (esp. p. 12-19).

[246] This paper covers relevant developments up to mid-May 2026, which is the first year after the re-run of the presidential elections.

with the Court's assertion that "the interference of state or non-state actors in conducting propaganda or disinformation campaigns must be excluded."[247] Mr Simion also invoked alleged foreign interventions in the Romanian electoral process by external state actors, citing the involvement of French, Polish, Moldovan, and Spanish authorities.[248] In this way, the legal semantics initially mobilised by the CCR to defend the democratic constitutional order were rapidly reappropriated within the political arena – illustrating how the irritant generates recursive processes of reinterpretation that exceed the socio-institutional context in which the doctrine was first deployed.

Contemporary developments reflect a period in which the contestation of electoral results has become strikingly recurrent, even within the most consolidated democracies.[249] Notwithstanding the illiberal rhetoric underlying Mr Simion's challenges – grounded in a conception of sovereignty framed "in a closed and holistic manner, described as the reflection of a static identity grounded in a mythical past and nourished by the traditional values" of the people[250] – it is unsurprising that the legal reasoning employed by the CCR in its purported defence of democracy in autumn 2024 resurfaced as a double-edged sword. That same reasoning was subsequently invoked in ways that partially undermined the credibility of the electoral process that culminated, on 18 May 2025, in the exclusion of the ultranationalist candidate from the presidential office through a massive popular vote.

This section argues that the Romanian case shows how 'militant democracy', once applied to presidential elections through constitutional interpretation, moved beyond a defensive legal doctrine to become part of the ordinary grammar of political contestation. From the perspective of 'legal irritants', the central issue is less the annulment of December 2024 than the process through which the meaning and scope of militant reasoning were reconfigured within the host legal order: how the CCR's reinterpretation interacted with its socio-institutional structure and reshaped the relationship between the legal and political systems.

The sequence of events leading to a CCR's defence of Romania's democratic constitutional order began months before the well-known decision annulling the first

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[247] App. No. 2103F of 20 May 2025, filed by Mr Simion before the CCR, 6. The CCR rejected it by Ruling No. 42 of 22 May 2025, and validated the electoral results by Ruling No. 44 of 22 May 2025, *Monitorul Oficial* No. 477 of 22.05.2025, available in Romanian at https://www.ccr.ro/wp-content/uploads/2025/05/Hotarare_44_2025.pdf (last accessed: 9 July 2026).

[248] App. No. 2103F of 20 May 2025, p. 3.

[249] L. Pegoraro, *Chi controlla le elezioni? L'insegnamento delle nuove democrazie e la lezione per l'Europa*, cit., p. 218.

[250] G. Martinico – D. Mier Galera, *El desafío iliberal a la independencia judicial: la contribución de los tribunales internacionales*, in *International Journal of Constitutional Law*, vol. 22, 5/2024, p. 1251 ff., p. 1255. See, more generally on the populist grammar linked to the main constitutional tenets: J. Přibáň, *The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash*, in M. Bobek – A. Bodnar – A. von Bogdandy – P. Sonnevend (eds), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States*, Baden-Baden, 2023, (esp. p. 52); P. Blokker, *Populism as a constitutional project*, in *International Journal of Constitutional Law,* vol. 17, 2/2019, p. 536 ff;

round of the presidential elections in December 2024. On 5 October 2024, the CCR delivered a highly controversial ruling excluding presidential candidate Ms Diana Iovanovici-Şoşoacă from the elections on the grounds that her public conduct – including anti-EU and anti-NATO rhetoric and expressions of sympathy towards Russia – was incompatible with the constitutional values and democratic principles underlying the Romanian constitutional order.[251] This ruling marked a significant transformation of prior case law in electoral matters under Article 146(f) RC, under which the Court had focused predominantly on formal rather than substantive eligibility criteria.

In that ruling, the CCR held that presidential candidates must also satisfy substantive conditions deriving from the democratic and constitutional identity of the Romanian state.[252] Reading Articles 1, 80, 148 and 149 RC together, it reasoned that the President, as guarantor of the Constitution and of the democratic order, must demonstrate loyalty to constitutional democracy, the rule of law, and Romania's Euro-Atlantic orientation, and that the oath of office under Article 82(2) RC implies substantive eligibility requirements applicable already at the candidacy stage, including a demonstrated commitment to defending constitutional values. On that basis, the candidate was found unfit to stand in the 2024 presidential elections:

"[…] the […] provisions establish the axiological framework [for the presidential] election […]the elected candidate takes an oath confirming that he or she will fulfill his or her constitutional obligations […] an act that guarantees the [state's] democratic nature […] there can be no fundamental constitutional inconsistencies in values ['incongruenţe valorice fundamentale de natură constituţională'] between the status of a candidate and that of an elected official; […] among the substantive conditions that must be met to run for office are those arising from the […] the oath taken […].

[…] The obligation to uphold the Constitution must not be judged solely on the basis of the moment when the oath is taken […] but rather from a dual perspective of time and values ("o dublă perspectivă temporală şi valorică") […].

[…] respect for the Constitution is a general obligation of citizens […] this […] [presidential] candidates' [obligation] […] must be interpreted in light of Article 80(2) ("shall ensure compliance with the Constitution"), [meaning] that it is not […] a simple attitude or […] compliance with the [Constitution] […] but rather an active and responsible demonstration in this regard […] the right to be elected necessarily implies the condition of unequivocally respecting the Constitution and of conducting oneself in a constitutionally

[251] CCR, Ruling No. 2 of 5 October 2024, cit., and *supra* Section 1. To be sure, this reasoning is also relevant in so far as it engages, at least in part, with geopolitical considerations linked to Romania's membership of the EU and NATO. See, more generally, on 'constitutional geopolitics': R. Ibrido, *Comparazione giuridica e geopolitica nello studio della proiezione internazionale dei Parlamenti: considerazioni introduttive*, in *Diritti comparati*, "Special Issue VII"/2025, p. 1 ff.; P. Passaglia, *Geopolitica e diritto: Un legame trascurato*. Milano, 2026.

[252] CCR, Ruling No. 2 of 5 October 2024, cit., para. 37.

responsible manner, capable of upholding the [presidential] duty to ensure compliance with the Constitution.

[...] The candidate must unambiguously demonstrate the will to defend constitutional values and order, [and] the active commitment necessary to enforce and oversee the enforcement of the Constitution. The [candidate's] conduct [...] must be characterised by a coherent public discourse oriented toward axiological respect for the Constitution […] respect for the Constitution and its values is not […] a choice, but an obligation expressly enshrined in [RC's] text and reinforced by the oath of allegiance, as an expression of loyalty to the country.

[…] the obligation to respect the Constitution, together with its two aspects, constitutes an essential condition of intrinsic and substantive eligibility for a [presidential] candidate […] [a] behaviour of defending democracy is also a condition for being able to run for [this] office."[253]

The Court's interpretative shift arguably contributed to expanding the scope of militant-democracy logic, moving it from a doctrine linked to collective political actors into a constitutional standard capable of justifying the individual exclusion of presidential candidates, with constitutional loyalty and democratic commitment framed as a "general [substantive] condition" inherent in the right to stand under Article 37 RC. In her dissenting opinion, Judge Scântei observed that the majority had converted the objective electoral review provided for by law into a subjective one, by assuming the verification of a candidate's conduct, acts and statements.[254] The distinction is relevant to the shift examined here. Objective review verifies compliance with conditions fixed in advance and raises no contested questions of fact about a person, which may explain why the summary procedure of Article 31 of Law no. 370/2004 was thought sufficient for it. Subjective review, by contrast, requires the adjudicating body to establish the facts of the case – to act, in this respect, as a court of fact – and is therefore difficult to conduct without adversarial argument, a right of defence and a procedure for adducing and contesting evidence. The Court may have undertaken the second exercise while retaining the procedural form designed for the first.

The application of militant reasoning unfolded in successive stages. A few months later, the CCR adopted the controversial Ruling No. 32 of 6 December 2024, cancelling the first round of the presidential election.[255] Only days earlier, on 2 December, the Court had unanimously validated the results of that same round and confirmed the second-round vote scheduled for 8 December between Mr Călin

[253] Ibid., para. 41, 43, 44, 45-47 (author's transl.).

[254] See *supra* n. 18.

[255] See also S. Gianello, *La difesa della democrazia e i suoi limiti: considerazioni a partire dalle elezioni presidenziali romene e dall'affaire Georgescu*, in *DPCE Online*, 2/2025. Linking the Romanian case to the broader evolution of the systems of government across Europe, see C. Martinelli, *Riflessioni critiche sullo stato di salute di alcune forme di governo europee*, in *Rassegna Parlamentare*, LXVII/2025, p. 199 ff. (esp. p. 213 ff).

Georgescu and Ms Elena-Valerica Lasconi.[256] Several intelligence reports concerning alleged irregularities in the electoral process, previously discussed within the Supreme Council of National Defence (*Consiliul Suprem de Apărare a Țării* – CSAT),[257] were subsequently relied upon by the Court in cancelling the ongoing process.

In Ruling No. 32/2024, the CCR substantially re-examined the legality and integrity of the 2024 presidential elections. According to the Court, the intelligence reports described extensive voter manipulation, violations of campaign financing rules, and the non-transparent use of digital technologies – including artificial intelligence – affecting both the electoral campaign and the equality of opportunity among candidates under the RC and Law No. 370/2004:

> "[i]n view of […] Article 37 [RC], […] the equality of opportunity of the electoral competitors has been affected, which reflects an alteration of the very right to be elected […] the considerable exposure of one candidate led to the directly proportional reduction of the online media exposure of the other candidates […] the use of digital technologies and artificial intelligence, both by electoral candidates or competitors, and by political parties, supporters or their sympathisers, must be transparent in order to ensure the integrity and impartiality of the elections. Otherwise, voters are hindered in their ability to form an opinion about the candidates and electoral alternatives, or may be misled about the identity and quality of a certain candidate, or about the voting procedures. […] the use of such practices […] authorises the competent public authorities, in accordance with the law, to verify, observe and, where appropriate, sanction such behaviour".[258]

Furthermore, the Court highlighted the State's positive obligation to prevent undue interference in elections and to ensure a resilient electoral environment in line with European standards, including the Venice Commission's *Interpretative Declaration on the Code of Good Practice in Electoral Matters as concerns digital technologies and artificial intelligence*.[259] As is by now widely known, the CCR – by unanimous vote – cancelled the 2024 presidential election and required the Government to organise a new process, including establishing new electoral bureaus, reopening candidate submissions, and conducting a new campaign under conditions of transparency and fairness.[260] The Court further held that the incumbent President should continue to exercise the

[256] CCR, Ruling No. 31, *Monitorul Oficial al României* No. 1214 of 3 December 2024.

[257] It should be recalled that the chair of the CSAT is the President of the Republic under Article 92(1) RC.

[258] Ruling of 6 December 2024, para. 14. The English version is available at: https://www.ccr.ro/wp-content/uploads/2025/02/RULING-No-32-2024.pdf (last accessed: 9 July 2026).

[259] Ibid., paras. 9-10, referring to the European Commission for Democracy through Law (Venice Commission), *Interpretative Declaration* approved by the Council for Democratic Elections at its 81st meeting (Venice, 5 December 2024) and adopted by the Venice Commission at its 141st Plenary Session (Venice, 6-7 December 2024), CDL-AD(2024)044.

[260] Ruling No. 32 of 6 December 2024, para. 19.

mandate pursuant to Article 83(2) RC until a newly elected President takes the oath of office. [261]

Faced with the unprecedented legal gap created by the cancellation of the elections, the CCR ruled that then President Klaus Iohannis should remain in office until a new Head of State was elected in May 2025, raising complex questions as to the interaction between Article 83 on continuity of mandate and Article 98 on interim arrangements.[262] The ruling provoked significant backlash and led to the initiation in Parliament of a procedure for the President's suspension under Article 95 RC. Mr Iohannis subsequently resigned, whereupon the office was assumed, pursuant to Article 98 RC, by the then President of the Senate, Mr Ilie Bolojan.

As a further development, when Mr Călin Georgescu – a presidential candidate in the cancelled 2024 elections, in which he had obtained 22.94% of the first-round vote on a turnout of 52.52%[263] – sought to stand in the repeat election of May 2025, the BEC rejected his candidacy, applying the reasoning adopted by the CCR in its earlier Decisions of 5 October [excluding Ms Şoşoacă] and 6 December 2024 [cancelling the first round].[264] More specifically, the BEC held that:

> "[the CCR's rulings] […] – which are also binding on the [BEC] – lead to the conclusion that, with regard to […] Mr Georgescu, […] the candidate, by failing to comply with the rules of the electoral procedure, has violated the very obligation (expressly provided for in [CCR's] Decision No. 2 of October 5, 2024) to defend democracy, which is based […] on fair, transparent, and impartial elections, in accordance with the laws*, without which the very foundation of the existing constitutional order is undermined.* Moreover, by annulling the ongoing electoral process and ordering its complete re-run (including with regard to the submission of candidacies) *as a result of the candidate's failure to comply with electoral procedure regulations – which are essential for democracy and the rule of law* – the [CCR] has *implicitly and generally ruled on the failure to meet the legal requirements for the registration of the candidacy [of Mr] Georgescu* […], as it is inadmissible that, upon the resumption of the electoral process, the same person should be considered to meet the conditions for assuming the [presidential] office. […] [S]ince the [CCR] has already ruled on the [these] issues, the fulfillment of the other conditions for the registration of the candidacy and the electoral symbol appears to be irrelevant."[265]

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[261] Ibid., para. 22.

[262] Article 83(2) provides that "[t]he President of Romania remains in office until the newly elected President is sworn in." Article 98(1) further provides that "[i]f the office of President becomes vacant, […] the office [shall be filled on an interim basis] by the President of the Senate or the President of the Chamber of Deputies, in that order".

[263] See: https://prezenta.roaep.ro/prezidentiale24112024/pv/romania/results. On Mr Georgescu's profile and campaign, see R.N. Radu, "How Disinformation Can Prevent Free Elections. A Discussion of the 2024 Romanian Presidential Election", in R. Bizzari – A. Sperti (eds), *Constitutional Courts and Electoral Integrity,* Pisa, p. 63 ff.

[264] Decision No. 18D/09.03.2025, available in Romanian at: https://prezidentiale2025.bec.ro/wp-content/uploads/2025/03/decizie_18D.pdf (last accessed: 9 July 2026).

[265] Decision No. 18D/09.03.2025, p. 3 (author's transl., emphasis added).

At this stage, a new constitutional understanding of the electoral requirements for presidential candidates was taking shape across successive decisions by different institutional actors within the ongoing electoral process, rather than in a single judicial intervention. One day later, the CCR dismissed Mr Georgescu's complaint of 10 March challenging the BEC's decision that had disqualified him from the re-run presidential elections.[266]

Some authors have noted that the shift to the BEC as the body *a quo* appears to address key recommendations in the Venice Commission's Urgent Report of 27 January 2025,[267] particularly those concerning an appeal mechanism to safeguard candidates' electoral rights during the electoral process.[268] Paradoxically, however, while this brings the process closer to the general standards of electoral review in international law – namely, the availability of an appeal body – the BEC's reasoning appears to complete one of the missing steps that had previously led the ECtHR to find that Mr Georgescu – also an applicant before the ECtHR against CCR's Ruling No. 32 of 6 December 2024 – did not have an "arguable claim" under the Convention. More specifically, the ECtHR held that "although [Mr Georgescu] refers in his application to 'the accusations' against him, the Court observes that the CCR's Decision No. 32 […] did not concern the determination of any 'criminal charge' against the applicant" within the meaning of Articles 6 § 1 and 13 ECHR (the rights to a fair trial and to an effective remedy).[269] Indeed, the case before the CCR involved a factual assessment based on electoral legislation, which is, at least at first sight, substantially different from criminal legislation.[270]

However, the BEC's reasoning in the Decision of 10 March 2025 permanently excluding Mr Georgescu from the re-run presidential elections – rendered after his initial appeal to the ECtHR – may arguably confirm that the CCR's Ruling on the annulment of the autumn 2024 elections directly and individually affected his ability to stand as a candidate in the re-run.[271] In this respect, the Romanian case study shows

[266] See *supra* n. 23.

[267] Venice Commission, CDL-AD(2025)003, Opinion no. 1218/2024, issued on 27 January 2025 and endorsed by the Venice Commission on 18 March 2025, para. 22 (referring to previous opinions of the Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 44, and the ODIHR publication "2019 Handbook for the Observation of Election Dispute Resolution"). Available at: https://www.coe.int/en/web/venice-commission/-/cdl-ad-2025-003-e (last accessed: 9 July 2026).

[268] B. Iancu, *Militant Democracy and Rule of Law in Three Paradoxes*, cit., p. 26.

[269] ECtHR, 6 March 2025, case *Călin Georgescu v. Romania* (App. No. 37327/24), para. 28-31.

[270] See T.R. Iancu, *The Romanian Saga of 2024-2025 Presidential Elections: The (Non)Adversarial Nature of the Proceedings and the Appropriate Standard of Evidence. The Challenge of New Technologies*, in R. Bizzari – A. Sperti (eds), *Constitutional Courts and Electoral Integrity,* Pisa, p. 171 ff.

[271] During the re-run after the annulment of December 2024, the BEC also rejected Ms Şoşoacă's registration by Decision No. 34D/15.03.2025, available in Romanian at: https://prezidentiale2025.bec.ro/wp-content/uploads/2025/03/decizie_34D.pdf. This was appealed before the CCR and was ultimately rejected: Ruling No. 22/2025, available in Romanian at: https://www.ccr.ro/wp-content/uploads/2025/05/Hotarare_22_2025.pdf (last accessed: 9 July 2026).

how the effects of a 'legal irritant' are not confined to the original event that triggered it, namely the Decision of October 2024. Rather, militant reasoning during the 2024-2025 elections progressively reshaped the relationship between the legal and political systems in Romania, creating new interpretative expectations and socio-institutional practices within the host legal order. In other words, this doctrine may have produced "wild perturbations" within Romania, with implications for political (in)stability that are bound to last.

At least initially, following the election of Mr Nicuşor Dan as President of the Republic in May 2025, Romanian constitutional life appeared to move towards political stabilisation. In June 2025, President Dan designated Mr Ilie Bolojan as PM, aiming to reinforce the public perception of institutional stability and pro-European continuity after the turbulence linked to the annulment of the presidential elections and the exclusion of Mr Georgescu from both electoral processes. However, the effects of this initial "perturbation" did not abate. On the contrary: in the period that followed, it became increasingly clear how profoundly the events of 2024-2025 had altered the Romanian political landscape and exacerbated the conflicts and instability arising from the interplay between the legal and political systems.

From autumn 2025 onwards, Mr Georgescu increasingly became the focus of public and political controversy. In September 2025, prosecutors initiated criminal proceedings against him on charges linked to an alleged attempt to undermine the constitutional order – accusations he publicly rejected as politically motivated and symptomatic of a broader attempt to silence anti-establishment movements. Although the judicial control measures imposed on him were later lifted, once again allowing him to leave the country freely, his discourse continued to frame the events of 2024-2025 as evidence of the capture of democratic institutions by technocratic and globalist elites. He repeatedly described the annulment of the presidential elections as a "coup against democracy" and denounced the Romanian authorities' actions as politically motivated attempts to prevent his candidacy.[272] This narrative has since been systematically reproduced both on social media and during parliamentary debates by ultra-right political leaders – above all by Mr George Simion, Mr Dan's main opponent in the second round of the re-run elections, who has incidentally used these events to launch the *Make [Romania] Great Again* movement.[273]

Beyond the accusations connected to the alleged attempt to undermine the constitutional order during the 2024 presidential elections, criminal proceedings were

[272] See, e.g., *Associated Press*, "Far-right front-runner in Romania's annulled presidential race files his candidacy in the rerun", 7 March 2025, available at: https://apnews.com/article/romania-election-presidency-eu-georgescu-russia-4ff4972a3c144ec1c26efe743e614fed (last accessed: 9 July 2026). More generally, for English-language accounts of the developments, see *Romania Insider*, accessible at: https://www.romania-insider.com (last accessed: 9 July 2026).

[273] *The New York Times*, "Romania's Presidential Election Pits a Trump Ally Against Europe", 16 May 2025, available at: https://www.nytimes.com/2025/05/16/world/europe/romania-president-election-simion-trump.html (last accessed: 9 July 2026).

also brought against Mr Georgescu for the public promotion of Legionary ideology and for promoting the cult of persons guilty of genocide and war crimes. Prosecutors alleged that, through repeated public statements and references to figures such as Corneliu Zelea Codreanu, he had promoted fascist or Legionary ideas within the meaning of GEO No. 31/2002.[274]

Against this broader political background, the Romanian legislature adopted Law no. 241 of 23 December 2025,[275] significantly strengthening the legal framework governing fascist, Legionary, racist, xenophobic and antisemitic manifestations under GEO No. 31/2002. The reform increased criminal sanctions; expressly included images, text messages, audio-visual content, books and articles within the notion of 'fascist, Legionary, racist or xenophobic materials'; and prohibited attributing or upholding the names of persons responsible for genocide, crimes against humanity or war crimes, as well as leaders of fascist or Legionary organisations, for streets, public squares, parks and public institutions.

More specifically, in the aftermath of the reform introduced by Law no. 241/2025, Article 3(1) of GEO No. 31/2002 criminalises the "establishment or formation of an organisation of a fascist, Legionary, racist, or xenophobic nature; or joining or supporting, in any form, such a group", making these offences punishable by imprisonment from 3 to 10 years. Articles 4(2^1) and 4(2^2) further criminalise the "distribution or public dissemination, by any means, of fascist, Legionary, racist, or xenophobic materials" – offences punishable by imprisonment from 1 to 5 years and the deprivation of certain rights, with penalties increased by one half when the offence is committed through an "information system". Importantly, Article 5 punishes "the cult promotion of persons guilty of committing crimes of genocide, crimes against humanity, and war crimes, or of persons who were part of the leadership of fascist, Legionary, racist, or xenophobic organizations, as well as public promotion of fascist, Legionary, racist, or xenophobic ideas, concepts, or doctrines", these latter offences being punishable by imprisonment from 2 months to 3 years or a fine and the deprivation of certain rights.[276]

President Dan brought the matter before the CCR under Article 146(a) RC, which empowers the Court to rule on the constitutionality of laws before promulgation, in this case upon request of the Head of State. It was argued, *inter alia*, that the amendments violated the constitutional requirements of legal clarity, precision and foreseeability, legal certainty, freedom of expression, the right to information, and access to culture, with particular regard to the undefined or insufficiently defined notions of "legionary", "fascist", and "fascist, legionary, racist or xenophobic

[274] D. Vulcan, *Fostul candidat la președinție Călin Georgescu a fost trimis în judecată pentru propagandă legionară*, in *Europa Liberă*, 2 July 2025, available at: https://romania.europalibera.org/a/calin-georgescu-a-fost-trimis-in-judecata-pentru-propaganda-legionara/33462003.html (last accessed: 9 July 2026). On the GEO No. 31/2002, see *supra*, n. 136.

[275] *Monitorul Oficial* No. 1200 of 24 December 2025.

[276] Author's transl.

materials". By Decision no. 356 of 17 July 2025, the CCR unanimously rejected the *a priori* challenge and upheld the constitutionality of the amendments to GEO No. 31/2002.[277]

The Court found that the law under review was clear, precise, and predictable in its content, in light of its legitimate purpose and objective, namely to protect, through criminal law, the most important social values of a democratic society, grounded in the need to ensure human dignity and full respect for fundamental rights and freedoms.[278] More specifically, the CCR held that, based on the ECtHR's case law: "Nazi[sm], […] fascis[m] […] and Legionaryism are historical and political concepts that cannot be relativised through legal definitions under positive law, as they reflect historical social realities that underpinned actual criminal political regimes […]. By their very nature, [they] […] violated […] the rule of law, human rights, and democracy".[279]

This decision was adopted after the CCR had also unanimously rejected, on 10 July 2025, another challenge concerning the same legislation, brought on similar grounds by members of the Chamber of Deputies representing ultra-right parties.[280] Here, the Court's reasoning followed a proportionality test between the proposed measures and the legitimate objective pursued by the legislator, finding that they do not infringe the rights and freedoms protected by the RC, in particular freedom of conscience (Article 29), freedom of expression (Article 30), the right to education (Article 32), and access to culture (Article 33).[281] More specifically, the CCR held that:

> "[A] clear definition of the types of materials […] […] used to convey or promote in the public sphere ideas, concepts, or fascist, Legionary, racist, xenophobic, or anti-Semitic doctrines reflects a *necessary measure* in a democratic society where such totalitarian ideological values are entirely incompatible with […] tolerance, mutual respect, and the protection of the human being in their individuality – values that underpin a democratic and constitutional culture […] [I]t cannot be accepted that […] freedom of expression […] should become a smokescreen or a shield formally invoked to promote within democratic society certain values,

[277] President Dan also submitted to the Parliament a request for the law's reconsideration before promulgation under Article 77(2) RC. He argued that certain provisions lacked sufficient clarity and foreseeability – particularly regarding the notions of "fascist", "legionary", and related prohibited materials – and could therefore lead to arbitrary judicial interpretation and disproportionate restrictions on freedom of expression. Under Article 77(3) RC, the law's promulgation takes place no later than 10 days after the receipt of the law approved after reconsideration or after the receipt of the decision of the [CCR] which confirms its constitutionality.

[278] Decision No. 356 of 17 July 2025, para. 57.

[279] Ibid., para. 56 (author's transl.).

[280] CCR, Decision 355/2025 of 10 July. The contestation was brought under the same Article 146(a) RC, the *a priori* review of constitutionality upon request, in this case, of at least 50 deputies.

[281] Decision 355/2025, cit., para. 104.

ideas, concepts, and doctrines that, in fact, have militated and continue to militate for the very destruction of constitutional democracy and its foundation, *human dignity*."[282]

Alongside these legal and political developments, the governing coalition between the National Liberal Party and the PSD grew increasingly unstable. Although the Bolojan government initially survived a motion of no confidence in December 2025, tensions within the majority intensified in early 2026, particularly following disagreements over economic reforms, coalition discipline, and the political management of the crisis. By spring 2026, the PSD had openly questioned its support for PM Bolojan, ministers had resigned, and parliamentary forces increasingly mobilised around fresh no-confidence motions. The government ultimately fell in May 2026, following a successful vote tabled by PSD and AUR Members of Parliament. Notably, throughout this sequence – including during the parliamentary debate on the motion – the annulled 2024 elections remained a recurring point of reference, invoked by ultra-right actors as symbolic evidence of an allegedly interrupted democratic order.[283] It can thus be seen that, even after the formal restoration of constitutional continuity through the election of President Dan, the Romanian political system continued to exhibit the persistent perturbations generated by the "legal irritation" produced by the expansive application of the militant-democracy rationale.[284]

4. *Conclusion: Normative Implications for the Romanian Legal Order and Beyond*

This paper has argued for a critical reconstruction of the CCR's case law on the 2024-2025 presidential elections through the lens of 'legal irritants', understood as a dynamic that produces perturbations within the host legal order, situated within the wider processes of legal transplantation and constitutional migration studied in comparative law. The Romanian case study illustrates how militant-democracy reasoning, once incorporated into a particular socio-institutional environment and

282 Ibid., para. 94 (author's transl.). Finally, in February 2026, a bill (No. B29/2026) was introduced in the Senate by 42 ultra-right MPs with the aim of repealing Law 241/2025 amending the GEO.

283 See, e.g., "Romania must return to the will of the Romanian people", in L. Mihăilă, *Mesajul lui George Simion la dezbaterea moțiunii de cenzură*, in *Ştirile ProTV*, available at: https://stirileprotv.ro/stiri/politic/mesajul-lui-george-simion-la-dezbaterea-motiunii-de-cenzura-noi-nu-suntem-de-vanzare-noi-nu-suntem-tradatori.html (last accessed: 9 July 2026).

284 See, e.g., B. Jansen, *Militant Democracy as Neurosis*, in *Critical Legal Thinking*, 13 January 2026, critically reflecting on the constitutive role of "real" political conflict in democracy and arguing that, in the current 'democratic resilience' framework, "what militant democracy was originally meant to signify… has, in essence, become irrelevant". For a rule-of-law critique proposing an alternative 'strategic democracy model', see A. Kouroutakis, *Against Militant Democracy*, in *German Law Journal*, vol. 26, 2025, p. 979 ff. Finally, with a similar approach, albeit from a global perspective, see M.-S. Kuo, *The State of (Militant) Democracy*, in *International Journal of Constitutional Law Blog*, 18 March 2026.

progressively developed through constitutional interpretation, underwent processes of reconstruction capable of producing unexpected consequences and broader perturbatory effects extending beyond the host legal order. These developments give rise, in turn, to further considerations regarding the constitutional implications of judicial intervention in the name of democratic self-defence, particularly as it bears on individual candidates rather than the collective actors typically at issue.

Starting from the relationship between democratic self-defence and the substantive conception of the rule of law within the Western constitutional tradition – grounded in (political) pluralism and the protection of fundamental rights – the paper examined the structural conditions that shaped the Romanian reception of militant reasoning. Attention was devoted to the central role historically played by legal transplants in Romanian constitutional development, which helped to create a socio-institutional environment especially receptive to the circulation and reinterpretation of foreign models. The analysis further highlighted how Romanian semi-presidentialism amplified tensions between competing centres of democratic legitimacy. In this respect, a structural feature deserves emphasis: while the presidential office is constitutionally detached from party, the militant instruments codified in the Romanian legal order are addressed exclusively to collective actors; presidential elections are thus an arena in which the Constitution's militant apparatus has, in principle, no addressee. Against this backdrop, the CCR's function of presidential review, though originally conceived as a "neutralising" and "constitutionalising" oversight of the renewal of the Head of State, significantly expanded the Court's capacity to intervene directly in politically sensitive electoral processes.

Within this framework, the paper traced the CCR's application of militant logic and the correlated "perturbations" in the host legal order, showing how 'militant democracy' gradually shifted from a doctrine traditionally applicable to collective actors and anti-system political parties to a constitutional standard assessed on a case-by-case basis by (constitutional) courts, ultimately justifying the exclusion of individual candidates on substantive axiological grounds. What distinguishes the Romanian case in comparative terms is not merely that an individual was affected, but that the addressee of the militant instrument changed: whereas the models examined here reach individuals through their membership of, or continuing activity on behalf of, an organisation, in Romania the disqualification attached to the person as such, and to a person who had passed unnoticed in the calculations proper to party democracies. From a normative perspective, this evolution invites further research into the relationship between militant-democracy-based judicial reasoning, political pluralism, (open) electoral competition, and democratic accountability, particularly as the crisis of the party state and the digitalised environment increasingly produce tendencies towards personalised politics.

Above all, the paper argued that the notion of 'legal irritants' offers a particularly useful framework to understand the recursive and perturbatory dynamics that may emerge within legal transplantation and constitutional migration, illuminating how

rules or ideas received into a legal order may undergo reinterpretation and reconstruction capable of generating socio-institutional consequences beyond their original rationale or intended (converging) function. The CCR's application of militant logic unsettled the existing "binding arrangements" between law and politics within Romania, activated institutional tensions already latent in the domestic political system, and progressively estranged the concept from the meaning it has traditionally carried across European democratic systems. Such developments may also affect the substantive guarantees traditionally associated with the Western constitutional conception of the rule of law, insofar as they contribute to the "normalisation" of the judicial individualisation of subjects and of the scope of militant measures. This is significant because, where the instrument is directed at an individual who lacks apparent links to collective subversive organisations, there is no clear collective purpose or programme to be assessed, but only the conduct and declarations of a single person – an assessment that requires the adjudicating body to establish and substantiate the relevant facts before deciding, and therefore heightens rather than diminishes the need for procedural guarantees.

Lastly, the paper's central argument was not intended to bear on the legitimacy of democratic self-defence as such, but on the constitutional implications of the interpretative techniques through which militant reasoning was operationalised. Two considerations follow. The first concerns the absence of prior codification: it is in the Constitution or in statute that the political-constitutional or political-administrative nature of the measure is fixed, together with its precise conditions, and it is from these that the intensity of judicial scrutiny, the timing of judicial action and the corresponding procedural guarantees follow. The second concerns the forum. Where a militant measure is addressed to a party, the involvement of a constitutional court may itself be considered a guarantee, as the comparative models illustrate, given the independence and minority-protection presumption of these bodies, as counter-majoritarian constitutional actors; where it is addressed to an individual, however, an ordinary judge may supply further guarantees – adversarial procedure, rules of evidence, avenues of appeal – that a constitutional court sitting in summary electoral review does not. In any case, the guarantees lie in the procedure as well, and not only in the adjudicating body's legitimacy or rationale; the involvement of a constitutional court does not by itself secure the protection of the constitutional order, of political minorities or of fundamental rights, where the factual basis on which the measure rests has not been established beforehand in positive law or through an adversarial procedure observing due process in the specific case. The Romanian case study thus illustrates how the CCR's expansion of militant-democracy reasoning may generate significant tensions for democratic legitimacy and accountability, as well as for the balance of powers within the contemporary constitutional state.

The persistent political instability that followed the 2024-2025 presidential crisis – to the point that President Nicuşor Dan reportedly acknowledged the impossibility

of any immediate "political normalisation" before June 2026[285] – demonstrates how the perturbations associated with this 'legal irritant' progressively extended the effects of the electoral crisis beyond the original dispute, embedding them more deeply within the Romanian political and legal systems. Furthermore, the recurrent mobilisation by ultra-right political leaders, on social media and during parliamentary debates, of narratives concerning the "restoration" of the original constitutional order allegedly disrupted by the annulled elections – elections in which, however, it was by no means certain that the ultra-right forces would ultimately have prevailed, particularly given that, at the time of the CCR's annulment, a broad pro-European coalition had already formed in support of Mr Georgescu's opponent, Ms Elena Lasconi – together with the persistence of socio-institutional tensions and the difficulties in re-establishing a stable political equilibrium, suggests that the effects of the CCR's intervention were not confined to the electoral process alone, but contributed to a broader reconfiguration of the relationship between law and politics within the Romanian legal order, and potentially beyond Romania's borders.

Furthermore, also the supranational level deserves emphasis. The Council of Europe operated throughout as a complementary layer of scrutiny, and its role may prove significant in potentially homogenising constitutional courts' practices, should the recourse to militant measures in times of political turmoil consolidate into a trend within and beyond European states. On this level, the Venice Commission's Urgent Report of 27 January 2025 pressed for an appeal mechanism capable of safeguarding candidates' electoral rights during the process – thereby offering orientations on the exceptional, last-resort character of a constitutional court's intervention in annulling elections, and on its proper place as an actor entering the scene only after the pronouncement of first-instance electoral bodies. On the side of the ECtHR, notwithstanding the discretion it leaves for militant measures to vary with the national political cultures and the operation of the margin of appreciation doctrine, its value for legal scholarship and courts lies above all in the temporal dimension of the national measures: when they are applied, how much time has elapsed since the transition to democracy, and whether a given measure remains appropriate – and sufficiently limited – in a constitutional state decades after that transition. The case thus illustrates not only the perturbatory dynamics internal to the host legal order, but also the role of the European legal space as a site where such irritants are, in turn, filtered and contested.

The Romanian experience raises broader questions about how the increasing use of militant-democracy reasoning by (constitutional) courts may affect the traditional Western constitutional conception of the rule of law – particularly as regards the protection of political pluralism, the priority traditionally accorded to the safeguarding of fundamental rights, and the role of counter-majoritarian bodies within democratic

[285] See *Romania Insider*, *Romanian President says political normalization impossible before June 2026*, 7 May 2026, available at: https://www.romania-insider.com/president-political-normalisation-june-2026?utm (last accessed: 9 July 2026).

systems, especially in Europe's, historically speaking, relatively young democracies. The case is instructive beyond its own peculiarities: every legal order examined here codifies its militant instruments primarily against organisations, and where they do reach individuals, they do so through the person's ties to a collective actor or through a procedure carrying full fair-trial guarantees. Notwithstanding the specificities of the case study, linked to reasoning grounded in electoral fraud and equality of opportunity between candidates, where personalised politics produces candidates who are not the emanation of any established party, that gap will be tested elsewhere – and the Romanian experience suggests that (constitutional) courts may seek to close it by interpretation where the Constitution or the legislature has not done so beforehand.

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Abstract: This paper examines the reception of 'militant democracy' in Romania, as reflected in the case law of the Romanian Constitutional Court (Curtea Constituţională a României, CCR) during the 2024-2025 presidential elections – a crisis that saw a first-round result annulled and a candidate barred from the re-run. It argues that in that case the doctrine operated as a 'legal irritant' (Teubner): a legal rule or principle incorporated into a host legal order to fulfil a specific function – typically to foster a convergence of meaning across legal orders – but which may instead give rise to "unexpected events" and trigger "perturbations" within it. This doctrine – already incorporated into the Romanian Constitution (RC) and generally applied to collective actors under specific limitations, aimed at rationalising the management of potential threats to democracy arising from within the legal order in post-authoritarian contexts – was stretched further through constitutional interpretation during the elections, extending the militant rationale to an individual candidate with no apparent ties to any collective political actor. The CCR's reinterpretation reconfigured the existing "binding arrangements" between law and politics, interacted with pre-existing institutional tensions in the Romanian political system, and reflected a gradual transformation of the meaning traditionally associated with 'militant democracy'. This case law widened judicial discretion, facilitated an expansion of CCR's institutional role and influenced broader developments beyond the host legal order. This intervention may also have contributed to reshaping the trajectory of the Romanian legal order, illustrating a gradual shift from the Western constitutional understanding of the rule of law, particularly as regards the role of courts in protecting political pluralism and fundamental rights. The paper is structured as follows. After the Introduction, Section 2 explores the conceptual foundations of this doctrine, tracing its origins in the German model and its proliferation across other European legal orders, with attention to the RC; it also analyses the doctrine's basic understanding and limitations as shaped in the case law of the European Court of Human Rights. Section 3 introduces the

notion of 'legal irritants' as a comparative analytical tool and applies it to the Romanian case study. Section 4 concludes by reflecting on the main normative implications of these "perturbatory" dynamics for the host legal order and beyond, in light of the Western constitutional tradition of the rule of law, with attention to the absence of prior codification and to the procedural guarantees required where militant measures are directed at individuals.

Keywords: Romanian Constitutional Court - Presidential Elections - Militant Democracy - Legal Irritants - Rule of Law.

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