

THE EU AND ITS POPULISM PARADOX: EXAMINING AN UNEASILY SOFT UNDERBELLY

John Morijn¹

1. Introduction

The populist wave across Europe is a fundamental challenge to the European Union (EU) as currently tasked and functioning. For someone strongly believing in the possible virtues of European integration it is hard even to formulate the following: by the substantive direction the EU chooses to act on today's key policy areas of migration and economic/monetary matters, and by how it does so in a manner that is felt to fall short and fragments democratic control between the national and EU level while functioning in highly technocratic ways, it puts ever greater pressure on liberal democracy in Europe. Yes: the EU may very well itself unwittingly *contribute* to populism. At the same time and adding to the complexity, that same EU, on the reasoning that European integration can only stably be guaranteed if all Member States ensure the minimum guarantees of Article 2 TEU, currently prominently and importantly attempts to act on the role entrusted to it to suppress democratic backsliding. It does so with regard to Member State level populism, for example through Article 7 TEU. It has also acted at EU-level to avoid populists becoming effective within its own democratic structures by introducing a compulsory electoral threshold for EP elections² and linking EU-level party funding to compliance with basic EU values and verifying this.³

¹ LLM EU Law (College of Europe, Bruges), PhD international law (European University Institute, Florence); Assistant professor of European human rights law, University of Groningen; Emile Noël Fellow 2018-19, New York University School of Law Jean Monnet Center. Formerly Head of the Interior Ministry Unit, Dutch Permanent Representation to the EU (Brussels) (2015-2018). Member, Dutch National Human Rights Institute (as of June 2019). All opinions are strictly personal and cannot and should in no way be attributed to any past or future institution to which the author was or will be affiliated.

² Council Press Release, European Parliament elections: Council reaches agreement on a set of measures to modernize EU electoral law, 7 June 2018, at: <http://www.consilium.europa.eu/en/press/press-releases/2018/06/07/european-parliament-elections-council-reaches-agreement-on-a-set-of-measures-to-modernise-eu-electoral-law/>

³ See for a discussion of the origins and likely functioning of the compliance mechanism in this instrument about funding of European Political Parties and Political Foundations (linking registration to Article 2 TEU compliance obligations), John Morijn, 'Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond', *International Journal of Constitutional Law / ICON* (forthcoming populism symposium issue, summer 2019).

These various aspects of EU law and policy are usually studied in isolation.⁴ This paper aims instead to explore EU-activities and -efforts fighting and causing national and EU-level populism holistically with a view to connecting dots and identifying contradictions. In that way it explores the contours and extent of what could be viewed as the EU’s populism paradox. It asks quite simply: (to what extent) can the EU effectively address national level populisms while simultaneously continuing to operate in ways that apparently feed it? Is it possible to (continue to) have it both ways? What, if any, options are available, and at what level(s), to ease at least the most blatant contradictions? To answer some of these questions, the paper starts by characterising populism (section 2) and sketching how relevant aspects of this elusive phenomenon relate to the EU’s tasks and functioning (section 3). It then catalogues, respectively, and without any claim to being comprehensive, some selected aspects of how the EU fights populism(s) by introducing elements of militant democracy and how it may cause it (sections 4 and 5). This will allow for laying bare a soft underbelly in the EU’s current functioning as it relates to us versus them politics, and offer some first reflections on unease about it (section 6).

2. “Populism”

Populism is a phenomenon that has not exactly suffered from a lack of scholarly attention of late. Particularly after the BREXIT referendum and the election of Donald Trump, literally dozens of books have been published about it over just the last few year.⁵ Although there are many ways to describe the essence of its resulting politics, it is at heart characterised by its systematic distinguishing of an “us” and a “them” and behaviour flowing from it. The “us”, whether it consists

⁴ For notable exceptions, see Gráinne de Búrca, ‘Is EU supranational governance a challenge to liberal constitutionalism?’, (2018) 85 *The University of Chicago Law Review* 337; Dimitry Kochenov & Petra Bárd, ‘Rule of law crisis in the new Member States of the EU – The pitfalls of overemphasising enforcement’, RECONNECT Working Paper 2018/1, at: <https://reconnect-europe.eu/publications/>

⁵ For a snapshot: Cas Mudde, Christobal Rovira Kaltwasser, *Populism: A Very Short Introduction*, Oxford University Press (2016); Jan-Werner Müller, *What is Populism?*, University of Pennsylvania Press (2016); Mark A. Graber e.a. (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press (2018); Yascha Mounk, *The People Versus Democracy*, Harvard University Press (2018); Steven Levitsky & Daniel Ziblatt, *How Democracies Die*, Crown: New York (2018); David Runciman, *How Democracy Ends*, Profile Books (2018); Chantal Mouffe, *For A Left Populism*, Verso Books (2018).

of all native French citizens, all French workers or all blue eyed blond French people, is by nature constructed in a way that results in targeting a number of people that is less than the total number of people present in France. The view of the relevant group to worry about is *factually exclusionary*, the “us” is smaller than the sum. After gaining power the exclusionary imagination of the relevant “us” is, in a second step, put into practice. It then becomes problematic when it leads to policies that attack, side-line or discredit “them” (or those protecting this sub-group, like the media or counter-majoritarian institutions, like the judiciary), i.e. those present but not part of the “us”. The interest(s) of the “us” (that by definition are not the totality, but a subgroup – just like the “them”) are pursued always to trump those of anyone else. There is debate about how to characterise the nature and the (relevance of the) causes of this type of political agenda and action.

Generally three different ways of viewing this phenomenon are distinguished.⁶ First: simply as a perspective of the nature of politics itself, where populism only defines democratic politics as necessarily a permanent struggle between two opposing camps with views that can never be reconciled, or reduced into a stable compromise.⁷ Second: as merely a political strategy, where populism is a polarising and simplifying “underbelly” style to achieve political aims, relying on the charisma of a leader. To achieve what is desirable for the mind, one needs to speak to the heart. Third: us versus them politics us seen as an ‘add on’ ideology to a different, substantive political agenda.

This latter so-called ‘ideational’ approach is dominant. It argues that populism is “a set of ideas that not only depicts society as divided between “the pure people” versus “the corrupt elite”, but also claims that politics is about respecting popular sovereignty at any cost”.⁸ Yet, however popular the latter approach may be amongst political scientists, it remains strangely elusive and nebulous to those who are legally or more practically oriented. There is a sense that populism

⁶ For a discussion: CRISTOBAL ROVIRA KALTWASSER (e.a.) (eds.), THE OXFORD HANDBOOK OF POPULISM (2018).

⁷ This is the view, for example, of Chantal Mouffe. She does, however, insist on respect between political adversaries as adversaries, and therefore denies us versus them politics in which an “us” is defined that is smaller than the sum of people present automatically leads to a practice in which the interests of that sub-group trump those of others under any circumstance. This leads the current author to conclude that what she describes, and advocates for as “populism” does not actually fulfil the second requirement of us versus them politics, which is that of “Us” > Σ in practice. It is mainly a discussion of the nature and perhaps the desired form or conception of political debate itself.

⁸ Cas Mudde & Cristóbal Rovira Kaltwasser, ‘Studying populism in comparative perspective: reflection on the contemporary and future research agenda’, 51 COMPARATIVE POLITICAL STUDIES 1, 4 (2018).

characterised thus is a bit of a Doughnut definition: all sides, no centre. If you are not focused on what causes support for us versus them politics and whether or not in terms of specific challenges for liberal democracy it inherently matters what substantive agenda is pushed, calling someone a populist seems to serve no other purpose than to delegitimise him, without sufficient analysis of why. On this very analysis some have called for retiring the term altogether.⁹

Whether or not one is wedded to the term “populism”, it is important to search for somewhat more actionable descriptions to (better) encapsulate something that many do indeed intuitively view as a sort of pattern or threat of sufficient particularity. Mudde himself has characterised the populist phenomenon as an ‘illiberal democratic response to undemocratic liberalism’.¹⁰ This is helpful for a number of reasons.¹¹ It describes that what we are looking at is bi-directional: cause is consequence, consequence is cause. On this view, although not often seen as an inherent part of the analysis of addressing “populism”, unresponsiveness of democracy is not just related to us versus them politics, but should be part of the analysis of why it is attractive, and perhaps increasingly so. Put more sharply, on Mudde’s convincing diagnosis populist politics results in acts of democratically legitimated vandalism of liberalism that need to be confronted but, at the same time, are themselves caused by a(n ultra-)liberally minded gradual, even conscious hollowing of representative democracy.¹² Put together these elements that serve as both cause and consequence of “populism” could well end up constituting a downward spiral. Awareness of the interconnectedness and mutually reinforcing nature of the structural causes and consequences is therefore a crucial analytical starting-point.¹³ What is required to counter-act the attraction of and support for us versus them politics is a simultaneous effort to re-liberalise democracy and to re-democratise liberalism. The first has mainstream attention, the second aspect not (yet).

⁹ Roger Cohen, It’s time to depopularize ‘populist’, *New York Times*, 13 July 2018.

¹⁰ Cas Mudde, ‘The Problem with Populism’, *The Guardian*, 17 February 2015.

¹¹ To be sure: this way of putting things also has important limitations, for it suggests that the “liberal” and the “democracy” in liberal democracy can be neatly separated. This is not the case. A democracy, to be a democracy in substance rather than in procedure only (i.e. periodic elections with one-woman-one-vote), has to have an inherent liberal element (e.g. protection of the interests of those outvoted along the way) to be seen as such. Liberalism cannot be stably pursued without a constitutional democracy either. Also from this perspective liberalism and democracy need to go hand in hand. The purpose of the introduction of Mudde’s distinction here is simply to stress the two-way street of cause and consequence of what leads to us versus them politics.

¹² As per the terminology of Mair: Peter Mair, *Ruling the Void: The Hollowing of European Democracy*, Verso Books (2013).

¹³ For this point, see John Morijn, ‘Book review: Mark A. Graber e.a. (eds.), *Constitutional Democracy in Crisis?*, OUP (2018)’, *European Constitutional Law Review* (forthcoming 2019).

If this all still sounds rather abstract, Eatwell and Goodwin¹⁴ have provided a very lucid diagnosis of the attraction of us versus them politics. They propose a breakdown that helps us establish a clearer and more sophisticated substantive and structural understanding within Mudde’s basic juxtaposition, the “4 Ds”. Us versus them rhetoric and action, they argue, find fertile ground where liberal democracy confronts a situation in which there is increasing and widespread *distrust* of (economic or political) elites, a perception of gradual *destruction* of culture and identity, and a sense of real or relative economic *deprivation*. Separately or in combined form these substantive and structural grievances lead to *de-alignment* (decreasing loyalty to traditional middle-of-the road political parties). Different non-mainstream politicians adopting and acting upon an “us versus them” agenda have different Ds as their primary focus.¹⁵ Each combination of Ds poses different challenges. Combined the insights of Mudde and Eatwell/Goodwin can provide for a basic visualisation of the causes and effects of populism and their relation to the “logic” of us versus them politics.

“Populism”: interlinked causes and effects as well as expression

Degradation of liberal democracy		↔	Support for us v them politics
Degradation of liberalism (Substantive grievances)	↔	Degradation of democracy (Structural expressions)	Rhetoric and practice of us v them (Moving to “us” as exclusionary sub-category)
Destruction (cultural/identity)		Distrust (elites)	“Us” < Σ (<u>rhetoric</u> excluding a part of the population - them)
Deprivation (economic)		De-alignment (political parties)	Combined with “Us” > Σ (<u>practice</u> of side-lining/sabotaging (those protecting) that part of the population)

¹⁴ Roger Eatwell, Matthew Goodwin, National populism: The revolt against liberal democracy, Pelican Books (2018).

¹⁵ To give an example in the southern European context with some non-mainstream (de-aligned) political parties often characterised as “populist”: Italian Lega is a traditional nativist extreme right party, focused on migration (destruction), Greek Syriza or Spanish Podemos are left-leaning political parties focused on social justice and economic austerity (deprivation), and Italian Movimento 5 Stelle was initially set up to voice complete dissatisfaction with a perceived self-serving and corrupt political elite (distrust). This author, for the reasons mentioned supra n. 6, would not at this moment actually characterise Syriza or Podemos as problematic. They do not - at this stage at least - put “Us” > Σ in practice. Some Latin American countries that have apparently inspired said movements in these European states (e.g. Venezuela) have, however, clearly shown that an initial focus on deprivation can lead to very problematic forms of us versus them politics. Lefties can also become populist baddies.

3. “Populism” and the EU

Viewed this way, how do the causes, consequences and expression of “populism” link to EU law and policy? We can consider this question at different levels. At an abstract level, Article 2 TEU¹⁶ is an expression of all values underlying EU cooperation. Each of them can come under pressure by the degradation of liberalism and democracy and the rolling out an “us versus them” agenda in practice. Article 2 TEU highlights values such as the rule of law, fundamental rights protection and democracy side by side, without hierarchy. In this way, through the prism of Article 2 TEU different elements of the populist phenomenon can be approached from the viewpoint of specific pairings, such as: distrust and de-alignment versus democracy and pluralism; deprivation versus freedom and solidarity; destruction versus human rights, pluralism, non-discrimination, equality and minority protection; and us versus them practice versus democracy, equality, non-discrimination and the rule of law. But an Article 2 TEU perspective also allows for the required comprehensive analysis that stresses the interrelated nature of the “populist” challenge. This phenomenon may particularly invite us to study the *interlinkages* between the Article 2 TEU values, as they need to be protected and materialised both at national and EU-level.

We can also have a more specific look. The EU has been equipped to act on many of the different elements that are in the mix when addressing the causes and consequences of us versus them politics. This mix at EU-level provides a picture of a mixed bag, however. The EU has competences to control and manage migration, asylum and integration, issues which are closely related to (avoiding) a sense of *destruction*. The EU, of course, also has competences to create a common economic market and formulate monetary policy with a stated aim to increasing wealth. These tasks are strongly related to (avoiding) a perception of *deprivation*. Both of these sets of competences, if acted upon satisfactorily and legitimately, could theoretically put the EU in a very good position to help address against support for us versus them politics. The EU as currently tasked can play a highly important role in pushing back against substantive grievances.

¹⁶ The provision 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.

The perceived legitimacy of resulting policies, however, depends strongly on how EU policy is, and currently can be developed at all. The EU is a layer of government where nationally elected politicians and EU-level elected politicians need to cooperate. The required multi-level cooperation complicates matters. We are all familiar with the terminology of the EU’s democratic deficit. Over time, including because the initial set-up of European integration was actually “to work around democracy”, the already complex combination of national and EU-level democratic control has been accompanied by technocratic working methods. As a result the question of ‘who decides what’ is not always easy to answer in the EU. This typical EU-level phenomenon, is now often seen as a strong source for *distrust* – and therefore as a cause of support for us versus them politics.¹⁷

Such multi-level democratic politics and policy-making is inevitably equally confronted with, and likely magnifies a situation where there is *de-alignment* away from mainstream political parties. To give an example: some populist parties that remained a fringe phenomenon nationally due to applicable national election rules, did find a very successful platform in the European Parliament governed by different election rules. UKIP has been a case in point. Finally Article 7 TEU, along with infringement procedures¹⁸, provides for a procedure for the EU to address democratic backsliding problems at Member State level. The purpose was essentially for Member States to mandate the EU to act in the European collective interest to control excesses of national level *us versus them political practice* that have the potential for negative spill-over for EU cooperation as a whole.

Clearly, then, the relation of the EU to the populist phenomenon is not one-sided or clear cut. Focusing solely on one aspect of this broader picture, without taking account of the broader context, risks losing important insights about whether the EU in its dealing with a particular issue is part of the solution, part of the problem, or both. There is therefore considerable benefit in zooming out, keeping in mind the bi-directional nature of degradation of liberalism and democracy

¹⁷ Harvard economist Dani Rodrik recently characterized the EU a ‘liberal technocracy’ for that reason; Dani Rodrik, In Defense of Economic Populism, Project Syndicate, 9 January 2018. Columbia political scientist Sheri Berman also recently discussed the EU in the key of technocracy, observing ‘populism and technocracy are evil political twins’; Sheri Berman, ‘The pipe dream of undemocratic liberalism’, (2017) (28)(3) Journal of Democracy, 29, 37.

¹⁸ Both discussed in Laurent Pech & Kim-Lane Scheppele, ‘Illiberalism within: rule of law backsliding in the EU’, (2017) Cambridge Yearbook of European Legal Studies 1.

that together lead to us versus them politics, and the specific role, tasks and methods of functioning that the EU has been given here. The following will distinguish between how the EU fights populism (section 4) and how its set-up, tasks and chosen functioning may inadvertently actually cause it (section 5).

4. The EU fighting “populism”

Most observers when pressed on the question of how the EU fights populism will likely primarily associate it with how the EU is trying to address democratic backsliding through Article 7 TEU. As is well known this is currently top of mind with regard to two Member States, Poland¹⁹ and Hungary.²⁰ For a variety of reasons the EU’s intervention has not yet led to concrete results, most importantly because the Article 7 TEU mechanism was never designed for a possible situation in which it would (likely) need to be applied to more than one Member State at a time. The paralysis has been rightly criticised as highly damaging and lamentable.²¹ The purpose here is simply to signal this. And to add the obvious point that this EU effort is focused of addressing and suppressing the practice of us versus them politics at *national* level. The rationale of invoking Article 7 TEU is not only to change the situation in these Member States themselves. But, perhaps as importantly, to avoid that it spills over to other Member States and EU cooperation more widely, including for example to cooperation in the area of freedom, security and justice. There the required mutual recognition in applying rules on asylum and the European Arrest Warrant, for example, requires mutual trust, which in turn necessitates a common minimum level of guaranteeing the protection of EU values.²²

¹⁹ European Commission, Reasoned proposal in accordance with Article 7(1) of the TEU regarding the rule of law in Poland, COM(2017) 835, 20 December 2017.

²⁰ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (document A8-0250/2018).

²¹ For the comprehensive and leading analysis of the situation, see Pech & Scheppele.

²² For a good analysis, see Cecilia Rizcallah, The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration, (2019) 25 European Law Journal 37.

What has received much less attention in this key is that the EU legislator has recently also aimed at fighting us versus them politics at *EU-level* itself, i.e. the European Parliament. In particular, and largely away from explicit public debate, it has recently moved to introduce elements of militant democracy to protect the integrity of EU-level democracy. It has done so by introducing measures to try and *restrict access to, and participation in* the EP political arena. It is interesting to look at this closely as both are clearly an attempt to avoid or row back on consequences of us versus them politics.

Restricting *access* to the EP was attempted by proposing the inclusion of a compulsory electoral threshold in the Electoral Act. This legal text lays down rules for how Member States need to organise the EP elections. Under current rules electoral thresholds, by which you need a minimum percentage of the vote to gain seats at all, are allowed but not compulsory. Some Member States use them for EP elections too. The push to include an obligation resulted from 2011 and 2014 rulings by the German Federal Supreme Court, which stated twice that the German national rules to apply them could not be used for the EP elections as the EU setting had different characteristics.²³ There was therefore a need for an EU legal basis. The initial EP proposal to amend the Electoral Act²⁴ suggested a compulsory threshold for Member States with more than 26 EP seats. The final result in the negotiations was to apply the obligation only to single-constituency Member States with more than 35 EP seats.²⁵ After the re-allocation of EP-seats due to BREXIT, this means it will only apply to *two* Member States: Germany and Spain.²⁶ It will make it harder for smaller parties from these Member States (including, but *not* limited to

²³ German Federal Supreme Court, Decision 2BvE 2/13 etc, 26 February 2014. See also the accompanying press release: “Three-percent electoral threshold in the law governing European elections unconstitutional under the current legal and factual circumstances”, at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-014.html>

²⁴ All documents relating to the file can be found here: <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu>

²⁵ Council Decision 2018/995 of 13 July amending the [1976 Electoral Act], OJ EU L178/1, 16 July 2018. Article 3(2) reads: Member States in which the list system is used shall set a minimum threshold for the allocation of seats for constituencies which comprise more than 35 seats. This threshold shall not be lower than 2 per cent, and shall not exceed 5 percent, of the valid votes cast in the constituency concerned, including a single-constituency Member State. The choice to formulate the requirement in such a way that it only focuses on two Member States is not explicated. Given the unanimity requirement it is clearly a political compromise.

²⁶ Poland (52), Italy (76) and France (79) have more seats in the post-BREXIT EP, but have multiple constituencies, i.e. EP seats are divided locally rather than based on the vote over the whole territory.

“populist” parties) to enter the EU political arena.²⁷ It also introduces a *de facto* distinction in treatment between German/Spanish and non-German/Spanish us versus them politicians.

The EU legislator has also acted to restrict *participation* in the EU debate of those us versus them politicians who were actually elected into the EP. This was done by strengthening long existing rules that lay down the requirement that EU-funding to European Political Parties (EuPP)²⁸ can only be issued on the condition that in their programme and actions basic EU values (Article 2 TEU) are complied with. To this effect Regulation 1141/2014, recently further amended by Regulation 2018/673²⁹, introduced a registration obligation for EuPP with an independent Agency for European Political Parties and Foundation (APPF). Part of the requirement is a written pledge of allegiance to Article 2 TEU. In addition, a procedure was set up to verify continuing compliance after the moment of registration. This can be triggered by the Commission, Council and the EP itself. The EP has adopted internal Rules of Procedure (RoP) how to trigger this procedure.³⁰ More recently it also approved an amendment. It made establishment criteria for political groups more stringent, by including a requirement of a statement of political affinity³¹ (in contrast to current rules, that state joint affinity needs no evaluation). This was clearly meant to ensure that “populists” would be less likely to be successful in forming alliances while not entirely agreeing on an agenda.

²⁷ Given the political situation in Germany, the political party that may have been targeted for prevention from entering the political arena at the time of formulation of these rules, Alternative für Deutschland, will likely very easily clear any threshold according to current polls. It could of course hit any other small party not clearing the threshold, including mainstream parties.

²⁸ A European political party is a political alliance of member political parties from at 25% of EU Member States (Article 3(b) Regulation 1141/2014). Its purpose is to develop a common European political agenda. A European political foundation is a think tank related to it. An EuPP is distinct from, yet linked to political groups in the EP. A political group, according to the EP Rules of Procedure (the latest version of February 2019 can be found here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20190305+TOC+DOC+XML+V0//EN&language=EN>), is a group of at least 25 Members of European Parliament from at least 25% of EU Member States. The purpose of such cooperation is access to political influence by dividing speaking times and files. EuPP and political groups are separate but connected. Most EuPP belong to political groups in their entirety. Some political groups are home to more than one EuPP. It is possible for populists not be part of an EuPP but still to be part of a political group (non-affiliated). It is equally possible to be part of an EuPP but not of a political group (non-aligned).

²⁹ For extensive analysis, see Morijn (2019, ICON).

³⁰ Rule 223a(2), stating the possibility of verification under the Regulation can be triggered by the EP only at the request of 25% of its members representing at least three political groups.

³¹ EP Rules of Procedure, Rule 32(5).

Although most attention in the negotiations was on how the verification would work, what is remarkable is that the registration requirement *itself* has served as a major hurdle. Many EuPP have not registered, thereby foregoing EU-funding. Those who have not registered are almost entirely in the right-wing “populist” corner. The implications of the rules suggest that perhaps the requirement to be seen to endorse Article 2 TEU was itself judged politically too damaging. The RoP requirement of support by at least 3 different political groups to trigger a verification request with Article 2 TEU almost certainly serves to protect “populists” who sit inside mainstream EuPP. As all mainstream EuPP have some, it is unlikely they would act against other mainstream EuPP. Why expose their own “bad apples”?³² They may still act against EuPP fully consisting of populists, however, both under the Regulation and the RoP.

The below visualisation shows their combined effects. “Populists” are highlighted in yellow. Areas where the effects of the Regulation have kicked in are red. Those areas where they could arguably still be felt soon are marked in orange. The green shows “limited risk” areas under the current rules, even if it also contains politicians affiliated with parties that have nationally put an “us versus them” agenda into practice. These include both Hungary’s and Poland’s ruling parties. Regulation with rather a large hole.

³² For an attempt to question this damaging logic, and show that it is unnecessary for mainstream EuPP and political groups to rely on their bad apples, the current author teamed up with the human rights NGO Liberties to visualise where “populists” sit in the current EP and how it is projected to be composed after the election. The project is called #vote4values tracker, and is available here: <https://www.liberties.eu/en/news/vote-4-values-tracker/17019> The logic and background thinking are explained in Israel Butler, John Morijn, Tracking anti-values MEPs: EP seat projections and rule of law protection, Verfassungsblog, 20 February 2019: <https://verfassungsblog.de/tracking-anti-values-meeps-ep-seat-projections-and-rule-of-law-protection/>

The partial effect of Regulation 1141/2014 and EP Rules of Procedure vis-à-vis “populists”

Political group	Affiliated European Political Party	Affiliated European Political Foundation	Status (all previously recognised and/or funded after 2014)			
			Registered by APPF	Application not approved by APPF	Removed from register by APPF	Never registered
Group of the European People's Party (Christian Democrats)						
	European People's Party		x			
	FIDESZ/HUN	Wilfried Martens Centre for European Democracy	x			
Group of the Progressive Alliance of Socialists and Democrats (S&D)						
	Party of European Socialists		x			
	SMER/SK *PL/MT* *S&D/RO*	Foundation for European Progressive Studies	x			
Group of the Alliance of Liberals and Democrats for Europe (ALDE)						
	Alliance of Liberals and Democrats for Europe Party		x			
	ALDE/RO – ANO/CZ	European Liberal Forum	x			
	European Democratic Party		x			
		Institute for European Democrats	x			
	Europeans United for Democracy					x
		Organization for European Interstate Cooperation				x
Group of the Greens/European Free Alliance (Greens – EFA)						
	European Green Party		x			
		Green European Foundation	x			
	European Free Alliance		x			
		Coppieters Foundation	x			
European Conservatives and Reformists Group (ECR)						
Danish People's Party	Alliance for Conservatives and Reformists in Europe		x			
	PIS/PL *FvD/NL*	New Direction – The Foundation for European Reform	x			
	<i>European Free Alliance</i>		x			
		<i>Coppieters Foundation</i>	x			
	European Christian Political Movement		x			
		Sallux	x			
Confederal Group of the European United Left – Nordic Green Left (GUE-NGL)						
(*Podemos/ES*)	Party of the European Left		x			
	(*Syriza/GR*)	Transform Europe	x			
	Europeans United for Democracy					x
		Organization for European Interstate Cooperation				x
Europe of Nations and Freedom (ENF)						
PVV/NL *AFD part 1/DE*	Movement for a Europe of Nations and Freedom		x			
	Vlaams Belang/BE *Lega/IT* *RN/FR* *FPÖ/AT*	Foundation for a Europe of Nations and Freedom	x			
	European Alliance for Freedom (EAF)					x (party dissolved in 2016)
		European Foundation for Freedom (EFF)				x
Europe of Freedom and Direct Democracy Group (EFDD)						
MSS/IT *AFD part 2/DE*	Alliance for Direct Democracy in Europe (ADDE)					x
	UKIP/UK	Institute for Direct Democracy in Europe (IDDE)				x
	Movement for a Europe of Liberties and Democracy (MELD)					x (party dissolved in 2015)
		Foundation for a Europe of Liberties and Democracy (FELD)				x
Non-aligned (NI)						
	Alliance of European National Movements (AEMN)					x
		European identity and traditions		x		
	Alliance for Peace and Freedom (APF)					x
	Golden Dawn/GR *Jobbik/HU*	Europa Terra Nostra (ETN)				x

5. The EU causing “populism”

The above detailed analysis of recent EU legislative and procedural activity shows that, even if the EU does push back against the possible or real consequences of national and EU-level us versus them politics, it currently does so in an ineffectual, partial and one-sided way that may partly entrench the problem. This is already highly unsatisfactory in and of itself, showing that the EU approach to militant democracy is deeply flawed. In addition, however, and even more fundamentally, it does not seem to act in a way that engages with the substantive and structural grievances leading to greater support for “populism”. This is up to the national level, or so the thinking seems to be. But what about the EU’s own relation to the underlying causes of support for populist politics? Is there anything in the way in which the EU is set up institutionally, tasked substantively, and how EU institutions sometimes themselves opt to act on these competences that may simultaneously *cause* it to feed into the populist problem too? This section will offer some first thoughts. It is suggested that this possibility cannot be dismissed. A much more self-critical and holistic perspective is worthy of deeper exploration in terms of linkages between areas of (Union) law and policy traditionally studied separately.

Earlier we associated economy and migration related EU policies with the substantive grievances of deprivation and destruction. Developing these policies satisfactorily, it was suggested, would therefore appear to be a golden chance for the EU to strike at the heart of support for us versus them politics at national and EU-level alike. This is, of course, not quite what has happened and how the EU’s record has been valued and evaluated.³³ Most objective observers have viewed the EU-interventions during the eurocrisis as not only bad economics but also driven primarily to protect the interests of banks in Northern Europe that had become exposed due to very risky investments. Rather than the market punishing them, it was decided for the EU to invest billions to bail them out. Whatever the merits, in any event the EU’s approach to handling it, particularly vis-à-vis southern European Member States where living standards have come under real pressure, consequently led to strong growth of support for populist parties in Spain, Greece and Italy running on an anti-austerity agenda. In that way the EU has directly contributed to de-alignment too.

³³ Add some sources.

The Commission’s efforts with regard to proposing solutions for migration and asylum were absolutely necessary and may have been laudable in substance too. Yet they have in important parts not been achieved or implemented because they have run into opposition of a growing group of increasingly vocal Member States led by politicians claiming to voice the concerns about destruction amongst their populations. The EU has been unsuccessful in countering that framing. In this area the issue may be more fundamentally that there is simply decrease in support for a common European approach to tackling the challenges at hand, even if they are so obviously policy issues that no Member State could ever tackle successfully on its own. In that sense it is less a problem of what the EU has proposed in substantive terms, but more one of not wanting to (be seen to) give up control (or, rather: admitting that this control was already given up as a matter of law, and that one is now under an obligation to cooperate in finding a solution in the EU). If control is what you are after as a Member State, working toward a system based on (mutual) trust³⁴ is likely to face an increasingly uphill battle.

Even if these files are quite different, they both tentatively raise the same vexing fundamental question for the functioning of EU policy-making in areas closest to the concerns of EU citizens. Could they point to the insight that, even if some rational optimum in terms of substantive policy output (whatever that may be) is put forward and politically agreed at EU level, the very fact that that solution is arrived at at *that* level in and of itself partly disqualifies the value of that outcome because for many this is not seen as a “trustworthy” source? This touches the heart of the issue of distrust as a structural grievance of populism.

The EU’s set up has long been seen as especially vulnerable to it. Perhaps we are only starting the effects more clearly now. Peter Mair wrote a most incisive analysis of the limits of the reach of representative democracy in the current EU setting, pointing out that trust is lost in the dysfunctional interaction between national and EU-level democratic control.³⁵ Nothing has changed since. Weiler recently also convincingly re-stated the analysis of the EU’s democratic deficit. The EU’s original design, with the EP as just one component, was to ‘work around’

³⁴ Rizcallah (2019).

³⁵ Peter Mair (2013), quoted above.

(national) democracy. This was simply never fully counter-balanced.³⁶ The fact that there is institution nominally called ‘parliament’ at EU-level does not mean the multi-level policy-making system in which it functions suddenly transforms into a ‘liberal democracy’. The questions that scholars like Mair and Weiler ask have only further increased in relevance given the rising tides of populist support, and need urgent rethinking.

It is often countered that the EU is ‘sui generis’ in character, and that there are other ways to improve participation. A recent initiative shows this intuition well. It also shows how wrong-headed such thinking may be, and why there is every chance that it will actually deepen rather than alleviate the problem of increasing support for us versus them politics. The case in point is the review of Regulation concerning the European Citizenship Initiative (Regulation 211/2011).³⁷ An ECI, based on Article 11(4) TEU and 24(1) TFEU, is a petition signed by 1 million EU citizens with a sufficient geographic spread calling on the Commission to act in a particular policy area. Its review, led in the EP by a politician associated to Hungarian Fidesz (populists are often enthusiastic about direct democracy), was presented to make this instrument more “user friendly”.³⁸ However, the basic bottleneck actually remains.

For even if there is a successful initiative, it does not result in an automatic *obligation* for the Commission to act.³⁹ This results both from the wording of the ECI and the underlying specific and general treaty provisions that include what is perhaps one of the most crucial constitutional elements of the Union legal order: the Commission’s right to initiative. So even if the procedure of submitting an initiative was made more smoothly, it is far from unlikely that continued, perhaps even increased dissatisfaction, will follow. Not acting on a successful ECI, which the Commission

³⁶ See J.H.H. Weiler, ‘The crumbling of European democracy’, in: *Constitutional Democracy in Crisis?*, OUP, 2018, 629-38.

³⁷ See also Erik Longo, ‘The European Citizens’ initiative: too much democracy for EU polity?’, (2019) 20 *German Law Journal* 181.

³⁸ European Parliament Press Release, Parliament makes it easier to organise a European Citizens’ Initiative. 12 March 2019, at: <http://www.europarl.europa.eu/news/en/press-room/20190307IPR30743/parliament-makes-it-easier-to-organise-a-european-citizens-initiative>

³⁹ The relevant parts of Article 15 (examination by the Commission) of the revamped Regulation read: (2) within six months of the publication of the initiative ... the Commission shall set out in a communication its legal and political conclusions on the initiative, the action it intends to take, **if any**, and its reasons for taking **or not taking** action.

would be completely within its rights to do (and depending on the topic, may even be wise to decide), will surely sit very uneasily with avoiding distrust. Instruments of direct democracy could perhaps be a useful specific addition to representative democracy. But that pre-supposes that the system in which it is implemented is itself (more) fully democratic.

6. Acting on an uneasily soft underbelly: some first reflections

It is one thing to argue that, although the EU is trying to push back on the consequences of “populism”, the way in which it does so is problematic. It is ineffective in confronting *national* us versus them politics, and one-sided and even partially entrenching or deepening its problematic aspects at *EU-level* by the militant democracy type measures it is taking, including with regard to those MEPs most directly affiliated with the ruling parties in Poland and Hungary. Make no mistake: this is highly paradoxical in itself. And therefore, given the stakes, highly undesirable.

To that it could be retorted that Article 7 TEU, with some added political pressure, may become effective in the future. It could perhaps be argued too that, even with the baddest of bad apples still in the heart of EP power and likely there to stay for now, the current EU-level approach to restricting access to and participation in the EU political arena is at heart correct but just a work in progress. Over time it can and should be further sharpened and ratcheted up because it is and remains desirable politically to incapacitate politicians aiming to act on an “us versus them” agenda. Why finance political parties with a stated aim and track-record of acting on us versus them which will inevitably undermine what the EU is built on? This is a difficult debate about the desirability of a fleshing out militant democracy approach at EU-level⁴⁰, which also rides in strong part on one’s view of the relative importance of political rights in these matters and the point at which you think debate should stop and sanctions kick in.⁴¹ Reasonable observers may disagree.

⁴⁰ For discussions about how the EU could operate from a notion of militant democracy to enforce liberal democracy at *Member State level*, see Jan-Werner Müller, ‘Should the EU protect democracy and the rule of law inside Member States?’, (2015) 21(2) *European Law Journal* 141; See also Ulrich Wagrandl, ‘Transnational militant democracy’, (2018) 7(2) *Global Constitutionalism* 143.

⁴¹ For an argument that the EU-level approach of the EU legislator is problematic from the viewpoint of EU-level freedom of assembly, since there was no serious investigation into available alternatives that would be less restrictive

A (more) open debate about it is, however, desirable. Currently the EU legislator clearly makes these choices implicitly and in isolated ways.

It is another matter altogether, however, to argue for the necessity of a simultaneous focus on how the EU could actually be feeding into underlying causes of populism rather than only have a role in suppressing its consequences. The EU's track-record *prima facie* shows that this is worthy of much deeper exploration. There seem to be strong tensions between the different directions that the EU is currently moving into, which is all the more relevant for the present purposes as these different directions happen strongly to correlate with indicators for substantive and structural causes and consequences for support for populist politics as defined earlier. The existence of these tensions also sits very uneasily with the stated goals and underlying values of European integration.

So the challenges may not be all that new. But the pattern of how populism hangs together lends a new urgency to re-considering some ever-greens of EU institutional and substantive legal questions, such as its democratic deficit, instruments of direct democracy, economic regulation and regulation of the Area of Freedom, Security and Justice, including how it relies strongly on the concept of mutual trust. This requires that analyses of any of these topics take a more holistic approach. In any event, in so far as these tensions in EU tasks and actions can be taken to be unintended, such a situation could be seen as highly paradoxical. They form the EU's populism paradox. Tensions may become contradictions and even mortal threats to the EU's ideals if not acknowledged as serious and urgent, and addressed accordingly.

but could have a similar result, see John Morijn, Case Note: Judgment of the General Court of 8 February 2018 in Case T-118/17, Institute for Direct Democracy in Europe/European Parliament, in: ANIEL PAHLADSINGH, ANNOTATED CASES ON THE EU CHARTER OF FUNDAMENTAL RIGHTS 2017-2018 (forthcoming 2019).