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ARTICLE

Militant Democracy and Rule of Law in Three Paradoxes: The Annulment of the Romanian Presidential Elections

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Abstract

The article analyses the annulment of the 2024 presidential election by the Romanian Constitutional Court. This unprecedented semi-peripheral exercise in militant democracy has received worldwide attention. The Romanian event was represented by various foreign officials and dignitaries (President of France, President of Poland, Vice President of the United States, etc.) as a bellwether for trends that are interpreted in diametrically opposed ways. Militant democracy is a concept that corresponds to specific constitutional instruments for the protection of democracy from radicalism. The notion is routinely understood as an important practical corollary of the "lesson of Weimar", whereas the German Basic Law has served as a blueprint for the general philosophy and the specific instruments of democratic militancy in various post-totalitarian systems. After decades of dormancy, the concept and its practical legal and political implications have once again come to the fore of political and theoretical preoccupations. This revival happened in a context marked by the steady erosion of Western liberal constitutionalism, which is placed under threat by radical forces, wishing to upturn it. I use the Romanian constitutional and political developments to showcase three sets of paradoxes that the events illustrate and illuminate: 1. Party bans enforced through constitutional courts as the synecdochic "lesson of Weimar"; 2. Individual militant democracy, as practiced in Romania, and the broader implications of the instrument; 3. The structural preconditions that lead to the perceived need to practice legal-constitutional militancy and the cause-effect correlations involved in the need and the practice.

Keywords The 'lesson of Weimar' · Militant democracy · Individual militant democracy · Invalidation of candidacies · Election annulment · Romanian Constitutional Court · Romanian presidential elections

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1 Introduction

On the 6th of December 2024, the Constitutional Court of Romania invalidated the presidential elections in their entirety, ordering a full rerun. The ruling was issued *per curiam*, during an impromptu, brief meeting of the court. It occurred as the second-round vote had already commenced abroad and less than a full day before the inland vote was about to start. Only three days before, on the third of December, the Court had certified the first-round results, green-lighting the runoff.

The reasoning, which will form the object of a deeper analysis below, was extemporized on the spot, so that effect could follow forthwith.[1] It indicated campaign finance irregularities, suspicion of algorithm manipulation on social media, possible foreign influence. Supporting the decision, intelligence briefs had been declassified in a prior National Security Council (*Consiliul Suprem de Apărare a Țării,* CSAȚ) meeting.

The lead contender in the runoff was Mr. Călin Georgescu, an ultranationalist independent whose predominantly TikTok-based campaign had for the most part flown under the radar of the mainstream press. Notably, he declared zero campaign contributions, claiming that his entire run had been volunteer-based. Georgescu made and has continued to make an endless stream of jarring statements, ranging from the outlandish,[2] through the offensive and even the arguably illegal. In the latter categories, he intimated recently that, should that country collapse, Romania has a vested interest in formerly Romanian parts of Ukraine. He made a point of calling Ukraine "an invented state." Mr Georgescu and his circle have smeared opponents as "Soros acolytes"; he promised to close down "the Soros network" on day one ("we know who they are"). The Hungarian-American billionaire philanthropist and the Open Society Foundations figure largely as arch-figures of hate in the ultranationalist discourse amplified by Georgescu. The trope is used primarily to signal contrived synchronicity with Hungary and the United States: out of hundreds of Romanian notabilities (MPs, ministers, judges, intelligence officials, etc.) over the years, less than a handful had any connections to Open Society Foundation programs.[3] The Romanian branch of OSF was phased out in the early 2000s and closed down completely in 2017. Strategically, the first-round winner has been stressing fealty to the current US President, Donald Trump: "Between America and the EU, Romania must immediately opt for America."[4] The runner-up contender, Elena Lasconi, is the leader of USR (Union Save Romania), an economically centre-right, professedly

[1] Hotărârea (*ruling*) nr. 32 din 6 decembrie 2024, M.Of. nr. 1231 din 6 decembrie 2024. The reasoning is less than four pages, 23-paragraph long. Decisions and rulings have binding effect only after publication, which had in this case to occur practically instantaneously, in order to stop the process in its tracks.

[2] Many examples could be provided. Mr. Georgescu speaks in mystical language, describing his candidacy as a "work" (*lucrare*) with "the Romanians" (and "of us all with God") and describes the presidency as shepherding of the homeland (*conducător de glie*).

[3] Two ministers of justice, Monica Macovei (2004–2007) and Raluca Prună (2015–2017), studied at the Central European University.

[4] The interview with a controversial, prominent Romanian journalist can be accessed here: https://www.youtube.com/watch?v=kGlDTicvAlc Mr. Georgescu also gave interviews in English, for instance to famous conspiracy theorist (and MAGA supporter) Alex Jones.

value-progressive party, created in 2016 on an anticorruption platform. The USR is now in opposition to the two mainstream parties, the traditionally centre-right National Liberal Party (PNL) and the centre-left Social-Democratic Party (PSD). The latter are joined at the hip since 2021 in a 'big tent', GroKo-style governing coalition.[5]

The December 6 judgment, a first in Romania's fledgling postcommunist democracy, took the country by surprise. Its effects reverberated quickly the world around and echoes have continued ever since.[6] Georgescu was first defended by Mr. Trump's son, Donald Trump Jr., who described the invalidation as "[a]nother Soros/Marxist attempt at rigging the outcome & denying the will of the people. She's going to lose, and they know it."[7] Donald Trump's sidekick, Elon Musk, followed suit with an approving retweet. Elena Lasconi—"she"—posted in turn an open letter on X, addressed directly to President-Elect Donald Trump, as he then was, and suggesting a meeting. Lasconi proposed to prove to Trump forthrightly that she was no "Soros candidate": "You are a true leader of the people, just like me."[8]

More recently, special presidential envoy Richard Grenell opined on X, tagging the incumbent PSD Prime Minister Marcel Ciolacu, that USAID funds were used to subvert conservatives around the world. Romania was presented by Grenell as the latest example in this supposed parade of horribles.[9] Prominent MAGA loyalist Kari Lake, currently tapped by President Trump to lead *Voice of America*,[10] threw her political weight on the scales, also in apparent support of Mr. Georgescu. Ms. Lake exhorted Romanians to stand up for and demand "the backbone of democracy… freedom, accountability, and the right to vote."[11] Conversely, Former Commissioner

[5] The PSD was until the pandemic the arch-enemy of the anticorruption-oriented center-right. In 2020, ultranationalism resurfaced in the Romanian parliament, with the far-right AUR winning, unexpectedly, slightly over 9% in the parliamentary elections. In 2021, the existing center-right coalition between the USR and the PNL was abandoned by the PNL. A new 'big tent' coalition, midwifed by the centre-right President Iohannis, was formed after the German fashion (*Grosse Koalition, GroKo*) between the two mainstream parties (purportedly, to ensure stability and also, increasingly, to combat extremism). The situation was entrenched once the war in Ukraine broke out and then became the new normal. Until 2024, the two parties also alternated prime ministers.

[6] The 2024 Economist Intelligence Unit ranking of democracies has downgraded Romania to the status of a "hybrid regime", the only one in the EU. The reasoning (EIU Democracy Index 2024, at 63–64) is, while factually accurate, selective and hyperbolically critical of the 'mainstream forces' ('deeply unpopular'). Their efforts ('at best, questionable', 'murky', 'flimsy', '[strain] credulity' etc.) to "stymie the chances of victory for an *anti-establishment candidate* do not bode well for the health of democracy in Romania." At 64, emphasis supplied. Mr. Georgescu and the forces behind him are treated in genteel contrast, earmarked in passing as "far right" or just "right-wing." How the transition to an openly authoritarian regime would "bode well for the health of democracy" remains an *Economist* Democracy Index mystery.

[7] At https://x.com/DonaldJTrumpJr/status/1865160362988826986 (All links were last accessed on February 25, 2025).

[8] At https://x.com/ElenaLasconi/status/1865501542888976665.

[9] At https://x.com/RichardGrenell/status/1886555811289424316.

[10] https://apnews.com/article/trump-kari-lake-voice-of-america-ambassadors-e894cf2e84791b35528baa0cbdd66b22.

[11] Video uploaded here: https://www.tiktok.com/@georgesimionoficial/video/7464176936609254678. The video recording was taken up by AUR, the strongest of a group of right-wing, ultranationalist factions that together make up, currently, over a third of both houses of Parliament.

Thierry Breton applauded the result ("It was done (*on l'a fait*) in Romania and it must evidently be done, if necessary, in Germany")[12] and was promptly branded by the indefatigably twitter-prone Mr. Musk as "the tyrant of Europe."[13] A fiery exchange between the two followed on X and through the classical media.

Andrzej Duda, the incumbent, PiS-beholden President of Poland, has jumped on the 'anti-globalist' bandwagon and used the Romanian example to rail and warn against an alleged cabal by "Brussels" against the proverbial will of the people: "Can only those with whom Brussels agrees win elections?"[14] In an interview for the streaming alternative news platform *Kanał Zero*, President Duda called for street protests in the hypothesis that the May 2025 results of the Polish presidential elections will have been voided "as in Romania."[15]

JD Vance, the current Vice President of the United States, interjected, opening his Munich Security Conference jeremiad with the election annulment and a dismissive-flippant reference to Breton, whom he did not name. He delivered an admonition regarding implications, both real and imagined: "If your democracy can be destroyed with a few hundred thousand dollars in digital advertising from a foreign country, then it wasn't very strong to begin with."[16] Vance explicitly attributed the annulment to alleged pressures exerted by Romania's continental peers. He went on to extrapolate from the event generic conclusions about the current state of constitutional democracy in Europe,[17] amounting, in his interpretation, to "running in fear of voters." The *motif* of Romanian elections being "tossed out" was last picked up by Tulsi Gabbard as indicative of a "something fundamentally deeper here, that shows a huge difference and divergence" between European and American values. The new Director of National Intelligence used the example as a foil against which she could

[12] The fragment from the interview is for instance embedded in this tweet by https://x.com/visegrad24/status/1877861172306673790. In the context (responses by the EU to the right-wing, extremist drift), *on l'a fait en Roumanie* could be translated more neutrally as "it was done" (not: *nous l'avons fait*, "we did it") or less benevolently, as "we did it". The latter is the caption translation used by the platform (Visegrad24), for obvious reasons.

[13] https://www.brusselstimes.com/1388595/elon-musk-calls-former-eu-digital-chief-breton-tyrant-of-europe-tbtb Musk has continued to retweet posts in support of Georgescu: https://x.com/MarioNawfal/status/1891653597974208965 (repost of a tweet attacking CCR justice ES Tănăsescu as a Soros minion: "Elena Simina Tănăsescu, the judge behind Romania's shocking election reversal, has deep ties to Soros-backed NGOs.") or https://x.com/elonmusk/status/1891643161249800209 (retweet of a post by Georgescu promising to "disband the Soros network on Day 1" with the comment by Musk: "Romania deserves its own sovereignty!"), and https://x.com/elonmusk/status/1892589525081133259 (retweet of a post criticizing *an interview in Romanian* by RCC President Marian Enache, with the caption comment by Musk: "This guy is a tyrant, not a judge.").

[14] At https://x.com/prezydentpl/status/1887232267543511273?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1887232267543511273%7Ctwgr%5Ec6f7626e7203a9e37c23ef9ed9296c89b8c64897%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fnotesfrompoland.com%2F2025%2F02%2F06%2Fpolish-president-suggests-eu-could-interfere-in-elections-to-choose-his-successor%2F Needless to say, the hypothesis as such is purely speculative, if not downright conspiratorial.

[15] https://www.bloomberg.com/news/articles/2025-02-05/polish-president-calls-for-protests-if-vote-voided-as-in-romania?embedded-checkout=true

[16] Deutsche Welle recording of the MSC speech by VP Vance here: https://www.youtube.com/watch?v=9dNv9tH0dkU.

[17] Vance revisited the general statement and its Romanian exemplification at the Conservative Political Action Conference (CPAC) in National Harbor, Maryland, on February 20.

delegitimise European support for Ukraine's position regarding ongoing US-Russian negotiations.[18] This is not the first time US geopolitics and European integration and constitutional dynamics intersect or collide (Janse 2018, at 74–75); the episode is however a first in order of magnitude, manner of delivery,[19] and contextual relevance and backdrop.

Internal events have also continued to unfold fast and unpredictably, from initial dithering of the ruling coalition, which deferred calling new elections or selecting a candidate for months, to a finding by the Fiscal Authority that the mainstream centre-right National Liberal Party (rather than the Russians) had paid out of their own public subsidies for a TikTok campaign, which ended up supporting Mr. Georgescu's candidacy. Mounting general disaffection and protests, primarily by the far-right, eventually led to President Iohannis's resignation on February 12.[20]

With the exception of a couple of posts on professional blogs, providing descriptions (Selejan Gutan 2024) or tentative analyses of the events (Kuti 2024),[21] legal scholarship in both English and Romanian has not yet had the time to adjust to the piling complexities. In such domestic and global circumstances, the more common implications of "Hegel's insight that philosophers always come too late to the scene" (Loughlin 2024, at 513) are at any rate exponentially compounded.

This article aims to place the Romanian constitutional events in their wider contexts, real and narratively fictitious, foreign and domestic. What took place in Romania (and this accounts at least in part for the global attention the invalidation elicited) is an extreme example of a revived topic, 'militant democracy.' Militant democracy, whose discursive frameworks and specific tools had lain dormant for decades, started to receive new purchasing power in a context marked by a global groundswell of illiberal forces. The notion is a partial misnomer, representing the sharp tip of the *legal*-constitutional spear, to be used when the constitutional counterpart of the rule of law, democracy as majority rule (Grimm 2016, at 364), runs completely amok. It is, in short, an extreme form of 'militant rule of law' (Sajó 2024).

[18] Fox News interview of March 02, 2025, at https://www.foxnews.com/video/6369523818112 (taking her cues from Vance, Gabbard also mentioned UK, Germany, and Ukraine, as allegedly revealing a widespread European disregard for the democratic-constitutional values America supposedly embodies).

[19] https://www.bloomberg.com/news/articles/2025-02-19/us-rattles-romania-with-demand-to-let-far-right-candidate-run?embedded-checkout=true; https://www.ft.com/content/3f951e0b-a9cb-489a-be89-fdf9f996ed27; https://www.reuters.com/world/europe/romanian-minister-says-he-did-not-face-us-pressure-over-influencer-andrew-tate-2025-02-19/.

[20] The ruling voiding the election had also interpreted Art. 83 (2) of the Constitution ("The President of Romania shall exercise his office until the new President-elect takes the oath.") to mean that the incumbent would continue in office until whenever new elections would be called (as it turned out, in May 2025). The provision was however traditionally understood to apply to ordinary transitions of power, as opposed to an interim situation, when a different rule applies (the Speaker of the Senate becomes the acting, caretaker President, under Art. 98).

[21] Selejan Guțan describes the unfolding of the crisis, naturalising somewhat the ruling. The author opines that Romania might serve as a "warning" to the free world (and by implication, in the context of the piece, possibly as a model for handling such crises). Kuti's analysis offers a more promising avenue, probing into the complexities. He contrasts the "means" (especially as regards the questionable constitutionality of the "Șoșoacă ruling") and "ends" (the desirability of the invalidation outcome, at least in the short run).

My essential argument is that the concept as such, its underlying justificatory narratives, and specific use in Romania are marked by significant paradoxes. In the logic of my argument, the Romanian case serves both as foil against which such tensions may be illustrated and illuminated and as a useful cautionary tale, whose implications may be distilled into lessons for comparative use. The first part of the argument discusses the paradox implicit in the current configuration of 'militant democracy' narratives and instruments, viewed as corollaries of the "lesson of Weimar." A second part dissects the legal articulations of the Romanian saga, as discrete and paradoxical exemplifications of a specific subset, "individual militant democracy" (Müller 2019). In the third, and last, part of my article I will discuss the mistaking of effects for causes as a third paradox. The piece closes with exploratory conclusions.

2 Paradox One: Militant Democracy and the 'Lesson of Weimar'

In this section, my argument, taking issue with the supposed 'lesson of Weimar,' is essentially two-prong. First, it is doubtful that history would have been any different if the postwar toolkit of militant democracy had been available then. As I will argue, a much more robust set of instruments was present at the time. Second, the effectiveness and legitimacy of the postwar militant toolkit is not to be overestimated, for a host of reasons discussed in this section.

The concept as such was famously coined by Karl Loewenstein, just as democracies were falling across Europe. He theorized it in a long 1937 article, published in two issues of the *American Political Science Review* (Loewenstein 1937a, b).[22] The first part elaborates on the conceptual framework. The second is primarily an analysis of developments and a distillation of instruments (a militant RoL 'toolkit', as it were). The conceptual underpinnings are straightforward: fascism, according to the author, is not an ideology. Unlike liberalism, it is merely a technique through which the masses are swayed by the instrumental masters of emotions. The technique relies on stirring up the lower orders of the populace, easily driven to emotionalism. As such, this attempt to stir the masses by recourse to "rationalized emotionalism" cannot be met on its own terms by liberalism, since "[d]democracy [i.e., liberal-constitutional government] is utterly incapable of meeting an emotional attack by an emotional counter-attack…even its emotional ingredients are only a prelude to reason" (Lowenstein 1937a, at 438). Attention moves therefore (Lowenstein 1937b) to technical means, partly proposed by the author, partly distilled from his review of developments in contemporaneous democracies, with emphasis on four that Lowenstein considered particularly successful in counteracting radicalism (Switzerland, Estonia, Finland, Czechoslovakia). Practices and proposals crystallize in a long list, from party bans and organization bans, including the forfeiture of parliamentary mandates, which should remain vacant until new elections, in which,

[22] The author himself fled to America to escape persecution; trained as a lawyer, Loewenstein reinvented himself in the United States as a political scientist, then remigrated to Germany after the war, having a direct hand in denazification (he served as a legal advisor to the military government).

after the Czechoslovak model, parties dissolved because of their subversiveness should not participate (Lowenstein 1937b, at 651), incrimination of hate speech and more generally draconic restrictions on free speech and free assembly rights. The incrimination of offences to authority, including verbal attacks on political figures both present and past ("leading figures in public life") is proposed. The example of France is cited, to the effect that "spreading false rumours" ('misinformation', 'fake news') could be incriminated (At p. 653). Emphasis is placed on the creation of a strong "political police" (*i.e.*, in contemporary language, intelligence services), with extensive powers, propped by "collaboration of all the citizens". The latter should be prompted, possibly, by "making it an offense not to report to the competent authorities information concerning unlawful or subversive activities" (At p. 655). In short, democracy should not "lose the day to the awakened masses" but has to be "redefined" into a "'disciplined' or even -let us not shy from the word- 'authoritarian democracy'" (At p. 657), through "the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government" (At 658). The author opined that such remedies could have cured "democratic fundamentalism" in Europe and, one day, perhaps, tamed "the elaborate fundamentalism of constitutional rights enshrined in the American constitution" (At 658). These sentiments were echoed and remedies similar in spirit, albeit not in technical detail, were proposed by Karl Mannheim in 1943 (Papier and Durner 2003). Loewenstein is often footnoted to indicate intellectual ownership over the concept but rarely analysed in detail. A few of the practical implications of his proposal as well as the underlying tenor of the argument (masses are stupid, emotional, etc.) are not easily digested nowadays.

The essential idea of constitutional militancy had already been spelled out in Weimar, notably, by Loewenstein's nemesis or frenemy Carl Schmitt (Sollors 2014).[23] In the Weimar interwar, Schmitt had ceaselessly upbraided liberalism for its failure to identify its foes and defend itself vigorously against them. Put to choose between Christ and Barabbas, Schmitt said, the liberal retorts with a proposal to adjourn or to appoint a parliamentary committee of inquiry (Schmitt 1922, at 66).[24] Schmitt saw Art. 48, instituting the 'commissarial' (Schmitt 1921) dictatorship of the Reich President, as the proper remedy for the Weimar Republic.

Loewenstein's concept, translated as "fighting democracy" (*streitbare Demokratie*, *wehrhafte Demokratie*) found its way into the West German Constitution

[23] Schmitt and Loewenstein knew one another and had corresponded in the interwar. As post-war legal adviser to the military government, Loewenstein had apparently instrumented Schmitt's first incarceration and certainly masterminded the seizure of the latter's personal library. Nonetheless, while silently engaging with Schmitt's work, Karl Loewenstein retained enormous respect for the former's intellect and work, considering that, should pre-Nazi-Schmitt's militancy-related admonitions had been heeded, Weimar democracy might have been saved (see the Loewenstein's memorandum on the confiscation of the library, whose first page is reproduced in Sollors 2014, at p. 152).

[24] Hans Kelsen also used, in silent dialogue with Schmitt, the famous episode in the Gospel of St. John ('*Quid est veritas*?', followed by mob plebiscite), deriving from it a different conclusion: "Perhaps one, perhaps the faithful, the political faithful, will argue that this particular example speaks against democracy rather than for it. And this argument must be accepted, but only on one condition: of their political truth, which must, if necessary, be imposed by political force, the faithful be as sure as was the son of God." (Kelsen 1929 (2000), at 109).

(*Grundgesetz*, Basic Law) of 1949, influencing a number of provisions, notably but not solely the party ban (Art. 21) and the forfeiture of basic rights by individuals who abuse them (Art. 18). These are, as the *Bundesverfassungsgericht*[25] and countless commentaries remind us, practical legal corollaries of "the lesson of Weimar." Not all constitutional systems took such lesson to heart. Post-fascist Italy only banned the reinstitution of the Fascist Party (*as such*) and provided for a five-year electoral disqualification (Transitional Provisions, XII).[26] The United States, after some hesitations, remained entrenched[27] in its "rights fundamentalist" paradigm, by setting the political speech prohibition bar at the criminal law burden of proof level (Tushnet 2009; Issacharoff 2007). The lesson did however translate to new democracies, either by direct importation or through the conduit of good practice standards.[28]

There are two main problems with the "lesson of Weimar", congealing into the promised paradox of this section. First, it is far from clear that defenselessness, in the sense of a lack of legal militancy instruments to stave off democratic excesses, was the main problem of Weimar democracy. On closer inspection (Huber 1981, 1984; Stein 1999; Alter 2015b), one finds that the legal system of Weimar was well-appointed with a broad palette of weapons, far superior in range and cutting edge to what post-WWII orders can or do provide. Federalism blunted somewhat the effectiveness of the two laws for the defence of the republic (*Republikschutzgesetze,* of 1922 and 1930) but party bans were exceedingly easy to adopt, whereas convictions for subversion, which sometimes carried the application of the death penalty, were swiftly rendered, against both communists and fascists. The first law, passed after the assassination of Walther Rathenau, created a quasi-political court (*Staatsgerichtshof zum Schutze der Republik*), composed partly of political appointees and equipped with both administrative and criminal jurisdiction. The police were endowed even

[25] See BVerfGE 39, 334—*Extremistenbeschluß* (1975): "In this context, it is simply out of the question that this Constitution, which has built the Federal Republic as a fighting, militant democracy, on the foundation of the bitter experience of Weimar's destiny would order this state…to surrender to its enemies." (Unless otherwise indicated, all translations are mine.). See also, e.g., BVerfG, 2 BvB 1/13, 2017 (*NPD Verbot*).

[26] "It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party. Notwithstanding Article 48, the law has 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.".

[27] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[28] The Romanian Constitutional Court has the power to declare parties unconstitutional (Art. 146 (k), Romanian Constitution). The Bulgarian Court decides (Art. 149 (5)) on the constitutionality of "parties and associations". The Polish Tribunal adjudicates (Art. 188 (4)) on the "conformity to the Constitution of the purposes or activites of political parties". The Constitutional Court of Croatia (Art. 125) "monitors compliance" of platforms and activities (and may ban non-compliant parties). The Czech Constitution attributes to the Constitutional Court a party-protective role on review; under Art. 87 (j), the court j) rules on "whether a decision on the dissolution of a political party, or another decision regarding the activity of a political party, conforms to constitutional or other laws." Parties may also be deregistered or their registration may be refused on "infraconstitutional" legality grounds, by designated ordinary courts (Bucharest Tribunal, Sofia City Court, Warsaw Provincial Court). See the Venice Commission Guidelines on Prohibition and Dissolution of Political Parties and Analogues Measures, including a synthesis of practices, CDL-INF (2000), at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e.

before the adoption of the two laws with political sections[29] and disposed of significant enforcement resources. Whereas the Versailles Treaty had imposed numbers limitations, the Prussian protection police (*Schutzpolizei*) alone disposed, for instance, of 53.000 officers in 1932 (Huber 1981, at 652). Extreme-right organizations were banned more frequently (Huber 1981, at 679–680), whereas harsher sentences, including death sentences and the harshest incarceration regime (hard labor, *Zuchthaus*) were skewed against the extreme left (Huber 1981, 655–656). The KPD was also the only radical faction to be declared incompatible with democracy per se (At 657).[30]

Even as the first republican defence law was watered down in 1927 and its successor, the *Republikschutzgesetz* of 1930, was a significantly watered-down version, Art. 48 provided an arsenal of instruments unlike any other, arguably in the history of liberal-democratic "constitutional dictatorship" (Rossiter 1948). Art. 48 was the prerogative of the federal president, as 'protector of the Constitution' (*Hüter der Verfassung*).[31] In the exercise of this power, the president was subject to countersignature even though, should irreconcilable differences ensue within the dual executive, the chancellor himself could be dismissed and replaced at the discretion of the president (subject to parliamentary or, should the parliament be out of session or dissolved, political pushback). The instrument was used extensively, in a constitutional system rocked by endless crises of all types: out of fourteen years of Weimar democracy, over nine were years of exceptional legislation (Huber 1981, at 689). The Constitution itself was drafted under the state of siege (*Belagerungszustand*) inherited from the dying Bismarckian Empire. As soon as it entered into force, President Ebert's Art. 48 dictatorship decrees (*Diktatur-Verordnungen*) replaced the older instrument. On this constitutional basis, party bans could be decreed, extraordinary courts (civilian or military) could be created, new crimes could be defined, criminal penalties could be heightened or administrative rules could be morphed into criminal ones. Newspapers could be suspended for four weeks, other periodicals for six months. Even as Art. 48 itself enumerated seven rights that could be restricted, the interpretation rapidly prevailed that any right with a legislative reservation attached

[29] At the federal level, the *Reichskommisariat für die Überwachung der öffentlichen Ordnung* is created within the Interior Ministry in 1920, after the Kapp Putsch, mirrored by political sections in the states (Huber 1981, at 649 ff).

[30] Jurisdictional fights (between Bavaria and the Reich immediately after the Rathenau assasination or between Prussia and the Reich in 1932) arose primarily out of disputes over who the principal enemy was. The extreme right was consistently perceived as the (much) lesser evil by an overwhelming majority of the elites. The Bavarian government declared for instance (an early iteration of the *Hitler war ein Kommunist* 'idea') that the first law for the protection of the republic, supported by the Social Democrats in Parliament and by Social-Democratic President Ebert was the bellwether of a "unitary socialist state", erected on the basis of "class domination" (Huber 1981, at 668: *Errichtung einer Klassenherschaft und eines sozialistischen Einheitsstaats*). This attitude and federal concessions to it led to the Bavarian stonewalling of the law, short-term jurisdictional divisions of competence, and the sentencing in Bavaria of the 1923 Hitler-Putsch participants to mild, decorative sentences.

[31] The term, which later gained notoriety in the Kelsen-Schmitt debate of 1932, goes back to a letter of 27th of July 1922, by then-*Reichspräsident* Friedrich Ebert to the premier of Bavaria, Graf Lerchenfeld. The former drew the latter's attention to the fact that, as 'Guardian of the Constitution and of the Idea of the Reich' (*Hüter der Verfassung und des Reichsgedankens*), he could, merely on the basis of Art. 48, simply annul any constitutionally objectionable Bavarian decree (Huber 1981, at 668).

(*Gesetzesvorbehalt*) could be limited to the point of extinction, which left in essence only one relevant fundamental right guarantee fully immune from Art. 48 dictatorship decrees, the non-retroactivity of criminal law under Art. 116 WRV (Huber 1981, at 717).[32] Parliamentary control was minimal and could be circumvented. All institutions of the states could be commandeered by the federal government. Constitutional review happened only once, in the famous *Preussenschlag* decision of 1932. Incidental control by ordinary courts was limited and had effects, if any, on a case-by-case basis (*inter partes*) (Huber 1981, at 727–729).

Furthermore, the lesson-of-Weimar narrative sidesteps an important historical detail, namely, that the NSDAP did not come to power by democratic means. In November 1932, it had just lost (from July to November) 2.000.000 votes at the national ballot, reducing its faction by 34 seats in the *Reichstag,* from 230 to 196 mandates. In the local Thuringian elections of December 1932, the NSDAP lost 40% of the vote compared to its state parliament (*Landtag*) results of July the same year (Huber 1984, at 1177). Aside from a minor 1933 recovery (Huber 1984, at 1219–1221) in the Lippe *Landtag* elections,[33] the faction was, democracy-wise, on the way down before von Papen had decided to plot against the Schleicher cabinet,[34] a choice which then, in turn, directly paved the way for the Hitler chancellorship (Huber 1981, at 302–303, Huber 1984, at 1264–1265, 1276–1277). It may in sum well be that, as Gertrude Lübbe-Wolf puts it, much of the Weimar defencelessness story is a fable (*Mär von Weimar*), which served disingenuous, primarily self-exculpatory (*Selbstentlastunglegende*) post-war elite needs and purposes (Lübbe-Wolff 2023).

Second, it is also problematic, both factually and conceptually, to consider that it was militant democracy per se that served to stabilize post-war Western, much less global constitutionalism. Post-war institutional realignments did correct structural problems of parliamentarism, trapped during the interwar in its nineteenth-century structures of justification, and thus poorly adjusted to the post-WWI onset of mass democracy (Lindseth 2004). Equally if not more important than institutional-constitutional readjustments were the *trente glorieuses,* which ushered in the preconditions needed for the socioeconomic reconciliation of liberalism and democracy,

[32] There were other rights protected absolutely by the lack of a *Gesetzesvorbehalt* limitation clause (e.g., the non-extradition of citizens) but they presented no practical relevance to the exercise of constitutional dictatorship under Art. 48.

[33] Lippe was the third least-populous state in Weimar Germany. The NSDAP won (on January 15) 39.000 votes (39.5%), less than its own July 1932 results, 10.000 votes less than the socialists and communists combined, and less than was needed for a governing majority. The new national-socialist government received its confidence vote with the help of the 'bourgeois' parties, upon the compromise of NSDAP fronting a more 'palatable' premier, Ernst Krappe. This diminutive victory was inflated rhetorically, to justify the Hitler chancellorship later in the month (the so-called *Machtergreifung* of January 30).

[34] I am not making von Papen responsible for Hitler and the Holocaust. There were many factors at play in 1932, e.g., the elections of November also brought about a radical left–right majority in the *Reichstag*. The remark is however in service of a point, namely, that the boilerplate about Weimar defenceless and democracy being the main problem (*cf.* Wilkinson 2021) is unsustainable. Elites were far more culpable than democracy/the voters, even if an abstract constitutional responsibility of the people cannot be fully excluded (Huber 1984, 1280–1281).

rule of law and majoritarianism (Wilkinson 2021, Malkopoulou and Norman 2019). Partly, militancy instruments were thus underused because there was less need for them: in Germany, no Art. 18 forfeiture of rights application was admitted, whereas only two parties were ever declared unconstitutional, the neo-Nazi Socialist Reich Party in 1952 and a communist faction (KPD) in 1956. Neither was of any real political consequence.

At a deeper conceptual level, the problem resides in the fact that, to paraphrase Jan-Werner Müller, a Schmittian-Loewensteinian problem or strategy was given a Kelsenian solution, namely, an opportunity decision was entrusted to constitutional courts (Müller 2012, at 1261).[35] Müller also notes in contrast –and in apparent support of the idea that second-order militancy has been alive and well– that hundreds of non-party radical organizations were banned by the government. Sub-party bans evidence however that Schmittian-Loewensteinian strategies operate well with Schmittian-Loewensteinian instruments: political decision, minimally reviewed for formal legality and abuse of discretionary powers in deferential administrative courts. Contrariwise, constitutional courts need a normative standard to take an opportunity decision, which is difficult to arrive at with judicial instruments and therefore it is used sparsely and controversially. The foot-dragging of the German Federal Constitutional Court in 2003, continued and amplified by the review-standard shift in 2017 (Alter 2015a)[36] on the NDP applications are crisp illustrations of the difficulties intrinsic in the practice of militant democracy by (constitutional) courts. The reason is issue polycentricity (Fuller 1978), meaning the boomerang effects and structural implications of possible judicial doctrines. One might adopt a more doctrinally purist conception and ban all parties whose programs or discrete practices indicate totalitarian leanings; this was essentially the 1950s course of action of the German Constitutional Court. Conversely, one might focus in a "clear and present danger" manner on serious risks only; in essence, the recent shift in the second German decision on the NPD ban application is the result of changing the test to risk-assessment. The first manner of proceeding about party bans is doctrinally clear and thus more in sync with structural judicial roles and limitations. However, it is fraught with significant suppression perils and mandate overreach dangers. Conceptually also, it is worth pondering whether courts can or should serve as gatekeepers for systemic ideological purism. The second option presents obvious democratic benefits but assessing risks and acting on such assessments are not what courts, including constitutional courts, were meant to do (as opposed to the executive or an intelligence agency). Reason, not action is the arch-judicial virtue. The second option also leaves aside an important practical difficulty. By the time a

[35] "In a sense, Europeans used a Kelsenian instrument (the constitutional court) to pursue a Schmittian strategy (of denying all political contestants an equal chance of gaining power).".

[36] In essence, the Court shifted (Alter 2015a) from a standard based on *Weltanschauungsvorsorge* (i.e., uprooting totalitarian worldview representations) to one based on probability or likelihood (*Gefahrenabwehr*), much like older versions of the American "clear and present danger" test. The early decisions focused primarily on programs, statements and -notably- structural party features (whether leadership can be contested, whether the structure is hierarchical etc.). The NPD decision of 2017, relying on the "intend to" (*darauf ausgeht*) formulation in Art. 21 (2) places the stress on the likelihood, the probability that the free-democratic order is really threatened.

party, movement, candidate are sufficiently popular to present a serious, real risk of overturning the "free democratic order" of a country, it may already be too late to ban them.[37]

Aware of the conceptual problems and consequentialist imponderables attendant to flat-out party bans, a few scholars have proposed alternative instruments. Samuel Issacharoff (Issacharoff 2007) mooted a 'half-ban', attuned to elections only. Electoral participation should be barred, with a view to 'mainstreaming' (socializing, softening the roughest edges of) radical factions. The case studies he bases this theory on are few and –proverbially– far between (India, Turkey, and Ukraine primarily) and the author admits the significant and unfalsifiable leaps of faith implied in his argument.[38] Promising is also the proposal, advanced separately by both Gertrude Lübbe-Wolff, with many caveats and mostly as a hypothesis (Lübbe-Wolff 2023)[39] and more forcefully by Jan-Werner Müller (Müller 2019) to practice what the latter author terms "individual militant democracy". One should focus on disqualifying dangerous individual politicians, not groups (parties or associations). This latter idea/concept is germane to the Romanian case study, which will form the object of the next, main section.

3 Individual Militant Democracy Comes to Romania: Paradox Two

The annulment of the Romanian elections in December 2024, even as the ruling did not name or formally refer to Georgescu and even as both contenders were equally enraged by the court's move,[40] was aimed at Mr. Georgescu. The decision serves as a paradigmatic example of oblique 'individual militant democracy,' closing an election cycle that had commenced constitutionally with another intervention by the CCR, earlier in October. The latter ruling was also and explicitly individually-militant in nature. Ruling 32/2024 will be placed and analysed in this compressed context. In so doing, I will use Romania's discovery of combative rule of law to illuminate the multi-faceted paradox attached to the practice of individual militant democracy.

[37] The constitution was however amended to provide for the possibility of depriving such parties of state funding, in response to the stay of the NPD proceedings by the *Bundesverfassungsgericht* in 2003 and the 2017 flat-out refusal to ban this party. The NPD successor party, *Die Heimat*, was excluded from state funding for six years in 2024 (BVerfG, Judgment of January 23, 2024, 2 BvB 1/19).

[38] Issacharoff admits for instance that the disqualification of an Islamist party in Algeria (FIS, *Front Islamique du Salut*) in 1990 ignited a civil war resulting in 100.000 dead and could be perceived as "another corrupt effort to preserve a ruling elite" (FN 197, at 1450–1451 and associated text) but opines that "even the most extreme cases are not so readily dismissed as counterproductive exercises" (at 1453).

[39] Notably, in Germany there is a specific constitutional instrument, Art. 18 (*Grundrechtsverwirkung*, forfeiture of basic rights). Few applications under Art. 18 were filed and none has ever succeeded thus far. The efficiency as such of the instrument is questionable (Coelln 2024).

[40] The runner-up, Elena Lasconi, qualified the ruling as "illegal", "immoral", "trampling democracy underfoot": "In a democracy, presidents are not…selected by cloakroom negotiation." At https://www.digi24.ro/stiri/actualitate/politica/elena-lasconi-dupa-ce-curtea-constitutionala-a-anulat-alegerile-prezidentiale-statul-roman-a-calcat-in-picioare-democratia-3036327.

As the Romanian Constitution had provided already in its initial, 1991 form, the Constitutional Court decides on the objections regarding the unconstitutionality of parties (now Art. 146 (k), initially Art. 144 (i)). Under the organic law of the Court, Law 47/1992, such objections may be raised by the Speaker of either house of parliament (Senate and Chamber of Deputies) but only upon an absolute majority vote in the respective chamber. The Government may also file such petitions. Plaintiffs must provide reasons and the objection must be supported by evidence (Art. 39, Law 47/1992). The procedure is court-like, contentious, with citation of the parties and review of evidence. Political parties may be defended by barristers qualified to plea before the High Court of Cassation (Art. 40). Houses designate representatives before the Court. The Government is represented by the Ministry of Justice. The Court decides *en banc* upon the report of the designated judge-rapporteur, with citation of both parties in the procedure and in the presence of the Public Ministry representative (Art. 40 (2), Law 47/1992). Parties may be declared unconstitutional under the conditions set forth by Art. 40 (2) of the Constitution: "The political parties or organizations which, 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." This procedure was never used.

The Romanian Constitution also provides a role for the court in the "observance of the procedure" of presidential elections and the certification-validation of election results (Art. 146 (f) in the Constitution). In this respect, the organic law contains barebones procedural guidance: challenges to the registration of (or the refusal to register) candidacies, as well as complaints regarding the preclusion of parties, formations, candidates from carrying out their electoral campaigns are adjudicated by the Court, according to the statutory time limits under the presidential elections law (Law 370/2004; for candidacy challenge petitions, two days). The Court has, over the years, received many notifications requesting the invalidation of this or that candidacy registered by the Central Electoral Bureau (BEC) but has rejected them all, invariably, with the same terse, one page and a half ruling. It pointed out that its role was minimal and formal and that the conditions for the registration of a candidacy are strictly enumerated in the Constitution and the presidential elections law: "any other reasons and considerations might be appreciated, perhaps, by the electorate only, on election day".[41] To be sure, the quote is lifted from a three-paragraph reasoning in a ruling rejecting a challenge to the registration of a certain Mr. Niculescu, accused by the complainant to have been surreptitiously promoted by the "Motorist Party". As the petitioner's reasoning went, that candidate was an "immoral choice", since automobiles cause much pollution (which endangers the planet), not to mention car crash victims. It can be granted that such concerns were significantly less important than the ones facing Romania in 2024–2025. And yet, challenges of all sorts, concerning a wide variety of candidates, including eccentric 1990s and early 2000s tribunes of the far right, were always meted out the exact same treatment

[41] În Hotărârea nr.17 din 16 septembrie 1996, M. Of. Nr. 224 din 19 septembrie 1996.

(procedural conditions fulfilled, petition rejected).[42] Any reasons other than the formal eligibility-candidacy conditions (e.g., number of supporting signatures, age over 35, etc.) had been until 2024 swept aside with short ceremony: "Such reasons, by their very nature, exceed the [electoral] review attributions of the Court, as set forth in the Constitution and its organic law. They might be considered by voters on election day."[43]

This practice was changed abruptly on the 5th of October 2024, when the Court, in an abbreviated seven-judge formation[44] decided to invalidate the candidacy of Mrs. Diana Iovanovici-Șoșoacă, an eccentric MEP and leader of a small ultranationalist faction (SOS-Romania),[45] which splintered from AUR, the flagship of the far-right. To much surprise and with a slightly more voluminous reasoning, the Court invalidated her candidacy.

In a nutshell, the argument comprises three steps. First, eligibility conditions were now expanded to comprise formal and substantive, the latter category further subdivided into "general" and "special".[46] The general conditions, a newly created doctrinal taxonomy, are defined as loyalty to the Constitution and its axiology under Art. 1 (3): democracy, rule of law, human dignity, etc. A lofty excerpt (out of many similar in rhetorical elation) bears a somewhat longer citation: "As such, the democratic traditions and aspirations of the Romanian people constitute a constant element, intrinsic and [sic!] sempiternal in its conscience, mentality and aspirations, whereas the Constitution, as a fundamental act of the state, is a shield for the defence against anarchic, arbitrary, extremist, oppressive or subversive tendencies, defending the very nucleus of Romanian identity, built and grounded in the ideas of democracy and the rule of law."[47]

Consequently, second, the Court will scrutinise a candidate's positions and statements, to check loyalty track records and sift through evidence as to whether said

[42] I thank Vlad Perju for pointing out that 'democratic fitness' objections *as such*, *in this form* were never filed with the Court. One could however turn this insightful observation on its head and note that precisely since the caselaw was predictably formalistic-minimalistic for decades, it was deemed useless to advance in candidacy registration challenges loftier substantive arguments.

[43] Hotărârea CCR nr. 21 din 25 septembrie 2014 privind contestarea înregistrării candidaturii domnului Gheorghe Funar la alegerile pentru Președintele României din anul 2014, publicată în Monitorul Oficial al României, Partea I, nr. 706 din 26 septembrie 2014. This challenge concerned the third presidential candidacy of Mr. Gheorghe Funar, a former mayor of Cluj, notorious conspiracy theorist, xenophobe, and antisemite. *Also see*, Hotărârea CCR nr.10 din 7 septembrie 1992, publicată în Monitorul Oficial al României, Partea I, nr.238 din25 septembrie 1992, Hotărârea CCR nr.12 din 7 septembrie 1992, publicată în Monitorul Oficial al României, Partea I, nr.238 din 25 septembrie 1992.

[44] Justices E.S. Tănăsescu and L. Stanciu did not take part in the deliberations.

[45] 7.36% in the Chamber, 7.76% in the Senate in the 2024 parliamentary elections.

[46] "Formal" conditions include the number of signatures in support of a candidacy (200.000), written request, the affidavit of non-colaboration with the former *Securitate*, the communist secret police. What the court calls now "special substantive conditions of eligibility" include age (35), citizenship, Romanian residence, the right to vote, the lack of a party membership incompatibility (as policemen, judges, etc. are under), the lack of criminal convictions unless rehabilitation, amnesty or pardon has cleared the record. Presidency is also term-limited (two terms).

[47] Hotărârea nr.2 din 5 octombrie 2024 privind contestarea înregistrării candidaturii doamnei Diana Iovanovici- Șoșoacă la alegerile pentru Președintele României din anul 2024. Publicată în Monitorul Oficial nr.1003 din 08.10.2024. Par. 33.

axiology has been internalised. It was in the event found, among others, that Mrs. Șoșoacă had expressed positions that run counter to Romania's NATO and EU commitments under the Constitution, whereas Romania shares with the great European family respect for values identical to those enumerated under Art. 1 (3). Also, the Court noted, NATO and EU memberships are singled out in the fundamental law.

Third, with a *Marbury v. Madisonian* twist, the Court proceeded to point out that Presidents swear oaths to defend the Constitution and must uphold it under Art. 80 (2) ("guarantee its observance"). In conclusion of this ingenious syllogism, given Diana Iovanovici-Șoșoacă's statements, it was considered that she would have perjured herself anyway and thus had to be disqualified right off the bat: "It would be unacceptable and contrary to the nature of the democratic process that the candidate should not fulfil these conditions ab initio and yet stand for elections, after which, should she win them, she would take a formal oath of office."[48]

This ruling was broadly criticised by a variety of political factions and observers and widely regarded as a judicial coup to bolster George Simion, the candidate and leader of AUR, to whom the votes of the smaller, splinter far-right candidate would have imaginably accrued. More precisely, critics saw the ruling as a move to promote a runoff between Mr. Simion and the Social-Democratic candidate Mr. Ciolacu, the only hypothetical configuration wherein the PSD champion could have won the presidency.[49] Such suspicions, which may neither be proved nor disproved with social-scientific methods, are however somewhat justified by the configuration of the votes, where, in the majority of six, five judges were promoted to the constitutional bench by or with the votes of the mainstream centre-left PSD. The Romanian Constitutional Court is prone, in times of crisis, to issue questionable solutions, partly because it has had, since the 2003 revision, an unstable, *Conseil*-type, very politicised appointments configuration, being endowed however with broad, *Bundesverfassungsgericht*-style, jurisdictional powers (Iancu 2023, at 519).

Assessed more charitably, in strictly legal-constitutional terms, the ruling's departure from precedents, coupled with a reasoning whose poetic virtues far outstrip its analytical-legal strengths, still gave rise to concerns. As the dissenting justice noticed, the court overturned 30 years of precedent and turned an objective review of formal conditions into a subjective constitutional trial, without any of the procedural guarantees (citation, representation by counsel, etc.) warranted for such an exercise under the Constitution and also the ECHR. In essence, the Court moved Art. 146 (k) militant democracy instruments to Art. 146 (f), without the attendant procedural guarantees. Problematic was also the argument that NATO- or Euroscepticism *as such* would go against the Constitution and predetermine invalidation of a candidacy. Even a platform built on a (mercifully improbable) Ro-Exit would not be unconstitutional. Membership in the EU and the North Atlantic Alliance are constitutionally protected by the usual EU-related provisions and a special, heightened treaty-ratification procedure, all resulting from a massive revision in 2003. Denunciation may occur under the same terms as the ratification: two thirds of the MPs voting in a joint sitting of Parliament. The revision was undertaken before and in view

[48] *Id.,* at par. 48.

[49] https://www.politico.eu/article/romania-election-russia-eu-nato-ballot-diana-sosoaca-ccr/

of the two accessions. The only legal bar to revision, the "eternity" clause (now Art. 152), predates accessions and is framed, in relevant part, in rather state-centric or even, perhaps, ethnocentric (Guțan 2018) terms. Whereas such a platform would be highly detrimental to the country and well-nigh impossible to undertake practically, proposing this extravagant course of action is not unconstitutional.

In the first round of elections, all polls and political commentariat calculations were disproved. The PSD candidate, Marcel Ciolacu, came up third, a few thousand votes behind Elena Lasconi, whereas the candidate of Ciolacu's big-tent coalition partner, the National Liberal Party (General (R.) Nicolae Ciucă) only secured the fifth place. Mr. Simion was third and Călin Georgescu the shockingly unexpected winner.[50] The Constitutional Court was caught up in and also amplified the general confusion that ensued from the release of election results. First, it received as admissible two annulment requests by candidates who arguably lacked standing (one had received 0.13%, the other 1.03% of the vote).[51] All of the candidates who stood any chance of benefitting from a recount had by then conceded. One complaint was rejected as filed after the legal term limit of three days but decision on the other was postponed. An injunction by the Court ordered the Central Electoral Bureau,[52] in response to the complaint whose resolution was deferred, to sift through the 9,5 million votes and verify election reports from all precincts by next day afternoon. The term of this expedited *Bush v. Gore* exercise was then extended and irregularities of a nature to change the order of candidates were not found.[53] Three days before the runoff vote was scheduled to commence overseas, on the 3rd of December, the Court validated the first-round results.[54] Then, on the 6th of December, by Ruling 32/2024, the CCR reversed itself and annulled the entire election.

The reasoning of Ruling 32 is, as already mentioned, condensed. It essentially relies on the findings of four intelligence agencies, whose reports had been presented in a CSAȚ meeting held on the 28th of November, before the certification of the results. Three services (the Foreign Intelligence Service (SIE), the Romanian Intelligence Service (SRI) and the Ministry of Internal Affairs's intelligence service (DGPI) accuse potential foreign interference and algorithm manipulation to 'push' posts favourable to Georgescu. The report of the Special Telecommunication

[50] Results can be consulted on the Romanian Electoral Authority (AEP) website https://prezenta.roaep.ro/prezidentiale24112024/pv/romania/results/

[51] Hotărârea nr. 30/2024 privind cererea de anulare a alegerilor pentru funcţia de Preşedinte al României din data de 24 noiembrie 2024, formulată de domnul Cristian Vasile Terheş. M. Of., Partea I nr. 1263 din 16 decembrie 2024 (*Cf.* concurring opinion by Justice Tănăsescu, indicating lack of standing).

[52] https://prezidentiale2024.bec.ro/wp-content/uploads/2024/11/CP_57.pdf

[53] According to Law 370/2004 (the law on presidential elections), Art. 55 (1), the Court may annul elections if voting and election results were affected by fraud, resulting in a misattribution of the mandate or (as the case may be) the order of the runoff candidates. In this hypothesis, the Court invalidates *that round only*. A new round of elections will take place in the second Sunday following the date of the invalidation. Parties, political alliances, electoral alliances, national minority organisations represented in the National Minority Council, as well as candidates may make such a request within three days after election results are made public.

[54] Hotărârea nr. 31 din 2 decembrie 2024 privind rezultatul alegerilor pentru funcția de Președinte al României în cadrul primului tur de scrutin din 24 noiembrie 2024, M. Of. nr. 1214 din 3 decembrie 2024.

Service (STS), actually in charge of securitizing electoral processes, essentially claims that there were cyberattacks on servers but not out of the ordinary and not of nature to affect the process and that the electoral process "is essentially paper-based" (*se desfășoară pe hârtie*).[55] This latter mention was an allusion to the recount, which had already been ordered and underway, and where no significant irregularities were eventually found.[56] With the exception of the DGPI brief, the other documents are cryptic. For instance, the SIE report mentions Russian patterns of manipulation and similarities to methods of interference in Moldova and Ukraine but does so apodictically ("we appreciate") in less than three pages. Two reports by the SRI are issued as "annexes" to the main document, presumably presented in the 28th of November meeting but not declassified. They are dated 4th of December.[57] This factor raised reasonable suspicions as to whether they were declassified or post-compiled; one of the two SRI documents contains for instance references to events that took place after that meeting.

The CCR ruling contains 23 paragraphs of reasoning, three pages and a half of text. Part of the reasoning summarises the main points in the intelligence briefs, to the effect that the freedom of the voter was affected and "denatured" by misinformation of the voters, due to the manipulation of the social media campaign. The ruling mentions putative foreign influence obliquely, in the sense that "the intrusion of non-state or state entities must be excluded."[58] The court points out that other candidates were put in a position of inferiority: "[T]he candidate benefited from preferential treatment on social media platforms, which altered the free expression of the voter's will."[59] This argument is not elaborated on. Georgescu had been accused of (benefitting from) TikTok manipulation only; unlike the radio spectrum, the internet is not finite.[60] Other media were monopolised by other candidates. The main thesis, synthesised from the intelligence briefs by SRI, DGPI, and SIE is complemented by general statements (the grounding of the Romanian state on the principles of democracy, the rule of law, etc.) and supplemented by three references to

[55] https://www.presidency.ro/ro/media/comunicate-de-presa/comunicat-de-presa1733327193

[56] https://www.presidency.ro/files/userfiles/Documente%20CSAT/Document%20CSAT%20STS.pdf

[57] The declassification decision as such was taken on December 4 but the declassified documents were supposed to have been presented in the National Defence Council on the 28th of November, 2024.

[58] Par. 13.

[59] Par. 14.

[60] This point is made in the Venice Commission report, para 57. "The simple fact that a candidate is successful in online campaigning, and that the use of social media platforms may amplify a candidate's message beyond what was possible with print and broadcast media, does not mean that the candidate has violated rules on campaign spending and transparency and thus obtained an unfair advantage. The role of the judge is to consider if any rules have been violated in receiving campaign support from third parties, be it online or not." See also, EIU Democracy Index at 63: "The claim that voters for right-wing outsider Calin Georgescu were widely influenced by a TikTok campaign strains credibility, especially given the social composition of Mr Georgescu's supporters, many of whom are older rural voters who consume their news from television (which is dominated by the ruling parties)." This argument, while not untrue, is overstated. TikTok penetration in Romania is very high, at 8.97 million users in all age groups and demographics. At https://datareportal.com/reports/digital-2024-romania?rq=romania

Venice Commission soft law standards.[61] A legal basis for the ruling, in the absence of a specific constitutional or legislative procedure or of a cause of action for the informal meeting, was found in the general role of the Court, under Art. 142 (1) of the Constitution, as "guarantor of constitutional supremacy", which, the CCR states, cannot be disentangled from but serves as a catchall canopy for specific procedures. This specific line of argument is particularly problematic. Should specific powers be derived directly from generic-preambulatory provisions, all institutions would be in principle boundless and therefore, arguably, lawless.[62]

In the aftermath, an urgent report by the Venice Commission[63] issued a courteously formulated rebuff to the Romanian court. The document stresses, among others, that 1. courts are in principle reactive, not proactive,[64] that 2. the more 'individualized' a judicial action or the bigger the scope of judicial discretion is, the higher the procedural safeguard bars should be,[65] that 3. election annulments are last resort options and should in principle (if at all) take place before voting begins,[66] that 4. reliance on intelligence briefs is problematic in judicial matters.[67] In a particularly disquieting paragraph,[68] the report also mentions that, according to prevailing European practices, even candidates who manipulate elections are not automatically

[61] Hotărârea nr. 32/2024, Paras 10, 15, and 17 of the ruling reference and rely on the Code of Good Practice in Electoral Matters, CDL-AD (2002) 23, its Guidlenies and Explanatory Report, and the Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, CDL-AD(2024)044-e.

[62] Paradoxically, Mr. Georgescu shares this vision or theory of constitutional interpretation, repeatedly stating that, once President, he will act directly on the mandate of Art. 80 (1) to "safeguard of the national independence, unity and territorial integrity of the country" and (2), to "guard the observance of the Constitution and the proper functioning of the public authorities…as a mediator between the Powers in the State, as well as between the State and society". Mr. Trump also believes in a plenitude of Presidential powers, immediately derived from the Vesting Clause of Art. II Sect. 1.

[63] Urgent Report on the Cancellation of Elections by Constitutional Courts, Issued on 27 January 2025 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure (CDL-PI (2005)001), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2025)001-e Marta Cartabia, Angelika Nussberger and Christoph Grabenwarter (a former ECtHR judge in respect of Germany, a former president of the Italian Constitutional Court, and the current president of the Austrian Constitutional Court) were members in the six-person expert group that co-authored the report.

[64] Par. 69.

[65] Par. 32.

[66] Par. 35.

[67] Par. 77.

[68] On February 26, 2025. Georgescu was stopped by the judiciary police in traffic, served a bench warrant, and escorted to the General Prosecutor's Office (PÎCCJ) He was placed under the preventive measure of judicial supervision (*control judiciar*) and indicted on a number of charges, including charges under OUG 31/2002; as regards these, *see infra* note 68 and associated text. Stopping someone in traffic to serve a bench warrant is theatrically- rather than procedurally-warranted; 'special effect' investigative practices (spectacular arrests, leaks to the press, perp walks, etc.) are carryovers from the age of 'RoL as anticorruption' (Iancu 2024). Georgescu also stands accused of other crimes and criminal associations. To wit, one person in his close entourage is Mr. Potra, a local politician and former French Foreign Legion fighter. Potra has fled the country and finds himself now in the Emirates. In his house, a significant stash of military-grade weaponry (dozens of firearms, hand grenades, ammunition) was found during a recent search by the Counter Terrorism and Organised Crime Prosecutor's Office (DIICOT).

disqualified from taking part in newly called elections, unless convicted.[69] Reading through this bill of particulars, one may even wonder if any room at all is left for the practice of 'individual militant democracy.'

The configuration resulting from this string of constitutional and political-constitutional developments is perplexing. Whereas it is not the task of scholarship to predict the future (See Section 5 below), in the likely renewed candidacy of Mr. Georgescu and the equally likely contestation of a BEC registration, the CCR was bound by its precedent to invalidate the candidacy. Significant difficulties were attendant to this otherwise *prima facie* desirable course of action. In so doing, the Court would have had to rely on a problematic precedent and fix a situation that in large part was of its own making. Had Diana Iovanovici-Șoșoacă not been prevented from running in October, it is not at all improbable that the 2024 election would have run a normal course, with a mainstream candidate of either the centre-left or the centre-right strongly favoured to win the runoff in December.[70] In this not implausible reading of the election saga, the Court has acted, invalidating the elections to stave off a catastrophic possible win by Mr. Georgescu, as the proverbial arsonist fireman. This happened, moreover, at a non-symbolic immediate cost to the taxpayer of approximately 280 million euros.[71] Should the CCR not have invalidated (damned if you do, damned if you don't), it would have implicitly accepted the illegitimacy of the October ruling and lost what remained of a credibility already in tatters. Aside from consequentialist speculations, the episode reveals the substance-procedure, RoL-driven difficulties intrinsic to the practice of "individual militant democracy."

If the CCR had addressed Mr. Georgescu's new bid for the presidency by incorporating in the process some of the specific safeguards intimated by the Venice Commission urgent report and the dissenting judge, that specific course of action might have gone some lengths towards reconciling contradictions, irrespective of the outcome. Whether and how this could have been done within two days (Art. 31 (2), Law 370/2004) is also worth pondering. An invalidation, however desirable in the short term,[72] is however only as a palliative for tensions running deeper and

[69] Venice Commission Urgent Report, Par. 63. The implication is that even a formal arraignment would not be a sufficient basis for invalidation.

[70] Ms. Șoșoacă was credited to win over 7%. This was the percentage her party, SOS-Romania, gained in the simultaneously held parliamentary elections (7.36% in the House, 7.76 in the Senate). 'Her' votes most likely 'migrated' to Georgescu, not to George Simion, whom Șoșoacă opposes as 'limousine radical' (and from whose faction she splintered off).

[71] https://www.libertatea.ro/stiri/cat-vor-costa-noile-alegerile-prezidentiale-5112912.

[72] I am not arguing for the pursuit of politics in constitutional-judicial robes. Mr. Georgescu expresses a vision that is so alien to anything liberal-constitutionalism stands for (or has ever stood for, from the nineteenth century onwards) and has expressed his visions so openly and often, that the reasons flimsily compiled for the Mrs. Ivanovici-Șoșoacă's invalidation ruling, if revisited persuasively and within a recognizably judicial process form, would have applied in his situation much more. He was however in the abstract an ideal candidate for disqualification on eligibility grounds. Ideally, Mr. Georgescu, who was in 2025 favoured by polls to win at least 37% in the first round (up from the 22,94% he did win in the 2024 cancelled round and more than the combined percentage of the ultranationalists in the current legislature), should have been rejected by voters at the ballot box. At https://www.euronews.ro/articole/sondaje-flash-data-sociopol-februarie-alegeri-prezidentiale-2025.

beyond the reach of militant democracy toolkits. These tensions and their paradoxical interplays will form the object of the next and last substantive section of my article.

4 Managed Democracies and Structural Authoritarianism: Paradox Three

Mr. Georgescu was widely described in the Romanian press as a throwback to the local fascist interwar. He did express admiration for interwar figures such as Corneliu Zelea Codreanu, the leader of the interwar Romanian-fascist Iron Guard (according to Georgescu, "a national hero" who "fought for the morality of the human being") and for Marshall Ion Antonescu, the Axis ally and military dictator during the war ("a martyr"). Most local ethnonationalists share and express such sentiments, including Ms. Șoșoacă. Public statements of this nature are criminally illegal but go routinely unsanctioned, even though a conviction would be a more legitimate avenue for a disqualification.[73] Georgescu was himself placed under and then cleared of such charges by the General Prosecutor's Office (PÎCCJ) in 2022. The reason provided then by the PÎCCJ, against the grain of contradictory constitutional case law,[74] was that the norms were allegedly too vague to be criminally actionable.[75] The recent ultranationalist worldview-representations are not leaning exclusively far-right and neither are specific policies, which range from nationalisation and reindustrialisation to agrarian smallholder autarchy and low taxes. The picture is mixed,[76] with antisystem melancholy spread evenly across a mix of national-communist and fascist figments.

The past illuminates in many ways local traditions of both democracy and the rule of law. Romania is a peripheral country, which, from the nineteenth century all the way until 1990, experienced only one set of free and relatively fair elections. This occurred in 1919, right after the introduction of universal male franchise. What passed in the pre-communist past for parliamentary democracy in Romania and arguably, to different degrees, all over the peripheries and semi-peripheries of Europe (Bugarič 2015; Kosař et al. 2019) was merely a façade (Maner 1997).

[73] Emergency Ordinance 31/2002 *on banning fascist, racist or xenophobic organisations or symbols and promoting the cult of persons guilty of committing crimes against peace and humanity* was half-heartedly adopted to secure EU accession and has practically been a paper tiger ever since.

[74] The CCR has deemed the provisions to be in accordance with legality of incrimination strictures (*nullum crimen, nulla poena sine lege)* already in 2005, DCC nr. 67 din 3 februarie 2005, M. Of. nr. 146 din 18 februarie 2005. OUG 31/2002 was modified and completed by Law 217/2015 (containing primarily definitional clarifications).

[75] At https://www.digi24.ro/alegeri-prezidentiale-2024/parchetul-general-explica-de-ce-a-clasat-in-urma-cu-doi-ani-dosarul-penal-care-il-viza-pe-calin-georgescu-3022219

[76] In a country where the Social-Democratic (PSD) Prime Minister announces that "following Elon Musk's lead, we started a clean-up" (on February 20, 2025, regarding projected administrative cutbacks), ideological orthodoxies are somewhat underpriced. https://www.digi24.ro/stiri/actualitate/politica/ciolacu-eliminam-1-800-de-posturi-din-institutiile-subordonate-guvernului-cea-mai-mare-reforma-administrativa-din-istoria-romaniei-3128167.

The Romanian parliament of 1919 was dissolved after four months. In a prevalently agrarian, fragmented country, plagued by rampant illiteracy, minimal urbanisation, and extractive modernisation, the freshly introduced universal male vote was too dangerous to be left to choice. Empty-formalistic parliamentarism obfuscated a process of authoritarian management, which consisted first and foremost of carefully doctored elections. Intensive tinkering with the militant democracy instruments of the time was also practiced, to stifle increasing discontent: the state of siege, extended for six months at a time, often for years on end, party bans, extensive censorship, 'motorized legislation', and the like. In this Balkan sideshow of the main Weimar performance, such modalities of securing stability were even more expensively purchased and experienced on borrowed time. In 1937, interwar democracy collapsed under the weight of its own contradictions, which included an electoral pact between one of the two mainstream parties and the upstart fascist movement.

What rudiments of liberal-democratic traditions have been created in Romania, arguably in Eastern Europe more generally, have only been built in the aftermath of the post-communist transition in 1989. In Romania, this process unfolded very slowly and progressed primarily with the boon of EU membership in sight. Expectations about what membership meant differed significantly in the EU-15 and the new member states, respectively, with economic well-being as the main desire at the gates of Europe (Czarnota 2006). Among the intelligentsia, dreams of EU cornucopia were seasoned with mystifications of a presumptive and, in reality, largely fictitious "return to Europe." In Romania, already in the trail of accession negotiations, the road to Europe unleashed unparalleled economic growth. This was aggregate 'well-being' mostly, skewed towards bigger urban agglomerations and severely against small-urban communities and rural areas. The latter still count towards 54% of the population, the country being one of the least urbanised in the EU.[77]

EU stabilisation policies, primarily anticorruption, were increasingly instrumentalised by local elites to extract rents and entrench power and, in so doing, naturalise and normalise inequalities and uneven development. By the same token, local RoL instrumentalism was reinforced by weak EU monitoring, which is in turn partly a result of structural deficiences (*cf*. Usvatov and Muharemović 2024). Once EU crises started in the late 2000s, whatever central attempts existed to discipline peripheral instrumentalism were lost in feverish searches for the "geo-constitutional fudge" (Wilkinson 2021, at 212ff). Dominant anticorruption narratives portrayed the often-questionable application of antigraft punitivism as the essence of Europeanness and the highest achievement of the rule of law. Such embellished accounts camouflaged and repurposed past legacies, few if any of liberal democratic stock (Cercel 2024; Kiss and Székely 2021). Budget allocations for the intelligence services have grown steadily, while securitisation has crept first into the law and politics of anticorruption (Iancu 2021, 2023, 2024) and from there into politics writ large.[78] The budget

[77] https://feps-europe.eu/publication/800-unequal-romania-regional-socio-economic-disparities-in-romania/.

[78] Perhaps not fully without epistemological reason, the academic discipline "political science" as such was in Romania split from its previous social science affiliation with sociology and grouped together,

of the internal intelligence service alone grows by a healthy 10% average year by year. Even when comparisons take all relevant differences into account, its emoluments tower, at 1,1 Bn. Euros, above those of all EU countries and indeed most NATO counterparts.[79] Meanwhile, education and research appropriations have for the most part decreased steadily and are consistently the lowest in Europe.[80] A 2011 law on national education directed appropriations to education corresponding to 6% of the GDP and 1% for research (Art. 8, Law 1/2011). Each year in December, an emergency ordinance was adopted to suspend the application of this provision during the upcoming budget year and thus defer it in perpetuity. Under new legislation adopted in 2023, 'motorized' decree solutions are no longer necessary. Investment in general-use infrastructure, especially trains, has been diminutive for decades.

New European dynamics appeared and, in their trails, new rifts, notably those accompanying the changing role of the millions-strong Romanian diaspora in local RoL politics. For over a decade and a half, the sizeable diaspora was conscripted into all manner of civilisational tropes, essentially presented as an enlightened, progressive, arch-European force for the good (Tănăsescu 2020).[81] Since overseas votes accrue almost unanimously to factions right of centre, these discourses served a clear purpose as long as anticorruption was the common centre-right ideological denominator. The diaspora could also help sway the outcome rightward in presidential elections. The reaction of the diaspora in the 2018 'referendum for the family' (at issue was an entrenchment of the heterosexual family definition in the fundamental law) was accordingly sidestepped in highbrow media and academic commentaries. In spite of a strategic centre-right boycott of the turn-out,[82] participation abroad was higher than in the parliamentary elections of 2016, reflecting the purely ideological interest of Romanians abroad in having the amendment pass.The embellished narrative continued however unabated, up until the point when it became impossible

Footnote 78 (Continued)

as regards assessment of all academic and professional degrees, with "security, military studies, intelligence, and public order." https://www.cnatdcu.ro/paneluri-cnatdcu/ (Order Nr. 4676/2020, Ministry of Education and Research, M. Of. Nr. 609, 10.07.2020).

[79] https://www.sri.ro/assets/files/bugete/Buget_SRI_01_2024.pdf If one compares budgets charitably, with the *Bundesnachrichtendienst*, the SRI budget is still slightly bigger. In other countries, foreign intelligence service allocations are higher than those of domestic services (see Iancu 2021) https://www.bundeshaushalt.de/DE/Bundeshaushalt-digital/bundeshaushalt-digital.html.

[80] In https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Educational_expenditure_statistics In 2022, unusually, Romania was 'overtaken' by Ireland, with public expenditure on education lower than Romania's, at 2.7% of the GDP. Research allocations as percentage of the GDP stand (2023) at 0,15%, the lowest in the Union (down from 0,21% in 2013) https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_budget_allocations_for_R%26D_(GBARD)#:~:text=In%202023%2C%20the%20total%20government,(€181.1%20per%20person).

[81] In the media, for instance: https://www.theguardian.com/commentisfree/2018/aug/22/romania-migrant-diaspora-protest-police-crackdown-corruption; https://www.carnegiecouncil.org/media/article/the-romanian-diasporas-impact-on-european-stability.

[82] Participation was boycotted strategically, to undermine the validation turn-out and thus to subvert the Social Democratic Party. The latter, then in government, could have capitalised on the potential success of the revision. The goal was achieved, with participation under the 25% validity condition, even as over 90% voted in favor.

to ignore the types of hard-right forces Romanian communities abroad favour with enthusiasm as soon as they are on offer.[83]

In other words, the sociologically true "spirit of the democratic traditions of the Romanian people" (Art. 1 (3)) was rediscovered,[84] as the country has travelled full circle to an avatar of its former self. Institutions are used and discourses steadily manipulated to influence outcomes and stabilise a brittle system. Such propensities, often misdescribed as 'rule of law', are a spitting image in reverse of the way in which candidates Georgescu and Șoșoacă misrepresent democracy. True stability is in the abstract possible but could only result from a modicum of fiscal equalization to even out problematic regional and demographic disparities. Long-term investment in education and in a minimal social ladder, allowing at least the meritocratic selection and recirculation of elites, is a must (*cf.* Malkopoulou and Norman 2019; Lübbe-Wolff 2023).[85] Such measures can only be guaranteed by moderately predictable and relatively impartial application of the law. Working on causes is however significantly more difficult than treating symptoms.

It would be convenient to relegate and dismiss the election cancellation episode as an idiosyncratic example of peripheral underdevelopment. As revealed by the high degree of external attention and the many pattern synchronicities,[86] the Romanian case is seamlessly integrated into structures and narratives that cut across past civilisational divisions. In 1937, Karl Loewenstein advocated for the use of militant democracy instruments in precisely this type of unsettled, peripheral society, musing about the need to acknowledge that liberal democracy was "anyhow suitable, in the last analysis, only for the political aristocrats among the nations" (Lowenstein 1937b, at 657). In the post-war context, an older Loewenstein was significantly more

[83] The vote of the diaspora has consistently favored the far-right, ever since far-right parties resurfaced during the pandemic. This applies with particular strength to the large expat communities in the Union and the UK. One may compare far-right parliamentary results inland and overseas https://prezenta.roaep.ro/parlamentare01122024/pv/abroad/results. Mr. Georgescu obtained abroad 43,16%, roughly double the national percentage (22,94%). At https://prezenta.roaep.ro/prezidentiale24112024/pv/abroad/results.

[84] This reference was inserted by the architects of the 2003 revision, with unselfconscious irony.

[85] *Cf.* Lübbe-Wolff (2023): "The causes of widespread discontent and political dissatisfaction with establishment parties and often with the political system as such cannot be combatted with the specific instruments of 'combative democracy.' Only politics attuned resolutely and realistically to the *constitutionally recognizable demands* of the citizens will be of use (*eine Politik, die sich…den nicht verfassungsfeindlichen Anliegen der Bürger zuwendet*)." [emphasis supplied].

[86] There are too many similarities, both discursive and factual, to enumerate here (some have been mentioned expressly or implicitly): Mr. Georgescu's programme shares some similarities, *mutatis mutandis*, with Mr. Trump's programme of reshoring and low taxes; patterns of demographic polarisation and culture wars are counterintuitively similar, other things equal, and cut across former civilisational divides; TikTok plays a similar role in the success of Germany's AfD among young voters and contributed similarly to the success of Donald Trump's campaign; individual militant democracy under Art. 18 GG is also reconsidered in German debates as regards a possible application to strip of rights-protections the Thuringian AfD leader Björn Höcke, etc.

ambivalent[87] and contemporary events, as reviewed in the introduction, cast doubt on established orders of constitutional aristocracy.

The idea as such that "militant democracy" is particularly needed in "fragile democracies" (Issacharoff 2007) has proven remarkably resilient. It is however a paradox, and among the contradictions reviewed in this article perhaps the most difficult to square, that in such societies blunt legal instruments are most likely to be used injudiciously, in dialogue with and also reinforcing mock-democratic appeals to "the will of the people." In point of fact, the (mis)use of militant instruments may be an indicator that polarisation has reached a momentum that renders likely the acceleration of mutual synergies at the level of effects and all the more difficult the treatment of causes. External 'nudges' towards liberal-democratic stability, in the framework of the Union ideally, also in that of broader transatlantic interactions, would be in this configuration salutary. As things stand now, the Western liberal order writ large is itself trapped in peripheralisation dynamics and likely to mirror-reinforce pathologies.

5 Conclusion: Liberal, Illiberal, and Structural Authoritarianism

Militant democracy is a relatively new concept in the liberal-constitutional tradition. It corresponds to a perceived need, in some post-totalitarian systems, to counteract illiberal authoritarianism. Illiberal authoritarianism reads oxymoronic, unless one remembers that, as stated above, Lowenstein's position was that militant democracy is also a form of authoritarianism, namely, a liberal one, whereby rational and well-meaning elites prevent the rabble-rousing fascists from swaying the plebs. One must combat "fire with fire", liberal democracy cannot be a 'free for all'; one must choose decidedly, as Schmitt had put it, between Christ and Barabbas.

Germany served as the blueprint for specific instruments and as the arch-cautionary tale for the dangers. "Combative democracy" is said (in Germany and elsewhere, routinely) to have risen Phoenix-like from the "lessons of Weimar." On closer inspection, it is not at all evident that this is the Weimar lesson. I have argued here that serious doubts exist as to whether any inferences from Weimar practices lead to constitutional courts as particularly apt custodians in this specific respect. Significant limitations prevent courts from fulfilling the role and for the most part courts have also refrained from exercising it.

Resilient beliefs that "fragile democracies" are most in need of militancy is, I have argued, disproved by the Romanian example. The position that individual militant democracy might be a good substitute for the party ban is also gainsaid by the case study. Romania has rather reverted to a perplexing, partly hi-tech avatar, of its various past traditions. Whereas membership in the Union has helped the country achieve fast a high degree of aggregate economic growth, results have been mixed

[87] E.g., Loewenstein 1965 (1957), at 329ff, where a subsection on democratic "fighting fire with fire" is placed in the main section on *The Crisis of Individual Liberties in Constitutional Democracy* and treated in reference (also) to contemporaneous McCarthyism, government and financial interests controls on the media, liberty-security trade-offs, mass society conformity patterns, etc.

in terms of constitutionalism. In more recent years, the overall picture is rather that foretold by Adam Czarnota already in 2006, as an arranged marriage between façade-type Eastern rule of law and EU 'infranationalism' of the post-democratic variety (Czarnota 2006, at 296–297). The interest elicited by Romanian events, in Europe and beyond, reveals another recent and most concerning trend. Tendencies towards polarisation and discourse instrumentalism that used to be a peripheral peculiarity have started to spread across former geographical divides, to systems that Loewenstein rightly called in 1937 "aristocrats among the nations."

The example is dramatically indicative of general limitations surrounding militant democracy. To wit, the crisis currently overhanging the country has likely been, albeit not single-handedly created, certainly influenced by the constitutional court's decision to tinker cavalierly with militancy. If Romania's practice of Eastern-style 'authoritarian liberalism' and its recent experiences with strident ultranationalism teach us anything, it is that both are symptoms. The causes, structural and intrinsically authoritarian, lie in deep patterns of fragmentation, systematically underfunded education, and the lack of meritocratic selection, including (if not primarily) at the highest levels of the political, judicial, and academic-intellectual elites.

Instead of treatment, the effects alone of ailments are being micro- and macro-managed through various institutions. The blind rage against the system that Mr. Georgescu capitalized on with delusions of past grandeur and false promises of collective renewal is only the last and most dangerous in a longer string of effects. Admittedly, it is also the hardest to deflect. However one acts in the short term, it is underlying causes that must be alleviated and hopefully cured, should some recognizable form of liberal democracy be able to survive in this particularcountry, in Europe or beyond.

This article was last revised and approved for publication before the most recent events, of March 2025, when a new institutional actor has risen from complete anonymity to militant democracy stardom: the Central Electoral Bureau (*Biroul Electoral Central*, BEC). The BEC is an election registration office, constituted before each election. Until now, it simply registered candidacies within 48 hours, fulfilling the rather dull, clerical task of counting signatures and verifying affidavits. The presidential elections BEC is under Law 370/2004 composed of five randomly selected High Court of Cassation and Justice (ÎCCJ, i.e., Supreme Court) judges, the President and vice-presidents of the Permanent Electoral Authority (*Autoritatea Electorală Permanentă*, AEP), and up to 10 representatives of the parties. The 2025 presidential elections BEC has only 14 members: the 5 Supreme Court judges, 7 party representatives, and the AEP interim president and vice-president. On the 28th of February, the Parliament removed the incumbent AEP president, subsequently replaced by one of the two sitting vice-presidents as interim head.

Petitions (*contestații*) against the BEC decision to register or not must be filed with the Constitutional Court within 24 hours, once the BEC decision is rendered. Georgescu filed his do-over candidacy on Friday, March 7. The CCR met on Saturday, March 8, to discuss challenges to Georgescu's candidacy, without waiting for a BEC decision that it was supposed to validate or quash. It eventually rejected four complaints as inadmissible. On Sunday, March 9, late in the evening, the BEC voted ten to four to refuse registration. The announcement was promptly followed by

rioting by Georgescu's supporters, already gathered in the hundreds in front of the BEC building in downtown Bucharest and galvanised-riled by the solution. Others did not join them, on account of Gendarmerie roadblocks. More importantly, Bucharest, albeit the capital of a relatively poor EU country, is an affluent city and therefore not a Georgescu stronghold. The cleavages that Mr. Georgescu has repurposed and amplified ideologically through his strident ultranationalism are, at their roots, primarily class-based, as discussed in section 4. above.

The three-page BEC decision (https://prezidentiale2025.bec.ro/wp-content/uploads/2025/03/decizie_18D.pdf) relies on the CCR rulings discussed in the third section of this article. It emphasises the need for a candidate to internalise the "axiological framework," as predetermined by CCR Ruling 2/2024, in order to be able to swear in good faith, if putatively elected, the "sacrosanct oath of office." The ruling referred however to another person; it specifies expressly (Par. 48) that such constitutional value-based, axiological certifications are *within the exclusive purview of the Constitutional Court*. BEC further pointed to CCR Ruling 32/20024 as dispositive of the matter: someone on whose account a prior round of elections was voided cannot be allowed to run in the restaged electoral process. The invalidation ruling did not however formally refer to Georgescu and, at any rate, hard evidence of foreign interference in the 2024 elections is still outstanding. Under the circumstances, the Constitutional Court's unanimous March 11 rejection of Georgescu's March 10 complaint against the BEC decision was a foregone conclusion. Legally, the 'switch' in the invalidation forum to BEC as *a quo* tribunal ostensibly responds to one of Venice Commission's Urgent Report arguments, namely, the need for an appeal. Through this institutional castling, the Constitutional Court formally became an 'appellate body' (the tribunal *ad quem*). Strategically, the shift deflected pressure from the CCR. These new developments and the many more which will undoubtedly follow do not affect the article argument, except perhaps by way of confirming it.

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Declarations

Conflict of Interest The author declares none.

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