**Research Proposal**

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**Defending democracy ‘beyond the state’: Towards a Europeanization of national militant restrictions dealing with extremism?**

**Abstract**

Academic literature on defending democracy tends to adopt a national state approach, without examining the possible horizontal interstate reactions or the dialogue between national and European defensiveness. Given the European political community deepening, it remains important to examine how defending democracy can be enforced ‘beyond the state’. My research project will feature a comparative study of the impact European Union politics (the so called Europeanization) have on national militant restrictions and, in reverse, a comparative study among national crisis moments, capable of triggering an EU intervention when it comes to combating extreme right parties. The project will similarly attempt to explain, in a two way process, why the level of Europeanization is stronger in some cases and how the depth of EU integration matters to Member States to adhere to the EU community of values.

**Introduction and objectives of research project**

The rise of extreme right parties has been a significant development in contemporary western European politics and its progression risks, becoming more important when linked to the economic crisis that traverses Europe. Nowhere does this seem to be more visible than within the European Union, where the reforms being put forward by different governments are causing much popular discontent and are also empowering formerly outsider political groups. Several texts attempt to trace the origins of these parties’ appearance, to explain the causes of their rise, as well as to predict their evolution. Although this phenomenon has captured the attention of academic interest, the question concerning the way in which institutional and legal mechanisms should be designed, or the way in which other political actors should deal with extreme right parties, has drawn comparatively less attention.

The strength of the old neutral model of deliberative democracy overcoming the traditional opposition between procedural and substantive views of democracy[[1]](#footnote-1) seems to have been overestimated: ‘In comparative constitutional law, the old neutral model of liberal democracy, according to which all political views are entitled to the same rights of expression and association, has given way to a general consensus that restrictions on basic rights designed to preserve democracy are legitimate’[[2]](#footnote-2).

Professor John Kean puzzled the picture of democracy being under pressure in a very interesting way; by extracting snippets of randomly-chosen local political news on a rather ordinary day, September 18th 2013: ‘In the Netherlands, newly-inaugurated King Willem-Alexander makes his first annual appearance before parliament with a speech announcing the end of the welfare state. From Germany comes the news that in the five months since its launch, the populist anti-euro party, Alternative für Deutschland, looks to be the only group seriously challenging Angela Merkel’s ruling CDU and the flagging opposition Social Democrats. (…) In Greece, Pavlos Fyssas is murdered by a member of Golden Dawn, the neo-Nazi party with 18 members in the 300-seat Greek Parliament’.[[3]](#footnote-3) Despite having different origins and contexts, all these developments point to the fact that the traditional twofold requirement of deliberative democracy- on the one hand, tracking all citizens’ concerns in the public sphere (procedural view of democracy) and on the other hand, adequately filtering such concerns in order to exclude the extremist ones- does not suffice to protect democracy and the use of stricter restrictions turns out to be necessary.

Scholarship has mostly sought to analyse the effectiveness and the opportunity of national institutional frameworks in verifying what makes militant policies and institutions politically viable on a national level. Nevertheless, given the European political community deepening, it is essential to examine how militant democracy can be enforced ‘beyond the state’. My research project will feature a comparative study of the impact that European Union politics (the so called Europeanization) have on national militant restrictions. Furthermore, it will also contain, in contrast, a comparative study of national developments capable of influencing the EU to adopt a more interventionist attitude in combating extreme right parties. The project will similarly attempt to explain, in a two way process, why the level of Europeanization is stronger in some cases and why certain national militant restrictions are more easily uploaded at the European level.

**Literature Review** **on militant and defending democracy**

The old concept of militant democracy[[4]](#footnote-4), introduced by Karl Loewenstein and defined as a natural politico-constitutional development of democracies responding with special legislation to the necessity of fighting Fascist and Nazi tendencies, has guided postwar scholarship which focused on the analysis of the differences between democratic systems in addressing threats to the democratic order. The studies by Jaap van Donselaar[[5]](#footnote-5), Tim Bale[[6]](#footnote-6) and David Art[[7]](#footnote-7) considering the response to extremist parties in many West European countries, support the claim that extremist parties tend to grow much more easily in a permissive than a repressive political environment whereas other scholars have argued that a repressive stance towards extremist parties can have counterproductive effects and lead, for instance, to stronger solidarity within the extremist group or to a hardening of ideology (Minkenberg[[8]](#footnote-8)). Taking this research even further, the combination of a repressive stance with inclusionist strategies is presented by Giovanni Capoccia who provides a comprehensive study of the reactions towards political extremism in inter-war Europe[[9]](#footnote-9).

At this point, it would be useful to recall that repressive legislation covers a very broad ground of measures. The range of these measures can include norms aiming at protecting the military structures of the state from extremist influences, special legislation setting limits to freedom of expression and political pluralism, temporary or total party bans, special legislation limiting political propaganda etc.

Even if the political circumstances during the inter-war era were markedly different from current ones because the risk of a total democratic breakdown was much more present than it is today, most democratic regimes still adopt some of the legal restrictions of militant democracy. The variation of these restrictions across time and space has more to do with the implementation and the enforcement timings, the political conjunctures and public acceptance.

The academic literature has sought to explain this cross-national variation in legal restrictions by mainly advancing the argument of cultural and historical background (Otto Kirchheimer 1961, Martin Klamt 2007). For Kirchheimer, Sweden and Great Britain—where tolerant values prevailed over restrictions on freedom of expression— had less need for restrictive rules whereas Italy and Germany adopted stricter rules in order to curb proauthoritarian trends in their public opinion[[10]](#footnote-10). Therefore, the existence of militant restrictions depends on each country’s politico- constitutional tradition. Similarly, Klamt refers to the development of legal cultures in his comparative study including six countries (Germany, Austria, Italy, Greece, Spain and Portugal), all five having had dictatorship experiences[[11]](#footnote-11).

Another interesting study which overcomes the culture explanations seen by Capoccia as ‘inherently static’ is the comparative work of Jaap van Donselaar[[12]](#footnote-12). The two hypotheses advanced by van Donselaar are that political parties’ bans are more likely to occur (i) at crisis moments and (ii) when the size of the party in question is dangerous enough to influence the political equilibrium. As his hypotheses grasp the question of the timing of reaction, they can help us evaluate whether militant restrictions should be enacted and enforced or if a total ban should intervene.

All these studies tend, however, to adopt a national state approach as they focus on or compare countries which are viewed as independent entities. This approach leaves out possible interstate interactions either at a horizontal level or at a vertical level. Regarding the vertical level, it goes without saying that the context and the level of European integration were not at the time a determinative factor in states’ reaction towards extremism.

The Treaty of Lisbon gave new impetus to a fundamental rights culture in the EU’s institutional structure, including new internal procedures in the European Commission, European Parliament and Council of the European Union[[13]](#footnote-13). The so called European community of values presupposes that the same democratic values are shared by all Member States and in particular the article 2 of the Treaty on European Union reads as follows: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are **common to the Member States** in a society in which pluralism, non discrimination, tolerance, justice, solidarity and equality between women and men prevail.” To safeguard Article 2 values, Article 7 allows for three different interventions: the determination of a “clear risk of a substantial breach” of core EU values; the identification of a “serious and persistent breach” of these values; and, the imposition of political sanctions against the EU Member State concerned although the threshold for setting any of these procedures in motion is high and the major players are political institutions[[14]](#footnote-14).

Taking into account that there is an established basis of agreement on these democratic values, which can no longer be negotiated, a possible interaction between national defending democracies and EU policies in combating extremism mightbe viewed mainly as a constructivist process towards Europeanizing defending democracy and not as an illegitimate EU interference in domestic politics.

Given the widespread acceptance of values being common and thus shared, the challenge is not conceptual but rather functional: the way the EU and its Member States deal with threats to their shared values remains mainly influenced by factors of national order such as partisan loyalties, pre electoral contexts and cultural differences. A recent example could be the reluctance of the German government to become involved in the application filed by the Bundesrat to the German Constitutional Court for declaring the NPD unconstitutional.

**Theoretical framework / Hypotheses**

Europeanization has been defined by Ladrech as ‘an incremental process of a reorientation of the direction and form of politics to such a degree that European politics and economy become part of the very organizational logic of national politics and their decision making mechanism’. Certain authors have directed their analyses towards the indirect rather than the direct effects (Kitschelt, Abedi, VanderBrug) of European integration and, more precisely, on the outcome of extreme right parties.

It is known that Europeanization is a two way process, in which Member State governments both shape European policy outcomes and adapt to them. Member States have an incentive to upload their policies to the European level to minimize the costs in downloading them at the domestic level.

More specifically, it has already been argued by Renee L. Buhr that when centre parties were in favour of a more extensive European integration, ‘a space opens for the extreme right to present itself as the alternative’.[[15]](#footnote-15) Speaking of the 2008-2009 crisis in France in his latest work, Pascal Perrineau similarly explains the Front National’s growth after its fall during the 2007 presidential elections by the fact that the party presents itself as an alternative to all those deeply affected by the crisis[[16]](#footnote-16).

Linking the management of the crisis at the EU level and the enforcement of extreme right parties will facilitate the understanding of the EU ‘**responsibility role**’ to enhance defending democracy. Since the EU-imposed anti-crisis measures deform the national context, as governmental parties ally themselves with these measures, opposition parties and parties outside of the government react. The opportunity space, which opens for the extreme right, partially finds its origins in the EU handling of the crisis. As a logical consequence, it would not be an exaggeration to argue that the EU has a causal responsibility in implementing its anti-extremist institutional design.

Secondly, the EU has **a codification mission,** given the extremely varied set of rules and institutions through which the principle of militant democracy is put into practice in national legal systems. It can be assumed that the higher the level of convergence between national militant restrictions, the higher the chances for a positive interstate interaction at a horizontal level. Member state A will logically become more confident to borrow or exclude defending mechanisms which have performed well in Member state B.

Keeping as a guideline the fact that Europeanization is a two way process, I will proceed to a two way analysis of the dialogue between national militant defending democracies and the EU community of values. Seen from a bottom-up approach: how can different ‘national defending democracies’ or ‘absent national democracies’ affect the policy of the EU in intervening for combating extremism? How does the depth of EU integration matter, in reverse, for Member States to commit to EU democratic values?

Based on the short literature review on defending democracy and the theoretical framework of Europeanization, one is able to draw candidate explanations for the observed variations in national defending democracies. A logical assumption could be that the stronger the adherence of a Member State to the EU democratic values, the higher the probability of adequate defending mechanisms at the national level (downloading process of Europeanization). Similarly and, in reverse, the higher the danger of extremism at a national level (crisis moments) and the more shocking to the public the extreme right parties’ activity, the higher the probability for the EU to develop stricter defending mechanisms at the EU level (uploading process of Europeanization).

The Europeanization literature and the debate on **whether Europeanization is constantly increasing over time**, along with the handling of the extreme right parties, could help us formulate the following hypothesis:

**Principal Hypothesis**: The level of Europeanized defensive mechanisms dealing with extremism is increasing over time and the anti-extremist institutional design is becoming more sophisticated.

Another discussion on the governance of the two-way process of Europeanization is identifying the significance of each actor’s role (government, party leaders, non-partisan elites, such as the judiciary, and public opinion) behind this process. A second hypothesis to test could be the greater role of some of the public actors in the uploading and downloading process.

**Subsidiary Hypothesis**: The national government’s policy plays a more influential role (than public opinion or non partisan elites) in the process of downloading and uploading defensive mechanisms.

**A closer look at possible case studies**

***The weaknesses of autonomous national responses***

A few recent examples will help us demonstrate the complexity of applying the existing defending democracies at a national level. The comparison between the German case and the Greek case reveals a difference in their existing national defensiveness but not necessarily in the adequacy of their responses towards extremism. In the first case, an impressively advanced defending constitutional framework exists and a greater judicial interventionism can be observed. In contrast, in the second case, the existing institutional framework passes solely through the criminal law channel –rather than the constitutional one- and the judiciary seems to be characterised by a relative inertia. These cases could be equally interesting in their variation of the political actor’s size and power: although the Golden Dawn has significantly perturbed the political parties’ configuration in Greece, the NPD is currently far from influencing the German political equilibrium.

In **Germany**, a debate over NPD’s ban has existed for many years. A previous attempt to ban the far-right party failed 10 years ago. In 2003, an application was rejected after the point was raised that 30 out of 200 members of the NPD leadership had been informants paid for by the state: some judges felt that this invalidated the evidence presented by the applicants. The Länder-chamber of the parliament (the Bundesrat) voted to start new proceedings before the Constitutional Court at the end of 2012. However, no official application has been made, due to the government’s hesitance to get formally involved in the application in a pre electoral context.

The NPD party reacted to this decision of the Bundesrat, as well as the whole discussion, by making an application to the Constitutional Court, thus aiming at having the Court ascertain that the NPD party was not an unconstitutional party. The Court essentially stated that the NPD had no standing for such proceedings, since a political party had to face such "polemic" by way of political discourse[[17]](#footnote-17). Coming back with a stronger case this time, officials are about to launch a fresh legal attempt to ban the NPD. Nevertheless, the government is still not planning to get formally involved in the application. Chancellor Angela Merkel’s actual position has been that the NPD is an anti-democratic, xenophobic and antisemitic party which should be fought with all means, but she has not considered a renewed ban application necessary.

**Hypotheses’ test:** How could Europeanization as an alternative explanation apply to the German context? The existing German defensiveness could serve to confirm or disprove the principal hypothesis, while the German government’s developing positioning could test the subsidiary one.

**In Greece**, the European Council’s report compiled in February 2013 by Nils Muiznieks, the Human Rights Commissioner, has identified the legal grounds to outlaw the Golden Dawn or any other political organisation found to be engaging in racially motivated crimes. It was thus made clear that legally binding treaties such as the International Convention on the Elimination of all Forms of Racial Discrimination and the European Convention on Human Rights, both of which have been ratified by Greece, give local authorities the right to curb or sanction individuals who support or engage in hate crimes.

The historic decision of the Deputy Public Prosecutor of the Greek Supreme Court in Athens that led to the arrest of the leader and members of the Golden Dawn was a long-awaited move by the Greek government that witnessed nationwide protests after the murder of the 18th of September. Although it is plausible that the Greek judicial system is finally taking measures to prevent the party from committing further criminal acts, the findings of the report did not have much impact on the public conscience; the theatricality of the arrest perhaps did, but Greek citizens were well aware of the ongoing crimes committed by Golden Dawn members.

Even though both the EU Institutions and the Council of Europe have long been putting pressure on the Greek government to conduct such investigations and to suspend the operation of this party, it has taken a considerably long time and much unnecessary grief to finally take this preventive action. The most challenging task for the Greek government remains to find an ingenious way to channel public anger against the policies that led the country to economic collapse, so that there is no longer any need to resort to extremism- a task that apparently the Greek government cannot handle on its own.

**Hypotheses’ test:** Similarly, the state of the actual Greek defensiveness and its evolution can be a useful case for assessing the variables leading Europeanization to increase over time or not (principal hypothesis). It can also assess the differentiated importance of the partisan and non partisan elites behind this process (subsidiary hypothesis).

***The limitations of an autonomous EU intervention***

In **Austria**, the 2000 Haider affair can be seen as a precedent for direct EU intervention in national politics[[18]](#footnote-18) but the ultimate exoneration of the Austrian government accounts for the inability of the EU framework to combat extremism in all cases. The EU has the option to screen, postpone and ultimately refuse membership to a candidate country via the Copenhagen criteria on respect for democracy and rule of law, but once a country has entered the EU, it becomes unclear what the EU can do in face of a breach of its main principles and values.

In **Hungary,** the constitution changes adopted in the Hungarian Parliament, combined with the government’s blatant disregard for the rulings of the Constitutional Court, are at odds with the fundamental values of the EU and ignore numerous recommendations made by European expert bodies[[19]](#footnote-19). As aforementioned, article 7 of the EU Treaty permits the suspension of an EU member state’s voting rights if actions pose a clear risk of a breach of the common values of the European Union, or if a member state is in serious breach of those values.

The EU would normally have taken resolute action in response to these constitutional changes, proving the Hungarian government’s contempt for the rule of law. The government’s willingness to bypass the constitutional court, and subvert the constitution for its own political ends, underscores the need for a concerted EU response. This response was once again far from being imposed, due to the limited powers of the EU institutions and the internal debate over the political orientation of the Union itself.

**Hypotheses’ test for both countries:** By assuming that Hungarian democratic values adhere less to the EU ones than in other Member States, the probability of an adequate defensiveness at the national level is lower (failure of the downloading process of Europeanization?). The principal hypothesis could turn out to be falsifiable here and, consequently, lead us to verify which actors render the Europeanization of defensive mechanisms static (subsidiary hypothesis).

**Notes on Methodology**

**General methodological approach**

As it is evident from the project description, my first **dependent variable is the level of existing defensiveness** at the national level, such as **the level of repressiveness of the response towards extremism**. My second dependent variable, which is slightly different from the first one, focuses on: (i) the existence of defensiveness at the European level, in general, and (ii) the development of this defensiveness, when a specific national crisis breaks out, in particular.

Few of the independent variables could be the depth of the EU integration of each Member State, the level of adherence to the European community of values, the occurrence or not of crisis moments, the public opinion’s reaction as well as the EU’s degree of interference (the interference can cover a broad range of measures, going from a recommendation or notification to the Member State having violated an EU fundamental value, to sanctions applied to the relevant Member State).

I expect my aforementioned cases to yield numerous within-case observations which can be used as a terrain for **systematic process-tracing**. As Peter Hall noted ‘process tracing is a method well suited to testing theories in a world marked by multiple interaction effects, where it is difficult to explain outcomes in terms of two or three independent variables’[[20]](#footnote-20). The reason I consider the theory- oriented process-tracing potentially helpful in my comparative project is its ability to grasp the interaction impacts and the interaction timings. It will be particularly enlightening to trace the different timings of the interaction and the dialogue between national defending democracies and the EU intervention. For instance, the timings of enactment and enforcement of militant restrictions will be tested in order to measure the level of Europeanization at each time.

**Empirical tools**

As far as the utilisation of empirical material is concerned, I will proceed to test the hypotheses mentioned above, at different crisis moments, through accessing EU documentation, through analysing speeches at both national and European levels, policy statements, along with primary and secondary sources with data on militant restrictions and through conducting interviews.

The level of adherence to the EU community of values will be examined, from both a qualitative and a quantitative perspective, in order to link hard polling data with the driving forces and the ideas that led to those results.

Euro barometers, as an empirical tool, could help measure the adherence to the EU community of values (one of the independent variables, determinative for the testability of the principal hypothesis). Apart from Standard Euro barometers measuring how often, and how much, Member States identify Europe with democracy, there are even more specific ones, focusing on the values of the Europeans[[21]](#footnote-21). For instance, the Eurobarometer 69 attempts to ascertain, at first, whether Europeans believe that the European Union has a set of common values, and then to identify these common European values. It is interesting to note that both the vertical level (identification of national values with EU values) and the horizontal level (the closeness of Member States in terms of values) are being discussed. Most of the time, the analysis of the results by country reveals relatively homogeneous trends, while still allowing us to identify important differentiating nuances with regard to each Member State’s constitutional tradition. Taking as an example one of our possible case studies, in Austria, 50% of the respondents state that the Member States are different from each other in terms of values.

Provided that Euro barometers fall mainly within the quantitative part of the analysis - except some qualitative surveys investigating in-depth the motivations and the reactions of selected Member States - other tools, such as qualitative reports of the EU institution and EU agencies, should be consulted. For instance, the recent report of the European Agency for Fundamental Rights, entitled ‘Racism, discrimination, intolerance and extremism: Learning from experiences in Greece and Hungary’[[22]](#footnote-22), the FRA examines the responses of Greece and Hungary, to demonstrate the need for more targeted and effective measures to combat these phenomena throughout the EU. The report ends by proposing a number of steps to improve the situation at both the national and the EU level, and by giving an overview of the current EU funding opportunities that could support policies and actions dealing with extremism.

Another example could be, at the European Council’s level this time, the report compiled for Greece by Nils Muiznieks, the Human Rights Commissioner. Some policy briefings of think tanks enhancing the ‘best practices exchange’ strategy might also be helpful in my research project. As part of the Institute for Strategic Dialogue’s stream of work on the far right, in 2012-2014, ISD is partnering with the Swedish Ministry of Justice on a pan-European project aiming at enhancing the understanding of what would work in preventing and countering right-wing extremism. This two year project, funded by the European Commission, will document the history, existence and varieties of right-wing extremism in 10 countries. I would be particularly motivated to be associated with similar projects during my doctoral research.

Regarding the interviews, fact-finding meetings in the Member States with government officials, prosecutors, law enforcement agencies, members of parliament, statutory human rights bodies and civil society organisations will be essential in order to closely examine the opportunity of responses by public authorities and other relevant public actors to counter extremism. An analysis of the government’s policy statements in relation to the non partisan elites’ recommendations or the courts’ decisions will assist us in verifying the subsidiary hypothesis. This includes identifying barriers that may prevent the effective implementation of actions taken and what could be done to remove such barriers, to take advantage of drivers that may not be fully used as well as the transferability of successful defending mechanisms from one Member State to another. However, the feasibility of these meetings and interviews with high level officials could be questioned as there will be no support, through an EU agency or an EU institution, from national liaison officers forthe respective Member States.

Undertaking fieldwork in the EU institutions and agencies, such as at the DG Justice of the European Commission and the EU Agency for Fundamental Rights, might be an alternative, while undertaking fieldwork at the national level Ministries (Interior and Justice) might be more problematic, due to confidentiality issues (sensitive information, classified documents etc.).

**Learning from the US model?**

Due to the fact that the legal nature (sometimes seen as quasi federal) of the EU is widely debated, one could refer to the US federal system to observe how anti-extremist legislations are imposed on the states through a downloading process. The US system, being ‘a leader in making racial discrimination and hate crimes illegal’[[23]](#footnote-23), could eventually serve as a tool in the attempt to verify how Europeanization could be operationalized. However, Bleich argues that while the Supreme Court has ‘monopolized decision-making in the realms of speech and association, it has largely **relegated antidiscrimination and hate crime laws to state and federal legislatures**’[[24]](#footnote-24). In this context, he explains that the civil rights movement has pressed legislatures to enact hate crime statutes, many of which were passed following unfortunate, high profile hate crimes which created public pressure for change.

Always bearing in mind the limitations of exporting a US model of defending mechanisms to the EU, due to the primordial difference in the legal nature of the two systems, the academic literature has equally revealed important cultural discrepancies on restrictions on freedom of speech. There is an important continental divide: Americans tend to be pro-free speech and Europeans seem more inclined to support restrictions on racist speech. Overcoming the challenge of this cultural gap, it remains stimulating to examine how downloading and uploading processes have affected the shaping of the US anti-extremist framework.

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