



MILITANT DEMOCRACY

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ABSTRACT

This project aims to present the analysis of major theoretical considerations on the concept of militant democracy with a substantive practical component investigating diverse aspects of the practice in various jurisdictions. The whole project centers on the premise that although militant democracy is admittedly a somewhat problematic concept, through considerate application it could become an important safeguard of democracy when it is threatened to be potentially harmed or destroyed by undemocratic actors. The project is considered to be an original contribution to the militant democracy debate as it aims to provide a detailed account of the potential dangers of militant democracy and suggest possible solutions and measures to outweigh or neutralize such dangers and concerns. In addition, the case-study element includes traditional cases of militant democracy application as well as covering the most recent developments in the understanding of the concept and its interpretation, i.e. extension of militant democracy to address new types of threats which democracies might face nowadays. The project investigates in details how dangerous religious movements and the threat of terrorism could be addressed by applying militant democracy logic.

The first chapter outlines some of the theoretical insights into the notion of militant democracy: its origin and development in the constitutional theory as well as providing a detailed account of the current state of literature on militant democracy and related matters. Furthermore, it elaborates on the major theoretical and practical justification of the concept.

In the second chapter an overview of the practice of militant democracy worldwide in relation to political parties and beyond is delineated. This includes an overview of militant democracy arsenal to demonstrate which legal measures and institutions could be used to safeguard democracy from its enemies.

Thereafter, the third chapter presents a case-study of militant democracy jurisprudence in relation to the prohibition of political parties. It includes a range of cases from militant democracy jurisprudence, beginning with the foundational German Socialist Reich Party and the Australian Communist Party to the most recently decided cases regarding the prohibition of political parties.

The fourth and fifth chapters represent the major contribution to the debate on militant democracy. The fourth chapter presents a case-study of three jurisdictions to test the hypothesis that militant democracy can be utilized to neutralize movements that allegedly aim to abuse institutions and privileges given by the democracy to establish fundamentalist coercive religions. In the fifth chapter another example of the potential use of militant democracy beyond its traditional scope of application is examined. This chapter analyses how militant democracy might be relevant for the theoretical debate and practical application of anti-terrorism policies on the examples of Spain, Russia, and Australia.

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“This will always remain one of the best jokes of democracy,
that it gave its deadly enemies the means by which it was destroyed.”

Paul Joseph Goebbels.

INTRODUCTION

The problem of defending democracy against its potential enemies can be traced back to the very beginning of democratic theory itself.¹ For example, already Plato discussed at length, in *The Republic*, the reasons for transition from one form of government to another and the difficulty of stabilizing governments.² In Ancient Greece, the Athenians were practicing denying civil and political rights to wrongdoers from previous regimes, i.e. during the transitions of 411 and 403 BC.³ Later, Montesquieu also produced extensive writings on the issue of stabilizing a moderate government.⁴ However, the issue of addressing the threat posed by the enemies of democracy and its nature, as it is perceived these days, was shaped between the two world wars.

The term ‘militant democracy’ was introduced in the 1930s by Karl Loewenstein, a prominent German legal scholar who immigrated to the United States when Nazis started to invade Europe. He introduced this expression in a series of two essays published in 1937.⁵ While Loewenstein was not the first or only author who stated a position on the need for militant democracy, he is, probably, the one who introduced this particular term.⁶ In his first essay Loewenstein elaborates on the features of fascism as a world movement and need to confront it while the second essays represent a comprehensive case-study of different anti-fascists techniques employed in different European states. There is strong proof that the need of militating democracy was not elaborated only in the minds of legal and political scholars,

¹ Otto Pfersmann, *Shaping Militant Democracy: Legal Limits to Democratic Stability*, in Andras Sajó (Ed.), *Militant Democracy* 47 (2004).

² Ibid.

³ For ancient antecedents discussed in details see Jon. Elster, *Closing the Books. Transitional Justice in Historical Perspective* 3-24 (2004).

⁴ O. Pfersmann refers to *L'Esprit des lois*, Book 8 (1748).

⁵ Karl Loewenstein, *Militant Democracy and Fundamental Rights I, II*, 31 *American Political Science Review* 417-432, 638-658 (1937).

⁶ For details see Pfersmann, *supra* note 1, at 48.

but many states also realized the need to confront subversive movements for the sake of preserving democracy.

According to Loewenstein, democratic fundamentalism and legalistic blindness could result in a situation where democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties as long as they conform formally to the principles of legality and free play of public opinion. The only remedy to this unfortunate situation is to turn democracy into a militant one: “if democracy is conceived that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.”⁷ By militating democracy Loewenstein means not only the acceptance of the fact that democratic fundamentalism may destabilize democracy (at least in the case of immense success of the Fascist movement) but also the necessity to introduce various techniques including but not limited to imposing limits on freedom of speech and opinion in order to have tools to exclude those players from the game who deny the very existence and meaning of its rule.⁸ In this sense, democracy has to be redefined to be equipped to stand for democracy and its absolute values.

As was mentioned above, ideas similar to Loewenstein’s were formulated also in the works of other scholars during the same period. One of the authors worth mentioning here is Karl Popper and his *The Open Society and Its Enemies*⁹ where he explains the ‘paradox of tolerance’ and the ‘paradox of democracy.’ The paradox of tolerance echoes somehow Loewenstein’s argument: “unlimited tolerance must lead to the disappearance of tolerance.”¹⁰ Unlimited tolerance should not be extended to those who are intolerant, otherwise “the

⁷ See Loewenstein, *supra* note 5, at 423.

⁸ For a detailed account of militant democracy anti-fascist measures see Loewenstein *Id.*, at 638.

⁹ Karl R. Popper, *The Open Society and its Enemies* (1950).

¹⁰ *Ibid.*, at 546.

tolerant will be destroyed and tolerance with them.”¹¹ “The right not to tolerate the intolerant” should be reserved in the name of tolerance as “any movement preaching intolerance places itself outside the law”;¹² incitement to intolerance should be criminalized in the same manner as incitement to murder, or to the revival of the slave trade, etc. The paradox of democracy means that the principle of majority rule may lead to self-contradictions. The potential problem of majority rule is that one day majority may decide that a tyrant should rule. While Popper mentions that a similar critique can be raised against all the different forms of the theory of sovereignty, he nevertheless is correct that democracy should not be only about procedure, but also about substance as well.¹³ All listed paradoxes can be avoided if we demand our governments to rule according to the principles of egalitarianism and protectionism, and tolerate all who are tolerant; that is controlled by, and accountable to, the public.

Thus, the unfortunate experience of the victorious Nazi conquest of many European states in the 1930s led democracy’s adherents to realize that democracy cannot thrive without institutionalized means to protect itself against attacks of its enemies. Democracy should not remain silent about attempts to damage it from inside by abusing privileges, rights, and opportunities granted by the democratic regime. Unfortunately it took time and many lives to realize and accept this state of affairs and it is definitely a lesson of worth remembering. While democracy is not a static construction and its understanding and interpretation have changed since Loewenstein’s *Militant Democracy and Fundamental Rights* essays, much of his arguments and claims are still valid nowadays, and “to neglect the experience of

¹¹ Ibid.

¹² Ibid.

¹³ For further debate on the paradoxes of democracy see, for example, John Rawls, *A Theory of Justice* 216 (1971).

democracies deceased would be tantamount to surrender for democracies living.”¹⁴ In the end, democratic experiences and practices should be a continuing and consistent response to the famous sarcastic comment of Paul Joseph Goebbels, the former Nazi Ministry of Propaganda.

Timeliness and Relevance of the Research

Militant democracy measures were incorporated into a democratic constitution for the first time in 1949 as a response to the tragic events caused by the Nazi regime. Later, militant democracy measures were widely utilized to curb the functioning of communist parties.¹⁵ While it was expected that the fall of communism would decrease the frequency of reference to militant democracy measures, due to local conditions some European states decided to preserve the possibility to resort to these measures.¹⁶ Moreover, many young European democracies inserted militant democracy provisions into their constitutions with the idea that it would help to protect the fragile democratic regime from the possibility of being harmed by previous rulers. Further, the terrorist attacks of 11 September 2001 brought issues of militant democracy back into the center of political discourse; with the perceived danger seemingly coming from “obviously amorphous groups involved in what become known as a new kind of non-conventional asymmetric warfare”.¹⁷ As a result, defensive mechanisms started to be discussed as being potentially used in a much wider scope to target and curtail some basic rights on a universal basis.¹⁸ Further interest was also boosted due to the fact that the democratic world became more aware of the novel threats posed by the religious fundamentalism of a new generation.¹⁹ Therefore, militant democracy is not a concept that is

¹⁴ Lowenstein, *supra* note 5, at 658.

¹⁵ Shlomo Avineri, *Introduction*, in A. Sajo (Ed.), *Militant Democracy 2* (2004).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Markus Thiel, *Introduction* in Markus Thiel (Ed.), *The ‘Militant Democracy’ Principle in Modern Democracies 4* (2009).

‘withering away’, but a lively and practical tool, useful for protecting democracy. Recently we have witnessed that it is being employed also beyond its traditional scope of application.

Militant democracy has been studied and discussed in various monographs and articles.²⁰ However, most of them refer to either a particular jurisdiction or matter of the militant democracy application. One of the most recent publications on militant democracy includes an extensive case-study of militant democracy from thirteen jurisdictions.²¹ However, there is no scholarly work that covers both theoretical and practical aspects of militant democracy measures, whilst tracking their development in the constitutional jurisprudence of various states from the early years of its existence, and investigating traditional and novel areas of the militant democracy application.

This project aims to present the analysis of major theoretical considerations on the concept of militant democracy with a substantive practical component investigating its practice in various jurisdictions, on diverse aspects of issues. The whole project is centered around the premise that although militant democracy is admittedly a somewhat problematic concept, through considerate application it could become an important safeguard of democracy when it is threatened to be potentially harmed or destroyed by undemocratic actors. The project is considered to be an original contribution to the militant democracy debate as it aims to provide a detailed account of the potential dangers of militant democracy practical application and suggest possible solutions and measures to overcome such dangers and concerns. In addition, the case-study element includes traditional cases of militant democracy application as well as covering recent developments in the understanding of the concept and its interpretation, i.e. extension of the militant democracy to address new types of threats democracies may face nowadays. The project investigates in details how dangerous

²⁰ A detailed account of the state of literature is included in Chapter 1.1., at 18.

²¹ Markus Thiel (Ed.), *The ‘Militant Democracy’ Principle in Modern Democracies* (2009).

religious movements and the threat of terrorism could be addressed by applying militant democracy logic.

Summary of the Research

Chapter one begins by outlining some of the theoretical insights into the notion of militant democracy, its origin and development in constitutional theory. It argues that the militant democracy notion was introduced as a response to tragic historical events and that democratic experience and practices should be a continuing and consistent response to the famous sarcastic comment of Paul Joseph Goebbels, mentioned above. Furthermore, the contemporary theoretical debate on militant democracy is introduced with the purpose of providing a detailed account of the state of literature on militant democracy and related matters. The first chapter also elaborates on the major theoretical and practical justification of militant democracy, including the debate over the militant character of the democracy as an obligation imposed by international treaties. Chapter one ends with preliminary observations on militant democracy justifications major concerns and challenges.

The second chapter provides an overview of the practice of militant democracy worldwide in relation to political parties and beyond. The starting point is a concise outline of militant democracy practice in different jurisdiction in the light of the argument that all democracies are more or less militant, and that militating a democracy becomes a natural feature of a democratic regime, such as institutions of representation and separation of powers. This survey is followed by the presentation of militant democracy arsenal to demonstrate which legal measures and institutions could be used to safeguard democracy from its enemies.

The latter analysis begins with the militant democracy arsenal as introduced by Karl Lowenstein and is further compared with contemporary constitutional practices. In order to

get better understanding of the arsenal of militant democracy measures, it is useful to make a distinction between other regimes of rights' limitation and militant democracy itself. This distinction not only distinguishes militant democracy measures from other regimes, but also supports the argument that militant democracy is a unique constitutional solution and therefore deserves careful analysis and research. Moreover, the second chapter will introduce the argument that the arsenal of militant democracy measures is being extended: Practice of many states and international judicial institutions demonstrate that militant democracy logic is invoked to address problems beyond unconstitutional and dangerous political parties, i.e. threats coming from growing religious fundamentalist movements and terrorism.

The issue of the relationship between militant democracy and transitional constitutionalism is of great relevance for a theoretical debate on militant democracy practice. The 'founding father' of militant democracy advocated that countries undergoing transition to democracy must incorporate militant features in their democratic system.²² This argument was fully incorporated into many constitutions of post-Communist European countries²³ and some scholars even argue that militant democracy is a sign of transitional constitutionalism only.²⁴ The debate will be analyzed in depth in order to answer the question whether militant democracy gives more chances for transitional democracies to survive, and if this is not an appropriate solution for stable democracies.

Chapter three presents a case-study of militant democracy jurisprudence in relation to the prohibition of political parties. The chapter starts with party prohibition cases which are

²² Karl Lowenstein in the first volume of his essays argues that "If democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant". See K. Loewenstein, *supra* note 5, a 423.

²³ For more details see Chapter 3.3, at 120.

²⁴ Ruti Teitel argues, for example that "Militant constitutional democracy" ought to be understood as belonging to transitional constitutionalism, associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledgling and often fragile democratic institutions; it may not be appropriate for mature liberal democracies." See Ruti Teitel, *Militant Democracy: Comparative Constitutional Perspectives*, 29 Michigan Journal of International Law 49 (2008). Available online at <http://students.law.umich.edu/mjil/uploads/articles/v29n1-teitel.pdf>.

considered to be the foundation of militant democracy jurisprudence: the German Socialist Reich Party and the Australian Communist Party. These judicial decisions were an excellent opportunity to test Loewenstein's arguments on militant democracy in practice and both could be considered as successful applications of militant democracy logic to guard constitutionalism in times of crisis. Furthermore, the third chapter refers to other militant democracy cases, demonstrating the major potential controversies and concerns for the practical application which occurred from the very beginning of its existence. Chapter three also includes a case-study of militant democracy jurisprudence of the European Court of Human Rights and young European democracies. Subsequent to this is a case-study of Russia, the state with an allegedly authoritarian agenda where militant democracy is (ab)used as a tool to suppress political dissent and guard political space from intrusion by those 'other(s)' than the ruling party. The chapter ends with the suggestion that militant democracy can be endorsed also through alternatives to party dissolution measures, i.e. banning parties' electoral lists from the upcoming elections (Israel) and content-restrictions imposed on electoral speech (India).

The fourth chapter presents a case-study of three jurisdictions to test my hypothesis that militant democracy can be utilized to neutralize movements that use democratic means to establish totalitarian ideology, i.e. fundamentalist coercive religions. Politics towards allegedly dangerous movements with a religious agenda from the jurisprudence of Russia, Turkey and the European Court of Human Rights will be assessed through the lenses of militant democracy. The purpose of this case-study is to investigate the extent to which policies in addressing threats of religious extremism are consistent with the rules of democracy, and if militant democracy can guide these policies more successfully. The chapter argues that militant democracy rationale is of relevance for the states' policies to

address such threats and, where it is applied properly, it might lead to better solutions with more considerate limitations imposed on fundamental rights and freedoms.

Chapter five focuses on another example of the potential use of militant democracy beyond its traditional scope of application and analyses how militant democracy might be relevant for the theoretical debate and practical application of anti-terrorism policies. The chapter content is focused upon an analysis of counter-terrorism policies from a militant democracy perspective at the national level only and will not apply to the international cooperation in the fight against terrorism. The main purpose of this chapter is to demonstrate that militant democracy might be a useful guiding principle to lead the ‘War on Terror’ to remedy some serious flaws of anti-terrorism policies, i.e. excessive curtails of fundamental rights, extended powers and discretion of the executive, in addition to a general shift in the separation of powers balance. This argument will be tested upon three case-studies: Spain, Australia and Russia.²⁵ All jurisdictions differ substantially in their anti-terrorism policies and in their experience of the fight against terrorism. Nevertheless, each of them represents a valuable example to test my hypothesis.

The concluding observations will provide the summary of the research outcomes and provide answers to the questions posed at various points of the project. First of all, it will aim to answer the question of who are the enemies of democracy and how to define them for the purpose of the practical application of militant democracy. Furthermore, it will elaborate on the effectiveness vs. legitimacy of militant democracy dichotomy in order to seek the most effective manifestation and application of the concept. It is also crucial to revisit the debate of whether democracy can resort to militant measures in order to protect itself without

²⁵ While the United States and the United Kingdom are also potentially interesting jurisdictions to test my argument, their anti-terrorism policies are over-analyzed to date. It is more challenging to analyze other jurisdictions, and to check the validity of my hypothesis on little-discussed anti-terrorism national policies.

compromising its democratic nature, especially taking into account the high risk of its potential use for political purposes.

Methodology

Contemporary comparative legal studies present a variety of methodologies to choose from.²⁶ Without going into detail on concerns and benefits of each method, I will note that throughout the project I will refer mainly to functionalism, critical legal studies and conceptual comparisons.²⁷ I believe that a project of this type requires a multi-pronged approach and it is important not to over-estimate the values of one approach over another.

As to the choice of jurisdictions for the comparative analysis, the selection of cases was based around major issues of militant democracy practice. This approach allowed for bringing more examples of constitutional practice to present a clearer and more complete picture of various approaches to the same problem. Moreover, it helps to track the development of the concept over time to see how its understanding and interpretation change in constitutional jurisprudence. More detailed justification for the selection of case-studies will be given in each chapter.

²⁶ See for example, Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law, 405 (2007).

²⁷ For a detailed account of the latter see Brand, *Ibid.*

CHAPTER 1: THE ORIGIN OF THE DOCTRINE, THEORETICAL UNDERPINNINGS AND PRELIMINARY OBSERVATIONS ON MILITANT DEMOCRACY IN PRACTICE

Introduction

What is militant democracy, when did the idea of self-protective democracy appear, and how was it developed throughout the years? Why, and how, was it incorporated into the legal systems of different jurisdictions? How does the contemporary theoretical debate on militant democracy look, and what are the major issues discussed in the literature? What is the current understanding of militant democracy in theory and practice, and how can resorting to militant democracy measures be justified in a democratic state? Do states have an international obligation to incorporate militant democracy measures into their legal systems? What exactly does militant democracy protect, and how it is different from other rights limitations a state might impose upon individual rights and liberties? These are some of the crucial questions that arise any time someone elaborates upon militant democracy issues. These questions represent the very foundations of the militant democracy debate, and therefore any work concerning the theoretical and practical aspects of the militant democracy principle must be conscious of them and attempt to at least clarify these points.

This chapter starts with overview of the origin of the doctrine and the idea of militating a democracy. The problem of defending democracy against its enemies can be traced back to the very beginning of democratic theory itself. However, the issue of addressing the threat posed by the enemies of democracy, and its nature, as it is perceived at the moment, was shaped between the two world wars. This chapter will reflect upon the development of the principle of militant democracy in constitutional theory starting from the 1930s (when the term was introduced by Karl Loewenstein). Examples of the paradox of

tolerance and the paradox of democracy formulated by Karl Popper will be discussed in support of the argument that Loewenstein was not alone elaborating on the ideas to limit the tolerance for the sake of democracy's self-preservation.

Furthermore, this chapter will elaborate on the contemporary theoretical debate on militant democracy and will introduce an overview of the existing literature and opinions on various militant democracy issues. All scholarly work in this field will be divided into three groups. It is important to keep in mind that everything written about militant democracy, including Karl Loewenstein's essays, was in reaction to certain events and developments in domestic constitutional legislation and jurisprudence.

The question of the understanding of militant democracy for the present research is a crucial one, and is included in the structure of the first chapter. At the moment there is no universal definition of militant democracy agreed upon by all of the scholars involved in the debate and related issues. While every author would try to come up with their own definition, most of them refer to the same qualities of democracy added by the term 'militant.' What follows will try to devise an acceptable definition of 'militant democracy' for this project, and outline if there are any difference between 'militant democracy' and 'militant democracy state'.

Additionally, this chapter will focus on militant democracy justification as discussed in theory and invoked in practice. In order to identify the major grounds for the justification the standard theoretical justification (as employed by Loewenstein, Schmitt, Popper, Rawls and others) will be examined in order to ascertain the status of militant democracy in public international law. The latter serves to investigate if a state might be found duty-bound to possess some militant democracy measures in its legal systems. The object and purpose of protection as possible additional grounds for militant democracy justification will also be

analyzed. The discussion on militant democracy justification will end with preliminary observations on major concerns and challenges of the concept which might affect its effectiveness and legitimacy.

1.1. The Origin of the Doctrine and Theoretical Underpinnings

1.1.1. The Origin of the Doctrine: the Need of Militating Democracy and the Paradoxes of Tolerance and Democracy

The problem of defending democracy against its potential enemies is not new for constitutional theory and practice. It can be traced back to the very beginning of democratic theory itself.²⁸ Otto Pfersmann mentions, for example, Plato, who discussed at length in *The Republic*, the reasons for transition from one form of government to another and the difficulty of stabilizing governments.²⁹ As early as in the time of Ancient Greece, the Athenians were practicing denial of civil and political rights to wrongdoers from the previous regimes during the transitions, i.e. of 411 and 403 BC.³⁰ Furthermore, Montesquieu also wrote extensively on the issue of stabilizing a moderate government.³¹ However, the issue of addressing the threat posed by the enemies of democracy and its nature, as it is perceived in the present day, was shaped between the two world wars.

The term ‘militant democracy’ was coined in the 1930s by Karl Loewenstein, a prominent German legal scholar who immigrated to the United States when the Nazis regime started to invade the European continent. He introduced this expression in a series of two essays published in 1937.³² Loewenstein is not the first or the only author to state a position on the need to militate democracy; however he is probably the one who introduced this

²⁸ Pfersmann, *supra* note 1, at 47.

²⁹ *Ibid.*

³⁰ For ancient antecedents discussed in details see Elster, *supra* note 3.

³¹ O. Pfersmann refers to L’Esprit des Lois, Book 8 (1748).

³² Loewenstein, *supra* note 5.

particular term.³³ In his first essay Loewenstein elaborates on the features of fascism as a world movement and the need to confront it while the second essay presents a comprehensive case-study of different anti-fascists techniques employed in various European jurisdictions. The second part of his project is compelling proof that the need of militating democracy was not elaborated only in minds of legal and political scholars and that many states realized the need to confront subversive movements for the sake of preserving democracy. While the second essay represents an extremely valuable summary of the early militant democracy practice, the first (theoretical) part of his work is of greater relevance.

In *Militant Democracy and Fundamental Rights, I*, Loewenstein explains the causes of the collapse of the Weimar Republic which could be equated with the defeat of democracy. His work starts with describing fascism as a world movement which is not an ideology, but rather a political technique for grasping power with the simple intention to rule.³⁴ Loewenstein observes the secret of the success of the fascist movement saw in its mastering of the techniques of combining emotionalism with extraordinary conditions offered by democratic institutions. In Loewenstein's words "the mechanism of democracy is the Trojan horse by which the enemy enters the city."³⁵ Democracy failed to take action and destroyed itself through unlimited tolerance towards its enemies. Loewenstein illustrates this argument with the German example and argues that attempts to establish democracy in the Weimar Republic failed due to the lack of militancy against subversive movements (even against those clearly recognized as such). Moreover, the purpose of getting access to national and

³³ For details see Pfersmann, *supra* note 1, at 48.

³⁴ Allegedly, the fact that Fascism is only a political technique makes it easier for governments to resist it than if it was an ideology.

³⁵ Loewenstein, *supra* note 5, at 424.

communal representative bodies was easily facilitated by “that gravest mistake of the democratic ideology, proportional representation.”³⁶

According to Loewenstein, democratic fundamentalism and legalistic blindness led to a situation that democracies were legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties as long as the latter conform formally to the principles of legality and the free play of public opinion. The only possibility to cure this unfortunate situation is turning democracy into a militant stand. As Loewenstein’s strong statement reads “If democracy is conceived that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.”³⁷ By militating democracy Loewenstein means not only the acceptance of the fact that democratic fundamentalism may destabilize democracy (at least in case of immense success of the Fascist movement). He discerns also the need to introduce various measures from criminal prohibition to form para-military bands to proscribing of subversive movements and imposing limits of freedom of speech and opinion in order to have tools to exclude those players from the game who deny the very existence and meaning of its rules.³⁸ In this sense, democracy has to be redefined to be equipped and able to stand for democracy and its absolute values.

Later works of Loewenstein echo the main ideas formulated in his essays *Militant Democracy and Fundamental Rights*. For example, in a series of two essays, *Legislative Control of Political Extremism in European Democracies*, he argues that liberal democracy (in the style of 1900) slowly gives way to a “disciplined” or even “authoritarian” one, the customary complacency of traditional liberalism toward danger from extremism has largely

³⁶ Ibid.

³⁷ Ibid., at 423.

³⁸ For a detailed account of militant democracy anti-Fascist measures see Ibid.

disappeared and it is being accepted more and more that democracy has to fight fire with fire.³⁹

As was mentioned above, ideas similar to Loewenstein's were formulated in the works of other scholars during the same period of time. One of the authors of note worth mentioning here is Karl Popper and his *The Open Society and Its Enemies*.⁴⁰ The final decision to write this book was made in March 1938 when Popper heard news of the invasion of Austria; most of the book was written during the grave years of the war. The book is in two volumes: Volume One, *The Spell of Plato*, and Volume Two, *The High Tide of Prophecy*. The main idea of this book is that one day we should arrive to an 'open society' which sets free the critical powers of man. Popper claims that civilization is still in its transition from the tribal, or 'closed society', to an open one. The shock our civilization is experiencing because of this transition is one of the factors facilitating the rise of different movements which try to return us back to tribalism and destroy the idea of an open society. The purpose of the book according to its author is to contribute to our understanding of totalitarianism, and of the significance of the perennial fight against it. Furthermore, Popper attempts to examine the application of critical and rational methods of science to the problems of open society, partially via criticism of those social philosophies responsible for the widespread prejudice against the possibilities of democratic reforms (historicism is labeled by him as one of the most powerful of these philosophies).

Karl Popper's book is of relevance for the debate on the origin of the doctrine of militant democracy at least for its note four to chapter seven, *The Principles of Leadership*, where the paradox of tolerance and the paradox of democracy were introduced and explained. In the note to the question "does not the excess [of liberty] bring men to such a state that they

³⁹ Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies, I, II*, 38 Columbia Law Review 5 (1938).

⁴⁰ Popper, *supra* note 9.

badly want a tyranny?” he refers to the so-called ‘paradox of freedom’,⁴¹ expressed a long time ago by Plato.⁴² In the same line of arguments, Popper brings two further but less known paradoxes: the ‘paradox of tolerance’ and the ‘paradox of democracy.’⁴³

The paradox of tolerance as explained by Popper echoes somehow Loewenstein’s argument: “unlimited tolerance must lead to the disappearance of tolerance.”⁴⁴ Unlimited tolerance should not be extended “to those who are intolerant, otherwise the tolerant will be destroyed and tolerance with them.”⁴⁵ “The right not to tolerate the intolerant”⁴⁶ should be reserved in the name of tolerance as “any movement preaching intolerance places itself outside the law”;⁴⁷ “incitement to intolerance”⁴⁸ should be criminalized in the same manner “as incitement to murder, or kidnapping, or to the revival of the slave trade.”⁴⁹ The paradox of democracy was not spelled out for the first time by Popper. He himself refers to Plato’s criticism of democracy and at least to Leonard Nelson’s suggestion that the principle of majority rule may lead to self-contradictions. The biggest problem of majority rule is that one day a majority may decide that a tyrant should rule. While Popper mentions that similar critique can be raised against all the different forms of the ‘theory of sovereignty,’ he nevertheless is correct that democracy should not be only about procedure, but also about substance as well.⁵⁰ All listed paradoxes can be avoided if we demand our governments to rule according to the principles of egalitarianism and protectionism; to tolerate all who are tolerant, or rather, controlled by, and accountable to, the public. Karl Popper’s paradoxes are

⁴¹ Italics in original.

⁴² The paradox of tolerance is the argument that freedom in the sense of absence of any restraining control might lead to a restraint, since it makes the bully free to enslave the meek.

⁴³ Italics added.

⁴⁴ Popper, *supra* note 9, at 546.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ For further debate on the paradox of democracy see, for example, also Rawls, *supra* note 13.

another step towards a militant democracy state: first, it re-states that pure majority rule and unlimited tolerance are not something democracy can afford; and second, it should have a right to interfere in the name of tolerance and self-preservation.

Thus, the unfortunate experience of the victorious Nazi take-over of many states in the 1930s led democracy's adherents to realize that democracy cannot thrive without institutionalized means to protect itself against the attacks of its potential enemies. Democracy should not remain silent about attempts to damage it from inside by abusing privileges, rights and opportunities granted by a democratic regime. Unfortunately it took time and many lives to realize and accept this state of affairs. Nevertheless, it was definitely a lesson worth remembering. While democracy is not a static construction and its understanding and interpretation have changed since Loewenstein's *Militant Democracy and Fundamental Rights* essays, many of his arguments and claims are still valid nowadays and "to neglect the experience of democracies deceased would be tantamount to surrender for democracies living."⁵¹ In the end, democratic experiences and practices should be a continuing and consistent response to the famous sarcastic comment of Paul Joseph Goebbels, the former Nazi Ministry of Propaganda that democracy gave its enemies the means by which it was destroyed.

1.1.2. Contemporary Theoretical Debate on Militant Democracy

The purpose of this section is to provide a detailed account of the current theoretical debate on militant democracy related issues. In general, all scholarly work in this field can be divided into three groups. Yet, before placing academic works in one or another category it is important to articulate here that everything written about militant democracy, including Karl Loewenstein's essays, is a response to certain events and developments in domestic constitutional legislation and jurisprudence. There is no scholarly article on militant

⁵¹ Loewenstein, *supra* note 5, at 658.

democracy written in abstract terms, without strong reference to the practice which means that militant democracy is not a mere theoretical construction and that it is a context-sensitive concept.

The first group I would call ‘General theoretical observations and comments on militant democracy theory and practice.’ This group consists of works on classical militant democracy issues and is applicable to the debate in general while based on the analysis of the constitutional practice from different jurisdictions. **The second group** includes articles, comments and analysis written and published in response to constitutional development in particular jurisdictions. Such publications appear most often once the militant democracy legislation is introduced or applied in practice by the national courts. Examples of academic publications on militant democracy practice can be found in relation to events in at least Turkey, Spain, Germany, Israel, India, etc.⁵² One of the most recent projects on militant democracy practice in different jurisdictions is a book edited by Markus Thiel. The book includes case-studies from thirteen different jurisdictions and represents an extremely valuable contribution to the debate on militant democracy practice.⁵³ **The third group** could be compiled from scholarly works which discuss militant democracy but from different and not widely discussed angles. For example, governmental attacks on political parties with an

⁵² See for example, Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, *European Law Review* 3 (2004); Miguel Revenga Sanchez, *The Move Towards (And the Struggle For) Militant Democracy in Spain (2003)*, Paper delivered at the ECPR Conference, Marburg, 18-21, September 2003, also available at <http://www.essex.ac.uk/ecpr/events/generalconference/marburg/papers/10/7/Sanchez.pdf>; Leslie Turano, *Spain: Banning a Political Parties as a Response to Basque Terrorism*, 1 *International Journal of Constitutional Law* 4 (2003); Victor Ferreres Comella, *The New Regulation of Political Parties in Spain*, in A. Sajo, (Ed.), *Militant Democracy* 47 (2004); Dicle Kogacioglu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 *Law and Society Review* 3 (2004); Mehran Kamrava, *Pseudo-Democratic Politics and Populist Possibilities: The Rise and Demise of Turkey's Refah Party*, 25 *British Journal of Middle Eastern Studies* 25(2) (1998); Ozbudun Ergun, *Party prohibition cases: different approach by the Turkish Constitutional Court and the European Court of Human Rights*, 17 *Democratisation* 1 (2010); Mordechai Kremnitzer, *Disqualifying of Lists and Parties: the Israeli Case*, in A. Sajo, (Ed.), *Militant Democracy* (2004); Thilo Rensmann, *Procedural Fairness in a Militant Democracy: the “Uprising of the Decent” Fails Before the Federal Constitutional Court*, 4 *German Law Journal* (2003), also available at <http://germanlawjournal.com/index.php?pageID=11&artID=332>, etc.

⁵³ Thiel, *supra* note 21.

Islamist agenda (i.e. the Welfare Party in Turkey) and its further approval by the European Court of Human Rights which generated manifold debate and discussion. Followed by the judgments of the Strasbourg Court on the headscarf ban, it led some commentators to open a debate on the expansion of militant democracy as being utilized to guard the principle of secularism.⁵⁴ The terrorist attacks of September 11 and many other unfortunate acts of terrorism occurred in different parts of the world initiated a theoretical debate over the application of militant democracy to guide states anti-terrorism policies.⁵⁵ The division is of course not strict as the same work can discuss different issues and fit into other groups too. While scholarly works from the second and the third groups will be addressed in greater detail in further chapters (mainly in case-study elements), the publications on general issues of militant democracy application will be the subject of this section.

After Karl Loewenstein's essays we can observe the implementation of his ideas in practice, however, much was said by academia not exactly about militant democracy but on other related matters. For example, it is argued that theorists from a variety of philosophic traditions argued in support of substantive view of democracy which can be regarded as one of the features of militant democracy.⁵⁶ John Rawls examines the problem of 'toleration of the intolerant' under the framework that principles of liberty "carry their own imperative"; they are not "derived from practical necessities or reasons of state" and can only be "justified when it is necessary for liberty itself, to prevent an invasion of freedom that would be still

⁵⁴ See for example, Teitel, *supra* note 24; Patrick Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe* (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660649; Peter G. Dancin, *Islam in the Secular Nomos of the European Court of Human Right*, 32 Michigan Journal of International Law (2011), also available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1980&context=fac_pubs&sei-redir=1#search=%22Islam%20Secular%20Nomos%20European%20Court%20Human%20Rights%22.

⁵⁵ See e.g. Andras Sajó, *From Militant Democracy to the Preventive State?*, 27 Cardozo Law Review (2006); Kent Roach, *Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses*, in A. Sajó (Ed.), *Militant Democracy* 171 (2004).

⁵⁶ Gregory H. Fox & George Nolte, *Intolerant Democracies*, 36 Harvard International Law Journal 17 (1995).

worse.”⁵⁷ In examining the problem of toleration of the intolerant Rawls concludes that intolerant groups do not have any entitlement to complain if it is not tolerated because a “person’s right to complain is limited to violations of principles he acknowledges himself.”⁵⁸

This conclusion can be easily projected to political parties in the event they disregard the rules of the game and aim at violating them claiming justification for such actions in their popular support. In addition, intolerance is permitted only where there are “some considerable risks at our own legitimate interests.”⁵⁹ Rawls, however, strongly believes in the natural strength of free institutions and heavily relies on the inherent stability of a just constitution; altogether it gives confidence to the members of the society to limit the freedom of the intolerant only when it is urgently needed and it is considered by him as an application of the principles of justice agreed to even by the intolerant in his famous ‘original position.’ The model offered by John Rawls has a significant position in the procedural v. substantive democracy debate.⁶⁰ However, it might have some difficulties in application when someone speaks about democracies during their still yet unstable and fragile stage as opposed to the United States constitutional system which proved to be able to resist many crises of different natures.

Arguments similar to Rawls, in support of the substantive view of democracy can somehow surprisingly be found in the works of Carl Schmitt, who later became the best-known legal defender of the Nazi regime once Hitler gained power in the Weimar Republic. Fox and Nolte refer in their article to Schmitt’s 1932 article *Legalität und Legitimität* (Legality and Legitimacy) where he argues for the distinction between procedural rules in a constitution and its substantive principles. Schmitt claims that there are some basic

⁵⁷ Ibid, From John Rawls, *supra* note 13.

⁵⁸ Ibid, at 18.

⁵⁹ Ibid.

⁶⁰ More details on the notions of procedural and substantive democracy will be provided later in this section at 23.

substantive principles which cannot be simply abolished by the elected representatives even if the procedural rules are observed.⁶¹ In the aftermath of the Second World War and the collapse of communism in Europe, Schmitt's view received widespread support and current constitutions of many states provide explicit reference to the idea of the non-amendable character of the most fundamental principles.⁶²

The 'toleration of the intolerant' debate as well as the issue of limitations imposed on the legislative decision-making process in the form of non-amendable constitutional principles came back into constitutional theory under the slogan of 'militant democracy' only in the 1990s; when Fox and Nolte published their famous article *Intolerant Democracies* which covers an impressive number of issues and jurisdictions.⁶³ The authors were inspired by the events in Algeria of 1991 when the first round of elections was won by the Islamic Salvation Front (FIS).⁶⁴

The main arguments of this paper are based around two theories of democratic tolerance: procedural and substantive democracy. The first model, according to Fox and Nolte, defines democracy only as a set of procedures. To describe this model the authors adopted Joseph Schumpeter's formulation of democracy as an "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a

⁶¹ The idea of constitutions containing an unalterable core is known in constitutional practice at least since 1884 when the French Constitution established the non-amendable character of the provision on the republican form of government.

⁶² The most famous example would be the eternity clause provision from the 1949 German Basic Law, **Article 79(3)**: Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

⁶³ Fox & Nolte, *supra* note 56.

⁶⁴ Driven by the fear that a party will ensure two-thirds majority in the Parliament after the second round and being aware of the fact that FIS would intend to turn Algeria into an Islamic state, the President of the country resigned and control of the country was taken over by the Algerian army. The second round of elections was cancelled and a state of emergency was declared in February 1992 which lasted until early 2011. See for example *Algeria lifts 1992 emergency decree*. February, 22, 2011 available at CNN World news archive at http://articles.cnn.com/2011-02-22/world/algeria.emergency_1_islamist-party-emergency-decree-insurgency?_s=PM:WORLD.

competitive struggle for the people's vote.”⁶⁵ This model provides a framework for decision-making and is in fact nothing more than pure governance by a majority rule. In contrast, the substantive model of democracy is characterized as a society in which majority rule is made meaningful.⁶⁶ In this view, the democratic process is not an end in itself but rather a means to create such a society where citizens enjoy a variety of rights, including the right to vote, whereas none of these rights is absolute, which means it cannot be used to abolish itself or other rights.

In addition to classifying all democratic systems into procedural or substantive, Fox and Nolte add the notion of tolerant (passive) as opposed to militant (active) states to take into account reactions towards anti-democratic actors. One clear line of demarcation between these two systems is whether the national constitution can be amended to alter or eliminate democratic institutions.⁶⁷ Further division is based on the visions of democracy endorsed in a particular legal system. A procedural democracy is described by the authors as a system providing a framework for decision-making but without prescribing the decisions themselves.⁶⁸ In contrast, substantive view of democracy assumes that democracy is not only a process of ascertaining the preferences of political majorities, but rather as a society in which majority rule is made meaningful.⁶⁹ As a result, state constitutional practice was divided into four categories: tolerant procedural democracy;⁷⁰ militant procedural democracy;⁷¹ tolerant substantive democracy;⁷² and, militant substantive democracy⁷³. The authors included only stable democratic systems in their analysis and the article was

⁶⁵ Fox & Nolte, *supra* note 56, at 14.

⁶⁶ *Ibid.*, at 16.

⁶⁷ *Ibid.*, at 24.

⁶⁸ *Ibid.*, at 14.

⁶⁹ *Ibid.*, at 16.

⁷⁰ E.g. United Kingdom, Botswana, and Japan.

⁷¹ E.g. United States (mainly because of the Smith Act of 1940, the Internal Security Act of 1950 and the Communist Control Act of 1954).

⁷² E.g. France, Canada, and India.

⁷³ E.g. Germany, Israel, and Costa Rica.

published in 1995; therefore, most of the young European democracies were, unfortunately, excluded from their analysis.

In conclusion, the authors' summarized that democratic states have substantial differences in the treatment of extremist parties which is explained to a large extent by past experience. Without any doubts, the memories of the Nazi regime influenced the German constitutional militant democracy model; in the same way India, as a multi-national state, imposes limitation on ethnically based political parties as participation of sub-groups in elections often pose challenges to the territorial integrity and cause violence. This observation on the importance of past experiences in the way militant democracy is practiced is utterly important for the general understanding of militant democracy. Constitutional militant democracy fits perfectly to the claim that a national constitution very often mirrors the fears of its drafters.⁷⁴ The idea to impose limits on activities of political parties does not come from the air and is brought into the process of constitution-making as a response to tragic events of the past. This argument leads us to another important conclusion, namely that militant democracy could be, and should be, a dynamic concept. States should not be too hesitant to refer to the weapons of militant democracy beyond the initial constitution-making process. Self-protection is a natural and logical feature of democracy, and therefore when it is needed it can be utilized at any stage of constitutional development. The further example of Spain would support this argument.

The final point from the Fox and Nolte article worth of mentioning here briefly is their summary on the state of international law on the question of anti-democratic political parties. While the authors did not have a chance to include many cases from the ECHR jurisprudence decided in the late-1990s and early-2000s, their findings are still valid and

⁷⁴ For example, Andras Sajó argues that often constitutions are written out of fear of earlier despotic power. See Andras Sajó, *Limiting Government: an Introduction to Constitutionalism* 13 (1999).

applicable to the current state of affairs: the international community is not hopelessly divided on the problem of anti-democratic actors. Most of the international human rights treaties could be interpreted in a way as promoting and supporting a substantive theory of democracy.⁷⁵

Otto Pfersmann in his essay *Shaping Militant Democracy: Legal Limits to Democratic Stability* underlines three main strands of the debate over militant democracy measures.⁷⁶ The first one is normative: it is questioned whether such measures are able to trigger the purported effect and how to best utilize the means they provide. The second tier of the debate focuses on the question of how democracies respond to a situation of internal and international crisis. The third and final strand is formed around the legal problems militant democracy provisions generate. Furthermore, Otto Pfersmann indicates that there are some points which appear as uncontroversial, i.e. that there is no democracy without democrats and that democratic attitude may be context-sensitive, depending upon the presence of threats and menaces.

Moreover, Pfersmann denotes that the major controversy of the militant democracy debate is built around the following questions: whether militant democracy provisions are compatible with the very nature of democracy and if yes, whether such provisions promote democracy? What is the precise legal meaning of the provisions and in what way should they be legally applied? And finally, how should they be effectively applied in certain situations? Pfersmann argues that the formulation of such questions is based on the acceptance of a few underlying assumptions: 1) militant democracy differs from simple democracy in quality; 2) militant democracy measures make a difference in content rather than in structure; and 3) democracy has a stable meaning and expression ‘militant democracy’ only adds specific

⁷⁵ This is, however, a subject for a subsequent chapter and I will come back to these issues in Section 3.3.2 at 130.

⁷⁶ Pfersmann, *supra* note 1, at 51-52.

features. Pfersmann disagree with these assumptions and claims their character false. Instead he argues that “democracies are always *more* or *less* militant.”⁷⁷ However, he warns us that making democracy more militant modifies the structure from which it starts and excessive extension of the area of protection could lead to a “decrease of the liberal heritage of constitutional democracy.”⁷⁸

As a response to the above discussed paradox of democracy (Section 1.1) Pfersmann offers two species of devices: legal and non-legal strategies. By non-legal strategies he means appeal to beliefs and political habits of the citizen to demonstrate the advantages of democracy. Legal strategies consist of legally imposed obstacles to abolishing democratic order which could be direct or indirect. Direct obstacles prohibit certain actions against democracy or impose obligations to identify those actions in a preventive way as well as to promote pro-democratic beliefs and attitudes, whereas indirect obstacles modify rules concerning decision-making. An example of this would be introducing qualified majority voting for certain matters which results in “a rule on rule-making that excludes pure democratic rule-making in a certain domain.”⁷⁹ As a result, any democracy with legal structures containing rules on preventing departure from open-democracy as the general rule of rule-making can be characterized as militant. Pfersmann concludes that there are only very few examples where the majority decision-making rule is not limited in any way and that is why all democracies are more or less militant.⁸⁰ The success of militant democracy’s important missions is to a large extent not only about the quality of the provisions and their precision, but on the way they are interpreted and applied by competent constitutional courts.

⁷⁷ Pfersmann, *supra* note 1, at 53

⁷⁸ *Ibid.* In this regard he disagrees with Fox & Nolte, *supra* note 56.

⁷⁹ Pfersmann, at 56.

⁸⁰ Democracies in which no absolute majority is entitled to modify certain democratic settings Pfersmann names as “strict militant democracies” (as for instance in Germany, Italy, and France).

Constitutional courts are the “final guardians of liberal democracy”,⁸¹ not the majoritarian or even hypermajoritarian parliaments, and it leads us to the necessity to develop strong analytical constitutional jurisprudence.

Traditionally, militant democracy is understood as set of procedures to outlaw political parties which programs and activities disregard major democratic principles or openly aims to destroy them. Therefore, legal scholarship produced numerous articles elaborating on party prohibition rules and procedures, introducing different models to classify party dissolutions, systemize states practices, and formulate some sort of a guide for successful practice of banning political parties. For example, Peter Niesen claims that all practices of banning political parties might be placed in three paradigms: anti-extremism, negative republicanism and civic society.⁸² His article is based on examples of constitutional provisions to outlaw political parties in Germany and Italy with some illustrations from restrictions of political speech in the same jurisdictions. Nielsen claims there are three pragmatic understandings of party bans which differ not only in the identification of their opponents and the conception of democracy they tend to rely on and the justification they offer for limiting political liberty, but also in the dangers they attempt to avert.⁸³

In the anti-extremism paradigm (which guides the German model of militant democracy) the defensive mechanism is directed against extremist political parties both from the right and left. Enemies are defined as those rejecting political institutions and values. Niesen claims there are no democratic contradictions to eliminate those political players who attempt “to do away with democratic institutions.”⁸⁴ The second model, negative

⁸¹ Pfersmann, *supra* note 1, at 68.

⁸² Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties, I, II, 3 German Law Journal* (2002), also available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=164>; <http://www.germanlawjournal.com/index.php?pageID=11&artID=169>

⁸³ *Ibid*, at 45.

⁸⁴ *Ibid*.

republicanism which we can find in Italy, identifies enemies of democracy based on their identity with those responsible for past tragic regimes of injustice. Party dissolution driven by this paradigm can be justified even when there is no apparent danger for the democracy coming from political actors identified as enemies of democracy. Their affiliation with a certain political ideology or movement is enough to eliminate their involvement in the democratic processes. Political parties with fascist and communist political agendas are prohibited not only in Italy but in some other European democracies would be a clear example of this logic applied in practice. The third paradigm offered by Nielsen, ‘civic society’ is not that clear however. He calls it a new abstraction and argues that this regime is more capable of addressing new emerging dangers and broadening the focus of protection compared to negative republicanism, but without falling back into anti-extremism.⁸⁵ The civic society view challenges, both other models, and views militant democracy restrictions as a moral duty to guarantee the reproduction of democracy. In addition, democracy is not considered as itself *protected* but rather as *protective* of minorities and later generations. This approach is based on a distinctly moral conception of democracy which is claimed to have serious advantages compare to the two other models. The major concern with Niesen’s classifications seems to be the fact that the division is not as strict as he sees it and we can find several examples when CEE countries combined different approached to develop their unique understanding of how party prohibition should be organized and functioning. Moreover, civic society approaches for which the author admits to be a pricy solution at the moment and could be afforded, probably, only by highly stable democratic systems.

Samuel Issacharoff in his article *Fragile Democracies* gives a detailed and profound analysis of what may be termed democratic intolerance based on a survey of institutional considerations surrounded by restrictions on political participation in various jurisdictions,

⁸⁵ Ibid, at 41.

including Germany, India, Israel, Turkey, Ukraine and the United States.⁸⁶ His major concern is “under what circumstances [a] democratic government may act (or, perhaps, must act) to ensure that their state apparatus not be captured wholesale for socially destructive forms of intolerance.”⁸⁷ The publication was inspired by the 2006 controversy surrounding Danish cartoon publications. This was an occasion to revisit one of the most serious issues for democratic governments: how to respond to the actions of intolerant groups in the name of preserving fundamental democratic principles without compromising democracy itself. The important contribution of Issacharoff in the militant democracy debate is that he brings to the picture jurisdictions outside Europe, the birthplace of the concept, and examines the European approach to restrictions on political activities against the US example. Issacharoff posed four questions the legislators and courts had to deal with while trying to mark the parameters on democratic participation: “(1) May a state draw a boundary around participation in the democratic process, excluding from the right of participation those who fall on the wrong side of the boundary? (2) If so, where does that boundary lie? Is it based on the ideological positions of the excluded actors, or must it turn on the immediacy of the danger they present? (3) If such determinations are to be made, is there an obligation to define legislatively the outer bounds of the right of participation? (4) if the legislator does so define the boundaries of democratic participation, must there be an independent body to implement exclusion or to avoid the temptation toward political self-dealing or settling the scores?”⁸⁸

To address these four fundamental questions, Issacharoff looks to the actual jurisprudence from democratic states confronted with internal antidemocratic challenges. The most interesting in his work is an attempt to introduce typologies of party prohibition based

⁸⁶ Samuel Issacharoff, *Fragile Democracies*, 120 Harvard Law Review 1405 (2007).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at 1415

on an approach employed to address antidemocratic mobilization. Thus, he distinguishes three type of restrictions imposed on political participation: content restrictions on electoral speech (i.e. in India), party prohibition, and party exclusion from the electoral arena (i.e. in Israel). The prohibition of political parties can be backed by three distinct rationales based on the type of threat coming from allegedly undemocratic parties which corresponds to three type of parties being traditional objects of party dissolution procedures: insurrectionary parties (for example, the Socialist Reich Party and the Communist Party from Germany), separatist parties (the Batastuna Party from Spain and Kurdish parties from Turkey), antidemocratic majoritarian parties (i.e. the famous Refah Party from Turkey). The latter is considered conceptually as the greatest challenge for a democracy.⁸⁹ This conclusion is based on assumption that the first two types of political parties do not have realistic chances to seize power. Probably, we should not be so optimistic about it and it might be risky to underestimate the mobilizing power of the politics of emotionalism (Karl Lowenstein was warning us exactly about danger of emotionalism in politics). Towards the end of his article, Issacharoff concludes that militant democracy used as a safeguard might be interpreted and applied in a way to suppress the dissent and that “in most circumstances efforts to silence parties by prohibition are ill-advised.”⁹⁰ This could happen not only because of the political will of the majority but also because of the difficulties naturally surrounding the task to define the type of threat that would justify such drastic measures as party dissolution. Moreover, political parties are accorded special and unique role in democratic process in many established democratic states and this fact only complicates the enforcement of militant

⁸⁹ Ibid., at 1442.

⁹⁰ Ibid., at 1418.

democracy provisions. However, on the condition of presence of strong procedural guarantees, “a tolerant democratic society must be able to police its fragile borders.”⁹¹

The diversity of arrangements regarding the issue of democratic self-defense caused numerous attempts at classification or typification of democratic countries.⁹² The difficulty of systemizing the approaches to militant democracy could be explained by the fact that “in terms of ‘militancy’, no two countries are ‘like peas in a pod’”⁹³ and every society “opts for the form of democracy it considers correct, fitting or tolerable”.⁹⁴ For example, a few models of classification were mentioned above, i.e. Fox and Nolte’s classification of substantive v. procedural democracies and militant v. tolerant as well as Otto Pfersmann’s thesis that democracies are always more or less militant (which was interpreted by Markus Thiel as an attempt to classify all democracies under the ‘gradual scale of militancy’).⁹⁵ Moreover, Pfersmann also mentions direct and indirect militant democracy measures in relation to the mode of limitations imposed on rights. Nevertheless, Thiel rejects one by one all the models as being impractical and bearing substantial disadvantages and suggests instead developing a model of clusters for the purpose of comparative analysis.⁹⁶ A closer look at Thiel’s clusters reveals that it rather represents a classification of militant democracy measure but not typology of democracies in relation to their arrangements in business of self-defense. Thiel offers in the concluding chapter of his book summary of militant democracy measures grouped in seven clusters.

1. The Constitutional protection of an ‘inviolable and unalienable ‘democratic core’.⁹⁷

⁹¹ Ibid., at 1466.

⁹² For a detailed account of models of classification see Markus Thiel, *Comparative Aspects* in Thiel, *supra* note 21, at 382-408.

⁹³ Ibid., at 398.

⁹⁴ Ibid.

⁹⁵ Ibid., at 396.

⁹⁶ Ibid., at 398 onwards.

⁹⁷ Thiel reveals example of non-amendable constitutional provisions from Germany, France, Italy, and Turkey and also mentions that there could be examples of sub-constitutional law provisions of a similar character.

2. The treatment of extremist political parties and other organizations, and of their members.⁹⁸

3. Provisions and measures taken against organizations and persons misusing their fundamental rights and freedoms to abolish the democratic system or its core values and principles.⁹⁹

4. Regulations and measures taken against institutions of the state, especially the government and the judiciary, which are preparing or conducting a *coup d'état* by the extirpation of the prevailing democratic structures or which are obviously and considerably violating fundamental constitutional law.¹⁰⁰

5. Regulations on the administrative protection of the constitution.¹⁰¹

6. Legal provisions regarding a 'state of emergency', a 'state of siege' or the 'state of war'.¹⁰²

7. All other regulations and provisions that cannot be classified as belonging to the other clusters or form an own cluster, or that actually have no direct connection to the 'militancy' issue, but contribute to the protection of the democratic system and the constitution.¹⁰³

Thiel's system of clusters is based on the Loewenstein's fourteen groups of militant democracy measures, but formed into smaller groups. The author of this scheme attempts to

⁹⁸ The ban or dissolution of political parties and other organizations is considered by the author as 'core element' of militancy.

⁹⁹ Thiel mentions here Germany's provision of forfeiture of rights, as well as broader notion of hate speech, incitement to sedition or violence.

¹⁰⁰ The core provision in this cluster would civil servants duty of loyalty and specific to Germany only 'right to resist' in Article 20 of the Basic Law as well as possibility to file a motion of impeachment in cases of deliberate infringement of the constitution (Article 61 of the Basic Law).

¹⁰¹ By administrative protection of the constitution the authors means legal provisions regarding the activities of special authorities or, in general, intelligence services in charge of the protection of the constitution against internal threat.

¹⁰² The author accepts that these provisions may be regarded as a marginal for the militant democracy debate, but nevertheless they secure the functionality of the system even in extraordinary situations.

¹⁰³ For example, the requirement of a qualified majority to amend the constitution or regulations that enumerate the acceptance of the constitutional order as an educational objective.

widen the list of militant democracy measures back to the original understanding, which goes against at least the contemporary constitutional practices. The domain of militant democracy is understood and applied in practice in a different mode now. There is little problem excluding at least clusters 6 and 7 as they appear to be misleading in defining which measures could qualify as manifestation of a militant democracy state. For the purpose of this project, the German model of a militant democracy state and list of measures we could find there is an excellent starting point. Nevertheless, to have a more updated picture of what amounts to constitutional militancy, it is important to study the current practice of modern democracies as the German model was modified and some more elements were added, especially in the last decade. The extension affects, however, rather the type of threats militant democracy could help to address but not measure. Further clarification of what is a militant democracy state could be given from the following sections. Their purpose is to provide a borderline between militant democracy measures and other regimes of rights limitations as well as to capture the most recent practical developments in the arsenal of militant democracy and areas of its application.

The above analysis covers few, yet representative scholarly works on militant democracy theory. The purpose of this overview was to demonstrate the intensity of the debate and numerous issues arising from the presence of militant democracy notion in constitutional theory and practice. The subsequent sections of this chapter will introduce the understanding of militant democracy issues for this particular research and provide brief sketch of major concerns to be addressed in the following chapters.

1.1.3. The Current Understanding of Militant Democracy: The Notion of Militant Democracy used for the Current Project

The very purpose of this project is to investigate how the concept of militant democracy is applied by modern democracies, what are the major challenges of the doctrine, and if there is a strategy to address those challenges and critiques. However, it is important to emphasize the current theoretical and practical interpretation of the doctrine and what understanding of militant democracy would be used in this project.

There is no universal definition of militant democracy agreed upon by all the scholars involved in the debate on militant democracy and related issues. While every author would try to come up with his own definition, most of them refer to the same qualities of democracy added by the term ‘militant.’ One of the most comprehensive definitions reflecting the major ideas of the founding fathers of militant democracy and current constitutional practices was given by Otto Pfersmann: militant democracy is a political and legal structure aimed at preserving democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population.¹⁰⁴

Macklem defines militant democracy as “a form of constitutional democracy authorized to protect civil and political freedoms by pre-emptively restricting their exercise in order to guard the democratic character of a constitutional order”.¹⁰⁵ Gregory H. Fox and Georg Nolte narrows down militant democracy to a set of measures to prevent the change of a state’s own democratic character by the election of anti-democratic parties.¹⁰⁶ Samuel Issacharoff in his article defined militant democracy as “mobilization of democratic institutions to resist capture by antidemocratic forces. The aim is to resist having the

¹⁰⁴ Pfersmann, *supra* note 1, at 47.

¹⁰⁵ Macklem, in *supra* note 54, at 1.

¹⁰⁶ Fox & Nolte, *supra* note 56, at 6.

institutions of democracy harnessed to what may be termed “illiberal democracy.”¹⁰⁷ Paul Harvey refers to militant democracy as a system “capable of defending constitution against anti-democratic actors who use the democratic process in order to subvert it.”¹⁰⁸ Similar distinct features of militant democracy could be derived from Miguel Revenga Sanchez’s article where militant democracy is defined as the one which has the appropriate means to confront the actions of those who attempt to destroy them by taking advantage of the many opportunities to do so, present in an open society.¹⁰⁹

Therefore, there are at least a few distinct features of the notion of militant democracy to delineate it from a tolerant constitutional democracy. First of all, militant democracy is of a preventive character and states are not expected to wait once those who aim to destroy or overturn the system have real opportunities to do so. Moreover, militant democracy represents a prescribed mechanism to take pre-emptive actions, i.e. militant democracy represents a constitutionally authorized departure from majoritarian democracy. Second, such pre-emptive measures are aimed against a specific ‘enemy’: individuals or group(s) of individuals aiming to harm the democratic structures of the state. Thirdly, enemies are aiming to harm democratic structures by abusing rights given to them by the democracy and open society. Finally, militant democracy is aimed to preserve the democratic nature of the state, which in narrow interpretation differs substantially from national security, public order and public safety.

For the purpose of this project militant democracy is defined as a legal and political structure possessing legal opportunities to preserve democracy by taking preventive actions against those who want to overturn or destroy democracy by utilizing democratic institutions or procedures. As ‘militant democracy’ was turned many years ago into a practical

¹⁰⁷ Issacharoff, *supra* note 86, at 1409.

¹⁰⁸ Harvey, in *supra* note 52, at 408.

¹⁰⁹ Sanchez, in *supra* note 52.

constitutional phenomenon it does not make sense to make distinction between militant democracy and a militant democracy state. Most of the examples, cases and analysis in this project are based on practical observations, therefore the term ‘militant democracy’ would be used not as a mere theoretical concept but rather as manifestation of its major principles in the constitutional practice of democratic states.

Nevertheless, it is important to note that the term ‘militant democracy’ is still a jarring one and, despite the substantial constitutional practice on this matter, many questions, concerns, and challenges remain unresolved. In what follows I would make an attempt to address most of them with the purpose of demonstrating how the concept is implemented in different jurisdictions, what it is used for, how states manage to address critical remarks about the militancy of their constitutional system and answer the question if militant democracy is worth being utilized in modern constitutional democracies.

1.2. Militant Democracy’s Justification: Theoretical Debate and Practice

1.2.1. Militant Democracy: Standard Theoretical Justification

The idea to protect democracy from its potential enemies sounds nice and plausible; however, it is impossible to deny that militant democracy by its preventive and open-textured nature is a rather problematic concept. The course of actions proposed by militant democracy can be considered as contradictory to the very nature of a liberal democracy¹¹⁰ and the concept can survive and overcome the criticism only if it is proved to be justified. Therefore, it is important to see what constitutional theory offers as a standard justification for militant

¹¹⁰ O. Pfersmann summarized the controversies of militant democracy as centered around four questions: 1) Whether or not such measures are compatible with the very nature of the democracy and if so 2) Whether or not and in what manner such provisions effectively promote democracy; 3) The precise legal meaning of the provisions as well as the way in which they should be legally applied; and, 4) How they are effectively applied in concrete instances. See, Pfersmann, *supra* note 1, at 52.

democracy measures and compare it later against the militant democracy justification as employed in practice.

As Karl Loewenstein was the one who introduced term ‘militant democracy’ and offered a systemized account of militant democracy measures and their justification, it makes sense to begin with his arguments. A brief summary of Loewenstein work was given at the beginning of this chapter, especially in relation to his criticism of democratic fundamentalism and legalistic blindness. However, a reservation should be made about Loewenstein’s and the arguments of others developed at around the same time. *Militant Democracy and Fundamental Rights* was written at the time when the growing popularity of fascism was accompanied by the strong assumption that “no country whatsoever is immunized from fascism as a world movement.”¹¹¹ On the eve of one of the most tragic events of the twentieth century, legal and political scholars were under serious emotional pressure if not panic writing their commentaries and recommendations. Consider for example Loewenstein’s words:

“I prefer to be hysterical now instead of being melancholy later. . . . I prefer dictatorship by democrats and decent people to permanent dictatorship by rogues and hooligans. We are at war, war demands emergency solutions. [It is] a risk and a gamble but we have no choice. The best defence is precaution.”¹¹²

Apparently, for Loewenstein, the events of fascist movements and their success in grasping powers in many European states amount to a war declared against democracy and, therefore, emergency measures were needed to be taken. He cites Leon Blum’s observation that “during war legality takes vacations”¹¹³ and suggests a militant stand of democracy as a tool to fight this war. Further arguments from Loewenstein’s work are built around specific

¹¹¹ Loewenstein, *supra* note 5, at 658.

¹¹² Cited in Horkheimer, "Militant Democracy," and War by Joseph W. Bendersky available at http://www.telospress.com/main/index.php?main_page=news_article&article_id=303.

¹¹³ Loewenstein, *supra* note 5, at 432.

features of fascism as a political technique and the politics of emotion in general. Accordingly, fascism is not an ideology but purely a political technique aimed at retaining power at any cost. The technique was successful mainly because it managed to detect weak points of democratic fundamentalism and adapt perfectly emotionalism as a uniting force to seek for more supporters. Emotionalism is perceived by Loewenstein as one of the biggest threats to democracy and in the 1930s; most democracies were not ready to accept such a threat and take any actions to address the weakness of the democratic regime. However, he deemed democracies as incapable of meeting an emotional attack by an emotional counter-attack as democratic governments could appeal only to reason.¹¹⁴ Times when people were ready to die for liberty passed and ‘democratic romanticism’ turned into self-contradiction. Therefore, democracy can defend itself only through political and legislative means.

Loewenstein was, however, aware of the possible critique of the solution he suggested to democratic theory and practice,¹¹⁵ but he offered a justification for possible negative outcomes on fundamental rights and freedoms. Loewenstein believed that liberalism is a spiritual movement that survived different hardships, but nevertheless conquered the world in the second half of the nineteenth century. Democracy proved to be a deathless idea. In the light of these considerations the solution is easy: once fundamental rights are institutionalized and being taken seriously, their temporary suspension in the name of democratic self-preservation is justified. He continues that “if democracy believes in the superiority of its absolute values”¹¹⁶ over the politics of emotions, it must meet the demands of reality and take “every possible effort”¹¹⁷ to rescue it, “even at the risk and cost of violating fundamental

¹¹⁴ Loewenstein, *supra* note 5, at 428.

¹¹⁵ For example, in the first essay he investigates the question of “can an idea be suppressed”.

¹¹⁶ Loewenstein, at 432.

¹¹⁷ *Ibid.*

rights.”¹¹⁸ The ultimate end of a liberal government is human dignity and freedom; therefore, legality could be sent on temporary vacation in order to ensure the move towards this end.

We can find similar grounds of justification in the works of the well-known defender of the state governed by the emergency rule, Carl Schmitt. One of his arguments relevant for this particular moment is his claim that constitutional theory and practice should pay more attention to the so-called unalterable core of the constitution. His book *Legality and Legitimacy*¹¹⁹ was published just a year before the collapse of the Weimar Republic. It envisaged his view of a political community based on four features: antirationalism, totalitarian etatism, an otherworldliness tied to antidemocratic sentiment, and otherworldliness tied to the particular notion of sovereignty.¹²⁰ He saw the problem of democratic states in their adherence to the robust regime of proceduralism: in the absence of certain substantive norms democracy becomes defenseless against organized political forces such as communists or national socialists. It was already outlined above that Schmitt argued in favor of certain substantive principles in the democratic constitutions which cannot be ignored or abolished even when the prescribed procedure is fully followed.¹²¹ The idea of the unalterable core could serve as a perfect ground to legitimize democracy’s self-protective measures. So, the Schmittian justification of the militant character of democracy is justified due to the existence of the paradox of majority rule when the foundations of the constitutional order can be suspended through a prescribed procedure.

The possibility that procedure might assist in overthrowing democratic principles and structures seems to be sufficient to introduce some preventive measures. Unfortunately, later

¹¹⁸ Ibid.

¹¹⁹ Carl Schmitt, *Legality and Legitimacy*, Translated and edited by Jeffrey Seitzer with an introduction by John P. McCormick (2004).

¹²⁰ See Review by Benjamin Gregg, Department of Government, University of Texas at Austin at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/schmitt804.htm>.

¹²¹ Fox & Nolte, *supra* note 56, at 19.

Schmitt interpreted Blum's observation that legality takes vacation during the war differently than Loewenstein. Schmitt argued for the replacement of parliamentary governance during an emergency in favor of the executive ruling (the idea implemented fully by Hitler's government when rule of law was suspended and replaced by the executive orders). Carl Schmitt argued that the executive officer captures the people's will better than parliamentary majority and therefore in times of emergencies democracies should behave accordingly.¹²² While the latter argument has not been welcome in constitutional theory for a long time now, nevertheless his argument in favor of the unalterable core of the constitution was widely followed in the aftermath of the Second World War, and the need for such phenomenon is justified by tragic events in the past.

In other words, a democratic constitution should not be a suicide pact and should incorporate some guarantees of its self-preservation to prevent the suspension and alteration of the very basic democratic features of the current constitutional structures.¹²³ A parallel can be drawn with an individual selling himself into slavery.¹²⁴ In the same line of arguments, democratic principles encouraging dissent and arguments over important public issues cannot be understood as permitting their alienation.¹²⁵

Another set of arguments related to the possible justification of the militant democracy comes from the debate on toleration of intolerant political players (in a broad sense of this word, i.e. including all voters and all kinds of their associations). The intolerant

¹²² For a detailed account of Carl Schmitt's theory of emergency powers see for example John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers in Law as Politics. Carl Schmitt's Critique of Liberalism* 217-251 (1998) John P. McCormick, *Emergency Powers*, in John P. McCormick, *Carl Schmitt's Critique of Liberalism* (1999).

¹²³ This could also be referred to as the 'paradox of democracy' explained earlier in this Chapter.

¹²⁴ Fox & Nolte cite the following piece from John Stuart Mill, *On Liberty* (1962): By selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom]. Mill himself borrows his argument from Humboldt.

¹²⁵ For details on debate over skepticism about all viewpoints as saving the value of freedom see FN 64 in Fox, & Nolte, *supra* note 56, at 16.

reaction from the side of democracy is justified by the mere presence of intolerant political players. As was already mentioned earlier in this chapter, Karl Popper claimed that “unlimited tolerance must lead to the disappearance of tolerance.”¹²⁶ Intolerance could be invoked for the sake of preservation of tolerance. John Rawls examines the problem of toleration of the intolerant from the perspective of justice. As Fox and Nolte summarize his position on this matter, Rawls argues that intolerance is permitted but only if there are “some considerable risks to our legitimate interests.”¹²⁷ Unless there are any threats of this kind, citizens, in general, should rely on the power of their democratic institutions. Moreover, Rawls believes that in most cases intolerant groups will lose their intolerance and accept the liberty of conscience. While this argument might be valid for stable democratic regimes, there is not much confidence that the same should happen easily in transitional democracies or democracies facing internal struggle between different groups of citizens over various matters of social and political life (i.e. religious, ethnic, national groups, etc).

The final argument from the most recent works to be mentioned here is Andras Sajo who claims that the state’s most natural characteristic is self-defense and militant democracy can be justified on a similar stand.¹²⁸ Democracy based on majority rule might give an opportunity to deform a democracy and establish a regime that dissolves democracy. The instinct of democratic self-preservation is inherent to the nature of the democracy which otherwise does not make sense and is subjected to the threat of being overthrown from inside. Moreover, democracy is often less self-sensitive where specific historical experience and reasons dictate so and lead democracy towards a precautionary character.¹²⁹

¹²⁶ Popper, *supra* note 9, at 546.

¹²⁷ Fox & Nolte, *supra* note 56, at 18.

¹²⁸ Andras Sajo, *Militant democracy and Transition Towards Democracy*, in Andras Sajo (Ed.), *Militant democracy* 213 (2004).

¹²⁹ *Ibid.*, at 215.

Therefore, a militant democracy justification is context-dependant in each particular case. The justification of militant democracy measures invoked in practice would be an issue for analysis of the following case-study chapters and will be summarized in the concluding part of this project in order to reconcile theory and practice and see how above arguments were interpreted in the constitutional jurisprudence of various democracies.

To sum up, constitutional theory offers few justifications for the militant stand democracy can take towards its potential enemies. First of all, democracy is a great idea as such but has certain problems and weak points. Those being aware of ideas of democratic fundamentalism might develop political technologies adjusted to such phenomenon and use it for the purpose to destroy the democratic order. In order to avoid such unfortunate events, democracy should overstep its legalistic blindness and be prepared to neutralize one of the major enemy of democracy, namely the politics of emotions. While this enemy was identified in Karl Loewenstein's essays, political populism is still a troubling feature of many modern democratic states.¹³⁰ Furthermore, a purely procedural view of democracy cannot guarantee that a majority will not decide to vote one day that a tyrant should rule and democracy should be abolished and replaced with another regime. The only possibility to prevent such developments is that democracy becomes substantive and takes into account the content of majority decisions. Militant democracy measures are invoked only towards disrespecting democratic rules. So, unless someone intends to use democratic institutions to abolish the democracy, citizens and their associations are safe from being suppressed and limited in their freedoms under the militant democracy rational. This reaction of democracy is explained by

¹³⁰ For example, right-wing populism is present in the political environment of some European states. See, for example, Chantal Mouffe, *The Limits of Liberal Pluralism: Towards an Agonistic Multipolar World Order*, in Andras Sajó, *Militant Democracy* 71-74 (2004). For a detailed account of populist politics in Central and Eastern Europe see Grigorij Meseznikov, Olga Gyarfasova and Daniel Smilov, *Populist Politics and Liberal Democracy in Central and Eastern Europe* (2008).

paradox of tolerance which means that unlimited tolerance towards democracy's enemies could be detrimental for democracy.

However, militant democracy can impose some limits not only on the substance of the majority decisions, but also prevent the situation of the 'majority captured by intolerant minority.' There were examples in the past when intolerant minorities utilized the weaknesses of the democratic structure and managed to grasp the power and abolish the democracy without the support or consent of the majority (i.e. the Weimar Republic). The preventive nature of the militant democracy aimed at preservation of the democratic structures and the ultimate goal of protecting rights and dignity can 'filter' such movements and stop them before an intolerant minority empowers itself to the degree where it is able to damage or even abolish a democracy.

There are two final points relevant to the debate on militant democracy's justification, both dictated by the practice. The first observation is that at the moment there are no realistic alternatives to militant democracy in the business of rescuing democracy when its existence is endangered. The idea that "democracy should refrain from providing legal regulations and measures of a 'militant' provenance and (mainly or solely) rely on self-regulative powers of the electoral and political processes"¹³¹ is of course very desirable, but does not sound realistic especially for young and transitional democracies.¹³² The second observation is that the necessity to have certain self-preservation measures in democratic constitutions was proved by the tragic events of the past. While it is very unlikely that something like Communism or Fascism will hit the world and existence of democracy in the foreseeable

¹³¹ Thiel, *supra* note 92, at 417.

¹³² For example, Peter Niesen argues that 'Civic Society' should be a new desirable paradigm for party ban. See Niesen, *supra* note 82. See also Gunter Frankenberg, *Learning the Sovereign* in Andras Sajó (Ed.), *Militant Democracy* 130-132 (2004); Thiel, *supra* note 92, at 417-421.

future and no declaration of rights risks today to be transformed into a ‘suicide pact’,¹³³ as the last couple of decades have demonstrated that democracy is accepted worldwide as the only structure of the state, even though it is not yet completely secured from ideological and physical attacks from within and outside. Therefore, keeping in mind the tragedies of the past, and absence of any realistic alternatives, militant democracy appears to be a justified concept as long as it is “capable of excluding conceptually and institutionally the abuse of opportunities for restricting rights.”¹³⁴

1.2.2. The Militant Character of Democracy as an Obligation Imposed by International Treaties: Additional Grounds for Militant Democracy Justification?

Previous sections had the purpose of summing up and analyzing the standard theoretical and practical justification for militant democracy measures to date. However, both parts concerned the justification for self-defensive democracy from the point of view of national or domestic legal systems. As it is a well-known fact that public international law is playing a more prominent role in the constitutional development of modern democracies (i.e. in the domain of human rights protection and adherence to democratic principles in general), it is well within a legitimate curiosity to ask if this field of law offers any guideline or suggestions on whether democracy should resort to militant democracy measures. In other words, can the militant character of a democracy be considered a positive obligation imposed on democratic states due to their participation in various international treaties?

The same question is being raised and discussed recently in legal scholarship quite often, but the first comprehensive contemporary account of the state of international law on the question of militant democracy was given by Fox and Nolte in their famous article on

¹³³ Sanchez, *supra* note 52, at 6.

¹³⁴ Sajo, *supra* note 128, at 211.

intolerant democracies.¹³⁵ They discuss, at length, if contemporary international law favors the substantive or procedural view of democracy and if there is an obligation to the international community to maintain democratic government. As to the first query, the authors claim that international law in general favors the substantive view of democracy, but at the same time it does not entirely reject the procedural view.¹³⁶

There are few examples from international treaties that can be cited in support of the argument that a substantive stand of democracy is more welcomed than procedural in public international law. For example, Article 22(2) of the *International Covenant on Civil and Political Rights* (ICCPR) is considered as providing a typical example that certain key rights may be restricted when “necessary in democratic society.”¹³⁷ Further, the authors refer to other similar limitation clauses and adopt the conclusion of Oscar Garibaldi that the notion of “democracy” used by the ICCPR describes a traditional Western society in which the panoply of rights established by the human rights instruments is respected in practice.¹³⁸ Moreover, additional support of this argument can be found in the EU accession criteria (known as the Copenhagen criteria)¹³⁹ and the Council of Europe membership requirement.¹⁴⁰ This view,

¹³⁵ Fox & Nolte, *supra* note 56, at 38-59, 59-68.

¹³⁶ *Ibid.*, at 38.

¹³⁷ **Article 22(2)** of the ICCPR reads as follow: “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

¹³⁸ Fox & Nolte, *supra* note 56, at 39. Authors refer to Oscar M. Garibaldi, *On the Ideological Content of Human Rights Instruments: The Clause “In a Democratic Society*, in L. B. Sohn, 23 *Contemporary Issues in International Law: Essays in Honour* (Thomas Buergenthal ed., 1984) and also mention that similarly. John Humphry suggests that “the General Assembly meant by democratic society the kind of society in which the rights enunciated by the Universal Declaration of Human Rights are recognized and respected.” John P. Humphry, *The Just Requirements of Morality, Public Order and The General Welfare in a Democratic Society*, in The Ronald. St. J. MacDonald & John .P. Humphry (Eds.), *Practice of Freedom* 137, 147 (1979).

¹³⁹ European Council in Copenhagen, 21-22 June 1993. Conclusion of the Presidency. Article 7(A) (iii) states that “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹⁴⁰ Statute of the Council of Europe adopted on the 5th of May, 1949. **Article 3:** Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of

however, led to the conclusion that human rights instruments do not directly answer the question of whether democracy can legitimately limit rights of anti-democratic actors.¹⁴¹

Therefore, Fox and Nolte seek for the answer in the evaluation of practice of banning political parties and groups combined with the ‘abuse clause’ provided in Article 5(1) of the ICCPR.¹⁴² After an analysis of the UN and regional practices in conjunction with the Article 5 provisions through the notions of abuse clause, standards of reasonableness, necessity, and states of emergency, the conclusion is that public international law allows for actions against anti-democratic parties and states can do it pre-emptively by enacting democracy’s self-protection legislation.¹⁴³ A parallel can be made here with widely accepted prohibition of hate speech and dangerous religious movements. For example, the European Court of Human Rights (ECHR) does not see as a problem in the prohibition of provocative and offensive speech.¹⁴⁴ Therefore, militant democracy measures at least do not fall into contradiction with international human rights standards and it might be concluded that a substantive view of democracy is supported to some extent by public international law. This finding adds to the legitimacy of the concept as long as it is practiced within the general rules and principles of rights’ limitations. However, it still does not answer the question if democratic states have an

human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I. *Article 4*: Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe. **Article 8**: Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

¹⁴¹ Fox & Nolte, *supra* note 56, at 39.

¹⁴² **Article 5(1)** reads as follows: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

¹⁴³ Fox & Nolte, *supra* note 56, at 59.

¹⁴⁴ For example, in *Garaudy v. France* Admissibility Decision (Application No. 65831/01) the European Court of Human Rights reminded that freedom of expression has limits and declared that “there is no doubt that, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10” and that there is “a category [of] clearly established historical facts – such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17.”

obligation to preserve democracies in their homelands, and if a state party might be requested to enact self-protection legislative measures.

Fox and Nolte also tried to answer whether the international community can dictate to the people of a particular nation on what kind of constitution and social contract they should adopt. The general observation is that citizens of each state should decide themselves if they want to live in a democracy formed by the constitutional 'suicide pact.' However, some provisions in international human rights treaties send a very strong message that certain things are not allowed even if they are approved by the political majority (i.e. torture or slavery).

In this line of argumentation, Fox and Nolte bring an example of an international duty to "hold genuine periodic elections."¹⁴⁵ Therefore, it means that states are obliged at least to protect their democratic systems from potential rulers who would be attempting to abolish this rule. This argument might be developed further to the extent that state parties are obliged to protect their democracies in general from overthrowing itself and not only when it comes to elections. However, even if we establish that duty not to abolish democratic rule exists under public international law, it does not automatically follow that states can be required to enact appropriate preventive measures to comply with this duty. Provisions requiring state parties to adopt legislative and other measures to give effect to the listed rights¹⁴⁶ do not offer much help as they describe state obligation at a very general level. In the end, Fox and Nolte arrive to the conclusion that "while the international community may define a permissible range of responses to authoritarian movements it should not dictate a choice among them."¹⁴⁷

¹⁴⁵ I.e. **Article 25(b)** of the ICCPR or Article 3 of the Protocol 1 to the European Convention on Human Rights.

¹⁴⁶ I.e. **Article 2(2)** of the ICCPR which requires that "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

¹⁴⁷ Fox & Nolte, *supra* note 56, at 69.

Fox and Nolte published their article some time before the ECHR adopted its famous and controversial judgment on the *Refah Partisi* (Welfare Party) case (however, the ECHR did have several party ban decisions before the Refah case, too).¹⁴⁸ The judgment not only stormed political and legal debate but also offered some solutions to the question at stake in this section. Markus Thiel is of the opinion that the case was decided in the same stance as a forfeiture of fundamental rights concept familiar to the German militant democracy model. The major lesson from this piece of jurisprudence according to Thiel is that the ECHR approved and allowed the practice of a defensive democracy, including the possibility to ban political parties endorsed in constitutional legislation. While it does not prove that there is a duty imposed on contracting parties to enact militant democracy measures, the mere acceptance of such practices is an additional argument for militant democracy justification.

A more rewarding move to answer our question is to take a look at the European Union where we can find duty to take democracy-protecting measures and failure to do so is subjected to certain sanctions. The issue came to the stage as early as in 1992 when the *Treaty of the European Union* was drafted. Markus Thiel cites Article 6(1) which states that “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member State.”¹⁴⁹ In case the principles are breached the Member State might be suspended from

¹⁴⁸ To be discussed in details in Chapter 3.3, at 122.

¹⁴⁹ Former **Article 6(1)** (before the adoption of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007) read as follows: 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Similar but modified provision can be found in Article 2 of the current version of the Treaty on European Union: 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.

some of its rights.¹⁵⁰ Therefore, the possibility of such sanctions demonstrates that the EU is not only aware of possible threats to the fundamental principles of democracy but can indirectly oblige the member states to react and provide defensive legal mechanisms to assist in democracy's survival in a member state.

Another interesting account of the problem is given by Eva Brems¹⁵¹ who emphasizes that Article 4 of the *Convention on the Elimination of all Form of Racial Discrimination* requires states to proscribe racist organizations.¹⁵² This requirement can legitimately be expected to be extended to the prohibition of political parties, at least in case they are driven by a racist political agenda and motives. Rory O'Connell provides another example which is in general within the same vein of argument as Eva Brems' comparison.¹⁵³ He brings the recently decided case from Spain on the prohibition of the Batasuna Party.¹⁵⁴ O'Connell argues that the Court's judgment seems to envisage the possibility to impose a positive obligation to ban certain parties.¹⁵⁵ The Strasbourg Court accepted the governmental actions to outlaw the Batasuna Party due to the presence of evidence of support for political violence. However, as O'Connell claims, the Court "also went on to indicate that such a conclusion was

¹⁵⁰ **Article 7(2)** as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007: The European Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. (3): Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

¹⁵¹ Eva Brems, *Freedom of Political Association and the Question of Party Closures*, in Wojciech Sadurski (Ed.), *Political Rights Under Stress in 21st Century Europe* 131 (2006).

¹⁵² **Articles 4(b)** impose obligation to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law".

¹⁵³ Rory O'Connell, *Realising Political Equality: the European Court of Human Rights and Positive Obligations in a Democracy*, 61 Northern Ireland Legal Quarterly 3 (2010).

¹⁵⁴ *Herri Batasuna v Spain* (2009), Applications No. 25803/04, 25817/04.

¹⁵⁵ O'Connell, *supra* note 153, at 277.

in accordance with the state's positive obligations.”¹⁵⁶ The reader is immediately warned though that paragraph 82 of the judgment should not be read as an explicit declaration of the positive obligation to ban the party (and most probably the Court said so to add the legitimacy to the national authorities actions), but “leaves open the possibility to argue that the state may have a duty to ban certain political parties.”¹⁵⁷

To sum up, scholars seem to be cautious and skeptical to state that militant democracy measures can be perceived as positive obligations imposed by public international law. However, there are some signs of moving towards the development of such an obligation, at least in certain cases and in certain international institutions (while it must be accepted that the European Union is a specific international organization; therefore it is not desirable to measure other human rights treaties' provisions from this stand). Nevertheless, public international law promotes a rather substantive view of democracy and does not contain any rules to conclude that militant democracy measures as such are contradictory to the states international obligations. The consistency with international human rights standards should be assessed on a case-by-case basis but in general states are allowed to utilize measures to protect democracy.

1.2.3. Militant Democracy: Distinct Object and Purpose of the Protection as Additional Argument in Favor of Militant Democracy Justification?

One of the grounds for militant democracy justification is the special object of its protection. Therefore, the issue of object of protection and purpose of militant democracy should be further examined in order to see if it adds anything to the justification debate. In vague terms militant democracy aims to protect the ‘core of the constitution,’ or the basic constitutional structure crucial for the very existence of the state, and functioning as a democracy. To

¹⁵⁶ Ibid., at 278.

¹⁵⁷ Ibid.

elaborate on this issue from the point of view of constitutional theory is not easy as each state defines and understands the ‘core of the constitution’ in its own way influenced by the text of the constitution and local conditions, including past experience of totalitarian and other non-democratic regimes. Therefore, some reference to the constitutional practices is inevitable here.

The easiest and the most logical answer to the question posed above can be found in Germany. The doctrine of militant democracy was incorporated in the democratic constitution (Basic Law) of 1949 and the document spells out precisely what it means to be a militant democracy state. In Germany, militancy does not have a solely descriptive or emblematic character. Rather it “is a constitutional principle with a substantive content of its own: the Basic Law is more ‘militant’ than the sum of its militant elements.”¹⁵⁸ German Basic Law also clarifies what militant democracy stands for, and what it is intended to preserve; the so-called ‘free democratic basic order.’ This expression is directly mentioned a few times in the text of the constitution (i.e. Article 18, 21(2) and 91(1) and is congruent with the so-called ‘eternity clause’ of Article 79(3). Moreover, the Federal Constitutional Court of Germany defined the notion of ‘free democratic basic order’ as early as 1952 in the following way:

The free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self determination of the people as expressed by the will of the existing majority and upon a freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi party principle; and equality of opportunities for all political parties.¹⁵⁹

¹⁵⁸ For elaborated account see e.g. Thiel, *supra* note 158, at 115; Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 217 (1997).

¹⁵⁹ Thiel, *supra* note 158, at 116.

Therefore, from this explanation it is possible to draw at least two important conclusions. First, militant democracy protects certain qualities of the state rather than an individual rights directly (noting that at the end protection of democracy is about rights, where ultimate end is human dignity and freedom). Secondly, it imposes certain limitations on fundamental rights as citizens and their groups are expected to behave in their political participation in a way compatible with the ‘free democratic basic order.’

Substantive democracy where majority rule is meaningful is based on the assumption that majorities are fluid. Following this assumption, citizens should be able to join or rejoin the majority and for that they must enjoy a core of political rights that ensures effective participation.¹⁶⁰ At the end, a central task for modern constitutionalism is “to seek to preserve and sustain ground rules of political competition that enable parties to compete for political power on fair and appropriate terms.”¹⁶¹ Therefore, the more precise task of militant democracy is to ensure that democratic procedures are not an end in themselves but a means to create and preserve a political space where citizens enjoy essential rights for meaningful political participation. This task extends further to the more general mission of preserving a democracy in general since the functioning of democratic procedures would prevent attempts to overthrow the democratic order.

To identify the ‘core of the constitution’ in other jurisdictions is not an easy task. Unlike Germany, not many modern democracies declare themselves as a ‘militant democracy state’ and therefore, their constitutions does not contain a direct reference to militant democracy measures and the object of protection. Some constitutions contain separate

¹⁶⁰ Fox & Nolte, *supra* note 56, at 16.

¹⁶¹ Richard Pildes, *Political Parties and Constitutionalism*, 179 New York University Public Law and Legal Theory Working Papers (2010).

chapters or parts called ‘general principles’¹⁶² or ‘fundamentals of the constitutional order’.¹⁶³ In such cases the core of the constitution could, probably, be derived from such parts of the text. Nevertheless, the militant democracy logic can be traced in constitutional norms in various jurisdictions exactly through the accentuating of certain principles as crucial for the democratic order. For example, the 1958 constitution of France precisely forbids abolishing the republican form of government.¹⁶⁴ While Article 89 is brief, the non-amendable character of the ‘republican form of government’ probably assumes to include many other principles, the list of which would be close to what the German Federal Constitutional Court referred to as ‘free democratic basic order’. There are also substantial differences in what democracies perceive as core principles which should be guarded through militant democracy measures. For example, Turkey is an interesting example as its Constitution and overall political project is particularly keen on the principle of secularism and the state’s territorial integrity.¹⁶⁵ Under the slogan of protecting the state’s integrity Turkey ended up denying the existence of any minorities apart from the ones mentioned in the 1929 *Treaty of Lausanne* and imposing serious limitations on religious and ethnic minorities. The principle of secularism was interpreted in a way to deny any possibility of religion to be present in public. While the principle of separation of politics and religion is not unusual and even in the United States the non-establishment clause of the First Amendment might qualify somehow as a militant democracy measure protecting the secular

¹⁶² For example in Turkey. Part 1 ‘General Principles consists of eleven articles’: I. Form of the State II. Characteristics of the Republic III. Integrity of the State, Official Language, Flag, National Anthem, and Capital IV. Irrevocable Provisions V. Fundamental Aims and Duties of the State VI. Sovereignty VII. Legislative Power VIII. Executive Power and Function IX. Judicial Power X. Equality Before the Law XI. Supremacy and Binding Force of the Constitution .

¹⁶³ Chapter 1 of the Russian Constitution which consists of 16 Articles is a valid illustration of such arrangement.

¹⁶⁴ **Article 89** reads as follows: The republican form of government shall not be the object of any amendment. Full text of the Constitution available at the National Assembly website: <http://www.assemblee-nationale.fr/english/8ab.asp>

¹⁶⁵ For details see Chapter 4.2, at 208.

character of the state. Nevertheless, some jurisdictions interpret the core of the constitution as allowing serious limitations of rights without proper justification. The example of India is also worth mentioning here, mainly for its emergency situation provisions and practice.¹⁶⁶

Additionally, the object of militant democracy measures can be traced from the types of enemies it wishes to eliminate. For example, many post-communist European states incorporated militant democracy measures in their new constitutions to protect their democracy from being occupied by the previous rulers, i.e. communists.¹⁶⁷ In other words, militant democracy would very often attempt to protect the status quo in order to prevent the previously known enemies to have another chance to harm the system. Moreover, the protection of the secular character of the state and strict separation of politics and religion became a serious concern for many western-type democracies. This can be concluded from the type of political parties prohibited from politics, i.e. political parties based on religious and/or ethnic affiliation.¹⁶⁸

Militant democracy aims to protect the constitutional security of the state, which is different from public order and national security. The militant stand of democracy is aimed to prevent possible harm to democracy through preventive actions, i.e. taken before the threat or some concrete actions occur. Militant democracy cannot help to protect society against violent riots, natural disasters, open calls to violence, formation of paramilitary forces, etc.

¹⁶⁶ While a state of emergency is different from militant democracy, in the case of India it demonstrates how different ‘core of the constitution’ could be in its content. For example, emergency powers constitutionalized in Article 356 of the Indian constitution were invoked in peace times about 100 times already. While the task of preserving peace and democratic order in a country like India should be extremely difficult due to its diverse social structure, but probably the State interprets the ‘core principles of democracy’ broader than many other democracies.

¹⁶⁷ For details see Sajo, *supra* note 128; Wojciech Sadurski, *Political Under Stress in the 21st Century Europe* (2006). The Constitution of Poland is a good illustration of such a policy: **Article 13**: Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.

¹⁶⁸ See for example **Article 11(4)**: There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent usurpation of state power in Bulgaria. Constitution of Bulgaria in English is available at <http://www.online.bg/law/const/const1.htm>.

Militant democracy is called to secure constitutional comfort in the field of political participation in a society's life in its broad sense, i.e. not only the right to vote. Militant democracy's major concern is to take care of the possible abuse of political process while to ensure all individuals are able to make choices in structuring their forms of social life.¹⁶⁹ Therefore, any movement that intends to establish through democratic means (i.e. freedom of speech, association, religion, etc.) a regime where individuals would be denied exit rights allowing them to leave freely pre-established and coercive forms of social representation, would provoke the attention of militant democracy measures.

To sum up, constitutional theory does not offer much clarification in terms of what exactly militant democracy protects and what it protects from, apart from vague phrases and expressions. Therefore, the answer to this question should be sought in constitutional practice (as well as many other concerns and puzzles related to the militant democracy concept). The scope of militant democracy protection would be, most probably, different in every democratic state, also due to the fact that the definition of 'democracy' still remains one of the fundamental questions of political theory, engaging statesmen and philosophers in debate since ancient times.¹⁷⁰ The fact that militant democracy is context-sensitive and each state could offer various justifications to introduce militant democracy measures complicates even further the task of defining what militant democracy exactly protects. Moreover, militant democracy practice in recent years sent the message of being potentially extended towards new types of threats and therefore, a new circle of enemies of democracy might lead to the protection of new qualities of the state. Therefore, the issue of militant democracy's object of protection should be investigated more carefully through case-study of constitutional practices from various states.

¹⁶⁹ Sajo, *supra* note 128, at 210.

¹⁷⁰ Fox & Nolte, *supra* note 56, at 2.

1.2.4. Militant Democracy's Justification and Major Concerns and Challenges: Preliminary Observations

In what follows I will introduce the preliminary observations on major challenges and critique of the doctrine from the perspective of its justification. The purpose of this section is not to introduce a detailed account of all the challenges the concept faces in practice and solutions or response to those critical remarks, but rather to outline a roadmap for further chapters. In other words, it is useful to prepare a list of issues worth paying attention to while analyzing the practice of militant democracy in various jurisdictions.

First of all, militant democracy seems to be a self-contradicting concept to some extent, namely it limits rights and liberties in order to secure their existence.¹⁷¹ The idea has been vehemently criticized since its establishment.¹⁷² It is questionable whether democracy can behave in a militant way and remain true to itself. This critique could be outweighed by the argument that democracy cannot afford to remain inactive when its basic structures are being attacked and could be possibly abolished. In other words, democracy is in self-contradiction if it allows this course of action from its enemies and continues to allow the enjoyment of all democratic privileges despite their abusive exercise. Moreover, the contradiction vanishes further if we consider that there is a clear difference between those who disagree with some democratic policies and those who deny reliance on democracy as a primary process of decision-making.¹⁷³ Altogether, militant democracy targets the latter group only and the former enjoys the same level of protection as always.

Second, the justification of militant democracy in theory should not be confused with its effectiveness. In practice, the former does not presuppose the latter. Otto Pfersmann

¹⁷¹ See for example, Loewenstein, *supra* note 5, at 431; Pfersmann, *supra* note 1, at 52; Sajo, *supra* note 128, at 211 Fox & Nolte, *supra* note 56, at 6;

¹⁷² Thiel, *supra* note 92, at 417.

¹⁷³ Sajo, *supra* note 128, at 211.

outlined the problem as one of the major dilemmas of militant democracy: how it works politically and legally. It is important to admit that the application of militant democracy can be surrounded by various difficulties affecting its effectiveness. For example, in Turkey militant democracy led to the very unpleasant political climate and forced unwelcome political parties to develop a so-called ‘spare-party’ system.¹⁷⁴ In case of banning political parties the state might face an embarrassing and difficult situation if a banned party was supported by substantial number of voters (i.e. in the instance of the Refah Party case). Furthermore, preventive oppression can potentially cause serious problems as “fear breeds repression [...], repression breeds hate.”¹⁷⁵ In the case of suppression of political groups with aggressive tendencies in (behavior and reactions), there is a justified fear that limitations of their associational rights will be followed by more violence and disobedience.¹⁷⁶ However, the overall practice of militant democracy proves it as a workable and plausible solution.¹⁷⁷

Third, it is hard to define the right moment to invoke militant democracy. It is never an easy task to draw a clear line between acceptable critiques of a democratic regime and a direct or indirect attack on it. How to define the point when democracy is endangered, who can decide on it and who should initiate the procedure? A preliminary conclusion on this matter is that the judiciary should examine carefully the arguments of the government, take into account local conditions and the degree of the threat. Judicial control is imperative as militant democracy measures may come dangerously close to limiting fundamental rights. Rule of law as one of the democracy’s foundational principles presupposes judicial interference where rights are at stake.

¹⁷⁴ Kogacioglu, in *supra* note 52, at 435.

¹⁷⁵ *Whitney v. California*, 274 US 357, at 375 (1927). Cited in Sajo, *supra* note 128, at 214.

¹⁷⁶ This, for example, was a serious concern in recent NDP part dissolution case. For details see Rensmann, in *supra* note 52.

¹⁷⁷ Such a conclusion is made in the final chapter of the book compiled from case-studies of militant democracy measures in 13 jurisdictions, so appears to be somehow reliable and logical. See Thiel, *supra* note 92, at 417.

Fourth, militant democracy is a concept of an extremely political nature; therefore it inevitably poses a risk of being abused for political purposes. This could be a serious argument against the militant democracy justification. Altogether, it could be effectively addressed in democracies where fundamental rights are institutionalized and perceived as the ultimate goal of the constitutional regime. In order to prevent the possible abuse of militant democracy by the leading political groups through silencing political opponents or other unwelcomed groups, the judiciary should be actively involved in the procedure. In the European space, the potential abuse of militant democracy at the domestic level could also be addressed later by the ECHR; whose jurisprudence proves that the militant democracy concept is far from being withering away. In the same line of criticism it could be mentioned that the potential tendency of governments to force the courts to relax standards of proof in party prohibition and similar cases. Courts should be cautious in such situations and insist on complying with all procedural rules and requirements before approving a government's motion to impose limits on someone's political participations rights. The judicial control play a role of preventing political misuse of militant democracy measures and preserving legal standards of the practices to limit fundamental rights for the sake of protecting a democracy.

The list of concerns is not exhaustive and could be prolonged. However, the above outlined critical remarks shape the debate around the militant democracy concept in theory and practice. These are the questions most scholars would address in their analysis of militant democracy practice from various jurisdictions and implications for the theoretical debate.

Conclusion

The unfortunate experience of the victorious Nazi occupation of many states in the 1930s led democracy's adherents to realize that democracy cannot thrive without an institutionalized

means to protect itself against the attacks of its enemies. While democracy is not a static construction and its understanding and interpretation have changed since Loewenstein's *Militant Democracy and Fundamental Rights* essays, many of his arguments and claims are still valid nowadays. As to the contemporary theoretical debate on militant democracy, all scholarly work in this field can be divided into three groups: general theoretical observations and comments on militant democracy theory and practice; articles, comments and analysis written and published in response to constitutional development in particular jurisdictions; and, scholarly works which speak about militant democracy, but from different and not widely discussed angles. The overview of the literature demonstrates the intensity of the debate and numerous issues arising from the presence of the militant democracy notion in constitutional theory and practice.

There is no universal definition of militant democracy agreed upon by all the scholars involved in the debate upon it and related issues. While every author would try to come up with their own definition, most of them refer to the same qualities of democracy added by the term 'militant.' Therefore, there are at least a few distinct features of the notion of militant democracy to delineate it from tolerant constitutional democracy. For the purpose of this project militant democracy was defined as a legal and political structure possessing legal opportunities to preserve democracy by taking preventive actions against those who want to overturn or destroy democracy by utilizing democratic institutions or procedures. As 'militant democracy' was turned many years ago into a practical constitutional phenomenon it does not make sense to make distinction between a militant democracy and a militant democracy state.

Nevertheless, it is important to note that the term 'militant democracy' is still a jarring one and despite the substantial constitutional practice on this matter many questions, concerns and challenges remain unresolved. The idea to protect democracy from its potential

enemies sounds nice and plausible; however, it is impossible to deny that militant democracy by its preventive and open-textured nature is a rather problematic concept. Even Loewenstein was aware of the possible critique of the solution he suggested to democratic theory and practice. Therefore, chapter one tried to investigate what constitutional theory offers as a standard justification for militant democracy measures. It was established that constitutional theory offers few justifications for the militant stand democracy can take towards its potential enemies.

First of all, democracy is a great idea, as such, but has certain problems and weak points. Those being aware of ideas of democratic fundamentalism might develop political technologies adjusted to such phenomenon and use it for the purpose to destroy the democratic order. In order to avoid such unfortunate events, democracy should overstep its legalistic blindness and be prepared to neutralize one of the major enemies of democracy: the politics of emotions. Furthermore, a purely procedural view of democracy cannot guarantee that a majority will not decide to vote one day that a tyrant should rule and democracy should be abolished and replaced with another regime. However, at the moment there are no realistic alternatives to militant democracy in the business of rescuing democracy when its existence is endangered. Furthermore, the necessity to have certain self-preservation measures in democratic constitutions was proved by the tragic events of the past. Keeping in mind those tragedies and the absence of any realistic alternatives, militant democracy sounds as a justified concept as long as it is “capable of excluding conceptually and institutionally the abuse of opportunities for restricting rights.”¹⁷⁸

When it turns to the question of militant democracy as a duty imposed by public international law, scholars seem to be cautious and skeptical to state that it actually exists. However, there are some perceivable signs of moving towards the development of such an

¹⁷⁸ Sajo, *supra* note 128, at 211.

obligation, at least in certain cases and in certain international institutions. Therefore, it is possible to argue that public international law promotes a rather substantive view of democracy and does not contain any rules to conclude that militant democracy measures as such are contradictory to the states international obligations. The consistency with international human rights standards would be assessed on a case-by-case basis but in general states are allowed to utilize measures to protect democracy.

Distinct object and purpose of the protection of militant democracy might be considered as additional argument in support of militant democracy justification. In general, constitutional theory does not offer much clarification in terms of what exactly militant democracy protects, therefore this issue should be answered at the end of the project when the case-study part will be complete. At the moment, it is possible to argue that the scope of militant democracy protection would be, most probably, different in every democratic state. The fact that militant democracy is context-sensitive and each state could offer various justifications to introduce militant democracy measures complicates even further the task of defining what militant democracy exactly protects. Moreover, militant democracy practice in recent years sent the message of being potentially extended towards new types of threats and therefore, a new circle of enemies of democracy might lead to the protection of new qualities of the state.

The major concerns and challenges at this stage of the project can be summarized as follows. First of all, militant democracy appears as a self-contradicting concept to some extent as it limits rights and liberties in order to secure their existence. However, it is argued that this critique could be outweighed by the argument that democracy cannot afford to remain inactive when its basic structures are being attacked and could be possibly abolished. The contradiction vanishes further if we consider that there is a clear difference between who

disagree with some democratic policies and those who deny reliance on democracy as a primary process of decision-making. Altogether, militant democracy targets the latter group only and the former enjoys the same level of protection as always. Second, the justification of militant democracy in theory should not be confused with its effectiveness. In practice, the former does not presuppose the latter. Preventive oppression can potentially cause serious problems as “fear breeds repression [...], repression breeds hate.”¹⁷⁹ However, the overall practice of militant democracy proves it as workable and plausible solution. Thirdly, it is hard to define the right moment to invoke militant democracy. A preliminary conclusion on this matter is that the judiciary should examine carefully the arguments of the government, take into account local conditions and the degree of the threat. Judicial control is imperative as militant democracy measures may come dangerously close to limiting fundamental rights. The rule of law as one of democracy’s foundational principles presupposes judicial interference where rights are at stake. Fourth, militant democracy is a concept of an extremely political nature; therefore it inevitably poses a risk of being abused for political purposes. The list of concerns is not exhaustive and could be prolonged. However, the above outlined critical remarks shape the debate around the militant democracy concept in theory and practice. These are the questions most scholars would address in their analysis of militant democracy practice from various jurisdictions and implications for the theoretical debate.

¹⁷⁹ From *Whitney v. California*, 274 US 357, at 375 (1927) as cited in Sajo, *supra* note 128, at 214.

CHAPTER 2: MILITANT DEMOCRACY IN PRACTICE: PROHIBITION OF POLITICAL PARTIES AND BEYOND

Introduction

In what follows I will provide an overview of the practice of militant democracy worldwide in relation to political parties and beyond. The starting point is a concise overview of militant democracy practice in different jurisdictions in support of the argument that all democracies are more or less militant; and that militating a democracy becomes a natural feature of democratic regime such as institutions of representation and the separation of powers. The overview will be followed by the presentation of militant democracy arsenal to demonstrate which legal measures and institutions could be used to safeguard democracy from its enemies.

The analysis has to begin with the militant democracy arsenal as introduced by Karl Lowenstein and it will be compared against contemporary constitutional practices. In order to gain better understanding on the measures of militant democracy arsenal it is useful to make a distinction between other regimes of rights' limitation and militant democracy itself. This distinction is helpful not only to distinguish militant democracy measures from other regimes, but also to argue that militant democracy is a unique constitutional solution and therefore deserves at least careful analysis and research. Moreover, it seems reasonable to mention in this chapter that there are signs that the arsenal of militant democracy measures is being extended. The practice of many states and international judicial institutions demonstrates that militant democracy logic is invoked to address problems beyond unconstitutional and dangerous political parties, i.e. threats coming from growing religious fundamentalist movements and terrorism.

The issue of the relationship between militant democracy and transitional constitutionalism is of great relevance for an introductory piece on militant democracy practice. The ‘founding farther’ of militant democracy advocated that countries in transition to democracy must incorporate militant features in their democratic system.¹⁸⁰ The argument was fully incorporated in many constitutions of post-communist European countries¹⁸¹ and some scholars even argue that militant democracy is a sign of transitional constitutionalism only.¹⁸² The debate will be analyzed in depth in order to answer the question if militant democracy gives more chances for transitional democracies to survive and if this is an appropriate solution for already stable democracies.

2.1 Overview of Militant Democracy States in the Modern World

The constitutional practice of many democratic states reveals that it is hard to find a modern constitution completely lacking militant democracy provisions and even if there is no precise reference to the militant character of a state it can be implied from text of its constitutional norms and preambles.¹⁸³ In this respect it makes sense to accept Otto Pfersmann’s claim that democracies are always more or less militant as legal structure of militant democracy is on a scale of degree with other forms of democracy.¹⁸⁴ He reveals examples of nationalist South Korea and China which took some inspiration from the German model of militant

¹⁸⁰ Karl Lowenstein in the first part of his essays argues that “If democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant”. See Loewenstein, *supra* note 5, at 423.

¹⁸¹ For more details see Chapter 3.3, at 122.

¹⁸² Teitel argues, for example, that “Militant constitutional democracy” ought to be understood as belonging to transitional constitutionalism, associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledgling and often fragile democratic institutions; it may not be appropriate for mature liberal democracies.” See *supra* note 24, at 49.

¹⁸³ For example, the French Constitution of 1958 explicitly provides that the republican form of government shall not be subject to amendment (Article 89).

¹⁸⁴ Pfersmann, *supra* note 1, at 53.

democracy.¹⁸⁵ The argument is further supported by Andras Sajó who argues that the state's most natural characteristic is self-defense.¹⁸⁶ If we are to accept his argument that democracy is about risk-aversion¹⁸⁷ then it is easy to find at least some signs of militant democracy in the constitutional framework of many democracies.

The list of countries where militant democracy is present and can be potentially invoked to preserve democracy could be too long, therefore it does not make sense to list all these countries and cite provisions from their constitutional and statutes to demonstrate the wide acceptance of militant democracy importance in order to protect democracy (especially due to the presence in this project of case-studies of militant democracy practice in various jurisdictions). It is more appropriate to follow the stages of adopting the legal structure of militant democracy in modern constitutional jurisprudence.

As was already mentioned above, the idea to limit the democratic tolerance towards potential enemies was not new even at the time when Karl Loewenstein published his famous essays. However, Germany became the first country where militant democracy was elevated to the constitutional level. The detailed analysis of the German militant democracy model will be provided later, but at this stage it is important to underline that constitutional militant democracy starts with the German Basic Law of 1949.¹⁸⁸ While there is no mentioning of a particular ideology to be banned from German politics and the Basic Law identifies only an abstract enemy, it is obvious that the famous Articles 18, 21(2) and 33 were adopted with a particular enemy in mind: Nazism.¹⁸⁹ The Italian constitution-makers chose another way to ensure fascism had no chance to return into the political mainstream, introducing a

¹⁸⁵ For details see, Pfersmann, *supra* note 1, at 50.

¹⁸⁶ Sajó, *supra* note 128, at 213.

¹⁸⁷ *Ibid.*

¹⁸⁸ For a summary of German Basic Law provisions on militant democracy see e.g. in Pfersmann, *supra* note 1, at 49.

¹⁸⁹ Germany's model would qualify as "anti-extremism paradigm" for banning political parties as outlined in Peter Niessen article. See, Niessen, *supra* note 82.

constitutional provision on the precise prohibition of the reorganization in any form of the dissolved Fascist party.¹⁹⁰ The Italian model differs from the German one also through corresponding provisions against constitutional amendments and constraints imposed on political parties. Overall, the Italian model relies on an “anti-fascist particularism, a historically specific identification of its opponent, and takes its understanding of what democracy means from this confrontation.”¹⁹¹

In the early years of constitutional militant democracy it was adopted as a response to the tragic events of the past where democracy gave a chance to its enemies to gain power and use it to overthrow it, and also as a preventive technique against a new enemy of all democracies: the communist regime. The fear of communism made many countries adopt legislation against the possible rise of communism and even constitutional democracies with stable systems of governments were on the verge of trade off their most cherished democratic principles for the sake of protecting their democracy. At least Australia and the United States had unpleasant moments dealing with state policies against the rise of communism.

The next phase in the development of militant democracy as a constitutionally recognized legal structure designed to assist in democracy’s self-preservation was the collapse of the communist regime on the European continent. Many young democracies in Central and Eastern Europe followed the German example and introduced various elements of militant democracy in their new constitutions, mostly in relation to restrictions imposed on political parties. These restrictions came in the form of *a priori* prohibition of parties’ adherent to certain ideologies, or a requirement to have party programs and activities to be

¹⁹⁰ The Constitution of Italy adopted on 22 December, came into force on 1 January 1948. **Article XII** of the Transitory and Final Provisions reads as follow: It shall be forbidden to reorganize, 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.

¹⁹¹ For a detailed account of Italian Negative Republicanism paradigm see Niessen, *supra* note 82, at 10-18.

compatible with major democratic principles.¹⁹² However, at some stage activism in militating post-communist democracies became worrying even for international organizations, like the the Council of Europe. Thus, in 1999 the Venice Commission had to conduct a survey on the prohibition of political parties and analogous measures following the request of the Secretary General of the Council of Europe.¹⁹³ The survey showed that “there are numerous legal means of prohibiting the activities of political parties”¹⁹⁴ in Europe, though party activities are guaranteed everywhere and protected by the principle of freedom of association. However, “it was concluded that it is nearly impossible to define behaviours which would generally warrant such serious sanctions as prohibition or dissolution of political parties.”¹⁹⁵ Nevertheless, constitutional practices of various states allow systemizing the rationale behind militant democracy measures being invoked. This will be introduced later in this chapter. In most of the cases the set of militant democracy measures and their addressees are context dependent and are determined to a large extent by the countries’ past.

The most recent trend in the militant democracy debate takes us back to the terrorist attacks of 2001. Many western-type democracies conceived that they became targets of an undeclared war as extremist Islam started to fight against the West and its values.¹⁹⁶ The September 11 terrorist attacks and the anti-terrorism policies and legislation that followed it brought issues of militant democracy back into the centre of constitutional debate. States’ response to the threat of terrorism and growing religious fundamentalism bear many features similar to militant democracy logic, at least in the reasons behind such policies, as well as

¹⁹² A detailed account of limitations on speech and political parties from militant democracy perspectives can be found in Sadurski, *supra* note 167, at 196-238.

¹⁹³ European Commission for Democracy through Law (Venice Commission). Guidelines on prohibition of political parties and analogous measures. Adopted by the Venice Commission at its 41st Plenary session (Venice, 10-11 December, 1999). Available online at <http://www.venice.coe.int/docs/2000/CDL-INF%282000%29001-e.asp>.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ Avineri, *supra* note 15, at 2.

questions and concerns posed for liberal democracy: whether such initiatives enhance or undermine democracy.¹⁹⁷ The practice of the ECHR demonstrates precise adherence to the principles of militant democracy. This is not only in relation to the somehow traditional situations, but there are also signs that the ECHR tends to extend it to new paradigm and apply militant democracy to relatively new issues, such as the headscarf ban and prohibition of political parties with Islamist agenda.¹⁹⁸

The final observation important for the overview of militant democracy states in modern democracies is that militancy of a particular constitutional system can be determined not only by looking through the national constitution. There are examples when constitutional provisions do not mention anything which would remind us of militant democracy. Nevertheless, militancy of the constitutional regime could be added by ordinary legislation as it happened in case of Spain. The Spanish Constitution of 1978 does not reserve any powers for the state institutions to refer to militant democracy measures, however, such a feature was added in 2002 when the Law on Political Parties was adopted and introduced a procedure to ban political parties from certain activities. It does not, however, follow that militant democracy in Spain is not constitutionally authorized. As long as the law is compatible with constitutional principles and standards, it amounts to the overall constitutional regime and therefore Spain became a militant democracy many years after its post-Franco constitution was adopted.¹⁹⁹

¹⁹⁷ See for example Rashad Hussain, *Security with Transparency: Judicial Review in "Special Interest"*, 113 *Yale Law Journal* (2004); and Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional*, 112 *Yale Law Journal* (2003).

¹⁹⁸ To be discussed in detail in section 4.3, at 236.

¹⁹⁹ Another distinguished feature of the Spanish case is that national judiciary is extremely reluctant and hesitant to call the system a militant democracy, as a completely tolerant political regime is of very special importance in the Spanish historical concept. The concerns of the Spanish judiciary and politicians can probably be cured once they accept the argument that the State's most natural characteristic is self-defence and that all democracies are more or less militant. The militant democracy state in Spain is to be discussed in details in Chapter 5.2 at 269 onwards.

The question of the location of legal provisions on militant democracy is not an easy one to answer. Otto Pfersmann, for example, admits that once militant democracy elements are introduced through ordinary legislation, the relation between this legislation and constitutional principles might become very problematic.²⁰⁰ The only way to overcome this difficulty is, according to Pfersmann, to introduce such measures directly in the constitution. This option sounds plausible to solve potential contradictions, but this solution does not look completely realistic if we take into account the sometimes complicated and lengthy procedures of constitutional amendments. Therefore, it does not look reasonable to deny the possibility of inserting militant democracy measures through the regular legislative process even though a constitutional status of militant democracy measures is more desirable for the stronger legitimacy and unique character of such measures. The question of the ‘domicile of militancy’ cannot be answered in general and answers depend on particular legal system.²⁰¹ The lesson from this observation is that it is important to look inside the constitutional system in order to see if it qualifies as militant democracy state as for various reasons states can deny they belong to the group of states employing the concept of militancy, maybe because it might sound aggressive and contradictory to the very idea of a liberal democracy.

2.2. Measures of Militant Democracy Arsenal: from Karl Lowenstein to Modern Democracies

2.2.1. Karl Lowenstein’s Militant Democracy and List of Measures Against the Fascist Movement

Karl Lowenstein was a pioneer in introducing the classification of militant democracy measures adopted in different states at the time when Fascists were marching through Europe.

²⁰⁰ Pfersmann, *supra* note 1, at 63.

²⁰¹ Thiel, *supra* note 92, at 416.

His essays published in 1937 represents a survey of measures to fight mainly fascist movements in countries like France, Belgium, the Netherlands, England, the Irish Free State, Sweden, Norway, Denmark, Finland, Switzerland, and Czechoslovakia. While the legislation he analyses was directed against fascists, or National Socialists, Karl Lowenstein mentioned that most of the jurisdictions attempted to achieve facially neutral laws and regulations on this subject; therefore, legislation was directed against subversive movements and groups in general.²⁰² Towards the end of his essay Lowenstein introduces fourteen groups of legislative measures employed in selected jurisdictions to fight Fascism and other dangerous movements;²⁰³ the author calls it as a “more systematic account of anti-fascist legislation in Europe”.²⁰⁴ The classification of legislative measures is accompanied by reference to the historical facts and legislative acts from different jurisdictions.

Loewenstein’s list of militant democracy measures might be considered too long and broad by the current standards and understanding of the militant democracy concept. Many measures listed by Loewenstein migrated, for example, to the domain of criminal law and are

²⁰² Lowenstein, *supra* note 5, at 644.

²⁰³ 1. Provisions in the countries’ criminal codes against acts bordering on or falling in the category of high treason or rebellion and additional regulations regarding martial law and conferment of extraordinary powers for the state of siege; 2. Provisions allowing for the prohibition of ‘subversive movements’, especially the ban or dissolution of extremist political parties; 3. Legislation against the formation of private paramilitary armies, the wearing of political uniforms or parts thereof, and other symbols which serve to denote the political opinion of the person in public; 4. Provisions against the constitutions of intolerable competitors of the state’s own armed forces, serving as stewards, assault troops or as bodyguards; 5. Legislation against illicit manufacture, transport, wearing, possession and use of firearms or of the other offensive weapons of any kind; 6. Provisions against the abuse of parliamentary institutions by political extremism (for example, regulations permitting the exclusion of adherents of subversive parties from representation in political bodies); 7. Provisions against the incitement to violence, agitation or hatred against other sections of the population and against violent campaigning; 8. Provisions to curb the tactics of disturbance in or wrecking meetings by militarized parties; 9. Provisions to curtail the freedoms of speech, expressions, public opinion and press in order to prevent revolutionary and subversive propaganda, for example, vilifying, defaming, slandering and ridiculing the democratic state itself, its institutions or leading personalities of existing regime; 10. Provisions against the practice of morality aiding and abetting political criminals and the ‘symbolism of martyrs and heroes’; 11. Provisions regarding the political activities of members of the armed forces and the police; 12. Provisions regarding the special role of public servants (for example, the duty of allegiance, loyalty oaths or the curtailment of certain fundamental rights); 13. Provisions on special authorities to discover, repress, supervise and control anti-democratic and anti-constitutional activities and movements (administrative protection of the constitution); 14. Provisions against political activities of foreigners or alien missionaries on the national territory, the importation of anti-democratic foreign newspapers, the wearing of fascist symbols by foreign visitors or residents and the activities of foreign party organizations within the border.

²⁰⁴ Loewenstein, at 638.

by no means controversial from the liberal democracy point of view, i.e. prohibition of wearing firearms and formation of paramilitary armies and other similar rules. In fact, Karl Lowenstein's long list captures all legal provisions directed against any kind of extremist behavior, including open call to violence, rebellion, high treason, formation of armies, etc. It would be too easy to claim that militant democracy is about dealing with any form of violence and dangerous ideas directed against the state's structures.²⁰⁵

Karl Loewenstein's account of democracy's self-defense is contradictory to some extent as he directly refers to criminal law provisions, but it is a well-known fact that criminal law is applicable only once a crime is committed or planned to be committed, requires the burden of proof, and, most importantly, not all actions dangerous for democracy could qualify as a crime. The grasp of power by Hitler demonstrates that it is possible to start ruining democracy without breaching any legal norms, therefore, criminal law is not always helpful for self-protection of democracy and the focus should be shifted towards a prevention topic. As a consequence, the militant democracy arsenal of measures became narrower. These developments made the concept more controversial and open to critique from the perspective of liberal democracy and placed it at the intersection of legal, social, and political science²⁰⁶ which makes it harder to study, justify, and apply.

Loewenstein's "account naturally is dated and rooted in a historical situation completely different from the present."²⁰⁷ While the founding father's arguments in favor of a militant stand of democracy are still valid nowadays, the way that militant democracy measures are put in constitutions and applied in practice are very different from what Loewenstein had in mind. This only proves that militant democracy in practice, as well as

²⁰⁵ Markus Thiel produced a good summary of Loewenstein's classification in the concluding chapter of his book, therefore I will refer to his work here.

²⁰⁶ Thiel, *supra* note 92, at 382.

²⁰⁷ *Ibid.*, at 401.

many other constitutional arrangements, is context-sensitive, especially in the fashion of their application. Therefore, probably it is not feasible to file the exhaustive list of universal militant democracy measures so all democracies can refer to it. Instead of doing this hopeless exercise, it probably makes sense to look for the most common features of militant democracy manifestation and practice to guide the reader through states' practices amounting to militant democracy.

2.2.2. Contemporary Debate on Militant Democracy Measures Classification

As mentioned above, militant democracy debate is based primarily on the analysis of states' practices. This is fully applicable to the list of militant democracy measures and theoretical attempts to classify them in different groups. However, the list of militant democracy measures should start from an example of a classic militant democracy state which gave new life to the concept of militant democracy by not only following it in the scholarship, but adding a novel feature to it, elevating it to the constitutional level. Germany is the first example which comes to mind when someone is discussing militant democracy. The German model of militant democracy is important to begin with not only because the Nazi regime originated there, but also because it represents a balanced and careful approach on how tragic mistakes in the past might be cured and prevented through innovative constitutional arrangements.

As German Basic Law was the first case of a constitutionally endorsed militant democracy state, the list of measures listed there is considered as a starting point for any militant democracy related debate. **The first element** of the militant democracy state is the non-amendable character of the most fundamental provisions of the Constitution. German Basic Law provides the preventive mechanism for changing the Constitution even by

unanimity.²⁰⁸ Most of the values and principles protected from amendment were disregarded and dismissed during the Nazi regime and it explains the strong intention of the writers of the Basic Law to prevent it in the future and make a democracy able to protect itself. The idea of intolerance towards the enemies of democracy is clearly expressed further in the Basic Law.²⁰⁹ The **second element**, established by Article 18 of the Basic Law allows the forfeiture of basic rights (however it was never invoked).²¹⁰ The idea is that individuals who abuse certain rights in order to eliminate the free democratic basic order can be denied the exercise of such rights by the Federal Constitutional Court.²¹¹

Third, the possibility to limit the basic rights such as freedom of association is envisaged in the Article 9(II) which prohibits the associations, with the purpose and activities of which are directed against the constitutional order or the concept of international understanding. **The fourth** and the central militant democracy provision is Article 21 which envisages the procedure to outlaw a political party and to declare a party unconstitutional by the Federal Constitutional Court.²¹² Under this provision political parties are recognized as an indispensable element of democracy. Article 21 of the Basic Law is evidence of the intention to give a status to political parties, which is different from other kinds of social organizations

²⁰⁸ **Article 79 (III)**: Amendments to this Constitution affecting the division of the Federation into States (Länder), the participation on principle of the States (Länder) in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible. This can also be referred to as the ‘Clause of Eternity’ (see Thiel, *supra* note 92, at 401). Similar provision can be found in Italian Constitution of 1948 (Article 139) and more recent Constitutions, i.e. Turkey (Article 4).

²⁰⁹ See also the discussion above at pp. 40-41.

²¹⁰ **Article 18**: Whoever abuses freedom of expression of opinion, in particular freedom of press (Article 5 I), freedom of teaching (Article 5 III), freedom of assembly (Article 8), freedom of association (Article 9), privacy of letters and secrecy of post and telecommunication (Article 10), property (Article 14), or the right to asylum (Article 16a) in order to combat the free democratic basic order forfeits these basic rights. Such forfeiture and the extent thereof are determined by the Federal Constitutional Court.

²¹¹ For details see Kommers, in *supra* note 158; and Thiel, in *supra* note 158.

²¹² **Article 21** reads as follows: (I) the political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization must confirm to democratic principles. They have to publicly account for their sources and use their funds as for their assets.

(II) Parties, which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.

protected by Article 9. Political parties are not an “extra-constitutional”²¹³ phenomenon anymore. The Basic Law granted a special status to political parties, which was the first positive recognition of political parties ever in German history.²¹⁴ At the same time, Article 21 imposes certain limitations on the internal structure of the party, its aims to ensure that freedom guaranteed for political parties will not be used for the purpose to disrupt and destruct the democratic government. After the Weimar experience the state could not leave the political parties and associations without any control, and since 1949 political parties seeking to impair or abolish the free democratic basic order, or to endanger the existence of the Federal Republic of Germany, can be banned.

Fifth, the German interpretation of the militant democracy includes the regulation of public servants activities. Article 33(5) establishes conditions of access to civil service, known as ‘a duty of loyalty’, which produced substantial discussion and case-law related to the application and implementation of this provision.

As we can see, German Basic Law followed the core of the Loewenstein’s arguments that democracies should not remain inactive and should take some preventive measures to protect itself from being destroyed from inside. However, the first example of constitutional militancy differs substantially from Loewenstein’s suggestions in terms of the list of measures. The difference is not that Germany does not have any legal provisions against rebellion, paramilitary armies, manufacturing and wearing firearms, but that these provisions can be found in other legal domains and militant democracy has nothing to do with criminal law, as such. As was mentioned above, some of the legal provisions from Germany’s militant democracy arsenal were never applied (i.e. forfeiture of rights), but some others were widely

²¹³ Christian Starck, *New Challenges to the German Basic Law: the German contribution to the Third World Congress of the International Association of Constitutional Law* 122 (1991).

²¹⁴ See for example Paul Kirchhof & Donald P. Kommers (Eds.), *Germany and its Basic Law. Volume 14. Past, Present and Future. A German-American Symposium* 155 (1993), or Carl. J. Schneider, *Political Parties and the German Basic Law*, 10 *The Western Political Law Quarterly* 527-528 (1997).

used not only in Germany but in other democratic states as well. After many years of the presence of militant democracy in the constitutional practice of different states it was narrowed down mainly to the prohibition of political parties.²¹⁵ Such practices fully endorse Loewenstein's arguments on the preventive character of militant democracy and the necessity to sacrifice some fundamental rights for the sake of democracy's survival. As Loewenstein did not warn us much about the possible dangers and disadvantages of such practices,²¹⁶ it was left for constitutional theorists to elaborate and suggest some safeguards against abusive militant democracy practices. The necessity to be cautious about dangers of the concept also influenced its current practices.

2.3. Militant Democracy and other Regimes of Rights Limitations

Militant democracy was designed to fight the possible abuse of the political process; therefore, militant democracy measures inevitably clash with civil liberties. However, it is interesting to see if and how militant democracy is different from ordinary rights' limitation clauses. This clarification will gain a better understanding of what constitutes militant democracy measures. The further question would be if militant democracy is different from regular rights' limitation clauses and states of emergency.

The starting point for this delineation can be referenced to Article 17 of the European Convention on Human Rights (ECHR) the so-called 'abuse clause.'²¹⁷ This provision gives a useful hint on how to distinguish various limitations of rights. The Convention provides for the possibility to deny rights to those who abuse them with the purpose of their destruction. It

²¹⁵ Sajo, *supra* note 128, at 210: "Today, militant democracy is most commonly understood as the fight against radical movements, especially parties, and their activities."

²¹⁶ See for example section in Loewenstein's essay on "Can an Idea be Suppressed?"

²¹⁷ **Article 17** reads as follows: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention

seems that a militant democracy state and Article 17 follow the same logic as they both impose limitations on rights of the individuals and groups who wish to use liberties guaranteed in a democratic state to overturn or harm democracy itself. However, the abuse clause of Article 17 of the European Convention on Human Rights is applicable to all rights protected in the Convention while militant democracy provisions do not affect the whole range of human rights. Both notions are applied in a similar logic but within a different scope or area of application. Militant democracy affects only a limited range of rights, namely rights of political participation, rights that potentially affects the operation of a state as a constitutional democracy. That is why limitations imposed on rights like family and private life and social and economic rights could not be justified by militant democracy rationale.²¹⁸ It might be explained by another crucial point: the object of protection. This brings us to the first important distinctions between a militant democracy state and ordinary limitation clauses. Moreover, the construction and language of the abuse clause led to the rare application of this norm by the European Court of Human Rights (ECHR)²¹⁹ which prefers to deal with cases under the ordinary limitation clause.²²⁰

While various events and individual behavior could be potentially harmful for democracy, a militant democracy state focuses on one area of social and political life as a subject of its attention: participation in political and public discourse. Moreover, militant democracy measures usually affect only a limited number of citizens directly (as compared to emergency situations and ordinary rights limitations cases). Militant democracy measures are applied mainly in a case-by-case manner and could never be invoked in relation to the whole

²¹⁸ If to consider the European Convention of Human Rights, the most frequent articles invoked in militant democracy related cases were Articles 10 and 11 (freedom of speech and freedom of association respectively). For more details see P. Harvey, in *supra* note 52, at 407-420.

²¹⁹ Article 17 is used by the ECHR more often to declare the case inadmissible; therefore there is not much of jurisprudence on the scope and manner of application of this provision.

²²⁰ See for details Chapter 3.3, at 122.

political community. In addition, the application of militant democracy measures always involves the State as a party (it is never an individual v individual case) with all possible consequences following from it. It might make it easier for a State to make a case, especially taking into account the object of the protection: the core of the constitution, and democracy. It is always hard for the individual or a group of individuals (like a political party, association or religious group) to resist this kind of situation where the government is relaxed in bringing convincing reasons, as the case is based on the assumption that nothing is more important than salvation of democracy.

Therefore, militant democracy measures could in general be separated from ordinary rights limitation clauses by the scope of protection, addressees of the measures, and the purpose of the limitations. However, where militant democracy is not conceptualized as a constitutional principle, militant democracy will often be accommodated within the application of the ordinary rights limitation clause.

Most of the differences outlined above are applicable to the distinction between a militant democracy state and a state of emergency.²²¹ However, one significant element should be added. In stable democracies a state of emergency it is introduced very rarely and for a very short period only, while the application of militant democracy measures can take time. Usually it cannot happen quickly, and therefore it does not make sense to limit its operation in time. Moreover, a state of emergency is declared when a disaster is already happening (or has happened) with a traditionally strictly prescribed mechanism of declaration of a state of emergency,²²² while militant democracy is a concept of preventive nature where taking certain action in advance is the main theme. The issue of distinction between a militant

²²¹ For brief overview of state of emergency see Fox & Nolte, *supra note 56*, at 54-60; and Norman Dorsen, Michel Rosenfeld, Andras Sajó, Susanna Baer (Eds.), *Comparative Constitutionalism: Cases and Materials* 328-349 (2003).

²²² For details see Oren Gross & Fionnuala Ni Aolain, *Models of Accommodation*, in Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis. Emergency Powers in Theory and Practice* 54 (2006).

democracy and a state of emergency is not as clear as it might appear if we bring an example of national emergency generated by political unrest. While the motives behind the application of militant democracy measures and states of emergency declared as a response to politically motivated riots and violence could be similar, the distinction is still obvious. First of all, declaration of a state of emergency is a response to events which already took place when militant democracy probably cannot help. Second, a state of emergency is about the suspension of some constitutional norms and guarantees while the application of militant democracy should always remain within the constitutional framework. While there are certain non-derogable rights which cannot be limited even during a state of emergency,²²³ the range of limitations imposed on rights and liberties could be of extraordinary character. Third, militant democracy aims to eliminate certain players from the political game (temporarily or permanently) while a state of emergency may go in different directions depending upon its purpose. The latter is aimed to secure the life and health of its citizens from an immediate threat.

What follows from the above differences for the militant democracy debate? And, are there any practical difference for governments and courts if they invoke militant democracy and not other regimes? It might be argued that if militant democracy is different from other limitations the state may impose on political rights, then it might cause a difference in the burden of proof on the State's side. Does it mean that state imposing limitations upon rights in the name of militant democracy can prove easier the necessity of such measures than in other cases of limitations of rights? In other words, does it make a practical difference for the government, courts, and individuals under which rationale their rights were limited? As most of the militant democracy cases are decided with an active intervention of the judiciary, it is

²²³ See for example Article 4(2) of the International Covenant on Civil and Political Rights; Article 15 of the European Convention on Human Rights.

of particular interest to see whether courts want to hear something special from the government as justification for militant democracy measures compared to ordinary rights limitation cases.

The answer to this question requires substantial analysis of the militant democracy practices which would go beyond the purpose of this chapter. My claim so far is that it depends very much upon the character of the imposed limitations (on whom, when, and what is imposed). For example, courts in many jurisdictions strictly require serious justification from the Government in instances of banning a political party (taking into account the special role parties play in modern democratic states).²²⁴ The same applies to non-registration of political parties. The test will be probably less strict in relation to other types of associations participating in public political discourse. However, even in relation to the same type of groups the test might be, probably, different in many jurisdictions based on the rationale of the imposed limitations.

The most likely conclusion on the question of whether limitations of the same character but with different rationale (militant democracy and ordinary limitations) require different justification would be that at least the government assumes that it is easier for it to make a case under militant democracy justification. However, it is important to see whether courts accept this position taking into account the type of rights affected by such measures and the possible consequences for the democratic political process. The jurisprudence of the ECHR demonstrates also that this judicial body does not refer directly to the distinction between militant democracy and ordinary rights limitation regimes; therefore the borderline

²²⁴ There are numerous cases from the ECHR jurisprudence where Court clearly expressed its serious concern for party ban practices and would scrutinize such measures very strictly. For details see e.g. *United Communist Party v. Turkey* (1998), *Socialist Party of Turkey v. Turkey* (2003), *Welfare Party (Refah Partisi) and others v. Turkey* (2001). Moreover, the same trend is supported by the Venice Commission. See for example *European Commission for Democracy through Law (Venice Commission). Guidelines on prohibition of political parties and analogous measures*, *supra* note 193.

is getting more blurred in jurisdictions where the militant democracy concept is not spelled out precisely in the constitution.²²⁵ The final answer to this question should be given after the case-study is complete and I will come back to this issue in the concluding part.

2.4. Extension of the Doctrine beyond the Prohibition of Political Parties

As mentioned above, militant democracy is traditionally understood as a tool to fight with the abuse of the electoral process and to suppress the activities of political organizations, mainly political parties. However, it is a well-known fact that constitutional law is not static and should be able to accommodate new realities of social and political life, happening within the domestic and international legal systems. As to threats and dangers posed to the existence of democracy, “every generation got its own disease.”²²⁶ If the idea of constitutional patriotism was given up in order to rescue democracy by ridding “societies of unjust and oppressive forms of political rule”²²⁷ (which were seen in fascist and communist parties), then democracies should be equipped to do the same against the enemies of new generations. Loewenstein’s slogan “fire is fought with fire” is still relevant for the current reality and does not mean outlawing only political parties and only with communist and fascist agendas.

Militant democracy and its logic might be applied and justified in a much wider range of cases than it was traditionally utilized, especially in the light of events which filled the constitutional debate recently, i.e. the war on terror and threat of religious fundamentalism.²²⁸ Legal and political science scholars started to debate over issues such as if Islam is

²²⁵ At the moment, the Court considers that ordinary limitations clause is enough to address the application of militant democracy in the practice of the Member States. For further details see section 3.3. Militant democracy in the practice of young Eastern Europe democracies.

²²⁶ Thiel, *supra* note 92, at 379.

²²⁷ *Ibid.*, at 382.

²²⁸ For example, Andras Sajó claims that protection of secularism is intimately interrelated with militant democracy. Sajó, *supra* note 128, at 210.

compatible with democracy,²²⁹ how democratic principle of secularism is interpreted in the new reality,²³⁰ and how to fight terrorism in the political arena.²³¹ The scholarly debate on these topics did not appear from nowhere, as well as the idea of militant democracy in Karl Loewenstein's essays in 1937. The constitutional practice of the last decade demonstrates that there are legitimate grounds to claim that the area of the application of militant democracy can be extended beyond the prohibition of political parties.

For example one of the latest challenges for democracy, as well as fundamentalist and coercive religions, becomes being controlled through militant democracy measures.²³² The jurisprudence of the ECHR can provide ample evidence that there are cases involving freedom of religion which could be better rationalized and understood through the prism of militant democracy.²³³ Therefore, jurisprudence involving, for example, the Court's analysis of Islam and *Sharia* is substantially different from traditional religious association cases.²³⁴ Moreover, the threat of terrorism is also being perceived through the lenses of militant democracy, and this concept seems to be more than relevant in the so-called war on terror.²³⁵ These are without any doubt clear symptoms of the extension of militant democracy to a more generalized sphere of participation in public discourse. If political Islam and terrorism are perceived as a threat not only to the life of the citizens but to the entire democratic structure and constitutional security, then militant democracy might be a relevant concept to guide the states' policies in relation to these new 'diseases.'

²²⁹ Asef Bayat, *Islam and Democracy: What is the Real Question?* ISIM Paper 8 (2007), available online at https://openaccess.leidenuniv.nl/bitstream/handle/1887/12452/paper_bayat.pdf;jsessionid=65C6B3839EA8CD7C6F1D4A90A0734155?sequence=1.

²³⁰ For example, see Danchin, in *supra* note 54; Macklem, in *supra* note 54.

²³¹ See for example, Suzie Navot, *Fighting Terrorism in the Political Arena. The Banning of Political Parties*, 14 *Party Politics* 6 (2008); Turano, in *supra* note 52.

²³² See for example, Danchin, in *supra* note 54; Macklem, in *supra* note 54; Michael D. Goldhaber, *A People's History of The European Court of Human Rights* 88 (2007).

²³³ See for example, *Kalifatstaat v. Germany* (2000); *Refah Partisi (Welfare Party) and others v. Turkey* (2001); *Sahin v. Turkey* (2005); *Dogru v. France* (2008).

²³⁴ Renata Uitz, *Freedom of Religion in European Constitutional and International Case-Law* 177 (2007).

²³⁵ See for example, Sajo, in *supra* note 55; Roach, in *supra* note 55, at 171-208.

Therefore, the debate over militant democracy measures is being entertained now by questions such as are militant democracy measures designed to fight exclusively with abuses of political process in democracy based on free elections? I claim that militant democracy measures can be used by the state in order to neutralize other kinds of movements that use democratic means to establish totalitarian ideology or fundamentalist coercive religions. Militant democracy could be helpful in explaining, for example, why religious and ethnic groups are not accepted as possible participants of the political process in many democracies or extensions of ‘core of the constitution’ in order to diminish the role of religion (for example, Turkish Constitutional Court). Moreover, in recent years many cases related to religious issues are being shifted to the free speech clause (as in the case-law of the United States Supreme Court) or to the participatory rights arena as in the case-law of the ECHR. In many religious-related cases courts are not talking about religion, but about who can participate in political discourse.

A similar line of arguments can be traced in the so-called war on terror. Andras Sajo points out several similar features between political radicalism and terrorism and therefore argues for the relevance of militant democracy consideration for anti-terrorism policies.²³⁶ The events of 11 September 2001 brought issues of militant democracy back into the center of political and legal discourse as many Western type democracies believe that they became the target of extremist Islamic movement against the values of Western democracy.²³⁷ While making parallels between anti-terrorism and militant democracy should be made cautiously, there is at least one feature which makes these notions closely connected. If we leave aside the criminal dimension of anti-terrorism policies we can observe that the fight with terrorism is based on preventive measures which include not only detentions and interrogations

²³⁶ Sajo, in *supra* note 55.

²³⁷ Avineri, *supra* note 13, at 2.

conducted by the intelligence services, but also serious limitations imposed on the freedoms of speech, association and religion. Moreover, both notions are based on the assumption that democracies are justified to deny the rights and freedoms to those who disrespect democracy. In addition, there are examples from constitutional practice when classic militant democracy measures were applied in the fight against terrorism.²³⁸

The issue of the extension of militant democracy deserves a special case-study to investigate more details and symptoms of this phenomenon. Militant democracy logic is of potential relevance for other rights limitations and for explaining and justification of the behavior of the State in relation to limitations imposed on rights of participation in public discourse. Militant democracy is not only about which political parties can compete for elections anymore, but rather who can participate in political discourse. If democracy is about general risk-aversion, then new challenges to its structures might be accommodated by militant democracy. Moreover, if some measures taken by the state are put into the framework of militant democracy (rather than attempting to be placed into new paradigms of mixed character, e.g. the ‘War on Terror’), it would probably decrease the number of uncertainties and put the practice of the State into a legal frame that might be justified. The latter applies principally to the concept of a War on Terror. This issue deserves a separate chapter and to be discussed in a detailed case-study, the results of which will be revealed in the following chapters.

2.5. Militant Democracy and Transitional Constitutionalism

The issue of the relationship between militant democracy and transitional constitutionalism is not only if transitional democracies are more likely to take a militant stand towards their

²³⁸ The Statute allowing prohibition of political parties in Spain was introduced as part of anti-terrorism policy and the law was applied not as a party prohibition case but rather as anti-terrorism measure. For more details on it see chapter 5.2, at 270.

potential enemies, but also if militant democracy is more legitimate in the situation of democratic transition. In other words, does militant democracy facilitate the process of transition, or weaken an emerging fragile democratic structure?

Karl Loewenstein argued that “if democracy is not convinced that it has not yet fulfilled its destination, it must fight on its own plane the technique which serves only the purpose of power. Democracy must become militant.”²³⁹ Early militant democracy practice reveals that Loewenstein’s argument was followed, at least in Italy and Germany. Further practice also suggests that transitional democracies are more open to militancy than stable democratic regimes. The fall of the communist regime and the wave of adopting democratic constitutions in the CEE region gave ‘a second birth’ to the doctrine. Many young European democracies incorporated militant democracy provisions into their new constitutions; and there are also several examples of practical application of such measures.²⁴⁰

Andras Sajó argues that, for example, many post-communist constitutional states are rather defenseless against the politics of emotion, one of the biggest threats to democracy.²⁴¹ This is explained not only by the lack of democratic experience and culture, but also by other additional radical elements, i.e. racism, and corruption.²⁴² According to Sajó, there are major risks to democracy in the transition period that provokes militant democracy behavior: the return of communism,²⁴³ territorial disintegration, and right-wing extremism.²⁴⁴ During the formation of the constitutional regime and transition the major task is to “rid societies of

²³⁹ Loewenstein, *supra* note 5, at 423.

²⁴⁰ For more detailed account of militant democracy measures list and practice in CEE region see Sadurski, *supra* note 167, at 219-230.

²⁴¹ Sajó, *supra* note 128, at 209.

²⁴² Priban & Sadurski mention in their chapter on ‘Democratisation of Central and Eastern Europe’ that the abolition of political censorship was resulted in the growth of political extremism and hate speech and right-wing extremism was flourishing in early 1990s. See Jiri Priban & Wojciech Sadurski, *The Role of Political Rights in the Democratization of Central and Eastern Europe*, in Sadurski, *supra* note 167, at 219.

²⁴³ The fear of re-emergence of communism is nevertheless at least problematic where communist parties were not even disbanded in the first place.

²⁴⁴ Sajó, *supra* note 128, at 217.

unjust and oppressive forms of political rule.”²⁴⁵ Therefore, these democracies function on the assumption of being endangered and therefore react with more suspicion to certain activities.²⁴⁶ This conclusion reaffirms also the earlier claim that militant democracy is always context-dependant and its content and target are always connected to the particular national past.²⁴⁷

Such constitutional practices led many commentators to conclude that militant democracy is only a phenomenon of transitional constitutionalism. For example, Ruti Teitel argues that “militant constitutional democracy ought to be understood as belonging to transitional constitutionalism, associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledging and often fragile democratic institutions; it may not be appropriate for mature liberal democracies.”²⁴⁸ A claim with a similar tone was made earlier by Samuel Issacharoff in his paper on fragile democracies. After comparing militant democracy practices in Europe (mainly) against the constitutional traditions in the United States, Issacharoff concludes that “some democratic societies are more fragile, and have political structures more porous to antidemocratic elements, than in the United States. That porousness requires an ability to restrict the capture of governmental authority by those who would subvert democracy altogether”, and he continues that “in order to manage the unique threats that arise from that distinct political realm, fragile democracies need the ability to discipline electoral activity...”²⁴⁹ Furthermore, Leto Cariolou reveals arguments from the ECHR judgment that preventive measures against expectation of an overthrow of the democratic government “may be more easily accepted in the context of

²⁴⁵ Thiel, *supra* note 92, at 382.

²⁴⁶ Sajo, *supra* note 128, at 229.

²⁴⁷ Pieter Niesen calls this model of behaviour ‘negative republicanism’.

²⁴⁸ Teitel, *supra* note 24, at 49.

²⁴⁹ Issacharoff, *supra* note 86, at 1467.

fragile democracies, where the past support of violent actions may justify restrictions in the future political career of individual in terms of standing for national elections.”²⁵⁰

Therefore, there is considerable debate about whether new democracies should resort to militant democracy and ban political parties in the early years of its existence. While many commentators argue that the solution is more plausible to be utilized by transitional democracies, the answer to this question is not this straightforward. Militant democracy measures during transition can assist in countering the re-emergence of former ruling parties and therefore can contribute to political stabilization.²⁵¹ On the other hand, suppression of political liberties in a still fragile democratic system might look more controversial and could be a more challenging task for the judiciary than a similar situation in a stable democratic regime. Moreover, there are practical examples of when so-called ‘incomplete democracies’,²⁵² with all the difficulties they might face, consciously choose not to resort to party dissolution; even at the level of adopting constitutional or legislative provisions on this matter. The example of South Africa is illustrative of this debate²⁵³ while European post-communist states demonstrated a general hesitance to actively apply militant democracy measures during their transition; there are very few democracies in which sanctions against political parties have been imposed, other than for formal reasons.²⁵⁴

²⁵⁰ Leto Cariolou, *The Right not to be Offended by the Members of the British National Party: An Analysis of Secro Ltd v Redfearn in the Light of the European Convention of Human Rights*, 35 *Industrial Law Journal* 4 (2006).

²⁵¹ Angela K. Bourne, *Democratisation and the Illegalisation of Political Parties in Europe* 7 Working Paper Series on the Legal Regulation of Political Parties 6 (2011), also available on-line at <http://www.partylaw.leidenuniv.nl/uploads/wp0711.pdf>

²⁵² The term ‘incomplete democracy’ adopted from Angela K. Bourne paper and is defined as “states that have set out on a process of democratic reform, and obtained some – but not other fundamental – characteristics of established democracies”, Bourne, *supra* note 232, at 12.

²⁵³ For South Africa’s experience with party prohibition provisions see: Jorg K. Kemmerzell, *Why There is no Party Ban in the South African Constitution*, 17 *Democratization* 4 (2010).

²⁵⁴ See for example Sadurski, *supra* note 145, at 225; Venice Commission Guidelines on Prohibition and Dissolution of Political Parties, *supra* note 193, at 21.

South Africa is one of the few African countries which abstained from including a provision for party dissolution in its Constitution.²⁵⁵ This exception is explained by the peculiarities of South Africa's transition, i.e. the actors beliefs in the context of historical memory (where the notion of party ban is closely connected to the past regime), and nature of the democratic transitions. The latter involved the political elite reaching an agreement and natural marginalization of extremist forces caused by the strong unity of all major groups of the society in the constituting assembly of 1994.²⁵⁶ Therefore, despite the multilayered character of South African society, ethnic and political tensions were solved without reference to party dissolution measures, but unfortunately South Africa remains a one party state to the present day. Constitutional theory can learn a lesson from the South African experience in relation to the ability to transit to democracy without reference to militant democracy measures. However, we should not rush to draw general conclusion and recommendation and criticize countries in transition which did it differently to South Africa. The South African experiment was successful mainly because the main transition actors were able to integrate spoilers.²⁵⁷ Similar solutions might play out differently in a deeply divided society within different settings. Again, this conclusion brings us back to the argument that militant democracy presence and practice (as well as its absence) is absolutely context-dependant. There is no universal solution to the issue of democratic self-defence as well as there are no two democracies with a similar past and fears it wishes to address through the militating of its constitutional structures.

²⁵⁵ Party ban was applied in a very distinct manner in Rwanda for example. For detailed account see Peter Niesen, *Political Party Bans in Rwanda 1994-2003: Three Narratives of Justification*, 17 Democratization 4 (2010). For the overview of party bans in Africa see the report on the Project 'Managing Ethnic Conflict through Institutional Engineering: Ethnic Party Bans in Africa.' Available on-line at <http://www.politikwissenschaft.tu-darmstadt.de/fileadmin/pg/arbeitsbereiche/theorie/africa.pdf>

²⁵⁶ Kemmerzell, *supra* note 234, at 703.

²⁵⁷ *Ibid.*

Another example which also does not fit into the general trend of militant democracy application is the case of Spain. This case will be discussed later in some detail; however for the moment it is worth mentioning that Spain completed its successful transition to democracy after the Franco regime with the widest possible tolerance towards its past enemies. The country was united around the idea to defeat the previous regime and to build a democracy, and the idea that constitutional intolerance would be accepted was implausible. However, Spain had to adopt a militant democracy stand many years later after its transition. In 2002 a legislative act was adopted and quickly applied to outlaw the Batasuna party which was alleged for a long time to have links with terrorism.²⁵⁸ Therefore, even ‘complete’ democracies might face the situation when they feel a need (and have reasons) to adopt and apply militant democracy measures.

While it is hard to argue that stable democracies could remain more tolerant to the signs of extremism than democracies in transition, there is no universal approach to this matter either, and there are examples of successful transitions in troubled societies without reference to the help of militant democracy, or the urge to introduce a party ban even in mature and stable democracies. Moreover, in post-communist democracies the notion of militant democracy in relation to past rulers had an extremely important symbolic meaning which had the purpose of demonstrating total disconnection from the previous regime in the eyes of its citizens, and to the international community. However, the infrequent application of party bans is a good sign of a more or less balanced approach towards the understanding of dangers and controversies of militant democracy.

²⁵⁸ For details on the Statute and case to outlaw Batasuna Party see Comella, in *supra* note 52, 133-156.

Conclusion

The constitutional practice of many democratic states reveals that it is hard to find a modern constitution completely lacking militant democracy provisions, and democracies are always more or less militant as legal structures of militant democracy. The argument is further supported by Andras Sajó who argues that the state's most natural characteristic is self-defense.²⁵⁹ In the early years of constitutional militant democracy it was adopted as a response to the tragic events of the past where democracy afforded opportunity to its enemies to gain power and use it to overthrow it and also as a preventive technique against a new enemy of all democracies: the communist regime. The next phase in the development of militant democracy as a constitutionally recognized legal structure designed to assist in democracy's self-preservation was the collapse of the communist regime on the European Continent. Many young democracies in Central and Eastern Europe introduced various elements of militant democracy in their new constitutions. The most recent trend in the militant democracy debate takes us back to the terrorist attacks of 2001. Many western-type democracies conceived that they became targets of an undeclared war against extremist Islam which started to fight against the West and its values.²⁶⁰ In addition, jurisprudence of the ECHR demonstrates precise adherence to principles of militant democracy not only in relation to the somehow traditional situations, but also apply militant democracy to relatively new issues, such as the headscarf ban and the prohibition of political parties with Islamist agendas.

The militancy of a particular constitutional system can be determined not only by looking through the national constitution: there are examples when constitutional provisions

²⁵⁹ Sajó, *supra* note 128, at 213.

²⁶⁰ Avineri, *supra* note 15, at 2.

do not mention anything which would resemble militant democracy. In addition, the question of the location of legal provisions on militant democracy is not an easy one to answer. Otto Pfersmann, for example, admits that once militant democracy elements are introduced through ordinary legislation, the relation between this legislation and constitutional principles might become problematic.²⁶¹ The only way to overcome this difficulty is to introduce such measures directly in the constitution. This option sounds plausible to solve potential contradictions, but this solution does not look realistic if we take into account the sometimes complicated and lengthy procedures of constitutional amendments. The question of the ‘domicile of militancy’ cannot be answered in general terms and the answer depends on the particular legal system.²⁶² The lesson from this observation is that it is important to look inside the constitutional system in order to see if it qualifies as a militant democracy state, as for various reasons states can deny they belong to the group of states employing the concept of militancy.

As to the list of militant democracy measures, the starting point was Loewenstein’s essay where he introduced fourteen groups of legislative measures employed in selected jurisdictions to fight Fascism and other dangerous movements. However, Loewenstein’s list of militant democracy measures might be considered as too long and too broad by the current understanding of the militant democracy concept. Many measures listed by Loewenstein migrated, for example, to the domain of criminal law and are by no means controversial from the liberal democracy point of view, i.e. the prohibition of wearing firearms and the formation of paramilitary armies, and other similar rules. In fact, Karl Lowenstein’s long list captures all legal provisions directed against any kind of extremist behavior, including open calls for violence, rebellion, high treason, the formation of armies, etc. Loewenstein’s

²⁶¹ Pfersmann *supra* note 1, at 63.

²⁶² Thiel, *supra* note 92, at 416.

account of democracy's self-defense is contradictory to some extent as he directly refers to criminal law provisions, but it is a well-known fact that criminal law is applicable only once a crime is committed, or planned to commit, requires higher standards of burden of proof, and, most importantly, not all actions dangerous for democracy could qualify as a crime.

Germany is the first jurisdiction which comes to mind when someone discusses militant democracy. The German model of militant democracy is important to begin with, not only because the Nazi regime originated there, but also because it represents a balanced and careful approach on how tragic mistakes in the past might be prevented in the future through innovative constitutional arrangements. As German Basic Law was the first case of a constitutionally endorsed militant democracy state, the list of measures listed there is considered as a starting point for any militant democracy related debate. German Basic Law followed the core of the Loewenstein's arguments that democracies should not remain inactive and should take some preventive measures to protect itself from being destroyed from inside. However, the first example of constitutional militancy differs substantially from Loewenstein's suggestions in the list of measures.

The further enquiry of Chapter 2 was whether militant democracy is different from other rights' limitation clauses. I assumed this clarification would assist in gaining a better understanding of what constitute militant democracy measures. In general, militant democracy measures could be separated from ordinary rights' limitation clauses by the scope of protection, addressees of the measures, and the purpose of the limitations. However, where militant democracy is not conceptualized as a constitutional principle, militant democracy will often be accommodated within the application of the ordinary rights limitation clause. Most of the differences outlined above are applicable to the distinction between the militant democracy state and state of emergency. The most likely consequences of these differences is

that the limitations of the same character, but with different rationale, might require different justification from the government (probably it would be easier for it to make a case under the militant democracy justification). However, it is important to see whether courts accept this position. The final answer to this question is left until the case-study part if this project is complete.

The issue of the extension of militant democracy deserves a special case-study to investigate more details and symptoms of this phenomenon. For the purpose of this chapter it was argued that militant democracy logic is of potential relevance for other rights limitations and for explaining and justification of the behavior of the State in relation to limitations imposed on the right of participation in public discourse. Further, if democracy is about general risk-aversion then new challenges to its structures might be accommodated by militant democracy. Moreover, it was argued that militant democracy framework (rather than new paradigms of mixed character, e.g. as in the War on Terror), would probably decrease the number of uncertainties and put the practice of the state into a legal frame that might be justified.

There is considerable debate about whether or not new democracies should resort to militant democracy and ban political parties in the early years of its existence. While many commentators argue that the solution is more plausible to be utilized by transitional democracies, an answer to this question is not easy to give. Militant democracy measures during transition can assist to counter the re-emergence of former ruling parties and therefore can contribute to political stabilization. On the other hand, suppression of political liberties in a yet fragile democratic system might look more controversial and could be a more challenging task for the judiciary than a similar situation in a stable democratic regime. Moreover, there are practical examples of when so-called ‘incomplete democracies’ with all

the difficulties they might face consciously choose not to resort to party dissolution, even at the level of adopting constitutional or legislative provisions on this matter (i.e. Spain). Therefore, even ‘complete’ democracies might face the situation when they feel a need and have reasons to adopt and apply militant democracy measures.

Chapter 3: MILITANT DEMOCRACY AND PROHIBITION OF POLITICAL PARTIES: FROM THE EARLY CASE-LAW TO THE MODERN CONSTITUTIONAL PRACTICE

Introduction

The major purpose of this chapter is to investigate the application of the militant democracy principle in relation to the limitations imposed on political parties and their activities. In what follows I will introduce the constitutional practices from different jurisdictions in applying and interpreting legislative provisions regulating issues of formation and functioning of political parties. The chapter starts with early militant democracy application cases – the German Socialist Reich Party and the Australian Communist Party – to demonstrate how Loewenstein’s arguments were tried in practice and applied by the judiciary while guarding the constitutionalism in times of crisis. Furthermore, this chapter will elaborate on references to the militant democracy principle by somewhat paranoid democrats (i.e. in Germany and the United States during the Cold War) as well as following up on the most recent developments in the jurisprudence of the first constitutional militant democracy state – Germany.

A substantial part of the chapter will be devoted to the application of the militant democracy principle in Europe, especially in young European democracies. The survey will cover the common trends in the legislation and jurisprudence of the CEE states as well as general framework in relation to prohibition of political parties provided by the Council of Europe (including the jurisprudence of the ECHR).

Furthermore, this chapter will reveal the case-study from Russia with the purpose to provide an example of how militant democracy logic might be invoked by the governments with an allegedly authoritarian agenda in order to safeguard the political space from any

unwanted intrusion through the procedure of political party registration. At the end, the examples of India and Israel will be introduced in order to demonstrate alternative militant democracy solutions when democracy resorts to softer measures in the business of self-protection against potential enemies.

3.1. Early Militant Democracy Application Cases: Testing the Concept in Practice, Setting the Standards, and Identifying Major Challenges

This section aims to present a brief summary and analysis of the early militant democracy application cases. The first part of this section will include two party prohibition cases which can be considered as foundational for militant democracy jurisprudence. The German Socialist Reich Party and the Australian Communist Party cases represent examples of considerate and careful application and interpretation of the doctrine (both cases were decided shortly after the Second World War). These judicial decisions were an excellent opportunity to test Lowenstein's arguments on militant democracy in practice and can be considered as successful application of militant democracy logic to guard constitutionalism in times of crisis. I believe this case-study is appropriate to introduce at the beginning of this chapter as both cases clearly demonstrate basic challenges doctrine can face in practice, and see how the judiciary can prevent the adherence to a Schmittian account in matters of protecting constitutional security. The second part of this section will refer to other early cases of the application of militant democracy measures to demonstrate the major potential controversies and concerns for the practice of the doctrine which occurred from the very beginning of its existence.

3.1.1. Germany: Testing Constitutional Militancy in Practice: *The Socialist Reich Party Case*

Germany was the first to incorporate a militant democracy arsenal into its national constitution (Basic Law of 1949) and therefore it is traditionally mentioned as a classical militant democracy state. Constitutional militancy was introduced to address major flaws of the Weimar regime which led to the destruction of the state. The Weimar regime is widely criticized and characterized as having been “defenseless against the rise of totalitarian movement, which availed itself of the democratic process as a Trojan horse in its effort to establish a brutal dictatorship.”²⁶³ Some commentators note that the Weimar Republic, Germany’s first constitutional state based on the principle of popular sovereignty “opened the door to the electoral assumption of power by the National Socialists, or Nazis, despite the party’s clearly antidemocratic means and aims.”²⁶⁴ Moreover, the Weimar Constitution is described by some scholars even as having played “a key negative role” in German constitutional policy.²⁶⁵

The Weimar Constitution provided for a system of proportionate representation in the legislature (*Reichstag*). In the early 1930s the Nazi party began to gain more seats in the Parliament; however, it never had a real majority. For example, in 1933 when Hitler was appointed Chancellor, his party was occupying less than one third of seats (although it was the strongest party at that moment). This fact did not prevent the Nazi party from achieving power and they did it through the established democratic procedure, using institutes of democratic representation. After the election of summer 1932, together with the Communist Party, a “negative majority” was organized in the Reichstag which allowed these parties to

²⁶³ Rensmann, in *supra* note 52, at 1117.

²⁶⁴ Dorsen, Rosenfeld, Sajo & Baer, *supra* note 221, at 1286.

²⁶⁵ See for example Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law. The Theory and Practice of Weimar Constitution* 1 (1997).

dictate the formation of the Government. After several failed attempts Hitler was appointed as the head of a coalition government and through the major ministers held by his fellows used his power in order to suppress all possible opponents for further elections. However, the 1933 elections did not bring a majority to his party again, but at that moment Hitler was powerful enough to convince the deputies to vote for the ‘*Ermächtigungsgesetz*’ (enabling act), which temporarily suspended major provisions of the Weimar Constitution and gave power to the government to legislate by decree. As a result, the very principles of the democratic state (like the separation of powers, and the guarantee of fundamental rights and liberties) were effectively dismissed and all powers were transferred to the Government. Therefore, a totalitarian regime was established without any visible violations of the democratic electoral process.

The legitimacy of the Weimar Republic itself is not a settled issue from political and legal point of view. The Weimar Republic was established after a military defeat, its Constitution was considered as illegitimate by a wide sector of Germany’s society and there was no consensus on whether to call it a republic or not.²⁶⁶ Combined with a lack of legal culture, and in the absence of a strong democratic tradition, the imperfections and flaws of the Weimar Republic led to its collapse with tragic consequences. Indeed, democracy should be an educational and cultural project to the same extent as a constitutional one: “there is no democracy if there are no democrats.”²⁶⁷ Hitler’s project of rising to power owes a lot to the lack of political and moral culture of the German society at that stage. At the end, people participated in elections and voted for the extremists who sought to gain power in order to destroy the democratic order. No doubt, Loewenstein’s argument on the politics of emotion

²⁶⁶ Pfersmann, *supra* note 1, at 52.

²⁶⁷ *Ibid.*, at 51.

and the necessity to confine it in order to prevent manipulating the people's emotions was based on real events and unfortunately is valid to some extent nowadays.

However, Germany's great experiment with liberal democracy generated an impressive body of legal thought. Many lessons have been drawn from the Weimar experience. Many of them found a reflection in the German Basic Law of 1949 which had recalled the conditions that led to the Nazi state and resolved that "the Federal Republic could never be neutral in the face of its mortal enemies."²⁶⁸

The Basic Law of 1949 presents the "counter-constitution to the previous one upon which the Nazi regime has been based."²⁶⁹ The document radically turned away from some previous provisions and rules and the German political system was given a completely new form. For example, citizens were granted basic rights with a strong mechanism for their protection;²⁷⁰ Germany was declared to be federal state with parliamentary-democratic institutions, and the founding principles of the state are the rule of law and social justice.²⁷¹ However, the most distinguished feature for the militant democracy debate is the mechanism to protect founding principles against the potential enemies of the state. The strong anti-fascist moods among the drafters of the Basic Law led to the creation of a model of democracy which is able to protect itself.²⁷² The central element of Germany's militant

²⁶⁸ Kommers, in *supra* note 158, at 218.

²⁶⁹ Elmar M.Hucko (Ed.), *The Democratic Traditions. Four German Constitutions* 68 (1989).

²⁷⁰ For example, **Article 1** states: (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

²⁷¹ **Article 20** states: (1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

²⁷² The elements of Germany's militant democracy were outlined above at p.72 and it includes a non-amendable character given to the most fundamental provisions of the Basic Law (Article 79 (III), forfeiture of the basic rights (Article 18), prohibition of associations, the purpose and activities of which are directed against the constitutional order or the concept of international understanding (Article 9 (II)) and mechanism to outlaw political parties and declare them unconstitutional as well as an obligation imposed on political parties in terms of their internal structure which must confirm the democratic principles (Article 21).

democracy to be discussed in details here is a procedure to declare a political party unconstitutional.

The constitutionality of political party can be challenged before the Constitutional Court by the motion of any chamber of the national parliament (*Bundestag*, or *Bundesrat*) or by the Cabinet. States' governments can initiate such action only against a party whose activity is carried out within the limits of that land.²⁷³ Shortly after the Basic Law was adopted, the Federal Constitutional Court was asked twice to outlaw political parties and in both cases parties were declared unconstitutional. However, the two cases will be discussed in different sections as they differ in the manner they were decided; and also in their implications for the militant democracy debate.²⁷⁴

The first case under Article 21(II) was decided in 1952.²⁷⁵ The decision of the Federal Constitutional Court outlawed the *Sozialistische Reichspartei* (Socialist Reich Party, SRP) a neo-Nazi Organization founded in 1949 as a successor to the German Imperial Party.²⁷⁶ In its publications, campaign appeals, and leader's speeches the party was informing people about its Neo-Nazi character. The Federal Government found that the SRP sought to destroy the liberal democratic order and asked the Federal Constitutional Court to declare the party unconstitutional under Article 21(II). Unsurprisingly, the Court declared the SRP unconstitutional and the ban did not cause a sensation as it was evident that the entire procedure to outlaw political parties was introduced to prevent neo-Nazi activities.²⁷⁷ The Court's decision was structured around three major themes: political parties and democratic

²⁷³ E.g. see Thiel, in *supra* note 158, at 121 for details on the Hamburg Senate attempt to ban the *National Liste* ('National List'), a small right-wing party in 1989.

²⁷⁴ The first case decided under Article 21 is included in this part while the second case will be discussed together with civil servants duty of loyalty jurisprudence in the next sub-chapter.

²⁷⁵ Socialist Reich Party Case. 2 BVerfGE 1 (1952).

²⁷⁶ Commentators observe that the banning of the party was surely no surprise. See e.g. David P. Currie, *The Constitution of The Federal Republic of Germany* 216 (1994).

²⁷⁷ Thiel, *supra* note 158, at 121.

order; the SRP's leadership and internal organization; and, SRP's program and its leaders' behavior.

The Court started with contemplating the issue of the recognition of political parties in a new Constitution and their special status within the political system. Political parties were defined as “agents – even if not the sole ones – forming the political will of the people.”²⁷⁸ The Court identified two major issues to be resolved in this regard: the relationship between the principle of democracy, which permits to manifest any political views (even if they are of antidemocratic orientation), and the status of a parliamentarian as free representatives of his electorate, and at the same time their dependence on a particular party program. The Court found that it was necessary to examine the first problem in detail. Political parties were characterized by the Court as the only means to emerge the popular will and it was concluded that the establishment of political parties (as well as their activity) must not be restrained. However, Article 21 does not only guarantee the free formation of political parties but also provides to prevent the activity of unconstitutional parties. However, the special role of political parties for a democratic state dictates the rule that it is possible to exclude dangerous parties from the political struggle only “if they seek to topple supreme fundamental values of the free democratic order which are embodied in the Basic Law.”²⁷⁹

The Court in its judgments also examined the relationships between Articles 9 and 21; political parties were found as being associations within the meaning of Article 9. In general, they might be prohibited under conditions established by Article 9 and be a subject of the general executive authority. However, due to special status accorded to political parties by the Basic Law, they are also entitled to additional guarantees provided in Article 21. The Court stated in no uncertain terms that a party with internal organization not corresponding to

²⁷⁸ Kommers, in *supra note 158*, at 219.

²⁷⁹ *Ibid.*, at 220.

democratic principles will most probably seek to impose the same structural principles upon the State if it were to achieve some political power.²⁸⁰

Further in the judgment the Court analyzed the history of German political parties, especially Hitler's Nazi party, and tested correspondence and documents of the SRP on the basis of which it was established that most of party's leaders were former Nazis with previous positions in such organizations as SS and SA. Moreover, the internal organization of the SRP was found to resemble very much the organization of Nazi party. In light of Article 21 it was stated that a party is required to be structured from the bottom up, with the involvement of all its members in the decision-making process, the basic equality of its members, and a guarantee to join or leave the party any time.

The Court found that in the SRP the authority flowed not from members to its leaders but from the top to down. The freedom to join the party was not also guaranteed (for example, some categories of citizens were denied becoming a member of the party) and the expulsion procedure corresponded exactly to the one practiced by the Nazi party. Moreover, the SRP followed the Nazi party's example by establishing affiliated organizations. All these facts led the Court to conclude that the SRP sought to impose its antidemocratic structure upon the State in the event that it achieved political power. As a result, the SRP was found as pursuing the goal of eliminating the free democratic basic order. Therefore, the Constitutional Court interpreted Article 21(1) of the Basic Law as imposing requirements on political parties' internal structure which must be organized in accordance with major democratic principles.

The last part of the Court's judgment presents a detailed analysis of the SRP program and its leaders' behavior. The Court reached the conclusion that the party's program reflected the intention to revive the idea of the Strong Reich and the superiority of the German race.

²⁸⁰ Ibid., at 222.

The speeches and activities of the party's leaders expressed their opposition to the government, state bodies, and eager acceptance of a Fuhrer State.

Thus, the party was declared unconstitutional under the Article 21(II). The Bundestag members represented a banned party and lost their places. This 'penalty' was ordered by the Court and at that time it appeared as "wholly unexpected and aroused considerable opposition among constitutional lawyers."²⁸¹ However, shortly after the decision, the Bundestag adopted a legislative rule of automatic loss of seats for members of unconstitutional party.²⁸²

The Socialist Reich Party case gave the Court an opportunity to express a judicial interpretation of the party-based state. The Court found that Article 21 of the Basic Law confers a special status on political parties, defines parties as the principle organ forming popular will, and legitimizes opposition parties unless they act in accordance with the democratic principles. The fascist ideas still seemed to pose serious threat to the new democratic system at that time, and damage Germany's international reputation.

However, the case was an occasion not simply to interpret the meaning of the party-based state, but mainly to support the principle of constitutional militancy established by the German Basic Law. This case represents the first attempt to bring the concept into life (meaning constitutional militancy as there were other legislative attempts to introduce militant democracy through ordinary legislation, as Lowenstein essay's reveal). It appears to be an example of thorough and careful interpretation of this notion. The Federal Constitutional Court of Germany occupied a steadfast position in relation to the necessity of protecting the State's structures from the attack of its enemies. The Court analyzed the party's program, its

²⁸¹ See Schneider, in *supra* note 195, at 539.

²⁸² Federal Electoral Law Enacted on 7 May 1956 (Federal Law Gazette I, p. 383). **Article 46(1)**: A deputy shall lose his or her membership of the Bundestag (5) if the Federal Constitutional Court finds in accordance with Article 21 (2) of the Basic Law that the political party or party section of which the deputy is a member is unconstitutional.

internal structure and activities as meaningful elements in order to make a judgment on the party's unconstitutionality, but did it through the lenses of the political party's special status. The simultaneous assessment of all these elements assisted in making the Court's decision look more legitimate and justified in the eyes of public.

The judiciary entrusted with the task to decide on parties' unconstitutionality asserted that everything about this party was troubling in terms of its adherence to democratic rules and principles. Moreover, the judiciary did not want to establish any uncertain rules to be applied universally in all party prohibition cases. It might be argued that the Court was cautious as it was the first occasion to render judgment on a party's unconstitutionality. However, keeping in mind the character of the party in question (neo-Nazi) and fresh memories of the previous regime and the world-wide tragedy caused by it, the Court might have been emotionally influenced and could have been driven by fears of the regime returning. Thus, the case of the Socialist Reich Party demonstrates the general ability of the judiciary to stand for constitutional democracy, and preserve it through careful and cautious implementation of the admittedly problematic concept of militant democracy. The first occasion to apply Article 21 provides constitutional theory and practice with a respectable example of judicial intervention to the business of the preservation of constitutional security. The German Federal Constitutional Court was not the only one capable of doing this in the aftermath of the Second World War. The Australian judiciary faced quite a similar task, but in relation to a different enemy: Communism.

3.1.2. *The Australian Communist Party Case: Australia's Experience of Militant Democracy*

The Australian Communist Party case is of relevance for this section for several reasons. First of all, it involves a classical militant democracy measure: the prohibition of an allegedly

dangerous political movement in the form of a political party. Secondly, the Australian judiciary had to deal with the validity of the prohibition of the Communist party at around the same time as the German Federal Constitutional Court, i.e. shortly after the idea of militant democracy was lifted to the constitutional level for the first time in the history of constitutionalism. Thirdly, the Australian Communist Party case is considered to be an iconic statement about the importance of judicial review in a modern Australian democracy.²⁸³ Furthermore it is regarded as a significant victory for constitutionalism, and the rule of law in general.²⁸⁴ In what follows I will summarize briefly the background of the case, the judicial decision, and analyze its implications for the militant democracy debate.

First of all, it is important to clarify that Australia is not considered an example of a militant democracy state in the same sense as Germany. The Australian Federal Constitution does not contain any explicit provisions of a militant democracy character. Moreover, the political party was banned under the federal law adopted for this particular reason: to outlaw the Communist Party of Australia. However, the Australian case is of relevance here as it demonstrates a clear example of militant democracy logic, even in cases where the militant nature of the democracy is not recognized as such at the constitutional level.

The Communist Party of Australia had existed since the 1920s, but it had never been close to overcoming the popular support for the Labor Party.²⁸⁵ The Federal Government had advocated banning the Party earlier. For example, the party was banned temporarily from 1940 until 1942 in terms of war time regulation. However, after the Soviet Union joined the war, the party was allowed to resume its activities and even gained some support. The party continued to grow throughout the 1940s, was in control of a few trade unions but never had

²⁸³ Hernan Pintos-Lopez & George Williams, *Enemies Foreign and Domestic* 'Thomas v Mowbray and the New Scope of the Defence Power', 27 *University of Tasmania Law Review* 108 (2008).

²⁸⁴ David Dyzenhaus, *Constituting an Enemy: A Response to Carl Schmitt*, in Andras Sajó, *Militant Democracy* 29 (2004).

²⁸⁵ Throughout this section, I rely on Dyzenhaus, *supra* note 265.

any serious success in elections. In the early 1940s a wave of industrial strikes affected Australia badly and communists were accused of being responsible for controlling these strikes and therefore trying to destabilize the country. The 1949 elections led the Liberal Party to power, and it did not take long to implement one of its platform statements: to ban the Australian Communist Party. The new Prime Minister, Robert Menzies ensured the passage of the Communist Party Dissolution Act which became law on 20 October 1950.²⁸⁶ The Communist Party and other associations likely to be under the influence of communists were declared to be dissolved and their property was ordered to be forfeited to the Commonwealth. The persons who were communists were banned from Commonwealth public service employment and it was declared an offence to be an officer or a member of an unlawful organization (punishable by five years of imprisonment). Overall, the content of the law in question is not much different from similar laws coming from other jurisdictions adopted at the same time – or later after the collapse of communist regime in Europe – however, the distinguished aspect of the Australian case is the judicial review the High Court of Australia performed over this piece of legislation.

On the same day the Communist Party Dissolution Act was enacted, the Australian Communist Party, ten unions and some unions' officials appealed to the High Court of Australia to challenge the constitutional validity of the statute and asked for an injunction to prevent the enforcement of the Act. The injunction was rejected, but the High Court was asked to decide on two important questions: did the validity of the Act depend upon proof in court of the facts recited in the Act's preamble and, if not, was the Act invalid?²⁸⁷ Five of the seven judges answered 'no' to the first question but answered 'yes' to the second and

²⁸⁶ The Communist Party Dissolution Act 1950 (Cth)

²⁸⁷ The Act commenced with nine recitals, indicating facts supporting the exercise of the legislative powers in relation to the Communist Party (specifically powers to legislate in matters of national defence). "Lengthy preambular recitals are considered as statute's most remarkable feature". See for example Dyznehaus, *supra* note 265, at 19.

therefore the statute was invalidated. The Chief Justice answered ‘no’ to both questions and the remaining judge answered ‘yes’ to both (so six judges of the seven judges voted to invalidate the Act).

The judgment itself was not that much about how dangerous the Communist Party was for the established constitutional structure of the state, as it could be expected for a classic militant democracy case. Indeed, the ‘yes’ answer to the second question was based primarily on the argument that the federal legislator exceeded its authority by enacting this statute. The majority’s reasoning was not without some serious tensions,²⁸⁸ but for the purpose of this section it is important to keep in mind the outcome of the battle which is recognized as “a watershed for civil liberties and the role of the court as ‘guardian of the abiding values that lie at the heart of the Constitution.’”²⁸⁹

The Communist Party case can be seen as an iconic statement about the importance of judicial review mainly due to the fact that the case was extensively politically charged, and no doubt the Court was under immense pressure deciding on validity of the Act. Thus, the majority of Australians, some 80 percent, supported the ban. Australia together with Britain, the United States and some other western states was obsessed with exposing communist plots in all parts of society, economy, and governance. Moreover, some facts cited in the preamble deemed to be true and were present by the Government that the party posed a great threat. Thus, the preamble stated that the party’s main aim was to seize power and it was engaged in espionage, sabotage, and treason to achieve its goals. The ban imposed on the Communist party was promoted as being necessary to protect Australia’s defense and security, and to ensure the execution and maintenance of the Constitution. Reference to the maintenance of the Constitution is an explicit sign of the militant democracy logic invoked by the government

²⁸⁸ See for more details Dyzenhaus, *supra* note 265.

²⁸⁹ H.Pintos-Lopez & Williams, *supra* note 283, at 108.

and the legislator to justify the ban of the Communist Party. So, the very idea of the preamble was to convince the population and the opposition that the law in question was not only compatible with the Federal Constitution but indeed was needed to protect it. The enactment of this statute and its execution was presented as fulfillment of the constitutional responsibilities the legislator and executive required to be performed by the Constitution. This justification put additional pressure on the judiciary as it was claimed that the statute in question was to protect the Constitution in general, and not only in the name of national security and defense. At the same time, the Bill had stormed negative comments from the international press and has been highly contested in Parliament by the Labor Party.

Despite pressure coming from various political actors and powerful arguments from the side of the government on the necessity to protect the very foundation of the state, the High Court of Australia invalidated the statute. The judgment stands “for the proposition that there are some things that governments are not entitled to do without the most compelling of circumstances.”²⁹⁰ The highest court of Australia rejected the legislator’s intention to broaden the scope of the defense power granted to it by the Constitution in order to accommodate the dissolution of the Communist Party through a separate legislative act.

Judicial decisions like the Australian Communist Party case demonstrate that the judiciary is capable not only of recognizing that the executive’s arguments in times of alleged emergency are very often seductive, but also of requiring governments to live up to the ideal model of the separation of powers and the rule of law. The Australian example of dealing with the fear of Communism in the early 1950s proves that governments cannot break the rule of law without any constraints simply because they are supported by the majority. It is a well-known fact that in times of crisis judges (in general) might tend to ease the work of the government in sustaining the need of exceptional measures. However, the Australian case is

²⁹⁰Ibid., at 109.

an honorable proof of the opposite. The judiciary can stand for the rule of law and an ideal version of democracy even in times of crisis whilst being under immense pressure (political and social). There is one paragraph from the judgment that is cited most often and it is worth remembering as it is applicable to the current constitutional practice of many states in limiting individual rights and freedoms in times of crisis and stress:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally suppressed, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequately only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.²⁹¹

This is a lesson worth remembering for the entire militant democracy debate. This is useful and applicable guidance for the practice of limiting rights and freedoms in the name of national security (including the basis of constitutional order). The Australian Communist Party case demonstrates many tensions that may arise when governments seek extra powers to defend the existing system, but it also is a wonderful example of how the judiciary might supervise such activities and protect a form of government from dangers likely to arise within the institutions to be protected. The Communist Party was not banned, and yet it did not manage to destroy the Australian state, or pose a significant and real threat to do so. While Australia does not consider itself as militant democracy state (and the case of Communist Party Dissolution Act was not based on the same legislative premises as the first German party prohibition case) the justification invoked by the Australian government is of a militant

²⁹¹ Australian Communist Party v Commonwealth, 83 CLR 1 (1951), at 187-188 (Judge Dixon)

democracy nature and therefore it is of relevance for the current chapter, and the overall experience of the application of militant democracy worldwide.

3.2. Militant Democracy Employed by Paranoid Democrats: The *Communist Party of Germany Case and the Subsequent Developments*

Australia was not the only western democracy being troubled by the growing popularity of a communist party and its ideology shortly after the Nazi regime was defeated. Many other countries around the world developed some techniques to suppress allegedly anti-democratic movements. The possibility of invoking such measures in the constitutional system of a democratic state is in general acceptable, however, the legitimacy and effectiveness of the militant character of the democracy depends to a large extent on the way and manner it is employed in practice.

In this section I will present case-studies of somewhat paranoid governments being driven by the fear of Communism sneaking to their states' structures to subvert the established order. The case of Germany is of particular relevance as its Federal Constitutional Court had to rule on the constitutionality of the Communist Party and later the country developed and implemented an extensive loyalty program under the slogan of militant democracy. Moreover, all cases discussed above and to be analyzed in this section were decided at around the same time, so it is fascinating to see how the idea of militant democracy was adjusted to particular setting and what was added to the meaning and understanding of this principle by different courts.

The United States example of prosecution of the Communist Party could be also of relevance here. The United States was undeclared enemy of the communist state of the Soviet Union, and therefore developed a set of measures to resist the intrusion of communism into its political system. Someone familiar with the political system of the United States might claim

that this jurisdiction is utterly alien for the militant democracy debate and that the United States is exceptionally unique from other western democracies on many accounts.²⁹² However, the United States could be an interesting and valuable example to be placed in the overall debate on militant democracy in early years of its practical application.²⁹³ During the post-World War II era fear over national security generated wide-ranging restrictions on “radical” speech, including extensive loyalty programs, attempts to outlaw the Communist Party, and state registration requirement for all communist-action organizations.²⁹⁴ In relation to the early practice of militant democracy it is of relevance to look at the 1940 Smith Act adopted in the United States to criminalize advocating the overthrow of government.²⁹⁵ The Act is best known for its application against political figures. *Dennis v. United States* represents but one facet of an American war on communism.²⁹⁶ During the ‘Cold War’ era the Federal Government launched an extensive campaign against the Communist Party that went far beyond the Smith Act.²⁹⁷ Despite the minor role of the Communist Party in the US, the government decided to impose considerable limitations on the free speech of adherents of communist ideology. Anti-communism campaign during the Cold War and the *Dennis case* were criticized on numerous occasions, including blaming the Court for allowing the Communist Party to be subjected to legal restraints that should not have been permitted under the standards of the criminal code, “and prosecuting people for their advocacy of Marxism-

²⁹² For a detailed account of American exceptionalism see Issacharoff, *supra* note 86, at 1415-1421.

²⁹³ David P. Currie mentions that early cases from Germany bear a close family resemblance to that of the Supreme Court in *Denis v. United States*. See Currie, *supra* note 276, at 215, 220-221.

²⁹⁴ Geoffrey R. Stone (Ed.), *Constitutional Law*: 5th ed. 1084 (2005).

²⁹⁵ The official title is The Alien Registration Act (18 U.S. Code § 2385). It is usually called the Smith Act (as the author of the anti-sedition section was Howard W. Smith, representative of the State of Virginia). Section 2 and 3 of the Smith Act provide as follows: Sec. 2 (a) it shall be unlawful for any person - (1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government; Sec.3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of ...this title.

²⁹⁶ *Dennis v. United States*. 341 U.S. 494 (1951)

²⁹⁷ For details see Stone, *Ibid.*, at 1090.

Leninism.”²⁹⁸ Therefore, the US example could be altogether considered as an example of militant democracy rationale employed by democrats driven by unreasonable and unjustified fears. However, the following section will focus on the anti-communism theme of militant democracy in Germany as the prohibition of the Communist Party was assessed by the judiciary, politicians, and commentators not through criminal law provisions but militant democracy lenses.

3.2.1. The *Communist Party of Germany Case* and its Impact on the Further Interpretation and Application of Militant Democracy Notions

The content of normative principles established by German Basic Law was revealed earlier in this section. However, in the Communist Party case application of those principles differs from the first occasion the Federal Constitutional Court had to decide on the meaning and interpretation of the militant democracy provisions. The Court’s decision to declare the Socialist Reich Party unconstitutional occasioned only very few protests in Germany. This happened mainly due to the fact that the memories of the Nazi regime were still fresh and the majority of the population accepted this move without questioning too much the true commitment of the new government to democratic principles. However, the following case decided by the Federal Constitutional Court of Germany was different by many accounts.

The second decision on the application of Article 21(II) was rendered in 1956 to ban the Communist Party of Germany (*Kommunistischer Partei Deutschlands*, KPD).²⁹⁹ The proceeding against KPD was initiated in 1951 (again by the Government), the same year the Government sought to challenge the constitutionality of the SRP. However, it took a long time for the Court to render the judgment. This move of the Adenauer Government was considered

²⁹⁸ See for example Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime. From the Sedition Act of 1798 to the War on Terrorism* 410 (2004).

²⁹⁹ Communist Party of Germany Case (1956), 5 BVerfGE 8. See Kommers, in *supra note 158*, at 222.

as premature as the party's electoral support was dropping constantly.³⁰⁰ Some justices of the Federal Constitutional Court believed that it would make sense to let the party vanish itself without the State's interference. However, after some years it became apparent that the Government was not going to withdraw its application and the Federal Constitutional Court had to deal with this case. There is no doubt that declaring the Communist Party unconstitutional had a great symbolic meaning for the new democratic polity being promoted and established in West Germany. For example, Donald R. Kommers commented on this case as being "important symbolically in the bitterly cold war between East and West Germany in the face of rising Soviet-American tensions exacerbated by the division and rearming of Germany."³⁰¹

The KPD faced the same fate as the SRP and was declared unconstitutional in a 308 pages long opinion (the longest in the Court's history). As the Court had few years between the decisions on these two cases, someone would legitimately expect to see further elaboration on potential tensions between militant democracy and the basic values it was designed to protect, as well as more precise guidance on the future application of militant democracy principles. It is not exactly true to state that the Court failed in this task and handed down an imperfect and not well-grounded judgment. However, the Court could not resist the Government's motion to ban the KPD, despite its dropping popularity. Instead, the Court tried to present as reasonable a judicial opinion as possible in the given circumstances and also tried to send a message for the future cases of references to the Article 21 procedure.

Apparently, the 1956 judgment reflected more sensitivity about the possible risks that the procedure under Article 21 of the Basic Law could pose to freedom of association and speech (expression). As in the earlier case, a substantial part of judgment was devoted to a

³⁰⁰ For example, in 1953 national elections the party was supported only by 2.3 percent, and by 1956 (under the impact of West German economic booming) it almost lost any popular support.

³⁰¹ Kommers, in *supra* note 158, at 218.

detailed analysis of Marxism-Leninism and the history of German Communism, an investigation of the party's structure, leadership, the relation between its members, and attitudes towards other political players. It was established by the Court that the KPD aimed all its activities against the existing constitutional system: the public platform of the KPD clearly announced its goals to make a revolution and establish the dictatorship of the proletariat. The judgment, however, included some important points of interpretation of Article 21 of the German Basic Law.

First of all, it was established that in order to deny a party's constitutional status it is not required to find that it is engaged in "illegal activity" or some other "concrete undertakings" to abolish the constitutional order. What is important is the presence of a "fixed purpose constantly and resolutely to combat the free democratic basic order" and manifestation of its purpose "in political action according to a fixed plan."³⁰² In order to identify the presence of such a plan, the Court should be looking at the party's program, its activity, leaders' statements, official declarations, educational materials, and so on. In this particular case, the Federal Constitutional Court conducted its own independent examinations of all listed elements and found that the KDP was an unconstitutional party within the meaning of Article 21. The most important lesson to be derived from this part of the judgment is that there is no need for an actual danger to the existence of the democratic constitutional state to be present in order to eliminate a political party from electoral process; it is enough that there is a probable chance by human standards to realize the party's unconstitutional goals in the foreseeable future.³⁰³ Therefore, the Communist Party case opened the door for the possibility of invoking militant democracy to avert not only empirical dangers but also to guard the internal consistency of a democratic system by watching the intentions of its

³⁰² Ibid., at 223.

³⁰³ Niesen, *supra* note 82, at 12.

participants.³⁰⁴ The Federal Constitutional Court found it a convincing argument to justify the dissolution of a minor political party without any substantial support from the electorate.

Second, in this judgment the Court formulated an understanding and interpretation of Article 21(II) which was formative of Germany's militant democracy. The Court felt obliged to comment on how it is possible to reconcile Article 21(II) with other basic principles of the Constitution. The Court found no conflict between Article 21 and presumably higher constitutional values. According to the Court's opinion the framers of the Basic Law in Article 21(II) the framers intended to ensure that the very principles of the democratic state should be protected and preserved, and it could be done through measures directed to affect the rights and freedoms of those who would destroy the existing order. The intention of the 'founding fathers' was based on the tragic historical experience which convinced them that democracy can no longer remain ignorant towards political parties and there should be some limit placed on their activities. Militant democracy was declared a constitutional value decision that is binding to the Federal Constitutional Court.³⁰⁵

Finally, the Constitutional Court declared that a declaration of unconstitutionality extends not only to the Communist Party itself – with forfeiture of its property and loss of seats in federal and land parliaments – but also to all its current and future surrogate organizations. The latter statement had a far-reaching implication for some organizations even some years after the Communist Party was dissolved. For example, the Communist Voters' League was denied to be put on the ballot for the Bundestag elections in North Rhine-Westphalia in 1961. The litigation to challenge the state's refusal to allow them to compete

³⁰⁴ Ibid., at 12.

³⁰⁵ Kommers, in *supra* note 158, at 223.

for the seats in the parliament was not successful as the League was found to be effectively supplanted by the banned KDP party.³⁰⁶

The Communist Party case is, however, somewhat problematic. First of all, some authors find it difficult to see how the small KPD could have posed a serious threat to the German democratic order.³⁰⁷ The major argument of the Federal Constitutional Court to declare the Communist party unconstitutional was the possibility to employ militant democracy not only to address a real threat but also a mere logically possible one. However, even in the light of this interpretation it does not sound very convincing when a Court speaks about the intention of the Communist Party to extinguish its political opponents and to overthrow the existing constitutional order in the foreseeable future. By the time the judgment was handed out, the Communist Party barely had any chance to influence the political processes in Germany; therefore it is hard to reconcile the Court's interpretation of the preventive character of militant democracy with the position of Communist Party in the 1950s. Moreover, by banning political parties a state demonstrates that it does not trust its people to decide on their own who will represent their interest in the decision-making process. Needless to say, the exclusion of certain political parties narrows the diversity of political views which is so important for the political process. These are the main questions of militant democracy. The only possible respond to them is that advantages of militant democracy measures outweigh such risks, and it is admissible only if it is carried out in accordance with strong procedural guarantees.

³⁰⁶ Kommers, in *supra* note 158, at 223-224.

³⁰⁷ Sabine Michalowski & Lorna Woods, *German Constitutional Law. The Protection of Civil Liberties* 19 (1999).

3.2.2. Germany's Militant Democracy in the Aftermath of the *Communist Party Case*

In general, the Federal Constitutional Court has been less strict in its enforcement of Article 21(2) since the 1970s; however, the government still retains the power to abolish any party when it finds it necessary to guard the existing constitutional order.³⁰⁸ The Communist Party case had a considerable impact upon the future interpretation and application of the militant democracy principle in order to protect the constitutional structures of German democracy. At first glance, courts started to take the party privilege guarantee more seriously and demonstrate a more cautious approach towards the constitutional obligation to guarantee special status granted to political parties. This could be evident from the famous Radical Groups Party case decided in 1978.³⁰⁹ During 1975 and 1976 three German states were denied campaign broadcasting time on radio and television to three radical left-wing parties. The Federal Constitutional Court vindicated the right of radical parties to have time for their political advertisement on public broadcasting stations and channels and found it a severe violation of public law when political parties were denied airtime without sufficient reason.³¹⁰ On the other hand, the Court's judgment on the Communist Party case influenced a lot activities and overall policies of the Federal and State Bureaus for the Protection of the Constitution (established in 1950).³¹¹ The interpretation of the requirement imposed by the free democratic basic order on political actors and especially the preventive nature of the militant democracy notion were revived and widely applied later in order to screen those entering civil service.

³⁰⁸ Ronald J. Krotoszynski, *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 *Tulane Law Review* 1592 (2004).

³⁰⁹ Radical Groups Case (1978), 47 BVerfGE 198.

³¹⁰ For detailed account of this decision see Kommers, in *supra* note 158, at 224-227.

³¹¹ Nielsen, *supra* note 82, at 30.

The duty of loyalty imposed on a civil servant is considered to be one of the elements of militant democracy in Germany.³¹² While in the early 1950s the German government did not hesitate to submit two motions to declare a political party unconstitutional within only three days, it changed its strategy and became more serious about the special status of political parties. However, the Federal Government did not drop the idea to use militant democracy measures to protect the existing constitutional order and even now one should not assume that the contemporary German government maintains a weakened commitment to militant democracy.³¹³ In the early 1970s Germany faced a fear of radical groups invading the state institutions and after an extended period of radical unrest, both federal and state governments issued a Loyalty Decree on January 28, 1972.

The purpose of the decree was to set forth guidelines on the recruitment and dismissal of civil servants in order to exclude enemies of democracy from the civil service; they were barred from being engaged in anti-constitutional activities and belonging to the organizations engaged in such activities. The policy was quite broad in its purpose and application; for example, it was applied not only to the most important and sensitive civil service posts (as do many other democratic states). Between 1972 and 1987 the Government subjected millions of civil services applicants to a loyalty test. Peter Katzenstein has estimated that between 1973 and 1980 around 1.3 million applicants were screened and about 1300 were barred from public service positions.³¹⁴ Sometimes the state targeted individuals with a hardly visible link to anti-constitutional organizations (e.g. as in the instance of the dismissal of a men from civil

³¹² **Article 33(5)** of the Basic Law requires the observance of the customary principles of public service, however the duty of loyalty is imposed by the ordinary federal and states legislation (e.g. Laws on Public Servants). For details see e.g. Thiel, *supra note 158*, at 130-131.

³¹³ Krotoszynski, *supra note 308*, at 1592.

³¹⁴ Shawn Boyne, *Law, Terrorism and Social Movements: The Tension Between Politics and Security in Germany' Anti-Terrorism Legislation*, 12 *Cardozo Journal of International and Comparative Law* 57 (2004).

service as he was cohabitating with Gudren Ensslin, founder of the German terrorist group Red Army Faction).³¹⁵

Thus, it is possible to observe that Germany opted for some trade-offs by shifting from the prohibition of political parties to less controversial measures of a loyalty screen of public servants.³¹⁶ The preventive character of militant democracy was greeted with enthusiasm and has been actively applied in less radical militant democracy measures. The Communist Party case and loyalty decree can be considered to some extent as examples of militant democracy employed by democrats who aim to preserve democracy at any cost. However, if we take a closer look at the nature of the alternatives, procedural guarantees accorded to them, and the scale of their application, it appears that stronger protection provided for political parties was traded for measures requiring less justification from the side of the Government but with an excessive burden placed on individuals applying for or being employed as public servants.

To present a full picture of militant democracy application in Germany it is important to mention the latest development in Article 21(II) jurisprudence. Although it is not about foundational militant democracy issues, it demonstrates that militant democracy is not easy to handle in states truly committed to major democratic principles which were apparent from the very beginning of German democracy militancy. The National Democratic Party (NDP) has been attacked for its neo-Nazi tendencies since its inception in 1964 and it had probably always satisfied the criteria of anti-constitutionality by the assessment of the Bureau for the Protection of the Constitution and of political scientists committed to research into

³¹⁵ Ibid.

³¹⁶ The Federal Constitutional Court was asked to decide on a party ban for the first time since the Communist Party case only in 1993: the federal government and the Bundesrat asked to declare unconstitutional Free Democratic Workers party and Hamburg's Senate filed similar petition in relation to the National List party. In 1994 the Federal Constitutional Court rejected to rule so as these organizations did not qualify as 'political parties' within the meaning of Article 21.

‘extremism.’³¹⁷ The discussion about banning the NDP revived in the late-1990s.³¹⁸ However, the question of its unconstitutionality was not referred to the Court until 2003. The tension between the government and this political player was not new and as early as in 1975 the NDP challenged the Interior Ministry’s report which described it as a party engaged in unconstitutional activity, an enemy of freedom, and danger to free democratic order. The NDP has considered such statement as a violation of party privilege guaranteed by Article 21(I) of the Basic Law. The Court found that governmental agencies are permitted to make such statements even if the party is not declared as unconstitutional.

In 2002 the Federal Constitutional Court was asked to rule on the constitutionality of the NDP.³¹⁹ The reason for such applications was the number of racially motivated attacks on foreigners, and a series of hate crimes attributed to neo-Nazi groups holding their activity in Germany. Moreover, the NDP at that time found a growing support amongst the young population of the country. The Court found the constitutional complaint admissible and scheduled a hearing. However, a few days before the hearing the Court was informed that one of the party activists had been an informer for the intelligence services. The issue appeared to be serious as the application to ban the party was heavily relying on his statements. The Court had to suspend the hearing. The applicants disclosed later that between 1997 and 2002 “no more than 15% of the members of the party leadership at the Federal and State level worked as informers of intelligence services”³²⁰ (but refused to disclose the names of all informers). The respondents asked the Court to stop the procedure and the “Court thus had to decide whether the proceeding could be continued despite the revelation that a considerable number

³¹⁷ Peter Niesen, *Banning Parties in Germany: Lessons from Europe*, Technische Universität Darmstadt. Working Paper N.9 12 (2007).

³¹⁸ Thiel, in *supra* note 158, at 122.

³¹⁹ It was a joint application by the Federal Government and both chambers of the Federal Parliament (this initiative gained support from all the major political parties) and therefore appears to be unprecedented move so far. National Democratic Party of Germany Case (2003), 2 BVB1/01, 2/01, 3/01.

³²⁰ Rensmann, *supra* note 52, at 1120.

of members of the NPD acted as informers for the intelligence services before and during the proceedings.”³²¹ In the end, four judges voted to continue the procedure while three others found that the presence of informers in NDP prevented the Court from further proceeding.

The case was turned into a decision on the procedural details of the process: according to the Federal Constitutional Act any decision in the proceeding to prohibit and dissolve the party with negative consequences for the respondent requires “a two-thirds majority of the members of the Senate”³²² assigned to deal with the application. This is a procedural guarantee of political parties’ rights and additional legitimacy to the Court decisions to ban the political parties. The Court assumed that the denial of the “implicit” application of the NDP to discontinue the proceedings constituted such a “decision with negative consequences for the respondent.”³²³ Thus, the Court found that the proceeding could not be continued since the Court did not have the six out of eight required votes to deny the respondent’s application. Therefore, the minority of the court played a decisive role in the decision to discontinue the procedure.

The solution offered by the Federal Constitutional Court “was greeted with a sense of relief by all parties concerned”.³²⁴ The political bodies which initiated the procedure “had bowed to the dynamics of the “uprising of the decent” without having fully supported the idea of trying to ban the NPD”.³²⁵ There was legitimate fear that the successful outlawing of the NDP would lead the members of the party to become more radical than before. On the other hand, if the Court failed to apply substantial grounds the NDP would be free from any charge which would give it more legitimacy and popularity. The Court’s decision to leave the substantive issue unsolved represent, according to the Thilo Rensmann, the most suitable

³²¹ Ibid., at 1121.

³²² Ibid., at 1122.

³²³ Ibid.

³²⁴ Rensmann, in *supra* note 52, at 1133.

³²⁵ Ibid.

solution in this situation. The main consequence from this decision is the exclusion of any possibility of a successful application to outlaw the party (except in cases of clear and present danger for democracy) as long as the minority judges remain in office. Those judges will be responsible for the increasing use of executive means to fight against the enemies of the democracy. It is possible to assume that after such an outcome the parties will become the subject of more coordinated and organized interference by the State.

The NDP case led some commentators to conclude that the concept of militant democracy is withering away as an effective safeguard against undemocratic political parties.³²⁶ I would not agree with this statement and the NDP case should be considered as a signal to the Government that it will not be easy to declare a political party unconstitutional unless there are serious attempts to damage the existing constitutional order. It does not mean, however, that the German state appears to be defenseless against those aiming to damage democracy. Instead of party prohibition the government will need to opt for alternative measures, like the individual prosecution of party members for crimes they committed (as was the case with some leading NDP figures), the banning of organizations, and other measures.³²⁷ Nowadays, Germany represents a state with a stable democratic system which can afford reference to party dissolution procedure but only in extreme circumstances.

³²⁶ Sanchez, in *supra* note 52, at 5.

³²⁷ **Article 9 (II)** of the Basic Law allows prohibition of association. The prohibition of such groups is held by the executive with a possibility of further appeal to the Court. The Federal Administrative Tribunal (the highest Court in the system of administrative justice) had ruled several times on the prohibition of associations on the grounds that it was directed against the established constitutional order, e.g. the Wehrsportgruppe Hoffmann Case (BVerwGE 61, 218 (1980)). The association was based on authoritarian leadership and used a rigid hierarchy. It was a military sport group and its members received paramilitary training. As was established later by the Federal Administrative Court, the mere fact that the association rejects the constitutional order and it with other principles is not enough to justify its prohibition. Associations could be banned under Article 9(II) of the Basic Law only if they want to realize their unconstitutional goals to threaten the constitutional order of the German State. The most essential is an attempt to realize anti-constitutional goals through acts of violence or other illegal activities (it is against the principle of pluralism in political process to suppress any group which activities are directed against the established constitutional order). For details see Michalowski, *supra* note 307, at 21-23; Another case decided by the Federal Administrative Tribunal is Nationalist Front Case (BVerwG NJW 1993, 3213).

3.3. Militant Democracy and the Prohibition of Political Parties in Europe: ECHR Jurisprudence and the Legislation of Young European Democracies

The following section will introduce an overview and an analysis of militant democracy jurisprudence in Europe. It is not feasible to do a full review of all European states' constitutional practices on militant democracy application within the framework of this project, so the focus will be on general trends common to most states, as well as the jurisprudence on political parties' prohibition of the ECHR.³²⁸ The ECHR case-law will be included in this case-study for various reasons. First of all, it is an international Court with binding judgments for 47 states which means that at least the general guidance on particular legal issues are given to a considerable amount of the European democracies, which they must follow and abide by. Second, in last couple of decades this institution has produced a substantive body of case-law on militant democracy related issues and problems. Third, the jurisprudence of the ECHR mirrors to a large extent the constitutional practice of European states and it is useful to provide an account of its case-law to track the most challenging and potentially problematic national constitutional and legislative provisions on militant democracy as invoked in practice.

3.3.1. Militant Democracy in Young European Democracies

The collapse of the Communism regime in Central and Eastern Europe gave second birth to the concept of militant democracy. The post-communism space of Europe is an excellent demonstration of how militant democracy can be utilized during the transitional period to ensure movement in the right direction: democratization and the liberation of a society and a

³²⁸ For a brief overview of the ECHR case-law on party prohibition see e.g. David John Harris (Ed.), *Law of the European Convention on Human Rights* 527-531 (2009) or Jacobs, White and Ovey, *The European Convention on Human Rights* 463-467 (2010).

state's structures. The past experience of the oppressive regime that existed for many years triggered wide support for the constitutional and legislative militancy we find in many countries in Central and Eastern Europe. A. Sajo, for example, suggests that a militant democracy reaction in transitional period was adopted by post-communist constitutional regimes in response to at least three major risks present in those societies: 1) the return of the communists; 2) territorial disintegration because of extreme nationalism; and 3) right-wing extremism.³²⁹ Sajo further points out that the actual constitutional and jurisprudential reactions are not framed in a way to treat the different problems in a distinct manner but all totalitarian attempts are to be treated equally, irrespective of the actual nature of the danger they represent.³³⁰

The transition to democracy in the countries of Central and Eastern Europe was accompanied by two specific and somehow contradictory circumstances. On the one hand, after a long experience of one-party rule, all states were hesitant to put any serious constraints on parties' activities, and "celebrated the principle of party pluralism (at times, even proclaiming this principle in their constitutions)".³³¹ On the other hand, the collapse of the communist regime caused a serious ideological vacuum and it was legitimately expected that many extremist organizations would use this opportunity to mobilize large numbers of 'lost' voters. Therefore, the principle of political pluralism was supported by the possibility of invoking militant democracy when it is needed.

In general, constitutional systems of post-communist European states provide a wide-ranging means to regulate political parties' activities and take measures once a party becomes

³²⁹ Sajo, *supra* note 128, at 217.

³³⁰ *Ibid.*, at 218.

³³¹ Priban & Sadurski, *supra* note 242, at 225.

potentially dangerous for democracy.³³² However, as was correctly pointed out by some commentators, provisions on militant democracy measures in relation to political parties have been used sparingly in the region.³³³ This conclusion also follows from the *Opinion of the Venice Commission on the Constitutional and Legal Provisions* relevant to the prohibition of political parties in Turkey where it notes that in states having provisions on party closure hardly ever invoke them.³³⁴ In this respect the practice of Turkey which prohibited “a high number of political parties over the years comes in contrast with the contrast of the prevailing European approach, under which political parties are prohibited or dissolved only in exceptional cases.”³³⁵

Central and Eastern European post-communist states have been extremely reluctant in putting militant democracy into practice.³³⁶ However, it would be an exaggeration to claim that the application of militant democracy measures in relation to political parties in the constitutional practice of the CEE region is without problems and concerns. At the same time, it is important to bear in mind that most of the attempts to ban political parties as well as some other measures imposing limitations on party activities were brought to the attention of the ECHR and in most of the cases political parties were accorded extremely wide protection as long as they do not use violence as a means of achieving their goals. As a result, most of the unjustified attempts on the side of the governments to dissolve or prohibit political parties was corrected by the Constitutional Courts (like in case of political party ‘Christian Democracy of the Third Polish Republic’)³³⁷ or by the ECHR.

³³² For a brief overview of the most distinct militant democracy provisions from the CEE countries see Sajo, *supra* note 128, at 218-219; Priban & Sadurski, *supra* note 242, at 225-230 .

³³³ Priban & Sadurski, *Ibid.*, at 225.

³³⁴ European Commission for Democracy through Law (Venice Commission). *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, *supra* note 224, section 22.

³³⁵ *Ibid.*, section 3.

³³⁶ Priban & Sadurski, *supra* note 242, at 228.

³³⁷ *Ibid.*

The entire body of jurisprudence coming from the CEE region on party closure and other limitations imposed on political parties can be divided into few groups, based on the type of limitations imposed. In what follows I will introduce briefly the most typical cases of militant democracy application in the region (all cases were brought to the attention of the ECHR; therefore there are reliable sources in English on the relevant legislative provisions and procedures at the national level).

Measures Restricting Freedom of Political Parties others than Party Dissolution

Among the measures regulating political parties could be listed mandatory registration procedures (which is usually a means of ensuring the compliance with formal criteria as to the name of the party, number of its members, list of documents, etc.), temporarily suspension of party activities, exclusion from a state's financial subversion, electoral threshold, etc. As to the registration procedures, these rules are not 'a dead law' and there are a few cases coming from different jurisdictions when political parties successfully challenged the refusal of the registration in the ECHR.³³⁸ As it was interpreted by the Council of Europe, the requirement of registration for political parties, *per se*, is not a violation of the Convention.³³⁹ However, contracting parties do not have unlimited discretion as to which and how serious requirements imposed on parties wishing to register (for example some states provide the limitation on party name, and some even allow for party closure on this ground as, for example, in the United Communist Party v Turkey case). The ECHR uses the same standards in cases of refusal of a party registration as in cases of party bans: refusal of registration must be necessary in democratic society, and meet the proportionality test.³⁴⁰ Usually the Court will take into account the historical and political background of the case,

³³⁸ See for example *Linkov v. Czech Republic* (2006); *Zhechev v. Bulgaria* (2007) which concerns public association actively advocating for constitutional changes; *Partidul Comunistilor and Ungureanu v. Romania* (2005).

³³⁹ European Commission for Democracy through Law (Venice Commission), *supra* note 193, Section 1.

³⁴⁰ *Partidul Communistilor (Nepeceristi) and Ungureanu v. Romania* (2005), *Tsonev v. Bulgaria* (2006).

but as a drastic measure as refusal to register party can be applied only in extreme cases and where there is evidence that a party had not sought to pursue its aims by lawful and democratic means, or changes of law proposed were not compatible with fundamental democratic principles.³⁴¹ However, the Court was not always supportive of political parties denied state registration. Thus, in admissibility decision in the case of *Artymov v Russian Federation* (2006), the ECHR agreed with the national authorities in the decision to deny registration to political parties based on the legislative provision prohibiting organizing political parties based on religious or ethnic affiliation.³⁴²

The issue of a temporary ban or closure of political parties did not arise often in post-communist European states, however the ECHR takes this measure as a serious constraint on party activities as it might have a ‘chilling effect’ on a party’s freedom. The best known case on temporary suspension of party activities is the case of the *Christian Democratic People’s Party v Moldova*.³⁴³ The temporary closure of the party was applied in response to allegedly unauthorized demonstrations organized by the party against some governmental proposals and it was imposed on the eve of the parliamentary elections. This fact combined with the communist affiliation of the then ruling party in Moldova probably triggered the extremely negative reaction of the Strasbourg Court, which stated that only very serious breaches could justify a ban on the activities of a political party (such as endangering fundamental democratic principles, or political pluralism).

As to the exclusion from a state’s subventions and other financial matters, where states provide generous financial support to political parties, the exclusion from such privileges may substantially limit the functioning and operation of a political party, especially in the case of minor parties with modest financial resources. Moreover, in the light of the War

³⁴¹ *Linkov v. Czech Republic* (2006).

³⁴² For more details on this case see the next section on militant democracy in Russia, Chapter 3.4 at 142.

³⁴³ *Christian Democratic People’s Party v. Moldova* (2006).

on Terror, the suspension or withdrawal of public funding for an organization promoting extremism (including political parties) became a widely-utilized legislative measure. Therefore, limitations imposed on financial support provided for political parties might potentially be considered as a measure of militant democracy arsenal in certain circumstances (especially with parties allegedly involved in terrorist and extremism activities). However, there is to date no relevant example for this discussion to be demonstrated in its practical application. In addition to financial constraints, political parties might be banned from having financial support from a foreign political party. While there are no cases on this issue coming from post-communist Europe, the ECHR ruled on a similar matter arising from the application of such a legislative rule in Spain.³⁴⁴

The Dissolution/Ban of Political Parties as the Main Instrument of Militant Democracy

As mentioned, Central and Eastern Europe post-communist states are extremely hesitant to employ militant democracy measures to the extent of banning political parties. Whilst political parties were refused registration in a number of cases, most often it stemmed from non-compliance with formal requirements.³⁴⁵ However, the statement of the sparing use of militant democracy measures is fully applicable to the party closure matters despite the fact that there is not a lack of extremist parties and associations in those states. This conclusion is evident from the jurisprudence of the ECHR which dealt with party dissolution cases originating mainly from Turkey. There are few reasons to explain the hesitance to dissolve political parties in post-communist Europe.

³⁴⁴ *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France* (2007). French legislation prohibits financing of the political parties by foreign ones in order to avoid creating a relationship of dependency and to ensure the overall protection of the constitutional order. As to this type of limitation, the Court found that the fact that a political party is not allowed to receive funds from foreign parties is not in itself incompatible with Article 11 (even where it is applied parties of other EU states). The measure does not call into question the legality of the party and party is still allowed to get funds from other French parties and/or benefit from State system of funding of election campaigns.

³⁴⁵ *Priban & Sadurski*, *supra* note 242, at 228.

First of all, most of the democracies from the region are becoming more stable and can afford wider tolerance towards extreme ideas and movements; even to those advocating openly racism and neo-fascist slogans.³⁴⁶ The current political situation is capable of promoting the idea that extreme speeches and ideas can be cured only by discussion and there is a growing perception that political mechanisms are more effective in combating political radicalism than legal ones. Secondly, the unfortunate experience of a recent totalitarian past limits states in their intentions to invoke illiberal measures like party closure. Moreover, states tend to accord as much freedom to political parties in exchange (sometimes) for a limitation imposed on hate speech. Some commentators also suggest that there is another, though very pragmatic reason, which is the opinion that it is better having radicals inside the system rather than outside.³⁴⁷ Most likely each explanation contributed to the current state of affairs and allowed the development of a reasonably balanced approach to the dilemma of the need to protect democracy from its enemies without undermining the democratic nature of a states structure. Someone might claim that if the frequency of party dissolution is measured against the number of extremist political movements, it looks as though militant democracy measures have been under-utilized. However, this statement does not match the original purpose of constitutional militancy. Militant democracy provisions are present in the national constitutions and legislative acts not only with the purpose to be applied but rather to send a message to the potential addressees of such measures and warn them so they have a chance to adjust their agendas and programs to comply with the rules of the game, i.e. democratic principles of the political participation and state governance.

³⁴⁶ Sadurski brings an example of National Revival of Poland (Narodowe Odrodzenie Polski), Bulgarian National Radical Party (BNRP), and the Hungarian Justice and Life Party (MIEP).

³⁴⁷ Priban & Sadurski, *supra* note 242, at 230.

Loyalty of Public (Civil) Servants

One aspect of militant democracy refers to the loyalty of public servants. The original understanding of militant democracy in Germany includes an obligation imposed on public servants to be loyal to the Constitution. The idea to expect public servants to be loyal to the system was adopted in some post-communist states.³⁴⁸ Czech Republic, for example, followed an approach similar to the German one and agents who collaborated previously with totalitarian regimes are excluded from certain position within public authority.³⁴⁹ The position of the Czech legislator is evaluated as relatively harsh compare to its post-communist neighboring countries whereas, for example, Hungary and Poland adopted more lenient lustration policies.³⁵⁰ While lustration laws affected a substantial amount of people involved in service in the public sector (especially in Czech Republic), in general such practices can be seen principally as symbolic measures to underline the value of transparency.³⁵¹

As to the ECHR evaluation of the national lustration policies and other limitations imposed on civil servants, the preventive defense aimed to address the communist danger was approved as legitimate state policy. The Court considers that transition to democracy from communism and other totalitarian regimes might justify restrictions on political rights in order to consolidate the authority of a new democratic government.³⁵² National constitutional courts and tribunals in general follow the same line of argumentation in their review of the lustration laws.

³⁴⁸ Lustration laws represent an interesting point of discussion from the perspective of militant democracy; however it will not be covered in this project as it goes beyond original scope of the research.

³⁴⁹ Sajo, *supra* note 128, at 219.

³⁵⁰ For more details on lustration regimes in CEE region see Priban & Sadurski, *supra* note 242, at 232-236.

³⁵¹ *Ibid.*, at 236.

³⁵² On restrictions of speech imposed during transition see e.g. *Castells v. Spain* (1992), on restriction of the political rights of the police officers see *Rekveny v. Hungary* (1999).

3.3.2. Militant Democracy in the Jurisprudence of the ECHR

The ECHR jurisprudence on militant democracy in its classic version – prohibition of political parties – can be split into few groups depending on the grounds for party dissolution, allegedly dangerous ideology advocating for which parties face dissolution procedure, and types of limitation imposed on political parties through militant democracy justification. Unsurprisingly, from the very beginning of the Court’s ‘life’ it had to deal mainly with cases concerning the supporters and fellows of fascist and (or) communist ideologies. In regards to these actors the Court developed a pretty consistent and rather simple line of argumentation. Most of such applications have been declared either manifestly ill-founded or were struck down under Article 17 of the Convention (the so-called abuse clause).³⁵³ The Court defined the function of Article 17 as “protecting the rights enshrined in the Convention by safeguarding the free functioning of democratic institutions...”³⁵⁴ One of the main objectives of the abuse clause is “to prevent totalitarian or extremist groups from justifying their activities by referring to the Convention...”³⁵⁵ and is closely connected by the Court with the notion of self-protective democracy.³⁵⁶ Provisions of the Convention may not be invoked by individuals or their groups “to weaken or destroy the ideals and values of a democratic society.”³⁵⁷ However, democratization of the Central and Eastern Europe made the ECHR reconsider its established interpretation and application of militant democracy and do much more than refer merely to the abuse clause and strike down cases concerning the prohibition of political parties supportive of allegedly dangerous ideas and ideologies.

The process of democratization in post-communist European states was not the only dimension of the Court’s task to interpret and apply the notion of militant democracy in its

³⁵³ For details see Harvey, in *supra* note 52, at

³⁵⁴ KPD v FRG. Decision of the Former European Commission of Human Rights (1957), Application 250/57.

³⁵⁵ Zdanoka v Latvia (2004); 41 EHRR 659 para. 109 (Chamber judgment).

³⁵⁶ Harris, *supra* note 328, at 649.

³⁵⁷ *Ibid.*

jurisprudence. At a point it was called to decide upon the prohibition of the (quite specific at that stage) type of political parties, and on more general issues of state vs. religion relations. What follows will demonstrate how the militant democracy concept was interpreted originally by the ECHR in relation to political parties supportive of fascist and communist ideologies, and later to minor political parties advocating challenges to various aspects of the states' structures. The major purpose of this case-study is to provide an account of the militant democracy notion as interpreted by the ECHR and what kind of minimum standard established within the Council of Europe in relation to the political parties operation.

Militant Democracy in Early ECHR Jurisprudence: An Extensive Protection Accorded to Political Parties

First of all, it is of relevance to outline the Convention's provisions referred to in the militant democracy debate. It is in Article 11 protecting freedom of association,³⁵⁸ and in most of the cases this article is invoked in conjunction with Article 10 guaranteeing protection of free speech.³⁵⁹ Article 17 is also of relevance as there are cases decided under this provision and national Governments very often refer to this article in their arguments to support the restrictions imposed on political parties.³⁶⁰ However, Article 17 did not find wide-spread

³⁵⁸ **Article 11:** 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

³⁵⁹ **Article 10** is read as follows: 1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³⁶⁰ **Article 17:** Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

support in the practice of the ECHR, at least in relation to political parties. Probably the reason for such an approach is the broad and ambitious language of the provision, introduced in the text of the Convention in the aftermath of the Second World War. The setting in which Convention and the Court function now is very different, therefore the Court does not use this provision too often. Moreover, once Article 17 is invoked the Court does not really have a chance to spell out its opinion on particular issues as the majority of such cases are not decided on by their merits. In addition to the listed articles, as political parties are one of the main actors in representative democracies, the right protected by Article 3 of Protocol No. 1 is also applicable in cases arising from the regulations and limitations imposed on political parties' activities.³⁶¹

Foundations: The Early Case-Law

The first party closure case of the ECHR was on the prohibition of the German Communist Party, banned in accordance with Article 21(2) of the German Basic Law.³⁶² However, the Commission did not examine the application in the light of Article 10 or 11 of the Convention, but applied the abuse clause enshrined in Article 17 (the same meaning as Article 21(2) of the German Basic Law) safeguarding human rights by protecting the free functioning of democratic institutions. In 1979 the Commission decided the case of *Glimmerveen and Hagenbeek v the Netherlands*.³⁶³ The applicants were the president and vice-president of the political party *Nederlands Volks Unie* prohibited by the Dutch Court. The grounds for its prohibition was a Civil Code provision: the prohibition of association if its activities or goals violate the public order. As a consequence of this ban, the party list submitted for election were later declared invalid, so the applicants claimed the violation of

³⁶¹ The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

³⁶² *KPD v. FRG* (1957).

³⁶³ *Limmerveen and Hagenbeek v. the Netherlands* (1979), Applications No. 8348/78, 8406/78.

their right to take part in elections (Article 3 of the Protocol 1). However, the Commission declared that the applicants cannot rely on this article since they intended to use the right guaranteed by this provision for a purpose that is unacceptable in the light of the abuse clause of Article 17. However, since 1998 the ECHR had to deal with new types of party prohibition cases and has developed a substantial body of case-law in this field with most of the cases originating from Turkey.

The ECHR Jurisprudence: Setting the Standards for the European Space

The first case on party prohibition decided by the ECHR after Glimmerveen and Hagenbeek was the 1998 United Communist Party v Turkey case.³⁶⁴ This case is worth of mentioning here in more details as the Court refers to this decision and cites the main findings and principles established here in nearly all cases on party prohibition decided afterwards. The United Communist Party of Turkey (TBKP) in the opinion of the Turkish Principal State Counsel at the Court of Cassation was accused of having sought to establish the domination of one social class over the others.³⁶⁵ Having incorporated the word “communist” into its name;³⁶⁶ having carried on activities likely to undermine the territorial integrity of the State and the unity of the nation;³⁶⁷ and, having declared itself to be the successor to a previously dissolved political party, the Turkish Workers’ Party.³⁶⁸ The Principal State Counsel at the Court of Cassation relied on the Party’s Program to support their application to the Constitutional Court. The Constitutional Court however rejected some of the alleged violations of domestic law by the party (that the *TBKP* maintained that one social class, the

³⁶⁴ For general comments on the case see e.g. Harris, in *supra note 328* at 527-528; Jacobs, White, Ovey, in *supra note 328*, at 463-465; Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, *Theory and Practice of the ECHR* 828-829 (2006).

³⁶⁵ These actions are prohibited by Articles 6, 10 and 14 and former Article 68 of the Constitution of Turkey, and section 78 of the Law on Political Parties no. 2820 (adopted in 1983).

³⁶⁶ This appears to be contrary to section 96(3) of Law on Political Parties no. 2820.

³⁶⁷ These activities are prohibited by Articles 2, 3 and 66 and former Article 68 of the Constitution, and sections 78 and 81 of Law on Political Parties no. 2820.

³⁶⁸ This is prohibited activity to be carried-out by political parties under section 96(2) of Law no. 2820.

proletariat, was superior to the others and that no political party may claim to be the successor to a party that has previously been dissolved). The Constitutional Court held that the mere fact that a political party included in its name a word prohibited by section 96(3) of the Law on Political Parties no. 2820, sufficed to trigger the application of that provision and consequently to entail the dissolution of the party concerned. The Court supported the rest of the arguments raised in the application and ordered the dissolution of the Party with all the consequences prescribed by the Contrition.³⁶⁹

The Party leadership lodged a complaint with the Strasbourg Court which found violation of Article 11 of the Convention.³⁷⁰ As there were some more applications from Turkey awaiting a hearing, and the ECHR correctly predicted further applications from Turkey, it used its chance to send a strong message to all Member States to guide them in practicing party prohibition and other limitations imposed on political parties. The main principles established by the ECHR in this case were cited by the Court on multiple occasions when it had to decide on cases involving different type of limitations imposed on political parties.

First of all, the Court extended protection of Article 11 to political parties as a response to the submission of the Government that political parties should be excluded from the scope of article 11. Political parties are a form of association essential to the proper functioning of democracy.³⁷¹ Secondly, a “political party cannot be not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for

³⁶⁹ According to **Article 69 (9)** of the Turkish Constitution: A party which has been dissolved permanently cannot be founded under another name. Article 69 (10) establishes that “The members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court’s final decision and its justification for permanently dissolving the party.”

³⁷⁰ The Case of United Communist Party of Turkey and Others v. Turkey (1998).

³⁷¹ *Ibid.*, para. 24.

the imposition of restrictions. State's actions, as they consider necessary to respect the rule of law or to give effect to constitutional rights, must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions."³⁷² Third, the political and institutional organization of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional or merely legislative."³⁷³ Thus, if the State uses these provisions to exercise its jurisdiction, they become a subject of the review under the Convention. The Court made a clear statement that it does not discern any difference between constitutional and legislative provisions when it exercises its jurisdictions. Nothing from a member state jurisdiction is excluded from the scrutiny under the Convention.

In its further arguments, the Court reiterated that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective and it would not be the case if Article 11 were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention.³⁷⁴ In addition, the Court drew attention to the precedent that "Article 11 must also be considered in the light of Article 10 as protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11."³⁷⁵ As the Court has said many times before, there can be no democracy without pluralism. Freedom of expression as enshrined in Article 10 is applicable to ideas that offend, shock, or disturb and the State is the ultimate guarantor of this

³⁷² Ibid., para. 27.

³⁷³ Ibid., para. 30.

³⁷⁴ Ibid., para. 33.

³⁷⁵ Ibid., para. 52.

principle.³⁷⁶ Democracy was once again proclaimed as the fundamental feature of the European public order and the only political model contemplated by the Convention and, accordingly, the only one compatible with it.³⁷⁷

At the same time, the Court admitted that a state's institutions could not be deprived of the right to protect those institutions and "therefore some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention (*Klass and Others v. Germany*)."³⁷⁸ Moreover, freedom of association as well as freedom of speech guaranteed by the Convention does not appear as unlimited in their scope. However, "the exceptions set out in Articles 10 and 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts."³⁷⁹ In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."³⁸⁰

In relation to the dissolution of the TBKP, the Court found that the mere fact that the national authorities dissolved the party solely on its constitution and program and before the party commenced any activity, does not mean they did not reflect the party's true objectives and its leaders' true intentions. Thus, the ECHR found it necessary to examine these documents. As to the party's name, the Court ruled that political parties' name in general is

³⁷⁶ Ibid., para. 43 and 44.

³⁷⁷ Ibid., para. 45.

³⁷⁸ Ibid., para. 32.

³⁷⁹ Ibid., para. 46.

³⁸⁰ Ibid., para. 47.

not enough to justify its dissolution. Furthermore, the Court gave assessment as to the alleged promotion of separatism and the division of the Turkish nation, the party was accused of. First of all, “the Court pointed out that one of the principal characteristics of democracy to be the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. Therefore, the Court concluded that measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society (violation of Article 11).”³⁸¹

Such a detailed list of the Court’s findings and statements was given for the sake of introducing the Court’s approach to the issue of political pluralism and the dissolution of political parties in the Council of Europe Member States. The Court refers to and cites conclusions from this judgment in all subsequent cases. Moreover, this decision contains an important statement about the difference between constitutional and statutory limitations imposed on political parties. While the Member States might claim that the Constitutional limitations have higher legal status than the statutory ones with attempts to exclude them from the Court’s supervision, the Court rejected this possible argument and expressed its attempt to review all national measures without making any difference as to their place in the hierarchy of legal norms.

³⁸¹ Ibid., para 57.

Only four months later the ECHR issued a judgment on the case of the Socialist Party of Turkey.³⁸² The Court mainly reaffirmed its previous judgment and stated that “the fact that party’s political program is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy.”³⁸³ This remains unclear what the Court was trying to say by this statement: that some of provisions of the Turkish Constitution are not exactly democratic; that rules of democracy are much wider than is written in the Constitution; or, it was just an accidental statement while the Court was trying to give as much freedom to a political party advocating for peaceful solution to the Kurdish problem as possible. This case was followed by a few other cases from Turkey concerning mainly Kurdish parties and in all of them Turkey was found in violation of the Convention.³⁸⁴ The OZDEP Party case is notable for the reason that the party dissolved itself before the Constitutional Court decided on the case. However, it did not help the party to avoid a declaration of dissolution by the Constitutional Court with all prescribed consequences.

Principles proclaimed in the TBKP case indicate that political parties enjoy broad protection of their association freedoms together with freedom of speech. It does not matter that a party propose changes and ideas not compatible with the national constitution, and discussion on the most important problems of the State should be actively debated through open dialogue. In the line with this statement was the *Zhechev v. Bulgaria* judgment concerning the dissolution of not a political party but a public association: the ECHR held that even if it may be assumed that what the association was trying to achieve was indeed contrary to the Constitution, it does not mean that the interference (or rather, its dissolution)

³⁸² *The Socialist Party of Turkey and others v Turkey* (1998).

³⁸³ *Ibid.*, para. 47.

³⁸⁴ *Freedom and Democracy Party (ÖZDEP) v Turkey* (1999) and some other cases.

was justified. Therefore, it seems that the Court was giving as wide a protection to political parties and all other actors involved in coining the public opinion in political matters.

Probably one of the reasons was its awareness of the possibility of easy abuse of militant democracy measures by a national government as a mean of getting rid of political opponents as many member states of the Council of Europe were still presenting unstable democratic regimes which could possibly refer to militant democracy without a real necessity in order to protect fragile state of democracy. However, there are signs that the Court is able to detect such moves in some instances and prevent them through its judgments. For example, in case of the Christian Democratic People's Party v. Moldova the Court acknowledged the fact that the applicant was only a minority party. It was held that the Government is under obligation not to resort to criminal proceedings where other means are available to address the unjustified attacks and criticisms of its adversaries or the media. However, this judgment is probably not strong enough to conclude that the ECHR is absolutely capable and willing to handle the situation when the Government abuses its dominant position and apply militant democracy measures in order to suppress its political opponents. The circumstances of the case mentioned must be taken into account. The majority party in Moldova at the time was the Communism Party. Probably it influenced the ECHR's decision to support the application and find Moldova in violation of the Convention. This was within the common trend in Europe to decrease the influence of communist ideas and push them away from political arena by any means.

The fact that the Court found Turkey in violation of the freedom of association rights, including the Communist Party, probably means that the Court is capable to some extent of striking down the most drastic and obvious abuse of militant democracy measures by the member states, but at this stage it is not possible to test it more definitely. The bigger problem

for the Court's jurisprudence is to what extent it can take into account the broader political context of the case. In many instances it is obvious that without getting deeply into the political environment of a particular country it is very hard to have a full account of the situation and draw a proper balance between associational freedom and a state's interest in the protection of public order, national security, and unity, etc. If the Court is not able to do it properly it is doubtful whether the Court can render a meaningful decision on dissolutions. On the other hand, the European Court should be very careful with going too deep into the politics as it might be perceived that Court interferes in the domain reserved for national authorities to regulate and control.

The Council of Europe's General Approach towards the Procedure to Ban Political Parties

As a response to growing number of cases coming to the Strasbourg Court from member states in relation to the prohibition of political parties, the Secretary General of the Council of Europe requested, in 1998, the European Commission for Democracy through Law (Venice Commission) to conduct a survey on the prohibition of political parties and analogous measures. The concern expressed by the Council of Europe was not only about cases coming from Turkey but also from the fact that most of the post-communist European states included a possibility to sanction the behavior of political parties in their Constitutions and legislation. The Venice Commission conducted research to study the situation existing in different member states and later adopted the *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*.³⁸⁵ The document consists of seven major points and it echoes the ECHR jurisprudence on matters of importance of political parties for the stable democratic system and wide protection accorded to political parties in order to prevent a government from unjustified intrusion into their activities. Thus, section 3 of the document

³⁸⁵ European Commission for Democracy through Law (Venice Commission). *Guidelines on Prohibition of Political Parties and Analogous Measures*, *supra* note 193.

allows “for dissolution of political parties only in cases where parties advocate for the use of violence or use it as a political mean to overthrow the democratic constitutional order but allows advocating for peaceful change of the Constitution.”³⁸⁶

The most guiding rules for the member states are provisions on the prohibition of political parties as measure of last resort only, and the necessity to provide strong judicial protection to parties facing the procedure of the dissolution (decisions should be made by the Constitutional Court or other appropriate judicial body). The Council of Europe is still committed to promote the same principles as established in 1999. For example, in 2008 the Venice Commission “was asked to review the constitutional and legal provisions which are relevant to the prohibition of political parties in Turkey.”³⁸⁷ The Commission found that the 1998 report still represents the concise summary of European practice, reiterating and confirming its conclusions.³⁸⁸

To conclude, there is a clear common European approach to the issue of how a democracy should respond to attempts to threaten it: by opening a free marketplace of ideas which is capable of neutralizing extremist and allegedly dangerous ideologies and ideas for democracy.. The ECHR has a developed body of case-law which in general supports the possibility of preventive actions to be taken by the democratic states in order to prevent the harm to the established order, including the possibility to ban/dissolve political parties. However, states are only allowed to utilize such radical and drastic measures in extreme situations. As to the national practice of militant democracy measures in relation to party closure, most of the post-communist states follow the standards established by the ECHR and Council of Europe. However, analysis of the constitutional and legislative provisions of the post-communist European states demonstrates that most of them reserved for the state a right

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

to act preventively in case there is threat for democracy emanating from political parties and other political movements. The inclusion of such measures in constitutional regimes was dictated by the experience of totalitarian ways of governance in the past and the fear of communists returning to the states' structures.

At the same time, all post-communist states adequately assessed the possible danger of illiberal policies in the suppressing of allegedly dangerous ideas. It appears that the presence of militant democracy provisions in constitutional orders during the transition granted more confidence to the government as they felt they had a 'back-up' in the case of a fragile regime being attacked by radicals and extremists. At the same time such provisions send a strong message to those seeking to abolish or damage the democratic structures that such activities will not be tolerated to an unlimited extent. The militancy of the post-communist constitutional regimes allows everyone to participate in the political debate as long as all players follow the established rules of the game. While there are some instances of misapplication of the doctrine in post-communist states, the situation as it stands now does not allow concluding that militant democracy was not needed to be present in the process of transition and that it was abused. In most of the cases inaccuracies were corrected by the national constitutional courts or later by the ECHR. CEE democracies have learnt lessons from Strasbourg's jurisprudence on the exceptional character of party closure and do not utilize this measure on a regular basis.

3.4. Militant Democracy in the Practice of States with Allegedly Authoritarian Agendas: A Tool to Suppress any Political Dissent (the Example of Russia)

Someone might argue that any reference to the experience of Russia as a militant democracy state is inconsiderate as it is premature to call Russia a true democracy. However, the Russian

case is of interest and relevance for this project, especially in the light of the argument on militant democracy as a symptom of transitional democracies. For the purpose of this project it is acceptable to suggest that Russia is a state officially pursuing a transition to democracy which is taking longer than many other European neighbors. Therefore, Russia is a good reality-check for the debate on the efficiency of militant democracy in transitional societies and beyond.

The Russian case study will consist of the analysis of the practice of regulating political parties' activities, which is often described as a classical militant democracy measure and is a major subject of this chapter in general. Russia is, however, quite distinctive from many other post-communist European countries in its regulation of political parties. First of all, political parties are not constitutionalized in Russia as there is no direct reference to such an institute in the Federal Constitution. Second, political parties in Russia can be organized freely but under very detailed and burdensome procedure of mandatory state registration. The Constitutional Court of Russia had an opportunity to comment on the first issue and derived the right to form a political party freely, and a more general freedom of political parties' activities from constitutional provisions on political pluralism and freedom of association. Moreover, the Court was asked to decide on the constitutionality of some elements of the registration scheme and its rulings contain important explanations on the reasons behind the existing regime. In what follows I will present a brief overview of the existing regime and will further focus on concerns it poses from the perspective of liberal democracy, outcomes for the political environment in the country and the judicial position on the aforementioned distinctive features of the regulatory regime.

3.4.1. Constitutional and Legislative Regulation of Political Parties' Activities: A General Overview

Russia is not a militant democracy state in its classical understanding and interpretation. However, some elements of the militant democracy notion can be found in the provision regulating activities of public associations. The Russian legal system is familiar with some of the elements described in previous chapters in relation to tolerance of intolerant institutions; such as allegedly radical and anti-democratic political parties and associations. For example, the Constitution of the Russian Federation does not prohibit itself from its total revision but only provides for a different procedure to amend the provision constituting the very basis of the constitutional order: the fundamentals of the Constitutional system, the rights and liberties of man and citizens and amendments and the revision of the Constitution (chapters one, two, and nine respectively).³⁸⁹ Those chapters cannot be changed through the ordinary amendment procedure by the Federal Assembly composed of two Chambers – State Duma and Federation Council – but only by a specially convened body, the Constitutional Assembly.³⁹⁰ The remaining chapters three to eight could be amended through legislative procedure prescribed for federal constitutional law but must be approved by no less than two-thirds of the constituting entities (States) of the Russian Federation.

As political parties are the major issue for this chapter, it is worthwhile referring to the Constitution of the Russian Federation to see if political parties enjoy any special protection or bear additional obligations compare to other public associations. For unknown reasons, the current Constitution of the Russian Federation does not contain any provisions

³⁸⁹ Chapter 9 “Constitutional Amendments and Revision” (articles 134-137), text of the Constitution available on-line at <http://constitution.garant.ru/english/>.

³⁹⁰ “If the proposal for such amendment are supported by the three-fifths of the total number of deputies of the Federation Council and the State Duma, a Constitutional Assembly shall be convened in accordance with the federal constitutional law; the Constitutional Assembly may either confirm the inviolability of the Constitution of the Russian Federation or develop a new draft of the Constitution which shall be adopted by two-thirds of the total number of deputies to the Constitutional Assembly or submitted to popular voting (referendum).”

directly related to political parties and therefore nothing could be found on the role and functions of political parties in Russian politics and society. However, every time the Constitutional Court of Russia had to decide on issues involving the activities of political parties it refers to a few articles mentioning this institution or simply implying the relevance of certain provision for political parties. The starting point is Article 13 of the Constitution proclaiming ideological and political diversity where the latter means that the multi-party system should be recognized.³⁹¹ The limitation clause of the last section of Article 13 is fully applicable to political parties, therefore parties the aims and actions of which are inclusive of the list of prohibited actions cannot be formed but once established can face the procedure of being banned. The freedom to form a political party is also derived from Article 30 which guarantees freedom of association and protects free and willful decision to join or leave any association.³⁹² In addition, the court would also refer to Article 1(1) which proclaims Russia as a democratic federal law-governed state with a republican form of government and Article 3(2) declaring that the people shall exercise their power directly, and also through the bodies of state power and local self-government.

The Russian Constitution is neutral towards the number of political parties, their size and social content, ideology, and program. Through regulation of public associations, which includes political parties, the Constitution just provides for organizational and functional elements of the existence of political parties. It means that principles of party formation must be in conformity with the democratic principles and human rights as they are expressed in the

³⁹¹ **Article 13** of the Russian Constitution reads as follows: 1. In the Russian Federation ideological diversity shall be recognised. 2. No state or obligatory ideology may be established as one. 3. In the Russian Federation political diversity and the multi-party system shall be recognised. 4. Public associations shall be equal before the law. 5. The creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited.

³⁹² **Article 30** of the Russian Constitution reads as follows: 1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed. 2. No one may be compelled to join any association and remain in it.

Constitution and that the aims and activities of the party must be compatible with the constitutional order.

For a quite long time the Constitution of the Russian Federation and Federal Law on Public Associations were the only legal instruments to regulate the activities of political parties and their participation in elections.³⁹³ The regulatory regime in relation to political parties and their activities can be divided into a few distinct periods.³⁹⁴ The first period started in 1993 and it was accompanied by the emergence of a huge number of groups and associations calling themselves ‘political parties’. When in 1993, the Russian Constitution entered into force and declared ideological and political plurality, the 1991 USSR Law on Political Associations was still valid. According to this law, a political party is a type of public association which is formed freely and functions on the basis of voluntary membership, equality of its members, self-governance, legality, and publicity. The only limit imposed on the eve of the first elections to the State Duma of 1993 was a 5 per cent electoral threshold. Nevertheless, as many as 35 electoral blocks and unions took part in the elections of 1993 and eight of them got seats in the State Duma.³⁹⁵ A huge number of seats (127 out of 450) were occupied by independent candidates, the institution which was abolished in 2003.³⁹⁶

The second period can be associated with legislative amendments which surrounded the preparation for the second State Duma elections of 1995, especially the adoption of the Federal Law on Elections of the deputies of State Duma of the Federal Assembly of the

³⁹³ For some examples of the regional politics during the early years of the Russian transition to democracy see Joel C. Moses, *Voting, Regional Legislatures and Electoral Reform in Russia*, 55 *Europe-Asia Studies* 7 (2003).

³⁹⁴ E.A. Volkova, *Kuda Idet Zakonodatel'stvo o Politicheskikh Partijah*, in S. A. Avak'jan, *Konstitucionnoe i municipal'noe pravo: Nauchno - Prakticheskoe i Informacionnoe Izdanie* 31 (2009).

³⁹⁵ *Ibid.*, at 32.

³⁹⁶ Until 14 July 2003 candidates in elections could be nominated by political parties, electoral blocks, or by self-nomination. Since the legislative amendments introduced on 11 July 2001 entered into force on July 2003, candidates in elections to State bodies may be nominated by political parties only (Article 36 para, 1 of the Federal Law on Political Parties as in force from 14 July 2011).

Russian Federation. The law allowed nominating a list of candidates to any electoral blocks and unions which were defined as any all-Russian public association with a major goal in its program as to participate in elections. As a result, 258 public association and 15 trade unions could potentially take part in the 1995 elections to the State Duma.³⁹⁷ Towards the next election the Federal Law on Public associations was amended in 1998 and non-party type of public associations were denied a right to participate in the 1999 elections. Thus, *only* 139 public political associations could qualify to stand for elections for the third State Duma.³⁹⁸

Apparently, the lack of proper legislative arrangements to define who (and on which conditions) can run for elections and nominate candidates led to an immense number of groups and associations potentially eligible to compete for seats in the Parliament. While many of them were not taking part in elections and made it to the State Duma, nevertheless, the number of potential groups eligible to call to vote for them and their candidates could confuse even the most experienced and prepared voter. Clearly, the institute of political parties needed better legislative attention and regulation. The first law devoted solely to the activities of political parties was enacted in 2001 by the third State Duma.³⁹⁹ The adoption of this law opened the last period in the legislative regime development and is in force in the present day (with some further amendments to be discussed later). The law did not only introduce the definition of a political party and declared the right of political parties to participate in elections alongside state financial support guarantees provided for political parties, but, more crucial for the purpose of this project, imposed substantive limits on parties' activities, including mandatory procedure of state registration (which according to the

³⁹⁷ Volkova, *supra* note 394, at 32.

³⁹⁸ Nevertheless some of the commentators concludes that most successful part of Russia's political transformation while the Soviet Union was still in existence and did not progress much since the establishment of the democratic regime in the country. See e.g. Brown Archie, *From Democratization to "Guided Democracy"*, 12 *Journal of Democracy* 35 (2001).

³⁹⁹ Federal Law on Political Parties (2002).

law does not amount to receiving state permission to form a party) and the possibility to be dissolved.⁴⁰⁰

The 2001 Federal Law on Political Parties represents an unprecedented set of rules regulating in great detail how a political party can be initiated and organized; what it can be called and which symbols it might use; what a political party cannot include in its program and advocate for; what the requirements are for its registration; what internal structure it must follow; what the rights and obligation of political parties are, including property rights; and the procedure to dissolve the party or temporarily terminate its activities. Most interesting, from militant democracy perspective, are limitations on the formation and activities of political parties proscribed by Article 9 which is applicable to both associations pursuing the status of a political party and already functioning parties. The only difference is that the former would not be registered in case of violations of Article 9 requirements while the latter would be banned and dissolved. Article 9 of the Federal Law on Political parties is a clear indication that political pluralism in Russia is not unlimited.

The Law guarantees non-violent competition of political parties in order to achieve power and participate in state affairs in constitutionally permitted forms as long as they act in compliance with the rules of Article 9. First of all, it prohibits “the formation and functioning of political parties if their goals or actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at incitement to social, racial, national and religious hatred.” Second, the same article prohibits the establishment of political parties based on professional, racial, ethnic or religious affiliation, which is a reference to the protection of the interests of a particular group as a goal in party’s program

⁴⁰⁰ For details on the law see for example, Edwin Bacon, *Russia’s Law on Political Parties: Democracy by Decree?* in Edwin Ross (Ed.), *Russian Politics under Putin* 39 (2004).

and reflection of such goals in its name.⁴⁰¹ Third, a party can have its branches created only on a territorial basis and it is prohibited to have subdivisions formed on any other basis (i.e. within state or municipal bodies, armed forces, law-enforcement agencies, etc.).

The 2001 Law established not only content-based restrictions on parties' programs and internal organization, but also quantitative restrictions for public associations in order to qualify as political party for the purpose of this law. Originally it required a political party to have at least 10,000 members and to have its divisions in at least half of the regions and such branches must include at least one hundred members.⁴⁰² However, on December 2004 this requirement was changed through a legislative amendment. The amended Article 3(2) required that a political party should have no fewer than fifty thousand members and regional branches with any fewer than five hundred members.⁴⁰³ Moreover, it is prohibited to establish regional and local parties in Russia (while ordinary public associations could have national, inter-regional, regional, and local character). The Federal Law on Political Parties came into effect in 2001. According to its Article 47, all inter-regional, regional, and local parties which did not fulfill the quantitative requirements within two years from the date the Federal Law came into force lose their status of political public associations which they had before the 2001 Law and will continue to act as an ordinary public associations. In the light of the 2004 amendments, political parties were required to bring the number of their members in accordance with the amended Article 3(2) by 1 January 2006, or to be reorganized into public associations.

⁴⁰¹ The Constitutional Court of the Russian federation was asked to decide on the constitutionality of the prohibition to ethnic and religious parties and found it in conformity with the Constitution. See Ruling of the Russian Constitutional Court N 18-P (2004).

⁴⁰² Article 3(2) of the Federal Law on Political Parties.

⁴⁰³ For details on the legislative initiative and reasons to increase the quantitative requirements of political parties membership see the ECHR judgement of Republican Party of Russia v Russia (2011), Application No. 12976/07, para. 31-34.

Therefore, in case a newly formed political party does not meet all aforementioned criteria it might be denied registration, and will not be allowed to participate in federal elections and nominate its candidates. When it comes to already existing parties, the 2001 Law supplies the regulating governmental agency with the possibility to seek its dissolution (Article 41). The most noticeable point about the procedure to dissolve a political party in Russia is that it could happen not only because a party's activities contradict Article 9 but also if it does not participate regularly in elections as well as if it does not meet quantitative requirements on the number of party members and regional branches anymore. It is not true to say, however, that Russian authorities abused the dissolution procedure. In general the Kremlin made little use of the 2001 law on parties to exclude opposition parties from the political competition: as of today there was no party banned under Article 41.⁴⁰⁴ Unfortunately, it has nothing to do with the complexity of the procedure and the strong guarantees accorded to political parties. This is rather a consequence of pushing many political groups to the margins of regular public association as most of them could not meet the requirement of the new law in relation to the number of party members and regional branches.⁴⁰⁵

The procedure to ban a party is, however, not simple. Once the Prosecutor General of the Russian Federation or registration body (presently the Ministry of Justice) found that a particular party violates the legislative provisions regulating the party's activity, they could notify the party about it and allow some time to take measures to discontinue such violations. If the party disregards such warnings, the Prosecutor General or the Ministry of Justice (the

⁴⁰⁴ Wilson Kenneth, *Party-System Development under Putin*, 22 *Post-Soviet-Affairs* 4 (2006).

⁴⁰⁵ For example, in the case of *Republican Party of Russia v Russia* the European Court of Human Rights refers to the Ministry of Justice data that on 1 January 2007 only seventeen political parties out of forty-eight registered as at February 2004 meet the requirements of minimum membership. Twelve political parties were dissolved by the Supreme Court of the Russian Federation, three political parties reorganized themselves into public associations, and seven political parties merged with bigger parties. Fifteen political parties remained registered by the end of 2007 and were eligible to participate in the 2 December 2007 elections to the State Duma (para. 35).

latter after two written notifications) can ask the Supreme Court of the Russian Federation to suspend the party's activity for up to six months. The suspension of the party's activity leads to the suspensions of its right as a founder of mass media; it is prohibited from organizing meetings, demonstrations, participating in elections, using its bank account, etc. Once a political party resolves violations of the legislation its activity is be restored. Otherwise the state body which asked to suspend the activity of the party can bring to the Court an application for its dissolution. Since the adoption of the 1993 Russian Constitution the procedure as it is described was never invoked. Only one controversial party was banned from the political space, but through a different mechanism. However, it is argued in the literature that parties favored by the Kremlin were able to operate with the presidential administration's active assistance and could also enjoy complete financial impunity.⁴⁰⁶

3.4.2. Impact of the Existing Regulatory Regime and its Purpose: Is a Militant Democracy Rationale used in Order to Perpetuate the Status Quo?

The 2001 Law on Political Parties had considerable impact on the content of the political struggle of the participants: there is no regional or local politics in Russia.⁴⁰⁷ Thus, while 139 political public associations were eligible to take part in the 1999 elections for the State Duma, this number had dropped to 44 in the first elections after the 2001 Law entered into force, and only 14 political parties took part in the fifth State Duma election of 2005. The number of political parties continues to drop and in 2007 there were 15 registered political parties while at the moment (as of July 2011) the Ministry of Justice's official web-site lists

⁴⁰⁶ Kenneth Wilson, *Party Finance in Russia: has the 2001 Law 'On Political Parties' Made a Difference?*, 59 *Europe-Asia studies* 7 (2007).

⁴⁰⁷ An unfortunate parallel can be drawn with the absence of also local and regional religious groups in Russia. For details see Chapter 4.1, at 184.

only seven registered political parties. Interestingly, most of them were established in 2001 or 2002, and only one political party from the list was organized in 2009.⁴⁰⁸

Unfortunately, these statistics are not the sign of the increasing stability of the Russian political system but rather it signals the serious constraints political parties face in order to enter into the political arena at the federal level. The situation looks unlikely to change dramatically in light of the judgments of the Constitutional Court of the Russian Federation⁴⁰⁹ and the ECHR.⁴¹⁰ Both courts agreed with the government's claims that the limitations imposed by the 2001 Law are needed to guard the basis of the constitutional order of the state which makes the Russian case relevant for discussion on militant democracy rational; invoking to suppress and limit the activities of political parties for the sake of protecting democracy.

The Constitutional Court of the Russian Federation had to rule on two provisions of the 2001 Law on Political Parties. The first judgment handed out in 2004 concerns the provision of the law which prohibited establishing political parties based on professional, racial, ethnic or religious affiliation. The terms 'professional, racial, ethnic or religious affiliation' shall be understood as including in the articles of association and political program of the party aims for the protection of professional, racial, ethnic or religious interests, as well as reference to those aims in the name of the political party.⁴¹¹ Only a couple of months later the Court had to deal with another constitutional complaint involving the same legislative act. In February 2005 the Constitutional Court ruled on the quantitative requirements for party members and regional branches. Both judgments amount in fact to the

⁴⁰⁸ List of registered political parties in Russian Federation according to the information of the registering authority: Ministry of Justice of the Russian Federation at <http://www.minjust.ru/ru/activity/nko/partii/>

⁴⁰⁹ Ruling of the Russian Constitutional Court N 18-P (2004).

⁴¹⁰ Artyomov v. Russia (2006). Admissibility Decision, Application No. 17582/05.

⁴¹¹ Article 9 (3) of the Federal Law on Political Parties.

endorsement of the state's vision on how political parties should be organized and what control the government might have over them.

In December 2004 the Constitutional Court of Russia ruled on constitutionality of the restriction to establish political parties based on religious and ethnic affiliation.⁴¹² The case originated from a reference of one of the Moscow district courts and individual complaints by Mr. Artyomov, Mr. Savin, and the Orthodox Party of Russia.⁴¹³ The Constitutional Court decided to join the reference and complaints in one case as they all raised the same issue. The ruling of the Court opens with a statement on the special role of political parties as the only type of public association admitted to participate in the electoral process and to nominate candidates for elections. The 2001 Law on Political Parties declares that the membership of political parties is strictly voluntary and cannot be restricted on account of professional, social, racial, ethnic or religious affiliation, gender, social origin, property or place of residence. Therefore, the right of individuals of any ethnicity or religion to become members of a party whose objectives and goals they shared could not be restricted.⁴¹⁴

However, principles of pluralism, in addition to the multi-party system and secular character of the state must be interpreted with regard to the particular features of the

⁴¹² Ruling of the Russian Constitutional Court N 18-P (2004).

⁴¹³ Mr. Artyomov, the leader of the public movement 'Russian All-Nation Union' ("*Russkiy obshchenatsionalniy soyuz*"). This public association was established in the early 1990s. On 7 December 1998 the Ministry of Justice registered the movement as a public association. In December 2001 it was decided to re-organise the movement into a political party bearing the same name. An application for the party's registration was lodged with the Ministry of Justice but the Ministry of Justice refused the application on a number of grounds, including the presence of adjective "Russian" (*ruskiy*) in the name of the party. It was concluded that the name of the party referred to an ethnic group, which is prohibited by Article 9(3) of the Law on Political Parties. The leadership of the movement contested the refusal in the Courts but without any success. The Court and the Ministry of Justice insisted (based on expert opinions) that the meaning of the word *ruskiy* was ambiguous and it could be understood either as denoting anything related to Russia or as referring to one particular ethnic group, the Russians. Moreover, the word "all-nation" (*obshchenatsionalniy*) in the name of the applicant's party also allegedly had two meanings, the first being "an association of people belonging to different nations" and the second "an association of the people of one nation". Therefore, it was found that the party was established on the basis of ethnic affiliation despite the fact that the party's program did not indicate protection of the interests of the Russians as its main objective. After the Moscow City Court upheld this position of the lower Court, the leaders of the association lodged a complaint with the Constitutional Court of the Russian Federation (from the facts summary of the *Artyomov v. Russia* (2006) admissibility).

⁴¹⁴ Ruling of the Russian Constitutional Court N 18-P (2004), para 3.

country's historic background, the national, ethnic and religious composition of the Russian society as well as the specific character of interactions between the state, political power, ethnic groups, and religious confessions.⁴¹⁵ Therefore, the principle of secularism could not be applied and interpreted in the light of the Russian reality in the same way as in those countries with a single-faith and a single-nation social structure (it is however not clear what countries the Court had in mind making this statement as there is hardly any democracy in the world not affected by minority groups involvement in politics). The only clarification given by the Court was a reference to the tradition of Christian democratic parties in Europe where Christianity is not associated only with religion but refers mainly to the European system of values and culture.

The Russian reality was found to be extremely distinct in this respect from its European neighbors. Thus, the Court notes that in multinational and multi-denominational Russia, public consciousness is more likely to identify the terms 'Christian', 'Orthodox', 'Muslim', 'Russian', 'Tartar', etc., with specific denominations or ethnic groups, rather than with a system of values common to the Russian peoples in their entirety. However, contemporary Russian society does not have substantial experience of democratic traditions and culture. According to the Constitutional Court, Russian democracy is yet too fragile to afford having political parties based on ethnic or religious affiliation. In the Court's opinion the presence of such parties would inevitably seek protection mainly for the rights of the respective ethnic and religious groups which would be detrimental for state's efforts to consolidate society and promote common national values for the entire nation. Moreover, the Court was very cautious to prevent any possibility of the politicization of religion which would occur if parties could be established based on religious affiliation. The Court linked the mere possibility of the existence of ethnic and religious parties to a violation of the

⁴¹⁵ Ibid., Para 4.

Constitution; equality, political, and ideological plurality as well as the major constitutional principle of democratic and secular state.

The Constitutional Court in deciding on the constitutionality of the prohibition to establish political parties based on ethnic or religious affiliation found it acceptable in the present circumstances of inter-ethnic and interdenominational tensions, absence of a stable democratic culture and traditions, the growing demands of religious fundamentalism, and separatist tendencies in Russia. Therefore, the prohibition of ethnic and religious parties is dictated by the need to preserve the democratic and secular character of the state which needs stronger protection during the period of transition. The Constitutional Court of Russia, however, left unanswered the question if its position can be changed later once Russian democracy becomes stronger and more stable. There is no surprise that some commentators concluded that the Court remains relatively weak in the context of the reinforced authoritarianism of the Russian regime.⁴¹⁶

The ruling of the Constitutional Court was challenged later in the ECHR by Igor Artyomov, leader of the public movement 'Russian All-Nation Union,' The Strasbourg Court declared Artyomov's application inadmissible.⁴¹⁷ In general, ECHR accepted that the interference pursued the legitimate aims of preventing disorder and protecting the rights, and freedoms of others and it was necessary in a democratic society. One of the most interesting findings of the admissibility decision is a distinction made by the ECHR as to the applicant's general freedom of association and ability of association under his leadership to participate in elections. The Court stressed out that the applicant's complaint was about the latter while it is reserved for states to decide on criteria to participate in elections. At the same time, Artyomov was not prevented from establishing a public association to promote and express

⁴¹⁶ See for example Marie-Elisabeth Baudoin, *Is the Constitutional Court the Last Bastion in Russia Against a Threat of Authoritarianism?*, 58 Europe-Asia Studies 697 (2006).

⁴¹⁷ Artyomov v. Russia (2006). Admissibility Decision, Application No. 17582/05.

specific aids and ideas, but the right to stand for election is not automatically derived from the freedom of association clause and a state is accorded a wide margin of appreciation to decide on its electoral system arrangements.⁴¹⁸

As was mentioned above, the Constitutional Court of Russia had also to decide on the quantitative restrictions imposed on political parties as well as on the prohibition to establish regional and local political parties. An individual complaint was lodged by a public political association, the ‘Baltic Republican Party.’ According to the Federal Law on Political Parties enacted in 2001 all public associations wishing to re-register and receive the status of political party must meet the requirement on the minimum number of its members (10,000 members at the time) and regional subdivisions in at least in the half of regions with no fewer than 100 members. Public associations were given two years to arrange their structure in conformity with these requirements. The Baltic Republican Party did not comply with the rule to update the number of its members and was banned for using with its name ‘political party,’ not qualifying for this status under the new law. The complaint was based on an alleged violation of constitutional provisions on freedom of association, principles of political plurality, the federal character of the State, and proportionality of the limitation of human rights. The Constitutional Court confirmed the constitutionality of the challenged provisions and based its ruling on arguments very similar to the previous case (rulings were adopted within a time frame of less than two months).⁴¹⁹ The Court opened its decision on the merits with the statement that provision of the Law on Political Parties allowing for only federal political parties amounts to interference with freedom of association, however it is legitimate

⁴¹⁸ The Court’s arguments are in line with the overall ECHR jurisprudence on religious parties ban (i.e. see chapter 4.3 on militant secularism in the jurisprudence of the ECHR).

⁴¹⁹ Ruling of the Russian Constitutional Court N 1-P (2005).

if it meets the requirements of Article 55(3) of the Constitution on the general rights limitation clause.⁴²⁰

According to the Court's reasoning, the legislator adopting the Federal Law on Political Parties meant that political parties are vested with a task to form and express the will of the entire nation, but not of some region(s) of the country. The task of the political party as a special type of political association is to express and protect national interests but when pursuing its activities and implementing its program in the regions, parties should take into account national as well as regional interest. As to the all-Russian character as the only type of accepted political party, the Court referred to the fragile character of Russian democracy, the poor democratic experience of the country, especially serious threats coming from separatist, nationalist, and terrorist groups. Moreover, the Constitutional Court assumed that the creation of regional parties would inevitably endanger the territorial integrity and unity of the state and uniformity of the State's power. The Court also found that creation of regional and local political parties would lead to the creation of an excessively multi-party system which would present a threat for developing Russian democracy, federalism, unity of the country, and equality of all citizens to the realization of freedom of association.

These reasons and fears were found as sufficient to declare a legitimate state interest in preventing the establishment of regional parties. It is unclear why the Constitutional Court of Russia did not trust the ability of its citizens to decide which parties they would like to see in the national parliament despite the number of their adherence and geographical location. Apparently, the unstable character of democracy in Russia was the most crucial point for the Court to find the limitation in conformity with the national Constitution. The Court had

⁴²⁰ **Article 55(3)** reads as follows: The rights and freedoms of man and citizen may be limited by federal law only to the extent necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

followed a line of argumentation envisaged in the previous case, and relied heavily on the need to accord special protection to the existing constitutional order as long as it remains fragile. There was no word said about the possibility of revisiting this conclusion later, when democratic institutions in Russia get stronger and democratic traditions and culture flow deeply in the everyday life of the society and politics.

As to the quantitative requirements imposed on political parties, the Constitutional Court did not elaborate much and left this issue for the legislator to decide. The legislator's intent requiring a political party to have considerable support within Russian society was in order to fulfill its very special mission. Quantitative limitations imposed on political parties do not contradict as such the Constitution unless they make the right to establish political parties illusory. The Constitutional Court found that rules on the minimum number of party members and regional branches in at least half of the regions (the total number of regions is more than eighty in Russia) do not make an attempt to create a political party unfeasible. Moreover, it was underlined that public associations can still be actively involved in politics even if they do not possess the status of a registered political party. Ironically, the only activity such public associations cannot pursue is participation in federal elections, the very purpose of any political movement.

On a separate point, it is interesting to observe that just few weeks before the Constitutional Court ruled on the Baltic Republican Party complaint the State Duma adopted amendments to the Law on Political Parties which increased the requirements on number of party's members five-fold: political party must have at least 50, 000 members in total and at least 500 in each of its regional branches.⁴²¹ It remains unclear why the Constitutional Court did not even mention such a development in the current legislation and simply ignored the

⁴²¹ Federal Law on Amendments to the Federal Law on Political Parties (2004).

novelty of imposing substantially heavier burden on public associations to pursue recognition as a political party.

Both Constitutional Court judgments can be assessed together as they do not differ at all in their reasoning and the extent of support granted to state's actions. First of all, both rulings endorsed the overall policy of the current government to prevent the emergence of new political parties. As was already mentioned, six out of seven currently registered political parties were established in early 2000 and only one party from the list was registered in 2009. This indicates that consistent policy aiming to reduce the number of parties was successfully implemented. Moreover, regularly adopting new legislative rules adds further access barriers. For example, in 2005 an institute of independent candidates was abolished; the electoral system was modified to allow voting only for parties lists of candidates; in 2006 voters were denied the right to vote against all candidates; state financial support for each cast vote was increased by four times in 2008. Additionally, and even more troubling, is the position of the Court in accepting the State's argument that such draconian measures are needed in order to protect the existing constitutional system, in order to make it stronger and more stable. The Constitutional Court manipulated the comparative argument in a way that references were made only when it was in support of its position (for example to the Christian Democratic political movement in Europe). The Court, however, did not refer to the experience of Germany, also a federal state, but one which never prohibited the existence of regional parties (i.e. the Bavaria Party).

It follows from the Constitutional Court's assessment that the federal legislator is the only institution totally in charge of deciding upon how the political will of the people should be formed and how many political adherents it must have in order to participate in the electoral process. It is not clear why a political party with 50,000 can nominate candidates for

elections and express the will of the entire nation but party with ten members less cannot. It is curious if the Constitutional Court ever made any calculations on how much would it cost to organize a political party if it is required to enroll the required number of members and organize regional offices in more than 40 federal units. Moreover, it is very doubtful if a unified will of the people in a country like Russia could be ever formed and whether it is good thing for democracy. It is a well established principle that democracy presupposes the competition of ideas, thoughts, suggestion, including issues of regional governance and politics. The Russian Constitutional Court seems to follow the questionable idea that a unified will of the Russian people can be formed one day and only federal parties with more than 50,000 members can help in expressing that will. The Court did not want to consider an option to open the Russian political space for competition in the true sense of the word. In the end, powers to decide on state matters were given to the people of Russia and maybe it makes sense to give the people more freedom to decide which party they want to support and vote for.

The prohibition of religious and ethnic parties is less easy to criticize as a state can legitimately insist on the separation of Church and State, especially when there is an opportunity to establish public associations, including religious ones. Similar provisions can be found in the constitutions of other European countries (like Bulgaria and Turkey). While the general prohibition of such parties might make sense, especially in the reality of Russia, courts and executive agencies should be encouraged to look at the programs and activities of political parties, but not to derive conclusion on party's character from its name only (as was done in Russia).

The Russian legislative regime regulating the procedure of establishing and the functioning of political parties is very troubling from the perspectives of liberal democracy.

The Russian political space is extremely hard to enter and the procedure to establish a political party is truly challenging. As one Russian commentator observed in order to register a political party in Russia, one need go through so many formalities that it is difficult to imagine that someone would decide to go through such hardship.⁴²² Difficulties in establishing political parties cannot be overcome via the fulfillment of organizational requirements only as the Federal Law on Political Parties imposes additional content-based restrictions on party programs and agendas. While the official position of the State is that political parties can be formed freely and without getting any permission from the State, in reality parties cannot pursue their activities without a mandatory procedure of state registration. It would be interesting to see how the State's approach and judicial interpretation would be changed if Russian democracy would be declared as being stable and strong. At this stage, the Russian government insists on very strict guardianship over the political space with the purpose of preserving the status quo, and tries to give the impression of a certain political diversity (Russia has seven registered parties, not two) but at the same time does not allow the emergence of new political movements.

The major rationale used by the Russian government is very similar to that of militant democracy: there is a need to limit the rights of those who can potentially harm democracy. However, in Russia it is done too prematurely as any attempt to establish political parties is aborted at the very beginning of the process and parties do not have a chance to enter politics. Moreover, this rationale is abused in order not to protect democracy but to keep control over the content of political debate through regulating how many political players are allowed to enter into the debate itself. The saddest thing about Russia is that this approach was endorsed by the judiciary: the Constitutional Court in late 2004 'blessed' the government and

⁴²² V.A. Sockov, *Pravovoe Regulirovanie Porjadka Obrazovanija, Priostanovlenija i Prekrawenija Dejatel'nosti Politicheskikh Partij v FRG i RF, 13 Gosudarstvennaja Vlast' i Mestnoe Samoupravlenie*. (2007).

parliament to pursue their policy in relation to political parties. The unfortunate conclusion is that the Russian government abused the notion of militant democracy and claimed to protect a fragile constitutional order while pursuing its own political goal to empower one particular party and prevent any serious competitors from entering the political space.

There is however a tiny hope for improvement of the situation as in 2008 Russian President Dmitry Medvedev expressed his concern about the burdensome requirements imposed on political parties by the current legislation. As a result a legislative amendment required for registration was enacted and from January of 2010 the number of party members was decreased to 45, 000, and from January 2012 it will be decreased further to 40, 000.⁴²³ It will take time to see if such changes will make any substantial difference, but it is already a positive sign that current leadership acknowledges the unpleasant state of affairs in the regulation of activities of political parties.

Furthermore, one of the most recent developments in the ECHR jurisprudence is supportive of my arguments that Russia abused the militant democracy rationale in imposing quantitative and territorial limitation on political parties' activities in its claimed attempts to protect democracy.⁴²⁴ In April 2011 the ECHR ruled that the requirements of minimum membership and regional representation was disproportionate to the Court-accepted legitimate aims pursued by the government – protection of national security, prevention of disorder and guarantee the rights of others – and therefore found Russia in violation of Article 11 of the European Convention on Human Rights.⁴²⁵

The ECHR pointed out that in the absence of any evidence that a political party was not democratic or intended to resort to illegal or undemocratic methods, the government's

⁴²³ For details see National News Agency news archive at <http://www.annnews.ru/news/detail.php?ID=182400>.

⁴²⁴ Republican Party of Russia v. Russia (2011), Application No. 12976/07.

⁴²⁵ Republican Party of Russia v Russia (2011).

decision to dissolve the party could be warranted only in the most serious cases.⁴²⁶ The applicant's party was dissolved for its failure to comply with the requirements of minimum membership and regional representation. The Court rejected the argument brought by the government on a possibility for the applicant to function as a public association as it would impair one of the applicant's main aims: participation in elections. It was accepted that it was essential for the applicant to retain the status of a political party and the right to nominate candidates for elections.⁴²⁷

As to the requirement of minimum membership, the Court did not declare it as unacceptable under the Convention and referred to the practice of other member states.⁴²⁸ However, the minimum membership requirement applied in Russia was found to be the highest in Europe⁴²⁹ and therefore the Court felt the necessity to discuss in details the reasons advanced by the Russian legislator to justify such a burden on political party formations. However, the Court rejected the arguments of the necessity to strengthen political parties and limit their number in order to avoid the disproportionate expenditures from the budget during the elections as well as to prevent excessive parliamentary fragmentation in order to promote the stability of the political system.⁴³⁰ In the Court's view, financial considerations cannot serve as justification for limiting the number of political parties and allowing the survival of large, popular parties only. As to the excessive parliamentary fragmentation argument, the Court noted that it might be achieved through the 7 per cent electoral threshold existing in Russia and conditional participation of a political party in elections (i.e. having seats in the State Duma or submitting a certain number of signatures, 150, 000 at the present date).⁴³¹

⁴²⁶ Ibid., para 102 and 103.

⁴²⁷ Ibid., para. 107.

⁴²⁸ Ibid., para. 62.

⁴²⁹ Ibid., para. 110.

⁴³⁰ Ibid., para. 111.

⁴³¹ Ibid., para. 113.

Furthermore, the Court disagreed “that small minority parties should not be denied a right to participate in elections. Democracy does not simply mean that the views of majority must always prevail and balance must be achieved to ensure the fair and proper treatment of minorities and avoid any abuse of a dominant position.”⁴³² In the end, the Court declared that “such a radical measure as dissolution on a formal ground, applied to a long-established and law-abiding political party such as the applicant, cannot be considered “necessary in a democratic society.”⁴³³

The regional representation requirement imposed on political parties was also found unacceptable under the European Convention on Human Rights. The rule was introduced ten year after the transition to democracy began and the Court considers that with the passage of the time, general restrictions on political parties become more difficult to justify.⁴³⁴ The Court suggests the case-by-case assessment of the party program instead of blanket prohibition of regional parties.⁴³⁵ In the end, the Court concludes that the present case is illustrative of a potential for miscarriages inherent in the indiscriminate banning of regional parties.⁴³⁶

To conclude, Russian political environment is being aggressively protected from any unplanned intrusion by the existing legislation and governmental policies. The militant democracy rational is present in the background of such policies; however, it is applied too prematurely. Russian complex territorial organizations combined with an extremely diverse ethnic population poses potential problems for the survival of democracy. However, it does not follow that preventive self-protective measures could be invoked at as early a stage as to prevent the emergence of any political parties. The current President of Russia expresses

⁴³² Ibid., para. 114.

⁴³³ Ibid., para. 120.

⁴³⁴ Ibid., para. 129.

⁴³⁵ Ibid.

⁴³⁶ Ibid., para. 130.

some concerns on the political situation and they were followed by certain legislative amendments. Moreover, the recent Strasbourg judgment is a clear indication that regulation of political parties in Russia is far from being recognized as healthy democratic practices. It is also a strong signal that Russia should take more serious steps to slow down its aggressive protection of democracy through draconian limitation imposed on political parties. All these events leave some hope that militant democracy will cease to be used by the Russian government to protect the dominant position of the existing majority party but will be utilized for its true mission: to safeguard democracy from its enemies.

3.5. ‘Softer’ Militant Democracy Measures: The Example of Alternative Solutions from India and Israel

The previous parts of this chapter were devoted to practices of different states directed at the suspension of activities of political parties, i.e. dissolution, temporary prohibitions of party activities and limitations in registration procedure. However, constitutional practice is familiar with alternative measures of a militant democracy nature adopted to promote substantive democracy via regulating what political parties might advocate and practice. The alternatives to party dissolution procedures could be a useful hint for states seeking to rearrange the current party-prohibition practices and for a general theoretical debate on militant democracy. Measures to be discussed within this section allow political parties to remain in the political arena but nevertheless impose substantial limitations on the major aim of any political party: participation in election. However, content restrictions on electoral speech as practiced in India, and disqualification of lists and parties in Israel, should be considered as a serious encroachment on political parties’ activities and their ‘softer’

consequences for affected political players should not lead to relaxed standards compare to the party dissolution procedures.⁴³⁷

3.5.1. Content Restrictions on Electoral Speech: The Case of India

India represents a fascinating example for studies on different constitutional law issues. This jurisdiction was already mentioned above for its constitutional provisions on a state of emergency within the debate on the core of the constitutional order as the main object of protection for the militant democracy concept. Moreover, India which is divided at least on the basis of language, tribe, caste, religion, and region could be considered as a successful example of political mobilization through ethnic parties despite the overall profound pessimism about the health of democracies with active ethnic parties.⁴³⁸ Finally, India is an interesting example for the militant democracy debate for its alternative political party regulation measures. In this jurisdiction the prohibition of political parties was replaced with the possibility to impose restrictions on political speech during times of elections.

Unfortunately, India has experienced throughout its history examples of electoral agitation which led to violence and a substantial number of fatalities. Therefore, a legitimate question arose in the circumstances of likely violent political unrests: how to balance free political speech versus the need to maintain public order. Despite a strong commitment to freedom of expression in its Constitution, India sought to achieve this balance by narrowing limits of political speech and imposed an electoral code to pursue this aim.⁴³⁹ Thus, it is prohibited to seek electoral support by promoting “enemy or hatred...between different classes of” Indian citizens “on ground of religion, race, caste [or] community.”⁴⁴⁰ In addition,

⁴³⁷ Both jurisdictions have various rules on political parties’ activities, however, I will not look at the whole story and will concentrate only on the peculiar features of the militant democracy measures employed in these jurisdictions.

⁴³⁸ For details on the study of ethnic parties and democracy see, Kanchan Chandra, *Ethnic Parties and Democratic Stability*, 3 *Perspective on Politics* 2 (2005).

⁴³⁹ The Representation of the People Act, No. 43 of 1951; India A.I.R. Manual (1989), v. 41.

⁴⁴⁰ Issacharoff, *supra* note 86, at 1425.

the electoral code proscribes “corrupt practices” to be identified by an Election Commission. One of the examples of corrupt practices would be a call to vote for or against a candidate “on the ground of his religion, race, caste, community or language or the use of, or appeal to, religious symbols.”⁴⁴¹ The most important role of the Election Commission in enforcing these rules is its power to seek remedies against candidates who relied on prohibited speech, i.e. the exclusion from the office of elected representatives. This provision is not a mere theoretical possibility and the Indian Supreme Court has imposed numerous similar remedies in practice.

The most famous case to demonstrate how an alternative militant democracy measure is able to keep control over activities of political parties worked out in India is *Prabhoo v. Kunte*, the Indian Supreme Court’s 1996 judgment.⁴⁴² Ramesh Yeshwant Prabhoo was elected to a state legislative office in Maharashtra. However, the High Court of Bombay decided that Prabhoo should be removed from his elective office due to the fact that his agitation campaign amounted to corrupt practice. The campaign had been organized by Bal Trakeray, the leader of the extremist Shiv Sena Party. The High Court found that the electoral campaign of Prabhoo appealed to Hindus to vote for this candidate on the basis of his religious affiliation and was threatening Muslim candidates. The decision to reverse the election results was based mainly on the manifesting threat to public safety and other candidates (in this case with Muslim affiliation). However, the highest judicial institution of India ruled that such an interpretation of the electoral code in the circumstances of the Prabhoo case would lead to a dangerously narrow understanding of grounds to identify certain political speeches as corrupt practices. The High Court pointed out that legislation prohibits any appeal to vote for or against the candidate based on his religion and it does not

⁴⁴¹ Ibid.

⁴⁴² *Prabhoo v. Kunte*, A.I.R. 1996 S.C. 1113.

matter that such appeals seemed to be posing a threat to public order. Seeking votes on the ground of the candidate's religion was declared to be inconsistent with the secular character of the Indian State. The Court expressly said that it was not going to assess only whether speech is dangerous in terms of its consequences, but that the nature of the speech itself is at stake. One paragraph from a typical speech of Bal Thackeray speaks for itself on the overall mood of the Prabhoo electoral campaign:

Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by the name Prabhoo should be led to victory in the name of religion.⁴⁴³

Not surprisingly, restrictions on political speech with such content were found constitutionally permissible in the light of wide constitutional emergency powers to protect public order. However, as one of the commentators on Prabhoo case notes, the Court has resolved potential constitutional conflict by making two distinct findings about the special constitutional status of the election period.⁴⁴⁴ First of all, the Court revisited its earlier understanding of the constitutional commitment to a democratic political order and expressed its concern that all the differences “of religion, race, caste, community, culture, creed and language could generate powerful emotions depriving people of their powers of rational thought and action and those differences should not be permitted”⁴⁴⁵ to disturb democratic freedoms. Secondly, the Court underlined that the prohibition on speech was directed only to the limited period of time when elections are about to happen. It was found to be necessary in order to maintain the integrity of the democratic processes.

⁴⁴³ Issacharoff, *supra* note 86, at 1423.

⁴⁴⁴ *Ibid.*, at 1426.

⁴⁴⁵ *Ibid.*

Therefore, while the limitation of electoral speech might appear as seriously problematic from a freedom of speech perspective and lead potentially to vague concerns, the Court has identified serious limitations in the application of such measures. First, antidemocratic appeals of political parties are scrutinized only during the election campaign. This would most probably mean, that political parties are free to speak in antidemocratic terms about other candidates and appeal for the support of their candidates on grounds of their differences from others, i.e. religion, race, caste, etc. Second, the electoral code does not impose ideological limitations on party program or their behavior as long as they comply with the rules of the game during times of elections.

The Indian approach is not free of complexities, as any other case when a state has to decide on measures to protect its constitutional structures from allegedly dangerous political players without compromising its commitment to the principles of democracy. First of all, the electoral code lacks clear guidance for decision-makers and is also applied mainly after the elections are over.⁴⁴⁶ This leads to the second concern. The application of electoral code rules on prohibiting certain electoral speeches means an ‘outcome-determinate’ oriented-decision, which in the Prabhoo case was the removal of the candidate supported by the majority of voters.⁴⁴⁷ Moreover, measures of a retroactive nature in general raise concerns regarding their legitimacy. The example of electoral speech limitation practices in India opposes the general tendency to accord the widest possible protection to the electoral arena than to political parties themselves. The German radical groups cases are clear demonstrations of such an approach. However, the Indian example shows the possibility of treating the conduct of political parties during election separately from issues of their political status. In the end, the very essence of the banned party is to keep it away from the chance to compete for seats in

⁴⁴⁶ Ibid., at 1427.

⁴⁴⁷ Ibid.

the parliament and have a say in matters of politics and governance. While the Indian approach on electoral speech limitation bears the same result it still leaves chances for political parties to correct their behavior to preserve electoral viability.

Therefore, the Indian solution to bar extremist political parties from the electoral process deserves attention and analysis. There is no doubt that it represents the least restrictive mean to achieve the grand goal: to protect political space from allegedly dangerous political groups seeking to challenged the existing order and damage it. Prohibition of political parties is accepted to be legitimately applied only in extreme situations. However, the number of parties banned in Europe in the last couple of decades demonstrates that such commitment is not taken as seriously as it should be. The case-studies in the previous section present a troubling tendency of many democratic states to eliminate even utterly minor political parties with no chances to influence the content of the political debate. The Indian example is a positive sign of considerate application of militant democracy. This jurisdiction opted not to interfere with everyday activities of political parties for various reasons (which might be peculiar to the Indian democratic structure only) but let the parties function freely until they decide to run for elections. It is hard to contest that times of electoral campaign are of crucial importance for the outcome of elections, especially in societies with a low political culture and general disinterest in politics. This is a chance for political parties and their candidates to present the party's program and to appeal to people to vote for them. Therefore, special attention to what candidates and party members do and say during the campaign deserve special attention from the side of the state, especially with the experience of violent riots caused by agitation as in India.

The major weakness of the Indian version of militant democracy is that it is not adjusted yet to the situations where a party can mild its language for electoral campaign but

will appeal to differences between citizens once it is elected. For example, the most prominent Hindu nationalist party, the Bharatiya Janata Party (BJP)⁴⁴⁸ was one of the parties behind the 1992 Hindu mob which led to ethnic riots with thousands dead. However, later it adjusted its political behavior so it became possible to secure its presence in the electoral scene and still remains one of the major political parties in India. It is hard to assess right now whether it was right thing to keep the party as a legitimate political actor or find a way to eliminate it from political discourse. However, the Indian example of practicing less restrictive militant democracy measures is a valuable contribution to the debate on militant democracy, its legitimacy, and limits. Despite some serious complexities, the Indian solution on the regulation of political parties' activities deserves to be considered as one of the possible responses to the threat coming from allegedly dangerous political movements.

3.5.2. The Banning of Political Parties from Elections: The Example of Israel

In Israel, the theme of self-defending democracy is discussed in two different contexts: threats by Arab nationalists, and by right-wing Jewish nationalist extremists.⁴⁴⁹ However, in Israel we can observe an interesting variation on the approach towards the regulation activities of political parties: electoral participation is treated separately from issues of party formation and functioning. One of the institutional arrangements in Israel in this respect is the possibility to disqualify lists and parties from participation in elections but without deciding on a party's legality and constitutionality.

Suzie Navot distinguishes three periods regarding the position of Israeli law on the banning of political parties, including their disqualification from participating in elections.⁴⁵⁰ The first period starts from the year of the state's establishment until the 1980s. The second period covers the years 1985 to 1992, when Israel enacted for the first time in its history a

⁴⁴⁸ Party's official web-page: <http://www.bjp.org/>.

⁴⁴⁹ Benyamin Neuberger, *Israel*, in Thiel, *supra* note 21, at 188.

⁴⁵⁰ Navot, *supra* note 231.

law allowing the disqualifying of a party. The third period begins from 1992, the year when the Parties Law was adopted, with a peak in 2002, when amendments were introduced to the elections law.

During the first period there was no legal basis to ban a party from election for its electoral agenda. However, the most intriguing feature of the early period was the actual attempt to ban one of the parties from participating in elections. The question of barring a party from participation in elections first arose as early as 1965, the year when the history of electoral list disqualification began in Israel. The Socialist List was disqualified from participating in the elections.⁴⁵¹ The Elections Committee refused to approve the list on the grounds that it was an illegal association and its members were challenging the integrity and existence of the State of Israel. The Supreme Court of Israel in a majority opinion endorsed the decision of the Central Electoral Committee.⁴⁵² The Supreme Court's decision in the Yeredor case is regarded as one of the most important and exceptional decisions in Israeli constitutional history and the symbol of the idea of defensive democracy.⁴⁵³ Despite the excitement expressed by some commentators, this ruling is far less problematic if we keep in mind that the Central Elections Committee was charged with mechanical tasks only and was not authorized by law to rule on or assess any matters of party platform content. Unsurprisingly there was a dissenting judge arguing against disqualification exactly on the grounds of an absence of any legal framework for such actions. Moreover, some commentators mention the imprecise rationale of the majority judgment on some crucial issues.⁴⁵⁴

⁴⁵¹ The party at that time was identified with the El-Ard movement, and the list included a few members of this movement. The El-Ard movement was prohibited for its objectives and activities that were undermining the existence of the State and was dissolved.

⁴⁵² EA 1/65 Yeredor v. Chairman of the Central Elections Committee for the Six Knesset 19 (3) PD (3) 365 (1965).

⁴⁵³ Navot, *supra* note 231, at 94.

⁴⁵⁴ For details see Kremnitzer, in *supra* note 52, at 157.

In the 1984 elections to the Eleventh Knesset, the Supreme Court had to deal with the resurfaced issue of a party ban with the appearance of the extremist right-wing Kach party.⁴⁵⁵ The party promoted racial hostility and was extreme to the extent that some observers would label it a “quasi-fascist” movement.⁴⁵⁶ The Elections Committee banned Kach from participation in the upcoming elections on the grounds that its racist goals are in contradictions with the foundations of the democratic regime and its decision was appealed in the Supreme Court. This time the Court struck down the actions of the Elections Committee, approved the party’s candidacy and allowed it to run for elections.⁴⁵⁷ In a majority opinion, the Court ruled that the Yeredor case should not be extended to disqualification of a racist list negating the democratic character of the state⁴⁵⁸ and democracy must contain even with unpopular views and opinions while reference to the extreme measures to deny voting rights should be an extreme measure of last resort to be invoked only in face of substantial probability of danger.⁴⁵⁹ As a response to such an optimistic position of the Supreme Court in relation to a racist party, the Knesset adopted legislative provisions that enabled the banning of an electoral list from the upcoming elections based on their goals⁴⁶⁰ to provide legal basis for the possibility to ban parties. The reforms of the law resulted in the disqualifying of Kach Party in 1998 elections, as well as in the 1992 elections in relation to the Kahana Hai list, confirmed by the Supreme Court rulings.⁴⁶¹

⁴⁵⁵ For details on Israeli experience dealing with the Kahanist see also Neuberger, *supra* note 449, at 191-196.

⁴⁵⁶ See for example Issacharoff, *supra* note 86, at 1447.

⁴⁵⁷ EA 3/84. *Neiamn v Chairman of the Central Elections Committee for the Eleventh Knesset* 39 PD (2) 225 (1985).

⁴⁵⁸ Kremnitzer, in *supra* note 52, at 158.

⁴⁵⁹ Navot, *supra* note 231, at 748.

⁴⁶⁰ For example, Section 7(a) of the Basic Law was amended and stated: A candidates’ list shall not participate in elections to the Knesset if its objects or actions, expressly or by implications, include one of the following: 1. negation of the existence of the State of Israel as the state of the Jewish people; 2. negation of the democratic character of the State; 3. incitement to racism.

⁴⁶¹ EA 1/88. *Neiman v Chairman of the Central Elections Committee for the Twelfth Knesset* 42 PD (4) 177 (1988); EA 2858/92. *Movshowiz v. Chairman of the Central Elections Committee for the Thirteenth Knesset* 46 PD (3) 541 (1992).

The final stage in the establishment of a legal regime of party regulation in Israel is associated with adoption of the Parties Law in 1992 which regulates formation, status, and registration of political parties. Interestingly, the 1992 Law does not impose on parties a requirement to be constituted and administered in a democratic manner.⁴⁶² Therefore, the Law has created a twofold system to review and control activities of political parties: at the stage of party registration and at the stage of a party's participation in elections. However, the political situations of frequent terrorist attacks, violence, and political unrest triggered the expansion of the party banning procedure to accommodate the new challenges for Israeli democracy.⁴⁶³ In these circumstances, the Knesset amended section 7A of Basic Law to include the possibility to disqualify a party for its support of terrorism.⁴⁶⁴

Shortly after the amendments to disqualify a party for its support of terrorism were introduced, the Central Elections Committee decided to disqualify the Balad list based on the statement of its leader. The content of his speech was allegedly about denying the existence of the State of Israel as a Jewish and democratic, as well as amounting to the support of an armed struggle or terrorist organization against the Israeli State.⁴⁶⁵ The Supreme Court did not support the Committee's motion and ruled in favor of Bishara, the leader of the Balad party. The case turned on the careful assessment of the statement of the party leader in order to establish with a required degree of certainty if Bashara supported the armed struggle of a terrorist organization. The majority of the Court was not convinced by the evidences

⁴⁶² For details see Navot, *supra* note 231, at 749.

⁴⁶³ One of the most troubling aspects of political parties activities would be the Balad (Democratic National Assembly) party, first elected to the Knesset in 1996. The party's leader statement expressing support for terrorist acts against Israeli citizens provoked adoption of serious restrictions on freedom of expression and association. For details see Navot, *supra* note 231, at 750-751.

⁴⁶⁴ Section 7(a) reads as follows in the amended version: A list of candidates will not take part in the elections to the Knesset nor shall an individual person be a candidate for the Knesset if the goals or deeds of the list or the deeds of the person explicitly or implicitly are one of the following: 1. reject the existence of the State of Israel as a Jewish and democratic state; 2. incite to racism; 3. Support the armed struggle of an enemy state or terrorist organisation against the State of Israel. A decision of the Central Elections Committee preventing a candidate's participation in the elections is subject to approval by the Supreme Court.

⁴⁶⁵ For details on the case see Navot, *supra* note 231, at 751-754.

presented and therefore refused to deny the right to participate in elections. However, some commentators observe that the Supreme Court of Israel in this particular case deliberately did not allow for the new amendments to be applied in this case.⁴⁶⁶ The Bishara judgment appears to be a compromising solution to the dilemma of how far democracy can go in protecting itself without exceeding the limits of democratic tolerance. In the case of the Balad party the Supreme Court of Israel decided this is “preferable for undemocratic pressures to find their expression within the legitimate framework of the democracy, and not externally.”⁴⁶⁷

In its interpretation of the disqualification procedure, the Supreme Court of Israel adopted quite a restrictive view in order to accord as much guarantees and freedoms to political parties as should be done in a true democracy. As one of the commentators on the Israeli practice to ban parties from elections, Mordechai Kremnitzer, points out that a restrictive approach could be evident in the few elements created in the second Neiman judgment of 1998 and employed by the Court in all following judgments on disqualifying lists and parties.⁴⁶⁸ First of all, the grounds for disqualification can be derived only from a party’s central and dominant aims. Second, these aims must be evident from direct statements as well as from conclusions unequivocally implicit. Third, theoretical aims are not enough and it must be proved that a list takes actions to achieve its aims. Moreover, this activity must be continued and consistent and must demonstrate high and extreme levels of intensity. Finally, the evidence of disqualifying aims must be ‘pervasive, clear, and unequivocal’.

The amendment to electoral procedures stormed extensive debates and discussion as well as some critical comments. For example, Kremnitzer argues that disqualification on grounds of negating the existence of the State of Israel as a Jewish state cannot be

⁴⁶⁶Ibid., at 751.

⁴⁶⁷ Ibid.

⁴⁶⁸ Kremnitzer, in *supra* note 52, at 168.

theoretically justified in any case. Moreover, he believes that it is hard, or perhaps impossible, to justify disqualification on the grounds of support for a terrorist group's armed struggle against the State of Israel. Finally, the Supreme Court failed to follow to its end the strict approach adopted on grounds for dissolution. Suzie Navot points out that there is no definition of 'terrorist organization' and it poses serious difficulties to decide on disqualifying a list on the grounds of support for a terrorist organizations armed struggle against Israel. The legislator left matters of final interpretation for the Court which is desirable to avoid. Samuel Issacharoff does not welcome the idea of having to double-check on parties, during the registration and during the elections. He suggests that such an institutional arrangement invites "courts to apply more stringent standard when a party is outlawed and a less rigorous test when a party is simply being disqualified from having its members elected to the national parliament."⁴⁶⁹ Probably, this author suspects that it might lead to relaxing standards for party disqualification from elections. Furthermore, Issacharoff suggests that a legal model where a party is allowed to exist but its electoral participation is restricted is not likely to be a stable arrangement.

Nevertheless, the Israeli example is worth of including to the list of legitimate militant democracy measures. Unfortunately, there is not any other jurisdiction with experience similar to Israel so it is not easy to provide some conclusive remarks on the effectiveness of such measures for the self-defense of democracy. At least in theory, a ban on running for elections appears to be a far less draconian measure than banning the entire party. The above case-studies clearly demonstrate that it is hardly possible to seek an ideal version of a militant democracy state in relation to the prohibition of political parties. The mission of protecting democracy against its enemies without compromising the State's democratic nature is never an easy task. However, it is important to keep in mind the importance of political parties in

⁴⁶⁹ Issacharoff, *supra* note 86, at 1449.

the marketplace of ideas and importance of political speech in general. Therefore, every time a state seek to impose such a drastic limitation on political parties as their dissolution it should be always encouraged to utilize less restrictive measures and softer solutions.

The Israeli example of disqualifying lists and parties from participating in elections is a valuable contribution to the debate on how to react to situations where allegedly dangerous political parties are competing for space in a political arena. While the institutional arrangement developed in Israel has in fact the same meaning as dissolution of political party, the denial of the possibility to participate in elections, the disqualification of lists and parties in Israel is only of a temporary character. Such a system leaves political parties with a chance to compete for voters' support in the future if the party adjusts its policies and agendas so they comply with legislative requirements. The decision to ban a party from the Knesset elections sends a strong message to the party and its leaders that practices, speeches, and agendas run counter to rules of the political game and cannot be tolerated to an unlimited extend.

The purpose of this case-study was not to appeal for a shift to the Israeli practice. This country as well as India, found their own alternative solutions which seem to fit better to their local circumstances. However, the beauty of the comparative constitutional argument is that best practices around the world could be studied, analyzed, and used as a reference point for solving similar situations in other jurisdictions but taking into account the local conditions.

Conclusion

To conclude, there is a substantive judicial practice on the prohibition of political parties at various times and in various jurisdictions. The case-study reveals that militant democracy

application is a complicated and burdensome exercise and, depending on the context and political background, can produce different results for the stability and health of democracy.

Thus, the Socialist Reich Party case from Germany demonstrates the general ability of the judiciary to stand for constitutional democracy, and preserve it through careful and cautious implementation of the concept of militant democracy. The first occasion to apply the militant democracy principle provided constitutional theory and practice with a respectable example of judicial intervention to the business of the preservation of constitutional security. However, the German Federal Constitutional Court was not the only one capable of doing this in the aftermath of the Second World War. The Australian judiciary faced quite a similar task, but in relation to different enemy: communism. Australia does not consider itself as militant democracy state and the case of Communist Party Dissolution Act was not based on the same legislative premises as the first German party prohibition case. The justification invoked by the Australian government is of a militant democracy nature and therefore it is of relevance for the current chapter and the overall experience of the application of militant democracy worldwide.

However, the second judgment of the Federal Constitutional Court of Germany on the prohibition of the Communist Party is harder to reconcile with the position of Communist party in the 1950s and the level of threat posed for democracy in Germany. The Federal Constitutional Court has become less strict in its enforcement of militant democracy provisions since the 1970s, but the Communist Party case had considerable impact on the future interpretation and application of the militant democracy principle. The interpretation of the requirement imposed by the free democratic basic order on political actors and especially the preventive nature of the militant democracy notion were revived and widely applied later in order to screen those entering civil service (so-called duty of loyalty). The most recent

development in the militant democracy jurisprudence in Germany – the NDP party case – led some commentators to conclude that concept of militant democracy is withering away as an effective safeguard against undemocratic political parties. However, I would not agree with this statement and the NDP case should be considered rather as a signal to the government that it will not be easy to declare political party unconstitutional unless there are serious attempts to damage the existing constitutional order.

The case-study of militant democracy in Europe reveals some specific features in the manner of its application and interpretation. First of all, there is a clear common European approach to the issue of how a democracy should respond to attempts to threaten it: by opening a free marketplace of ideas which is capable of neutralizing extremist and allegedly dangerous ideas and ideologies for democracy. The ECHR has a developed body of case-law which in general supports the possibility of preventive actions to be taken by democratic states in order to prevent harm to the established order, including the possibility to ban/dissolve political parties. However, states are allowed utilizing such radical and drastic measures only in extreme situations. As to the national practice of militant democracy measures in relation to party closure, most of the post-communist states follow the standards established by the ECHR and Council of Europe.

The inclusion of militant democracy measures in constitutional regimes was dictated by the experience of totalitarian ways of governance in the past and fear of communists returning to the states' structures. At the same time, all post-communist states adequately assessed the possible danger of illiberal policies in suppressing of allegedly dangerous ideas. It appears that the presence of militant democracy provisions in constitutional orders during the transition granted more confidence to the government and they felt more secure and prepared to react in case a fragile regime is being attacked by radicals and extremists. The

militancy of the post-communist constitutional regimes allows everyone to participate in the political debate as long as all players follow the established rules of the game. While there are some instances of misapplication of the doctrine in post-communist states, the situation as it stands now does not allow concluding that militant democracy was not needed to be present in the process of transition and that it was abused. In most of the cases inaccuracies were corrected by the national constitutional courts, or later by the ECHR. Young European democracies have learnt lessons from the Strasbourg jurisprudence on the exceptional character of party closure and do not utilize this measure on a regular basis (with the exception of Turkey).

The situation looks very different in Russia, another post-communism state in the European space. The Russian legislative regime regulating the procedure of the establishing and functioning of political parties is very troubling from the perspectives of liberal democracy: the political space is extremely hard to enter and the procedure to establish a political party is truly challenging. Difficulties in establishing political parties cannot be overcome via the fulfillment of organizational requirements only as the Federal Law on Political Parties imposes additional content-based restrictions on party programs and agendas. While the official position of the State is that political parties can be formed freely and without getting any permission from the State, in reality parties cannot pursue their activities without a mandatory procedure of state registration. At this stage, the Russian government insists on very strict guardianship over the political space with the purpose to preserve the status quo in terms of political competition content and list of participants. There is however a tiny hope for the improvement of the situation as in 2008 Russian President Dmitry Medvedev expressed his concern about the burdensome requirements imposed on political parties by the current legislation and his warning was followed by the enactment of a

legislative amendments decreasing the minimum membership requirements. Moreover, in the light of the recent ECHR judgment on the Republican Party of Russia v Russia case there are grounds to expect further changes in the regulatory regime. Hopefully, the Russian government will take more serious steps to slow down its aggressive protection of democracy through draconian limitation imposed on political parties and will stop using militant democracy rational to protect the dominant position of the ruling party.

Examples from India and Israel are believed to be a valuable contribution to the debate on militant democracy, its legitimacy, and its limits. Despite some complexities, the Indian solution on the regulation of political parties' activities deserves to be considered as one of the possible responses to the threat coming from allegedly dangerous political movements without resorting to the prohibition of political parties. Furthermore, the example of Israel demonstrates the possibility of seeking alternative solutions which seem to fit better to their local circumstances. The case-study did not appeal to give up the legislative provisions on prohibition of political parties but rather to think about the usefulness of comparing different approaches and use them as a reference point for solving similar situations in other jurisdictions while taking into account the local conditions.

CHAPTER 4: MILITANT DEMOCRACY AND RELIGIOUS EXTREMISM

Introduction

This chapter presents the case-studies of three jurisdictions to test one of my arguments that militant democracy can be used to neutralize movements that use democratic means to establish totalitarian ideology like fundamentalist coercive religion. In what follows three jurisdictions, Russia, Turkey, and the ECHR will be assessed in their politics towards allegedly dangerous movements with a religious agenda through the lenses of militant democracy. The purpose of this chapter is to investigate to what extent policies in addressing the threat of religious extremism are consistent with the rules of democracy and if militant democracy can guide these politics more successfully.

The survey begins with the Russian case-study. This case is important to be discussed from the perspective of militant democracy as Russian authorities are actively involved in suppressing non-traditional religious movements, and the policy of suppression is driven by the alleged need to protect democracy. The analysis of the legislation and law-implementation suggests that the Russian government urgently needs to reconsider its approach to limit sometimes truly arbitrary restrictions imposed on certain religious groups. Russia's chaotic policies in relation to foreign religious movements give the impression that there is a hidden governmental agenda to eliminate the presence of all foreign religious communities. This Russian case-study will investigate if militant democracy is relevant for the Russian case, and if it is capable of making the State reconsider its approach to secure more freedoms to suppressed groups.

Thereafter, I will continue with the example of Turkey to present an analysis of the militant democracy logic application and interpretation as invoked to guard the

constitutionally proclaimed principle of secularism. This case-study is of particular interest for a few of reasons. First of all, both recent Turkish Constitutions of 1961 and 1982 include some elements of militant democracy.⁴⁷⁰ Second, the country has considerable experience with the prohibition of political parties: the Turkish Constitutional Court dissolve six parties under the previous Constitution and 18 under the current Constitution of 1982.⁴⁷¹ Third, most of the rulings on political parties' dissolution were based on the alleged violation of the constitutionally protected principles of the indivisible and territorial integrity of the State or the principle of secularity. The latter is an excellent opportunity to test my hypothesis that militant democracy shows signs of its extension beyond its traditional area of application. In addition, Turkey represents an interesting example to elaborate on a statement that militant democracy is potentially dangerous mainly for minority parties as the Turkish example clearly demonstrates that even parties with substantial popular support (i.e. the Refah Partisi, the HEP Party, and the AK Party) can become a target of the party dissolution procedure. Finally, Turkey represents a fascinating case-study for the headscarf ban and this is another aspect I would like to explore in order to test the hypothesis of militant democracy extension.

The ECHR is included in this case-study for various reasons. First of all, it is an international court with binding judgments for 47 states which means that at least the general guidance on particular legal issues are given to the considerable amount of the European democracies which they must follow and abide by. Secondly, in last couple of decades this institution has produced a substantial body of the case-law on militant democracy related issues and problems. Thirdly, this jurisdiction demonstrates many difficulties and challenges the democracy might face in combating the alleged threat coming from growing fundamentalist and extremist religious movements, and how difficult the task to address these

⁴⁷⁰ For a detailed account of militant democracy-type constitutional provisions in Turkey see Bertil Emrah Oder, in Thiel, *supra* note 21, at 263-310.

⁴⁷¹ Ozbudun, in *supra* note 52, at 126.

threats is while remaining true to democracy. Moreover, the Court had numerous occasions to rule on the content and meaning of ‘freedom of religion,’ so it is fascinating to see what happens in the courtroom when religion is accused of being dangerous for democracy. The case-study on militant democracy in the practice of the ECHR is based on a similar type of cases as the Turkish one. However, it includes analysis of the party prohibition placed in the context of previously decided cases on involuntary party dissolution. The issue of a headscarf ban is also extended and is assessed from the principles established by previous jurisprudence of the Court on Article 9. The placement of these issues into the broader context of the Court’s jurisprudence might potentially reveal inconsistencies in its line of reasoning depending on which political ideology or religion is attached to the case.

4.1. Russia: Guarding the Perimeter from any Foreign Religious Interference?

4.1.1. Freedom of Religion in Russia: An Overview of the Existing Regulatory Regime

The general system of protection of the Russian constitutional system from the militant democracy perspective was already introduced in the previous chapter. The constitutional provisions on the principles and rules to be observed by the different associations are fully applicable to the religious groups as well. In addition, as any modern-type democratic constitution, the Constitution of Russia proclaims freedom of religion and conscience (Article 28)⁴⁷² and the principle of the separation of state and religion (Article 14).⁴⁷³ The further regulation of the freedom of religion clause is totally in compliance with Russian legal tradition to provide details in a separate federal law.

⁴⁷² “Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them.”

⁴⁷³ The Russian Federation is a secular state. No religion may be established as a state or obligatory one.”

In the wake of the collapse of the Soviet Union religious freedom was regulated by two statutes passed in 1990: the laws *On Freedom of Conscience and on Religious Organisations*⁴⁷⁴ and *On Freedom of Worship*. The laws “established religious non-discrimination and a foundation for religious liberty and separation of church and state in Russia.”⁴⁷⁵ The former has been described as going “beyond everyone’s expectations in proclaiming total freedom of religion.”⁴⁷⁶ However, the law was not welcomed by the Russian Orthodox Church as it complicated its primary objectives and it was forced to “compete” against other religious groups in the “free marketplace” of ideas now open to all groups.⁴⁷⁷ In the face of the liberal 1990 legislation on religious freedom the Russian Orthodox Church “demanded nothing else than state protection against what it termed as “invasion” of foreign faiths and peoples that threatened the fabric of the Russian society.”⁴⁷⁸ As early as 1993 Patriarch Aleksey II requested the amending of the Law On Freedom of Conscience to impose restrictions on “non-traditional” religious organizations, however, President Yeltsin did not sign the amendments and the idea to amend the law was left for a while.⁴⁷⁹ Nevertheless, the Russian Orthodox Church continued its effort to restrict the activities of “non-traditional” religions and ultimately it led to the substantive legislative amendments in the legislative regime regulating religious freedom.⁴⁸⁰

⁴⁷⁴ Law on Freedom of Conscience and Religious Associations (1990). Text of the Law in Russian is available at <http://bestpravo.ru/ussr/data01/tex10709.htm>.

⁴⁷⁵ Marina Gaskova, *The Role of the Russian Orthodox Church in Shaping the Political Culture of Russia*, 7 *Journal for the Study of Religions and Ideologies* 118 (2004).

⁴⁷⁶ Robert C. Blitt, *How to Entrench a de facto State Church in Russia: A Guide in Progress*, 3 *Brigham Young University Law Review* 719 (2009). Available online at <http://lawreview.byu.edu/archives/2008/3/2Blitt.FIN.pdf>.

⁴⁷⁷ *Ibid.*, at 720.

⁴⁷⁸ *Ibid.*, at 724.

⁴⁷⁹ For details see e.g. Cole W. Durham (Ed.), *The Future of Religious Liberty in Russia: Report of the De Burght Conference on Pending Russian Legislation Restricting Religious Liberty*, 8 *Emory International Law Review* 1 (1994).

⁴⁸⁰ Blitt, *supra* note 476, at 731.

In October 1997, a new law came into force in Russia.⁴⁸¹ Some of the Russian human rights defenders claimed that this legislative act could be entitled as Law “On freedom *from* Conscience.”⁴⁸² While the first articles of the law reproduce the provisions of the Constitution on the separation of Church and State, and equality of religious association before the law, further provisions of the new legislative act contains a whole serious of “openly anti-constitutional, wittingly discriminatory provisions, practically cancelling out all that is written before.”⁴⁸³

The 1997 Federal Law on the Freedom of Conscience and Religious Associations (the 1997 Law) in general recognizes the right to choose or change religion freely (the right is granted to both citizens and legal aliens), to believe individually or with others, have and disseminate religious convictions, and act in accordance with those convictions.⁴⁸⁴ In addition, it provides detailed guidance on registration issues and imposes a number of requirements the religious groups have to meet to be recognized as a legitimate legal person for the purposes of this law. The law also recognizes that “freedom of religion is not an unlimited right and it might be restricted in case there is a necessity to protect the basis of the constitutional order, morals, health, rights and legitimate interests of others, ensure the defence and security of the state.”⁴⁸⁵

However, the 1997 Law ignores the provisions of the Constitution which guarantees freedom of religion to everyone. “First, it introduced retroactively various categories of legal entities with unequal amounts of rights.”⁴⁸⁶ Second, those associations that could not prove the fact of the existence for a period of no less than 15 years lose their right to “produce,

⁴⁸¹ Federal Law on Freedom of Conscience and Religious Associations.

⁴⁸² Anatoly Andreevich Krasikov, *Church-State Relations in Russia: Yesterday, Today, and Tomorrow*, in Andras Sajo & Shlomo Avineri, *The Law of Religious Identity. Models for Post-Communism* 153 (1999).

⁴⁸³ *Ibid.*, at 153.

⁴⁸⁴ Article 3(1).

⁴⁸⁵ Article 3(2).

⁴⁸⁶ Only those religious organizations which “operated on a legal basis” 50 years ago can be considered “all-Russian”. See e.g. Krasikov, *supra* note 482, at 153.

acquire, export, import, and distribute religious literature or printed, audio, and video materials and other objects of religious purposes.”⁴⁸⁷ Furthermore, such organizations are not eligible to “create cultural-educational organizations, educational institutions, or to establish mass media.”⁴⁸⁸ Moreover, even the right to “invite foreign citizens with the goal of professional work, including preaching and religious activities” was taken away from them.⁴⁸⁹ The overall nature and impact of the law could be described as endorsing Christianity in its Orthodox traditions as playing the role of official ideology and guaranteeing “the Orthodox Church a most favoured status, while limiting administratively or even legislatively the rights of other religious communities.”⁴⁹⁰ Russia’s 1997 Religion Law is often discussed and there were numerous attempts to amend it. For example, in March 2011 the amendments to ban everyone except for registered religious organizations from distributing religious literature was proposed and submitted to the State Duma (an initiative of the Duma of the Belgorod region). It is unlikely at the moment that amendment will be adopted but the mere idea of such legislative initiative is already troubling.⁴⁹¹

The regulatory regime of freedom of religion in Russia is also supplemented by the presence of anti-terrorism and anti-extremist legislation applied to suppress religious extremism. The presence of foreign religious groups was considered as a threat to the national security at least from as early as 2000.⁴⁹² The *Concept of National Security of Russia* mentions that one of the ways to ensure the national security is “by opposing the negative

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid..

⁴⁹¹ For details see e.g. Felix Corley, *Russia: Will Duma approve ‘anti-Constitutional’ Religious Literature Restrictions?* Publication by F18News from 24 March 2011, available at www.forum18.org/Archive.php?article_id=1555.

⁴⁹² See for example Russian Federation National Security Concept (2000), available online at <http://www.russiaeurope.mid.ru/russiastrat2000.html>. Similar provisions can be found in the updated 2009 Russian National Security Concept, available online in Russian at <http://archive.kremlin.ru/text/docs/2009/05/216229.shtml>.

influence of foreign religious organisations and missionaries.”⁴⁹³ As a result, all non-Russian Orthodox religions are considered as potentially posing a threat not only to health and minds of people, but to national security as well. This position is supported not only by State officials but by the Russian academia as well.⁴⁹⁴ The situation is quite paradoxical as in Russia there is a form of religious extremism bombing airports, metro and train stations. However, the religious component is taken away by the states in those situations; it is not discussed within the domain of religious extremism which is mainly about foreign v. traditional religions in Russia. The former are the most frequent targets of the anti-extremist policies in Russia. This argument could be supported by the regulatory regime and practice of the governmental agencies applied in line with the Russian Federation’s 2009 National Security Concept which lead to discriminatory treatment of various religious groups considered to be ‘foreign’ and therefore unwanted in the Russian space.

The Russian Federation is declared by law a secular state with no dominant religion or privileges given to any particular religious denomination. However, the preamble of the 1997 Law recognizes the special role of the Orthodox Church in the history of Russia and the formation and development of its spirituality and culture, and acknowledges Christianity, Islam, Buddhism, Judaism, and other religions, as constituting an integral part of the country’s historical heritage. It is not easy to assess now what the drafters of the law meant exactly by inserting these provisions to the preamble of the 1997 Law, however, it is very easy to see how these provisions have been interpreted and what impact they have on religions not listed in these provisions. In reality it led to the creation of the special regulatory

⁴⁹³ Ibid.

⁴⁹⁴ For example, one commentary on registration of religious associations presents the registration procedure in the context of national security and public order debate. See e.g. O.N. Petjukova, Gosudarstvennaja Registracija Religioznyh Organizacij v Rossijskoj Federacii. Nauchno-Prakticheskij Kommentarij (2007).

regime for those religions and effectively establishing privileged treatment for them and the discriminating of all others.⁴⁹⁵

Registration of Religious Groups: Problems and Concerns

I have already mentioned that the 1997 Law established the regime of religious groups' registration and it might be considered as one of the legal constructions having considerable impact on the freedom of religion exercise. The law has created three different categories of religious communities: groups, local organizations, and centralized organizations. Each category is accorded different legal status, rights, and privileges.

The most basic unit is a "religious group" which is a "voluntary association of citizens set up with the objective of joint profession and dissemination of faith, carrying its activities without the registration with the state authorities and without the acquisition of capacity of a legal entity".⁴⁹⁶ The 1997 Law suggests that such groups are created with the intention of further transformation into a religious organization. Religious groups are allowed to conduct worships and teach religion to its members. The fact that the group is not registered with state authorities effectively means that it cannot open bank account, own property, issue invitation letters to foreigners, cannot publish and distribute literature, and cannot conduct services in public schools, hospitals, and the armed forces. In addition, "it cannot enjoy any tax privileges and the premises and property required for the activities of the religious group shall be provided for use by such a group by its members."⁴⁹⁷ Needless to say that a religious group does not have a standing in court as in the eyes of law it does not exist as a legal person and the alleged violation of the entity's rights can be accommodated only through individual or group complaints of its members.

⁴⁹⁵ For the overall history of church and state relations in Russia see e.g. Blitt, *supra* note 476, at 710-718 (Church and state in Soviet times); Krasikov, *supra* note 482, at 154-160 (period until early 20th century), 161-168 (Soviet period), 168-174 (cover period from 1990 until 1999).

⁴⁹⁶ Article 7.

⁴⁹⁷ *Ibid.*

The next category created by the 1997 Law is a “local religious organisation”⁴⁹⁸ which should be registered with state authorities in case it meets the requirements established by law: has at least 10 citizen members, has existed as a religious group for at least 15 years or is a branch of a centralized organization. Local religious association possess a legal status and is entitled to have property, bank accounts, has standing in a courtroom, can invite foreign guests as well as publish literature, and visit state hospitals, school, and armed-forces to conduct worship service at those premises.

The third category introduced by the law is “centralised religious organisation” which can be registered by combining at least three local organizations of the same faith. The centralized organizations that have existed for more than fifty years enjoy a privilege to use the words “Russia” or “Russian” in their official name. While the transformation from the category of local religious organization to a category of centralized organization does not cause many complications the same cannot be said about transformation from the religious group to religious organization. The fifteen years requirement seems to be one of the biggest challenges for non-traditional Russian religious groups and this matter was even brought to the attention of the ECHR which ruled in October 2009 that it violates the ECHR provisions on freedom of religion.⁴⁹⁹ The fifteen years requirement of presence in the territory of Russia causes labeling as “new religions” even those groups which existed elsewhere in the world for decades (i.e. Jehovah Witnesses).

Registration of the religious organization is probably the major component of the regulatory regime on religious communities in Russia. However, some aspects of the activities of those groups might be affected by other laws and regulations effective on the territory of Russia. For example, the immigration policy might limit the important aspect of

⁴⁹⁸ Regulated in detail in Article 8.

⁴⁹⁹ Kimlya and Others v. Russia (2009), Applications No. 76836/01, 32782/03.

certain religious communities' activities, i.e. missionaries from foreign members of the Church. The visa regulation allows foreigners to spend only 90 out of 180 days in the country in case they hold business or humanitarian visas. No doubt it substantially affects the work of foreign religious workers and imposes additional financial burden connected to travel arrangements.⁵⁰⁰ Another aspect of a regulatory regime is access to places of worship (i.e. lands and building permits). While these norms are of general use and applicable to all citizens and public associations, the considerable degree of discretionary powers given to local authorities on such matters very often impose unjustified limits on minor religious groups in case they want to construct a building or get a permit to use the land for such purposes.

4.1.2. Foreign Religious Movements and the Fear of Religious Extremism: The Impact of the Regulatory Regime and Practice on non-Orthodox Religions

Religious Demography in Russia⁵⁰¹

Unfortunately there is no single set of reliable statistics on religious denominations and the numbers of their adherents, but from the data collected from the government, polling, and religious groups sources, international reporters estimate that about 100 million citizens (out of 142) who identify themselves with the biggest and the most influential Russian Orthodox Church. The largest religious minority is Muslims with a population estimated between 10 million and 23 million (mainly populating the North Caucasus regions of Russia). In addition, there are about one million Buddhists (coming from traditionally Buddhist regions of Russia i.e. Tuva, Kalmikiya and Buryatiya) and between 250,000 and one million Jews. According to the data collected by different NGOs, Protestants form the second largest group of

⁵⁰⁰ See for example ECHR judgment on Nolan and K. v. Russia (2009), Application No. 2512/04 concerning termination of long stay of visa to Mr. Nolan, member of and missionary for the Unification Church.

⁵⁰¹ Bureau of Democracy, Human Rights and Labour International Religious Freedom Report 2010. Published on November 17, 2010, also available online at <http://www.state.gov/g/drl/rls/irf/2010/148977.htm>.

Christians with an estimated two million adherents and 3,500 registered organizations. The Roman Catholic Church claims to have about 600,000 Catholics on the territory of Russia (most of whom are not ethnic Russians).

As of January 2010 the Russian Ministry of Justice reports to have registered 23,494 religious organizations and according to 2008 data these groups are distributed as follows: Russian Orthodox (12,586), Muslim (3,815), Protestant (3,410), Jehovah's Witnesses (402), Jewish (286), Orthodox Old Believers (283), Catholics (240), Buddhist (200), and other denominations.

Equality of Religions: Is Everybody Welcome?

The 1997 Federal Law on the Freedom of Conscience and Religious Associations declares in Article 4 the secular character of the State (and reaffirms the Constitutional provision) and equality of religious associations before the law. Basically, the latter would mean that all religions, religious groups, and religious believers are entitled to equal treatment and protection from the law. However, the situation does not look exactly in conformity with this interpretation of the constitutional equality clause if we take a closer look at the practice of the regulatory agencies (i.e. responsible for registration of religious associations) and the manner some provisions of how the 1997 Law are interpreted and applied by state officials.

The starting point to assess if different religious groups are treated equally in Russia would be the preamble of the 1997 Law itself. It is a well known fact that Russian society is comprised from multiple and diverse ethnic, religious and cultural groups, therefore the issue of giving a special status to any group (be it religious or ethnic) might become a source of conflicts, disagreements, and potentially, discrimination. While the preamble of the 1997 Law is only an introduction to the law it is still a part of it and the Russian experience demonstrates that it might become a powerful reference point in some instances. Despite the proclaimed equality of all religions, the recognition of the special role of the Orthodox

Church in the history of Russia and naming only four religions as constituting an integral part of the historical heritage of the Russian people could be potentially interpreted in a way to accord higher level of protection and respect to these four religions. There are multiple occasions on which this interpretation was promoted by state officials and it will make a long list to cite them all. In order to give some examples on how the preamble of the 1997 Law indirectly promotes the privileged position of some religions it would be worthwhile to note that in 2003 a commission in support of values promoted by traditional religions was established within the State Duma (lower chamber of the Russian Parliament).⁵⁰² Later, the Executive Secretary of the commission Mr. Efremov repeated on different occasions the statement that “there are only four traditional religious denominations in Russia, and the existence of any other is not possible”.⁵⁰³ The special status of four religions mentioned in the 1997 Law is not only being promoted through statements similar to the one of Mr. Efremov, but also there are calls to enact a law to support such religions. For example, in 2004 President Putin expressed his support to the proposed legislation on support of traditional religions as the State has an obligation to find proper forms of support for religious leaders of those denominations.⁵⁰⁴ The statements of the state officials of different levels is not easy to square with the general declaration of the equality of all religious associations before the law and equal protection accorded to them.

The next aspect casting a shadow on the equality of religions principle is the registration procedure established for religious communities. The fifteen year requirement is

⁵⁰² See for details Center for Information and Analysis “SOVA”, *Parlamentarii Namereny Otstaiivat' Interesy "Tradicionnyh Religioznyh Obshin"*, available online at <http://www.sova-center.ru/religion/news/authorities/legal-regulation/2003/01/d78/>.

⁵⁰³ See Center for Information and Analysis “SOVA”, *Ispolnitel'nyj Sekretar' Obwestvennoj Deputatskoj Komissii Oleg Efremov: "Est' Chetyre Tradicionnyh Verovanija, i Nikakih Drugih ne Mozhet Prosto Byt' dlja Rossii..."* available online at <http://www.sova-center.ru/religion/news/authorities/legal-regulation/2004/04/d2094/>.

⁵⁰⁴ See Center for Information and Analysis “SOVA”, *V.Putin Vyskazalsja v Podderzhku "Tradicionnyh" Konfessij na Zakonodatel'nom Urovne*, available online at <http://www.sova-center.ru/religion/news/authorities/legal-regulation/2004/03/d2017/>.

used to label as a “new religion” even those groups that exist in other countries for a few decades (i.e. Jehovah’s Witnesses or Church of Scientology). For the Russian context the presence on the territory of only Russia matters for the purposes of registration. The most evident example would be the battle of the Church of Scientology over denial of its registration. The major ground to reject the application to register this community as a religious association was the fact that they have existed in the territory of Russia for less than 15 years. The members of this group opened the first centre for study of Dianetics (the creed of the Church of Scientology) in 1994 and not surprisingly the application lodged in 2000 was rejected by the Justice Department (responsible at the material time for registration of religious associations). The group exhausted all domestic remedies and later filed a complaint to the ECHR.

In October 2009 the Strasbourg Court ruled in favor of the Church of Scientology and found the 15 year requirement a violation of the European Convention on Human Rights’ provisions on freedom of association and religion. The Court pointed out that “contested provision of the Religions Act only targeted base-level religious communities that could not show either their presence in a given Russian region or their affiliation with a centralised religious organisation. It appears therefore that only those newly emerging religious groups that did not form part of a strictly hierarchical church structure were affected by the “fifteen-year rule”. The Government did not offer any justification for such differential treatment.”⁵⁰⁵ Therefore, the attempt of the Russian legislator to keep new religious away from playing any significant role in society was found illegitimate and discriminating towards such groups.

Another burden imposed on religious groups by the registration procedure is not connected to the length of presence of the group in a particular region, but involves potentially serious scrutiny of the internal structure, objectives, and tasks of its activities.

⁵⁰⁵ Kimlya and Others v. Russia, para. 101.

Along with other papers and documents the religious community seeking registration with authorities must provide so-called charter of a religious organization which must include: “the name, location, type of religious organisation and faith denomination; objectives, tasks and basic forms of activity; procedure for establishment and cessation of activity; structure of organisation, its bodies of management, procedure for formation and competence thereof; financial resources; and other property of organisation, etc.”⁵⁰⁶ However, it is not enough to submit all the required papers and notify the authorities of the attempt to be registered.

The charter of a religious association will be assessed further by the registration authorities to see if the objectives and activities of a religious organization run counter to the Constitution of the Russian Federation and the laws of the Russian Federation. Therefore, it might be concluded that the religious views and the way they see it appropriate to organize their activities of a newly established religious communities (for Russia) will be subjected to a screening procedure before it can get the status of a religious organization and exercise fully its rights. In case there are any doubts on the religious nature of the group seeking registration and/or credibility of its religious doctrine, additional expertise can be arranged.⁵⁰⁷ Needless to say that the procedure to check the compatibility of the charter of a religious organization with the Constitution and legislation of the Russian Federation could be a powerful weapon in the hands of authorities, and officials stick to the idea of four traditional religions, and having certain ideas in their minds on what kind of values religions should promote.

⁵⁰⁶ Article 10 of the Federal Law on the Freedom of Conscience and Religious Organizations (1997).

⁵⁰⁷ The procedure is regulated by the Governmental Decree of 1998.

Banning of Religious Associations as a Tool to Guard the Perimeter from any Foreign Interference?

The procedure of registration and *a priori* privileged position granted to certain religions are not the only legislative constraints imposed on non-traditional religions in Russia. The 1997 Law also mentions the possibility to ban already existing and registered religious organizations (which is in general compatible with the same possibility for all other types of associations existing within Russia).⁵⁰⁸ The procedure and grounds to ban a religious association are listed in Article 14 of the 1997 Law. The first procedural guarantee granted to religious associations is that involuntary dissolution can occur only through court procedure. Moreover, the association can be banned only for repeated and gross violations of the Russian Constitution, 1997 Law, and other relevant legislative provisions. The right to seek the dissolution of religious association is given to quite a wide range of state officials: the “prosecutor’s body, federal body of state registration or territorial agencies thereof, as well as bodies of local administration.”⁵⁰⁹

However, the most worrying in this procedure is the list of grounds on which religious association might face the dissolution. Those are listed in Article 14(2) and include:

- The breach of public security and public order; actions aimed at engaging in extremist activities;⁵¹⁰
- coercion into destroying a family unit; infringement of the personality, rights and freedoms of citizens; infliction of harm, established in accordance with the law, on the morals or health of citizens, including by means of narcotic or psychoactive substances, hypnosis, the committing of depraved and other disorderly acts in connection with religious activities;

⁵⁰⁸ The procedure to ban existing religious organization was not present in the previous Law on Freedom of Conscience (1990) (see text of the previous Law at <http://bestpravo.ru/ussr/data01/tex10709.htm>).

⁵⁰⁹ The list is much wider than, for example, in case of banning a political party. For details on party dissolution procedure see Chapter 3.4, at 141.

⁵¹⁰ Article 14 (2) of the Federal Law on Freedom of Conscience and Religious Organizations (1997).

encouragement of suicide or the refusal on religious grounds of medical assistance to persons in life- or health-threatening conditions;⁵¹¹

- hindrance to receiving compulsory education; coercion of members and followers of a religious association and other persons into alienating their property for the benefit of the religious association; hindering citizens from leaving a religious association by threatening harm to life, health, property, if the threat can actually be carried out, or by application of force or commission of other disorderly acts; inciting citizens to refuse to fulfill their civil duties established by law or to commit other disorderly acts.⁵¹²

Even the quick screening of the grounds for dissolution gives an impression that authorities have a wide choice of grounds to initiate the procedure.⁵¹³ Not only do some grounds sound vague and have a potential to be accommodated through broad interpretation to attack nearly any religion, but also some of them appears as direct interference into the issues of faith itself (i.e. refusal of being subjected to medical treatment and refusal to fulfill civil duties). Moreover, some of the grounds can hardly be proved by facts and therefore cases against some religious groups will most probably be based on assumptions and unjustified biases. The 1997 Law provisions on the dissolution of religious associations are indeed often used in practice.

One of the most famous and relevant to be brought up here would be the case of the Jehovah's Witnesses of Moscow.⁵¹⁴ The case demonstrates that all grounds listed above for the association's dissolution were included in the law with particular type of religious groups

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ To compare, political parties can be dissolved if "their objectives or actions aim at a forcible change of the fundamentals of the constitutional system, violation of the integrity of the Russian Federation, undermining of the national security, formation of military and paramilitary units, incitement of racial, national or religious enmity." For the unofficial English translation of the 2001 Law of Political Parties see http://www.medialaw.ru/e_pages/laws/russian/polit-part.htm.

⁵¹⁴ Jehovah's Witnesses of Moscow and others v. Russia (2010), Application no. 302/02.

in mind and State authorities had the chance to use most of them.⁵¹⁵ Thus, the Moscow Jehovah's Witnesses were accused on most of the grounds (apart from being involved in extremist activities) and the decision to ban was supported by all the courts in Russia the association had to go through.⁵¹⁶ The Russian government claimed that it was entitled to "verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population" and also "may legitimately consider it necessary to take measures aimed at representing certain forms of conduct [...] judged incompatible with respect for the freedom of thought, conscience and religion of others."⁵¹⁷ In June 2010 the ECHR handed out the judgment and decided upon the case in favor of the banned religious association. The ECHR rejected all the arguments and the finding of the national authorities, concluding that Russia had violated Articles 9 and 11 of the Convention as interference into the applicants freedom of religion did not meet pressing social need, and therefore was not justified. The major argument of the Strasbourg Court was that adult persons can decide on their own on matters of blood transfusion and rendering property and many other issues and the State cannot interfere that far as to protect people from their own beliefs:

[...] the Court reiterates that "private life" is a broad term encompassing the sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside world. It also extends further, comprising activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest,

⁵¹⁵ The Russian Government claimed that "Jehovah's' Witnesses are distinct from "traditional religions" for the "salient theocratic hierarchy" of the community, "mindless submissions" of individual members, aspiration to integrating families into the life of a "totalitarian non-secular collective" and "paramilitary discipline". The government, nevertheless claimed that national courts did not assess the creeds or views of Jehovah's Witnesses (Ibid., para 96).

⁵¹⁶ Ibid., para 95: Russian Government argued that Jehovah's Witnesses activities led to disintegration of families, had been connected with calls to refuse civic duties, negatively influenced the mental health of the individuals, and refusal of blood transfusion had led to grave consequences in some cases.

⁵¹⁷ Ibid., para. 97.

opportunity of developing relationships with the outside world (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, §§ 42-50, ECHR 2004-VIII; and *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). In the light of these principles, the decisions of Jehovah's Witnesses whether to take full-time or part-time, paid or unpaid employment, whether and how to celebrate events significant to them, including religious and personal events such as wedding anniversaries, births, housewarmings, university admissions, were matters that fell within the sphere of "private life" of community members.⁵¹⁸

As to the all other limitations imposed on the members of the Jehovah's witnesses, the ECHR found that the expectation to pray, preach door-to-door, and the regulation of their leisurely activities, had not differed fundamentally from similar limitations imposed by other religions on their followers' private lives.

The Threat of Religious Extremism: Additional Ground for Unjustified Interference?

A further serious constrain for the exercise of freedom of religion is the reality of enacting measures to suppress religious extremism in order ensure national security. In light of the overall policy of reference to religious extremism as one of the threats undermining national security,⁵¹⁹ anti-terrorism and anti-extremist legislations are interpreted in a way targeting any unpopular or suspicious religious groups. For example, the 2002 anti-extremism law "has frequently been interpreted to include any criticism of government officials, including content published on personal blogs on the Internet."⁵²⁰ Targets of such prosecutions are often religious groups. Various NGOs unanimously and regularly report that the Russian extremism law of 2002 has been used widely to prosecute Jehovah's Witnesses and adherents

⁵¹⁸ Ibid., para. 117.

⁵¹⁹ As stated in the Russian Federation's 2009 National Security Concept, *supra* note 492.

⁵²⁰ Radio interview with Radio Free Europe in February 2010 by the chair of the Moscow Helsinki Group, Ludmila Alekseeva. Transcript of interview of 4 February, 2010, available at http://www.rferl.org/content/off_mic_russia_extremism_law/1948888.html.

of the Turkish Muslim theologian Said Nursi.⁵²¹ The Russian NGO SOVA organized a separate column on its website to monitor misuse of anti-extremism laws in Russia and regularly reports on numerous misuses of such legislation.⁵²² Unfortunately, the pressing issues of counter-terrorism and anti-extremist policies are often used as a reason to eliminate and ban unwanted religious associations.

Bearing in mind the privileged position of the Russian Orthodox Church in Russian society and the special status of three other World religions, these big groups are mostly immune from the charges of alleged engagement in religious extremism. The concept of religious extremism is not clearly defined in Russia and there is no unified approach on how to address it.⁵²³ However, the lack of definition does not prevent State authorities from seeing religious extremism as one of the principal threats to national security or from fighting an open war against foreign religions. It appears that governmental policy equates foreign religions with sects (used in a derogatory sense) and call attention to the public to prevent their growth and support. The phenomenon is not only a Russian one.⁵²⁴ The appearance of new religions almost automatically triggers speculation in any other jurisdiction and in addition to the usage of uncertain terms, like ‘sect,’ the concept of brainwashing usually accompanies the discussion.⁵²⁵

This state of affairs is troubling for various reasons. First of all, there is no legal definition of ‘sect’ and therefore it is not clear what is exactly at stake when officials of the

⁵²¹ See for example Human Rights Without Frontiers Report of 2010 at <http://www.hrwf.net/Joom/images/forbnews/2010/russia%202010.pdf>.

⁵²² See the June 2011 update at <http://www.sova-center.ru/en/misuse/news-releases/2011/07/d22022/>. Misuse of anti-extremism news archive reports not only on anti-extremist measures applied to religious organizations but to all other cases of alleged abuse of the anti-extremism rationale.

⁵²³ For details on lack of definition and unified understanding of religious extremism see Dvornikova O.A., *Religija i Zakon: Problemy Vzaimodejstvija*, 7 *Zhurnal Rossijskogo Prava* (2009).

⁵²⁴ For details on new religious movements see e.g. Eileen Barker, *Why the Cults? New religious Movements and Freedom of Religion or Belief*, in Tore Lindholm, Cole W. Durham, Bahia G. Tahzib-Lie, (Eds.), *Facilitating Freedom of Religion or Belief* 571-592 (2004).

⁵²⁵ Uitz, *supra* note 234.

State lobby to cease the activities of such groups, or how to reconcile it with freedom of religion. Second, the label 'sect' is given mostly to new religious groups with some degree of foreign affiliation. Third, 'sect' is always being mentioned in a negative sense and citizens connected anyhow to these groups are assumed to be in troubles and the State feels obliged to take action.⁵²⁶

As for the Russian experience, in 2003 the Head of the State Security Council warned of the necessity of the State's intervention in the activities of totalitarian sects which pose a threat similar to the one coming from nationalist and fascist movements.⁵²⁷ There are numerous examples coming from all regions of Russia where state and local authorities take measures to suppress the activities of 'sects' and rescue their members. For example, in 2008 the Public Council at the Ministry of Internal Affairs of Chuvash Republic created a center of protection from totalitarian sects.⁵²⁸ A similar initiative was implemented by the Perm regional branch of Ministry of Internal Affairs which in 2009 opened a hotline for victims of totalitarian sects (the initiative was launched by the Center on Anti-extremism Policies).⁵²⁹ The State's policy in relation to so-called sects is widely supported by the leaders of major religious groups, especially by the Russian Orthodox Church.⁵³⁰

One of the most recent developments in relation to the fight with religious extremism is the establishment of the council to study religious materials with the purpose to detect in

⁵²⁶ For a detailed account of the governmental obligation to protect against dangerous religions, new religious movements and the label of brainwashing and sect observatories see Uitz, *Ibid.*, 164-178.

⁵²⁷ Center for Information and Analysis "SOVA", Vladimir Rushajlo Zajavil, *Chto Gosudarstvo Dolzhno Borot'sja s Dejatel'nost'ju Totalitarnyh Sekt*, available online at <http://www.sova-center.ru/religion/news/harassment/discrimination/2003/03/d213/>.

⁵²⁸ Center for Information and Analysis "SOVA", *Obvestvennom Sovete pri MVD Chuvashii Resheno Sozdat' Centr Zashity ot "Totalitarnyh Sekt"*, available online at <http://www.sova-center.ru/religion/news/harassment/discrimination/2008/10/d14304/>.

⁵²⁹ Center for Information and Analysis "SOVA", *UVD Permskogo Kraja Otkrylo "Gorjachuju Liniju" Dlja Postradavshih ot "Totalitarnyh Sekt"*, available online at <http://www.sova-center.ru/religion/news/harassment/discrimination/2009/10/d17124/>.

⁵³⁰ For details and news archive on relations between traditional religions and 'sects' see the Center for Information and Analysis "SOVA" website at <http://www.sova-center.ru/religion/news/interfaith/against-sects/>.

them signs of extremism (as an organizational unit of the Ministry of Justice).⁵³¹ There are serious doubts that the activity of such governmental agencies would not amount to censorship and will impose an additional burden on non-traditional religious groups and associations. Unfortunately, in the reality of Russia, the creation of the mentioned institution within the structure of the Ministry of Justice became an additional tool to exercise stricter control over new religions through reviewing their religious materials. Adherents of the affected religious communities, NGOs, and members of academia were actively protesting against the composition of the Council and requested on multiple occasions to exclude officials with a reputation of expressing intolerance and hate towards ‘sects’.⁵³²

In summary, the regulatory regime on the freedom of religion in Russia is far from being perfect and contains many opportunities to manipulate it and interpret it in a way compatible with a particular governmental agenda or even ideology. This opportunity was perfectly used by the Russian authorities to guard the religious perimeter from certain groups. It is clear that the major theme in such a policy is prevention, and it resembles to a large extent the policy being implemented by many other European states (and even being approved by the Strasbourg Court) in relation to the presence of Muslim groups. Now it is worthwhile bringing attention back to the issue of how a state should be discouraged to use militant democracy rationale for preventing some practices to exist for the purpose of maintaining the status quo unless there is significant justification for doing so, and providing all procedural guarantees are observed in order to prevent the abuse of preventive measures and not to make the state more militant than democratic.

⁵³¹ Center for Information and Analysis “SOVA”, Pri Minjuste Budet Sozdan Sovet po Proverke Religioznyh Materialov na Predmet Vyjavlenija v Nih Priznakov Ekstremizma, available online at <http://www.sova-center.ru/religion/news/authorities/legal-regulation/2009/07/d16504/>.

⁵³² Center for Information and Analysis “SOVA”, Institut Religii i Prava Prosit Ministra Justicii Iskljuchit' iz Ekspertnogo Soveta "Sektovedov" i Objavljaet Vserossijskuju Akciju "Inkvizitoram -Net!", available online at <http://www.sova-center.ru/religion/news/authorities/legal-regulation/2009/04/d15820/>.

4.1.3. Analysis of the Freedom of Religion Regulatory Regime in Russia: Militant Democracy as a Tool to Wipe out all Non-Traditional Religions?

The regulatory mechanism established in Russia in relation to the freedom of religious was described above in details and the preliminary conclusion was that it left enough room for the law enforcement bodies to adjust laws to particular vision of the role and place of religion within the Russian society. This vision does not only refer to Church vs. State relations, but also includes a clear idea on which ones are dangerous and therefore do not deserve to be present on the scene. For some reason the Russian authorities are very concerned about the spiritual well-being of its citizens and takes all possible steps and measures to maintain the ideal vision of religious domain. It was however extremely interesting to observe the similarity of the hidden intentions in the practice of some European states and Russian authorities to prevent particular religious group from playing any substantial role within society.

The only difference in that in Europe most recently it is predominantly about Muslims and Islam while in Russia the goal is to keep away all foreign and non-traditional religious movements. The issue of the headscarf, for example, does not seem to have the same attention as in Europe and Muslim women in Russia can even have a passport photo with a covered head.⁵³³ Rather, the Russian government has adopted an interesting approach in which religious elements are dangerous for Russia: it is not Muslims from Chechnya and other North Caucasus regions but foreign religious groups. The interpretation of the ‘foreign’ religious movements means that any religious movements not mentioned in the preamble of the 1997 Law on Freedom of Religion are considered as foreign, non-traditional, are therefore suspicious, and allegedly dangerous no matter how long they have been presently

⁵³³ See Center for Information and Analysis “SOVA” commentary on the 2003 Supreme Court Judgement allowed passport photograph to be taken wearing hijab, available online at <http://www.sova-center.ru/religion/news/harassment/intervention/2003/03/d152/>.

pursuing their activities within the territory of Russia or outside. The Russian government paranoid about the elimination of any ‘foreign’ intrusion in the religious component of Russian social life left to complete ignorance domestic religious conflicts, i.e. Chechens in North Caucasus and constant terrorist attacks on the civilians. Somehow, religious tensions between Muslims and non-Muslim religious groups are taken away from any official debate over freedom of religion. Keeping in mind the frequency of terrorist attacks allegedly committed by Chechen terrorist it looks at least awkward that government is concerned only with suppressing foreign religious movements as the ones posing a threat to democracy in Russia.⁵³⁴

The approach of the Russian government towards freedom of religion has a twofold effect on the activities of different religious groups. The first one affects in a very positive way the dominant religion in Russia: the Russian Orthodox Church. This denomination enjoys the widest possible support from the authorities and some actions amount indeed to the state endorsement of this particular faith. The Orthodox Church is very supportive of the overall State’s policy and initiate different measures which are fully compatible with the governmental policies against new religions.⁵³⁵ The second aspect of the governmental policy is negative for most of the newly established religious communities in Russia as the existing legislation, its interpretation, and application by the authorities easily leads us to conclude that the regulatory regime and practice are aimed at eliminating the presence of non-traditional religions from the society but not to protect Russian democracy.

The government had good use of imperfections in the legislation to accommodate the policy of pushing away new religious communities. The discretionary powers given to the

⁵³⁴ For details on terrorism in Russia see Chapter 5.3, at 290. Also see John Russel, *Chechnya – Russia’s ‘War on Terror’* (2007).

⁵³⁵ For s news archive on the Russian Orthodox Church v. other religions see Center for Information and Analysis “SOVA”, available online at <http://www.sova-center.ru/religion/news/interfaith/>.

authorities on registration matters were widely used to reject the application to register minority religious groups and some of them had to seek protection from the international supervisory bodies like the ECHR and not surprisingly Russia was found in violation of the Convention. However, despite the fact of being found in violation of the Convention, Russia's authorities did not rush to change the situation, and for example the 15 years requirement for the registration of the religious association was not removed from the 1997 Law. The situation also did not change after the ECHR found Russia in violation in the case of the Moscow branch of the Jehovah's Witnesses and rejected all allegations of the authorities. The SOVA-Center and other NGOs working in the field of the freedom of religion in Russia regularly report on discriminatory treatment of these religious communities in all regions of the country. It is not clear what could change the discriminatory treatment by public authorities of 'new' religions in Russia but for sure it will not be an easy process as long as the State promotes and supports such an approach.

It appears that the treatment of non-traditional religions in Russia is allegedly based on the militant democracy rationale as most of the actions taken against those groups are of preventive character and are meant to protect Russian democracy from its enemies: foreign religious movements in this case. The government does not see it as necessary to wait until foreign religious groups modify the existing balance of presenting religious beliefs within the Russian society. The State wants to preserve the status quo because it is convenient for the State and it does not see the threat to itself coming from the religious groups allowed to be present. Moreover, I have a sense that the Russian government acts in an alleged militant democracy manner because it tries to make an impression that it is engaged in a very important mission and does not feel obliged to provide any sustainable justifications for taking these measures.

Militant democracy can potentially be utilized to address the alleged threat coming from extremist religious movements.⁵³⁶ However, the legitimacy of militant democracy measures is dependent on many factors which are not met in the Russian case. Prevention is a dominant theme in the militant democracy state, however it does not follow that a state can suppress anything, just in case, and justify it by the need to protect democracy. This is exactly what is happening in Russia. There is an established governmental agenda on how to treat the foreign religious movements and how unwelcome they are in Russia. Moreover, the government even has an idea how proper religious group should look in terms of its structure, treatment of members, and activities.⁵³⁷ The preventive measures limiting religious freedoms could be accepted under certain circumstances, but in the Russian case it must be proved how religious groups facing considerable encroachment into their activities are actually but not hypothetically dangerous for Russian democracy. The Russian approach to treatment of non-traditional religions definitely lacks a tighter test in order to justify the interference and even minimum standard of neutral and impartial treatment.

The overview of the existing regulatory regime and its practical application leads us to conclude that the Russian government protects through such measures not the particular quality of the State (i.e. it was never argued that it is crucial for guarding the principle of secularism) and not for democracy, as such, but for a particular notion of the quality of society. Unfortunately, there is a strong sense that the government does not want society to split into many religious groups, it is more convenient to have people broke down into very few religious communities with which the State has established good relations and therefore can rely on their support.

⁵³⁶ For details on militant democracy and secularism debate see further sections of this chapter.

⁵³⁷ See e.g. *supra* note 483.

However, even if we accept that the presence of foreign religious groups is detrimental for Russian democracy, the denial of the fundamental right of the freedom of democracy cannot happen in the governmental agencies (i.e. refusal of registration). A militant democracy approach is legitimate only when all procedural guarantees are ensured and the judiciary is actively involved. Unless the regular attacks on the minority religions in Russia stop it is not possible to say that the state was acting in a militant democracy fashion.

To conclude, from what was described and analyzed above, it follows that Russia needs to reconsider seriously its approach towards foreign religious movements, including its definition of 'foreign' which has a unique meaning in the Russian reality. I argue that if laws are to be interpreted and applied in a true militant democracy fashion it will help to resolve the situation and will leave foreign religious groups alone in conducting their activities and their adherents could enjoy their religious freedoms.

The militant democracy rationale, if applied properly in regulation of religious matters in Russia, will encourage the government refocus its attention from protecting the spiritual well-being of the society (which is not exactly the State's function) to the protection of democracy, especially knowing that Russia is not a religious-conflict free society. In this case the government will need to provide evidence in support of the claim that the presence of foreign and non-traditional religious movements is dangerous for democracy but not for the spiritual preferences of its citizens. Such an approach will force the government to give a stronger justification in each case in order to prove how a particular religion is involved in extremism or anything else which can potentially harm democracy. The government could not get away with generalized statements that this is what the society needs but will have to demonstrate that a threat is imminent and needs to be addressed.

Unfortunately, threats coming from religious extremism are not only a matter of political speculation in Russia. This country has long-standing experience since the collapse of the Soviet Union with fighting against terrorism and secessionist movements; and the religious component is often present. This makes my argument even more sustainable: the threat of religious extremism is present in Russia and the government needs to take measures to prevent potential harm to democracy. However, to the date the government has failed to do so as it does not identify the enemy correctly and replaced the need to protect democracy with its urge to preserve the existing social order. Militant democracy would bring the State's attention back to the real problems and would give (guaranteed by the law) freedom of religion to various communities that are being suppressed in Russia at the moment.

4.2. Militant Secularism in Turkey⁵³⁸

Introduction

This section aims to present an analysis of the militant democracy logic application and interpretation in Turkey to guard the constitutionally proclaimed principle of secularism. This case-study is of particular interest for a number of reasons. First of all, both recent Turkish Constitutions of 1961 and 1982 contain militant democracy provisions (while the latter went much further than its predecessor).⁵³⁹ Second, this country has considerable experience with the prohibition of political parties: the Turkish Constitutional Court “has closed down six parties under the 1961 Constitution and 18 under the current Constitution of 1982.”⁵⁴⁰ Partially this is due to the fact that the “Turkish Constitution of 1982 (a product of a military

⁵³⁸ The term ‘militant secularism’ adopted from Macklem, in *supra note 54*.

⁵³⁹ For details account of militant democracy-type constitutional provisions in Turkey Oder, *supra note 470*, at 263-310.

⁵⁴⁰ Ozbudun, in *supra note 52*, at 126.

coup) still reflects some features of authoritarian, statist, and tutelary character.”⁵⁴¹ The analysis of the Constitutional Court jurisprudence on party prohibition cases demonstrates that “one of the most important areas of remaining democratic deficit concerns the low level of protection granted to political parties.”⁵⁴² Third, most of the rulings on political parties’ dissolution were based on the alleged violation of the constitutionally protected principles of the indivisibility and territorial integrity of the State or the principle of secularity. The latter is an excellent opportunity to test my hypothesis that militant democracy shows signs of its extension beyond its traditional area of application. Keeping in mind the local conditions, all party prohibition cases could be divided into two groups: against political parties aimed at the protection of the Kurdish minority’s rights and against political parties with Islamic sentiments in their agenda.

In addition, Turkey represents a challenge to the generalized statement that militant democracy is of potential danger the political environment as it might easily target minor parties in order to silence the political debate. The Turkish example clearly demonstrates that even parties with substantial popular support (i.e. the Refah Partisi, the Welfare Party, the HEP Party (People’s Labour Party)⁵⁴³ and the AK Party) can become targets of the party dissolution procedure. Finally, Turkey represents a fascinating case-study for the headscarf ban and this is another aspect of the Turkish version of militant democracy I would like to explore in this part.

The main purpose of this chapter is to demonstrate the innovative dimension of militant democracy development and to analyze the move towards addressing new threats

⁵⁴¹ Ibid., at 125.

⁵⁴² Ibid., at 126.

⁵⁴³ The HEP Party case was based on two main charges: the party became a center of illegal activities and was cultivating social difference with the aim to destroy unity of the Turkish State and its people while two other faced the ban (or possibility to be ban on the case of AK Party) for alleged violation of the principle of secularism.

through militant democracy lenses. The section starts with a general introduction of Turkish constitutional militancy. The more detailed analysis of militant democracy application will be provided in relation to one group of party prohibition cases: political parties banned for the alleged violation of the principle of secularism and the headscarf ban. These questions are brought together under the militant democracy ‘umbrella’ to test the argument that militant democracy is being utilized to fight the enemies of democracy and other extremist from the right wing, and their implications for my argument. The section will finish with conclusions on the Turkish case-study and the possibility of utilizing militant democracy logic to protect the secular character of the Turkish state.

4.2.1. Militant Democracy in Turkey: General Observations

It was already mentioned that under the 1982 Constitution the Turkish Constitutional Court has closed down 18 political parties. Such activism in the business of dissolution of political parties can be, probably, explained to some extent through the analysis of the Constitutional provisions protecting particular qualities of the Turkish State and the procedure to initiate and ban political parties. The construction and language of the constitutional norms themselves do not offer the full picture of militant democracy practice in Turkey. The Turkish version of militant democracy is as context-sensitive as in any other democracy. However, I would suggest that Turkey could even qualify as an example of the most-context dependant militant democracy version. One of the most influential factors in understanding and shaping the debate over militant democracy in Turkey (as well as over any other constitutional matter) is the ideal society of Turks as proposed by Atatürk in the 1920s. While reforms in all sphere of social, political, and legal activities started a long time ago, contemporary Turkish politics are

still concerned to lead the country towards “highest level of civilization and prosperity”⁵⁴⁴ as was advocated by the 1920s national hero.

There is no doubt that some specific features of the Turkish Constitution were a precondition of creating quite an aggressive regime jealously protecting the secular character of the State, and unity of the nation. The necessities to protect exactly these two qualities of the State were invoked in most of the party prohibition cases. The jurisprudence of the Constitutional Court demonstrates that political parties with an Islamic agenda or aiming at the protection of Kurdish people almost automatically become targets of the party prohibition provisions in the Constitution and relevant laws (some of them were banned even before they started their activities or were banned through the Constitutional Court procedure after the party dissolved itself). Considerable attention is paid to the protection of the national unity and the principle of secularism in the Constitutional provisions and jurisprudence is one of the items of the Atatürk’s heritage.

First of all, the Constitution of Turkey protects some features of the State from the procedure of amendments.⁵⁴⁵ Non-amendable provisions of the Turkish Constitution protect the following qualities of the state: republican, democratic, secular, and social state governed by the rule of law; Turkey as an indivisible entity and the principle of secularism.⁵⁴⁶ The latter seems to be of extremely high importance; the preamble to the Constitution follows the Atatürk’s ‘dream society’ and states “there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.” However, the manner in which the Turkish state protects its secular character and the indivisibility of its territory does not allow in fact any political dialogue on matters related to religion and minority protection (if we do not talk

⁵⁴⁴ See for example www.ataturk.com web-site for detailed information on Atatürk biography and his reforms.

⁵⁴⁵ **Article 4:** The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.

⁵⁴⁶ For detailed account of eternity clause in the Turkish Constitution see Oder, *supra* note 470, at 267-270.

about the minorities mentioned in the Lausanne Treaty of 1923).⁵⁴⁷ These processes were tried to be placed under the umbrella of a bigger and more general goal Turkey wants to achieve: to attain “the modernity and civilization of the West.”⁵⁴⁸

A further manifestation of militant democracy in Turkey could be found in the regulation of political parties’ activities. Chapter 4, Section III is devoted to the regulation of political parties: some provisions represent traditional norms and guarantees for political parties (i.e. declaration of freedom to form political parties without prior permission, the importance of political parties for democracy, and the duty of the State to provide political parties with financial support). Furthermore, Article 68 of the Constitution requires that “the statutes and programs, as well as the activities of political parties, should not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they should not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.”⁵⁴⁹ Moreover, the same Article bans “persons occupying a certain position from being members of political parties (judges and prosecutors, members of higher judicial organs including those of the Court of Accounts, civil servants in public institutions and organizations, other public servants who are not considered to be laborers by virtue of the services they perform, members of the armed forces and students who are not yet in higher education institutions).”⁵⁵⁰

⁵⁴⁷ Lausanne Treaty had settled the question of Minorities in Turkey. According to this document only non-Muslim groups were recognized as minorities (i.e. Armenians, Greeks). Therefore Kurds cannot make any claims about recognizing them as national minority.

⁵⁴⁸ Kogacioglu, in *supra* note 52, at 434.

⁵⁴⁹ Article 68 (as amended on July 23, 1995: 4121/6 Article).

⁵⁵⁰ The provision is not unique for Turkey, though taking into account the role of the army in Turkish society and politics, this norm might get different interpretation and consequences.

Provisions of such a character are not unknown to constitutional theory and practice and many states have similar provisions in constitutions and in the legislation regulating activities of political parties. However, the Constitution of Turkey contains very detailed provisions on political parties; similar norms usually are included in the ordinary legislation and national constitutions refer only to very basic principles and guarantees of parties' activities. For example, the Constitution of Turkey contains a separate article on principles to be observed by all political parties and the decision to dissolve a political party permanently may be rendered only if "it is established that the party in question has become a centre for the execution of prohibited activities." In addition, Article 69 goes into detail on the consequences for the banned party and its members.⁵⁵¹

Drastic consequences of the party dissolution for its members – banning them from being engaged in politics for 5 years – is probably one of the reasons that most of the dissolved parties decided to seek later protection in the ECHR which decided upon a number of cases against Turkey. The political environment in the country is considered unhealthy due to frequent party prohibition practices and the democratic character of the Turkish State has long been questioned and debated outside and inside the country; the Turkish government is being blamed often for imposing 'narrow limits' within which political activities can take place.⁵⁵² For example, different human rights organizations permanently report on the killings, torture, disappearance, and imprisonment of individuals advocating for political solution for the Kurdish problem.

⁵⁵¹ **Article 69** establishes that first, "the party which has been dissolved permanently cannot be founded under another name." Second, "members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of the Constitutional Court's final decision and its justification for permanently dissolving the party." Further, Law no. 2820 on the Regulation of Political Parties which also states that "all the assets of the political parties dissolved by the order of the Constitutional Court shall be transferred to the State." (Section 107 (1)).

⁵⁵² Kamrava, in *supra* note 52, at 281.

To achieve “the modernity and civilisation of the West” mentioned above, Turkey agreed to changes in its legal, political and social regimes. Thus, the Republic of Turkey was established in 1923 as a secular state under the leadership of Mustafa Kemal Pasha (known as Atatürk).⁵⁵³ The Sultanate and Caliphate were abolished, Sharia Law was replaced with laws based on European legal traditions, and even Arabic script was replaced by the Latin alphabet.⁵⁵⁴ Religious schools and sects were closed down and it was assumed that the population would gradually absorb and accept the changes coming from governmental orders (usually supported in Turkey by the military). However, this was not exactly the case and therefore different social and political movements appeared to express disagreement and to challenge the situation. Unsurprisingly, such movements were perceived as threats to Turkish democracy. Kurdish political movements were always seen as posing a threat to the territorial integrity and political unity of the State. At the same time, Islamic political groups as threatening the laicism principle through trying to impose Sharia order. These groups became the main targets of the party dissolution procedures. Statistics are helpful here to illustrate the argument: up to the 2004 nine out of eighteen banned parties had to do with accommodating the concerns of the Kurdish people as posing a threat to the unity of the state.⁵⁵⁵

As a result, since the early 1990s political parties with Kurdish or political Islamic sentiments operate and function under the normalized threat of being banned. Political parties with the above mentioned agendas have adjusted to these circumstances and had to develop a ‘spare party’ system,⁵⁵⁶ a process where a new party is created with the purpose so that the main party could resume political activities in case it is banned. This is by no means a pleasant or desirable construction for the political environment and stability of democracy in

⁵⁵³ Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* 133 (2006).

⁵⁵⁴ Ibid.

⁵⁵⁵ Kogacioglu, in *supra note 52*, at 439.

⁵⁵⁶ Ibid., at 435.

general; voters might be very confused in attempts to follow all the re-emerging political parties. Therefore, Turkey is an interesting example for the general debate on the effectiveness of the procedure to ban political parties.

In the Turkish political environment parties got used to the possibilities to be banned and form another party with the same agenda even before the main party is dissolved. This might be an endless process when the government bans a party but another party with the same program appears immediately. This demonstrates that banning a party from the political space is not always an effective and helpful solution. Such a situation does not affect the functioning of the political parties and voting system but also would mean that the Constitutional Court will be permanently dealing with party prohibition cases while it obviously has some other important things to do. Numerous cases on party prohibition will make the Constitutional Court care less about the justification and grounds of dissolution; it will lead to a more relaxed and generalized approach to party prohibition cases without taking into account individual features and peculiarities of each and every case. Dealing with parties' prohibition in a manner that it becomes the usual business of the Constitutional Court will not add anything to the protection and support of political pluralism and freedom of speech and association.

Therefore, it is possible to conclude that the Constitution created a broad in its scope regime of its own protection which has had a negative impact at least on political parties. However, the Constitution itself and its written norms are not enough to say that the strict regime substantially limiting freedoms of political parties will necessarily be established. To the large extent that would depend on the interpretation given to the norms while invoking and applying them. Unfortunately, Turkey started its move towards as limited a regime as possible: the Turkish Constitutional Court opted for excessively rigid interpretation of the

provisions regulating political parties' activities.⁵⁵⁷ Not only those cases to dissolve political parties were initiated too often, but the initiative was supported by the Constitutional Court in most of the cases. In addition, while the ECHR very often disagreed with the decision of Turkish authorities to ban political parties, it is applicable mainly to the parties with Kurdish sentiments or other minority issues in their agenda. On the other hand, there seem to be a “degree of convergence on the question of the protection of secularism”⁵⁵⁸ between the ECHR and the Turkish judiciary. In addition, the Constitutional Court of Turkey is widely criticized for its selective activism in protecting civil liberties through its judgments⁵⁵⁹ and it might be tracked especially through the analysis of the party prohibition cases.

As was mentioned above, militant secularism in Turkey should be analyzed not only through the prism of the party dissolution cases but through the wider range of cases involving the urge to protect the secular character of the State. In the next section I will try to do exactly this in order to demonstrate that militant democracy is the model Turkey should practice in its activities to protect secular character of the State. I argue that if the Turkish government and politics accepted a militant democracy approach with all conditions of its legitimacy and justification towards preserving secularism it would offer a better solution than is practiced at the moment.

4.2.2. Protecting Secularism in Turkey: The Dissolution of Political Parties and the Headscarf Ban: Reasons and Concerns

As was mentioned above the entire body of the cases on political parties dissolution cases can be divided into two major groups based on the political agenda of the parties. The first group of banned parties was advocating for solution to minority protection issues (mainly Kurdish),

⁵⁵⁷ Ergun, in *supra* note 52, at 136.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ See for example Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 *Law and Society Review* 3 (2006).

while the second group of banned parties was outlawed for violating the principle of secularism. It is not useful to go into details about the most ridiculous cases when the party was banned even before it pursued any activities and especially in cases when the party dissolved itself while the case was pending in the Constitutional Court.⁵⁶⁰ Many of these cases were later challenged in the Strasbourg Court and represent an important and valuable contribution to the whole debate on militant democracy. However, for the purpose of this chapter I will leave aside the dissolution of political parties for alleged violation of the unitary character of the State and will concentrate on the second group of cases. The main reason to proceed this way is the fact that all political parties banned for the alleged violation of the unitary character of the State were successful in challenging their dissolution in the ECHR and it is hard to disagree with the arguments the Strasbourg Court gave in those cases.

The Refah Partisi (the Welfare Party) Dissolution: Background of the Case⁵⁶¹

The Refah party was not a new player in Turkish politics, it was presented under different names since the late 1960s (it is clear demonstration of the spare-party system mentioned above).⁵⁶² The latest version of the Refah party with mainly an Islamic agenda appeared in 1983. The first participation in general election of 1987 was not successful and the party scored only 7.1% and therefore failed to be represented in the Parliament (in Turkey there is a 10 % threshold for the parties seeking representation in the national Assembly). Later, in the 1991 elections the party gained 62 out of 450 seats in Parliament and after the 1995 general elections became the largest single block in the parliament with 21.5% of the popular support

⁵⁶⁰ The case of United Communist Party of Turkey and Others v. Turkey (1998), and Case of Freedom and Democracy Party v. Turkey (1999).

⁵⁶¹ Refah party was not the only one banned for their alleged anti-secular activities. Earlier the Constitutional Court of Turkey ordered to dissolve the National Order Party (20.05.1971), Turkey Peace Party (25.10.1983), Freedom and Democracy Party (23.11.1993) despite the fact that party dissolved itself while the case was pending and in 2001 the Virtue Party was also banned.

⁵⁶² For more details on the Refah Party history see Kamrava, in *supra* note 52, at 286.

(158 seats out of 450).⁵⁶³ In June 1996 Refah formed a coalition government with the True Path Party (centre-right oriented party) and came into power.

In May 1997 the case to dissolve the party was initiated, the party was accused of becoming a centre of activities contrary to the principles of secularism. On January 1998 the party was dissolved, its assets were transferred to the Treasury. The case to outlaw the Refah Party was built around three major groups of reasons:

- Proposal to introduce plurality of legal system which would lead to the discrimination on grounds of belief;
- Intention to introduce Islamic law (Sharia) as the ordinary law and as the law applicable to the Muslim community;
- Reference by some Refah members to the concept of jihad, a holy war to fight for the complete domination of Islam in society.

The Constitutional Court judgment sparked extensive public debate and was highly criticized by domestic and international politicians and scholars.⁵⁶⁴ For example, all the charges were based on the activities and speeches of the party leaders mainly and the Court never looked at the party program. While both elements of party activities are of equal importance, probably the detailed analysis of the party constitution would add more legitimacy to the dissolution in case the government could prove that party intentions were also contradictory to the Constitution. The Constitutional Court observed that secularism is “one of the indispensable conditions of democracy”⁵⁶⁵ and it is safeguarded in Turkey mainly

⁵⁶³ December 1995 elections result: Refah Part 21.5%, Motherland Party 19.5%, True Path Party 19%, Democratic Left Party 14.5%, Republican People’s Party 11%, smaller parties gained 14.5% of the votes together.

⁵⁶⁴ See for example: David Schilling, *European Islamophobia and Turkey - Refah Partisi (The Welfare Party) v. Turkey*, 26 *Loyola of Los Angeles International & Comparative Law Review* (2004).

⁵⁶⁵ *Refah Partisi (Welfare Party) and Others v. Turkey* (2001), Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 24.

because “country’s historical experience and the specific features of Islam.”⁵⁶⁶ The decision of the Constitutional Court provided a long list of grounds for dissolution which included speeches and various activities of the party leaders, which the Court found contrary to the principle of secularism. While the application of militant democracy to prevent the events and tragedies which occurred in the past is not new and indeed is quite often the main reason for the introduction of the doctrine into the national constitutional order, the Turkish case of the Refah party is quite distinct and instructive for the debate on militant democracy, namely its legitimacy and effectiveness. First of all, as was already mentioned, Refah was the fifteenth political party dissolved in Turkey in recent times. It is worth noting here that this is not a fault of the judiciary only (namely the Constitutional Court). However, it seems that the Turkish Constitutional Court does not take seriously the widely accepted practice of compulsory dissolution of political parties as a measure of last resort.⁵⁶⁷ The number of banned political parties in Turkey gives an impression that the prohibition of political parties became an ordinary practice in Turkey. Moreover, while most of the previous parties were banned before they managed to pursue any activities and get any popular support, Refah was the ruling party when it was dissolved. It was the largest political party in Turkey and claimed more than four million members, had 158 seats in the National Assembly and received 35% of the total votes in local elections of November 1996.⁵⁶⁸ Furthermore, the charges against the party were based only on individual statements of the party leaders (and not the party) and no single word was said about the party program.

⁵⁶⁶ Ibid.

⁵⁶⁷ See for example European Commission for Democracy Through Law (Venice Commission), Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, *supra* note 193.

⁵⁶⁸ Therefore, one third of the votes were given to the non-existing party and people were left without representation of their choice. Taking into account that democracy is about election of the rulers, denial of the substantial number of voters to be represented by the party of their choice poses serious questions about the reality of the right to vote and choose.

The Refah Partisi story is relevant for this particular chapter because the Constitutional Court in its judgment concentrated on the principle of laicism (proclaimed in the preamble of the Constitution as one of the foundations of the State) and necessity to protect it through banning this particular political player. According to the Constitutional Court of Turkey, laicism is in fact the “basis of the vision of democracy that develops with the enlightenment of science, nation, independence, national sovereignty and the ideal of humanity.”⁵⁶⁹ The Court pointed out the necessity to keep religion away from politics for the sake of saving religion from being a tool in the hands of the administration and ensure its proper place in the conscience of the people.⁵⁷⁰ The Court’s distinction between every day life and politics was in a line with arguments brought earlier in the HEP case. However, while in the HEP case the issue of language and ethnic diversity was placed in the domain of culture, this time the Court did the same with religion. It is interesting that the Court tried to represent it as a measure necessary to protect the religion and safeguard its dignity. The Court believes that it is necessary to eliminate culture and religion from public debate and it is fully legitimate to question whether the judiciary is able to draw a clear border between culture and politics, and whether it is a judicial task in general.

Based on this distinction and interpretation of the laicism principle the Constitutional Court has concluded that the Refah party has to be excluded from the domain of politics. Moreover, the judgment concluded that Refah threatens not only the principles of laicism but also the unity of the nation. Unity might be achieved only if social phenomena from the cultural domain are preserved there and not allowed to enter the domain of politics. Refah arguing to bring religion to the politics was a threat to the unity of the State and therefore should be dissolved. The Constitutional Court made it clear that religion should be

⁵⁶⁹ Kogacioglu, in *supra* note 52, at 441.

⁵⁷⁰ *Ibid.*

completely banned from the public debate and from the language of the judgment it follows that any political party mentioning religion in its program or in the speeches of its leaders is of potential threat for the principle of secularism and unity of the State, and therefore, for Turkish democracy in general.

The Refah Party Dissolution: Problems and Consequences

It is a well-known fact that Turkey has experienced the presence of religious fundamentalism throughout its history. Therefore, someone might argue that it has reasonable ground to introduce strong protection in the national constitutional in order to prevent the history from repeating itself and to accord strong guardianship to the unity of the State. However, I do not think it is feasible to achieve the entire unity within any modern state and call it democracy through denying any claims of the religious and ethnic identity as being different from the views of the Atatürk. We also should not forget that Turkey is a predominantly Muslim state; therefore it is not possible to detach completely religious preferences of the majority of the population from being brought into the political debate. The same line of criticism is applicable to the claims to preserve minority languages which are also considered as posing a threat to the unity of the nation and therefore dangerous for democracy.

This is quite an intriguing observation that the Turkish government refers a lot to the comparative law in justifying its ‘protectionism’ of the secular character of the State. The Turkish government relied extensively on international practice and constitutional norms coming from other democracies to support the ban of the Refah and similar parties. While comparative arguments might be very much in favor of certain solutions, however, it is not exactly the case if we compare the position of the Christian democrats in many European countries and Muslim parties in Turkey. For example, many highly debated and controversial issues very often gain strong support or disagreement of the religious leaders (for example the issues of abortion and same sex marriage always involve active interference of the religious

beliefs especially in conservative societies). Therefore, the Turkish government seems to be selective in its comparative argument and picks only the facts in favor of the party ban in general. The comparative law argument does not seem to add more legitimacy to the justification given by the Turkish authorities in cases on political parties' dissolution. The justification on the drastic limitations being imposed on political freedoms through outlawing parties should be more consistent and convincing than mere reference to the specific features of Islam as justifying exclusion the Refah from political arena.

The task to accommodate religious beliefs and views of the different religious groups imposed on national governments is never an easy one. However, it does not mean that the State could simply disregard them and ban them from being discussed in the political domain for the sake of the protection of democracy. Intent of the protection of the constitutional order is not the same as unwillingness to engage in dialogue and compromise and find a fair balance between religious demands and preferences and democracy survival. To protect religion from the influence of the State and not allowing religion to overtake the State's business is a worldwide accepted practice. Nevertheless, religious and ethnic diversity are not factors that could be excluded from any involvement in the domain of politics. The politics of disregarding them does not help the State's mission of establishing a stable democratic order.

The Refah party case was very instructive for the Turkish judiciary and political environment if we look briefly at the latest development in this field. The 2008 case of the AK Party (the Justice and Development Party) was called by many commentators, AK party leaders and foreign politicians as a "victory for Turkish Democracy".⁵⁷¹ The party was accused of violating the principle of secularism. The party became a target of the compulsory dissolution procedure due to its move to lift the existing ban on wearing the headscarf

⁵⁷¹ See for example ' Turkey's ruling party escapes ban'. Story from BBC NEWS: <http://news.bbc.co.uk/2/hi/7533414.stm>. Published: 2008/07/30.

(however the move could be considered as a failure so far as the Constitutional Court overturned the relevant amendment in June 2008).

Procedure to outlaw the Justice and Development Party (AK Party) which is a governing political party in Turkey since 2002 was initiated in March of 2008. In July 2008 the Constitutional Court of Turkey handed out the judgment against AK Party dissolution.⁵⁷² While someone can call the AK Party case a victory of Turkish democracy the story is not as shining as someone might see it from the first glance. The party was not dissolved (the Court was one vote short of the required qualified majority of seven judges) but 10 out of the 11 judges decided that AK Party became a focal point of anti-secularism activities. As a result the party was denied half of its public funding. In this judgment the Constitutional Court “persisted in its rigid and authoritarian interpretation”⁵⁷³ of the notion of secularism as constitutional principle of the Turkish Republic. This fact combined with an absolute majority of the Court in favor of the AK Party closure indicates that “the prohibitionist tendency” in Turkey is still quite strong and political parties do not have same level of protection as in the majority of modern democracies.⁵⁷⁴

The decision to ban AK Party would be an unprecedented event in the militant democracy application as the target was the governing party with a huge parliamentary majority. It is however not easy to conclude with certainty what made the Court not vote for the dissolution: the need to support the progress of democracy, pressure from the international community (especially the EU), or the conclusion that lifting the headscarf ban does not mean that Islamic fundamentalism will come back tomorrow. However, the case

⁵⁷² Decision of the Constitutional Court of Turkey 30.07.2008, E.2008/1 (SPK), K.2008/2. Summary available at <http://www.anayasa.gov.tr/index.php?l=content&lang=en&id=137>. Main argument to initiate the procedure to ban a party was the initiative of Constitutional amendment aimed at the abolition of headscarf ban at the universities. See for example, Sinan Ikinici, Turkey’s Chief Prosecutor Seeks to Ban the Ruling AK, available online at <http://www.wsws.org/articles/2008/apr2008/turk-a02.shtml>.

⁵⁷³ Ergun, in *supra* note 52, at 137.

⁵⁷⁴ *Ibid.*, 137.

gave hopes that the situation with political pluralism might get better and courts will pay more attention to the arguments and justification brought by the government to convince that parties with Kurdish and Islamic sentiments automatically pose a threat to Turkish democracy, and interpretation of the core of the Constitution to be protected through a militant democracy measure (which is probably broader than necessary at the moment) would not be extended even further. This line of behavior should probably be followed in the future and the dissolution of the party should be considered as a measure of last resort.

To conclude, the situation we can observe in Turkey can be considered as an example of militant democracy but to some extent only. The main similarity of the existing Turkish regime with militant democracy is the reason to ban a party or parties: through this procedure the government aims to protect the particular quality of the State established in the Constitution (secularism) which is a precondition for the stable democratic regime in Turkey. However, there is another dimension of militant democracy practice in Turkey that should be included in this survey: the headscarf ban debate.

The Headscarf Ban: Background of the Debate and the Turkish Approach

I would fully agree with the statement that Turkey represents one of the most fascinating case studies of the headscarf (*hijab*).⁵⁷⁵ Unfortunately, it is not feasible to provide a full history of the headscarf debate in Turkey in this project and it will go beyond its purpose and scope. However, some background information certainly will help to understand the nature and source of the constant political tensions in Turkey since the 1980s in relation to the ban of the headscarf.

At this point I would like to stress that the headscarf ban case is included into this debate because the justification for such a measure given by the government is very similar to

⁵⁷⁵ See for example Ozlem Denli, *Between Laicist State Ideology and the Modern Public Religion: The Head-Cover Controversy in Contemporary Turkey*, in Tore Lindholm, Cole W. Durham & Bahoa G. Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* 497-511 (2005).

the one given in cases of prohibition of political parties advocating for more active role of religion in the everyday life of Turkish society and discussing it within the political domain. Leaving aside the arguments of the Turkish government about taking these actions in order to protect religious feelings and eliminate subversion of women through lifting the headscarf ban, the very first reason given by the government is protection of the basis of the constitutional order.

Turkey has a population of around 70 million people and it is overwhelmingly Muslim (more than 90 per cent).⁵⁷⁶ In 1923 the Caliphate was abolished and Turkey (under the leadership of Atatürk (Mustafa Kemal Pasha) was declared a secular republic.⁵⁷⁷ The banning of the traditional Turkish head cover for men (*fez*) in 1925 and of the Islamic veil in 1930 was one of the measures⁵⁷⁸ adopted in pursuit of the achievement of modernization through creation of the religion-free zone where all citizens would be treated equally and without any distinction on the ground of religion: the main goal of the Atatürk reforms.⁵⁷⁹

Later in 1934 a ban was imposed “on wearing religious attire other than in places of worships and religious ceremonies.”⁵⁸⁰ It seems that the issue of headdress was of crucial importance for the vision of the State and social order Atatürk had in mind. For example, in the justification for the law introducing the ban of the head covers it was noted that “the issue of headgear, which is completely unimportant in and of itself, is of special value for Turkey who wants to become a member of the family of modern nations. We propose to abolish the hat worn currently, which has become a mark of difference between Turkey and other modern nations, and replace it with the hat that is the common headgear of all modern,

⁵⁷⁶ McGoldrick, *supra* note 553, at 132.

⁵⁷⁷ *Ibid.*, at 133.

⁵⁷⁸ Among other measures could be listed the repeal of the Constitutional provision declaring Islam a state religion (in 1928), the introduction of the Swiss Civil Code, Constitutional amendment granting equal political rights to women (in 1934), replacement of the Arabic alphabet with Latin).

⁵⁷⁹ McGoldrick, *Ibid.*, at 133.

⁵⁸⁰ The Dress (Regulation) Act of 3 December 1943 (Law No 2596). Q.

civilized nations.”⁵⁸¹ While the laws mentioned above did not target formally only women’s attire but it follows from the leader’s statement and spirit of the laws that the breakthrough should be accompanied with the promotion of the visibility of women in the public sphere.

The liberation of women was supposed to be used to demonstrate the new image of the whole country: a state ensuring modern and civilized life for its citizens.⁵⁸² The described background and spirit of the modernization and civilization led to the establishment of the environment where secular states was perceived “as the political agent that unveiled the female body, dressing it in accordance with secular ideals and principles so as to display Turkey’s new national identity for a Western global gaze.”⁵⁸³

However, in the 1980s an unexpected phenomenon started to rise within Turkish society, university students wearing the Islamic headscarf started to appear in public places, i.e. in schools and universities. As was mentioned previously, the public sphere was kept closely under the umbrella of secularism since Atatürk’s reforms and it was interpreted in a way that Islam cannot possibly exist in a university campus.⁵⁸⁴ The reaction to this movement was not unanimous and the intellectuals and political community are still deeply divided on the issue of wearing an Islamic headscarf in public (as in France and many other European states facing the same phenomenon).

However, within a few years time the headscarf “went from being a controversial item of religious attire to a matter of Turkish national security.”⁵⁸⁵ The official position of the Turkish state was remaining the same for many years and wearing a headscarf in public

⁵⁸¹ Alev Cinar, *Subversion and Subjugation in the Public Sphere: Secularism and the Islamic Headscarf*, 33 *Comparative Perspectives Symposium: Gendered Migrations* 899 (2008).

⁵⁸² *Ibid.*, at 900.

⁵⁸³ *Ibid.*, at 902. .

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.*, at 891.

universities was banned through different governmental regulations and circulars.⁵⁸⁶ Moreover, in order to calm down the rising popularity of wearing headscarves, the National Security Council declared the headscarf “as one of the main indicators of what they called the “Islamic threat” – the single most important threat to the well-being and security of the country – and called for the enforcement of a ban on the headscarf in all public places, including classrooms, universities and public offices.”⁵⁸⁷

The most famous and controversial (but not the only) case on the headscarf debate coming from Turkey is the Leyla Sahin story.⁵⁸⁸ The events leading to the long-lasting battle between a woman of Turkish nationality and her own State began in 1997 when Leyla Sahin was denied access to the lectures, tutorials, and courses on the fifth year of her university studies for wearing a headscarf. Later she was denied entrance to the written examination and later was subjected to the disciplinary proceedings by the university administration. In the end, Leyla Sahin had to leave her home country and go to finish her medical education abroad.

The Turkish Constitution clearly indicates that secularism has a special place in the constitutional order of the country and it is explained and justified by the historical and political experience of the State. Therefore, the headscarf ban and elimination of political parties with Islamic agenda have similar reasons behind them: the State wants to preserve the established structure and particular qualities of the State and sees that any presence of religion in the public domain as dangerous for the established order (even advocating wearing a headscarf is perceived as a danger as it was a main reason to outlaw The Fazilet Partisi (the

⁵⁸⁶ For detailed account of the regulations on headscarves wearing in educational institutions and the judicial practice before Leyla Sahin Case see McGoldrick, *supra* note 553, at 135-137.

⁵⁸⁷ Cinar, *supra* note 549.

⁵⁸⁸ The other case in the similar vein is Karaduman and Others v. Turkey (2008), Application No. 8810/03 - case concerning the refusal to provide the degree certificate for women provided identity photograph wearing headscarf-hijab.

Virtue Party) in 2001.⁵⁸⁹ I will elaborate on the assessment of the measures taken by the Turkish government later, but what is obvious from all the discussion above is that the Turkish government (including legislator, executive, and judiciary) refers to a militant democracy argument in doing both banning certain political parties, and the prohibition of headscarves in public places.

Therefore, it confirms my argument that militant democracy is being extended beyond party prohibition. And moreover, it is evident from the Turkish example that militant democracy logic is used by governments to address the alleged threat of religious extremism, including a wider range of political ideologies being banned from the public debate. It was mentioned in a previous chapter that the majority of the case-law coming from the jurisprudence of the European states concerns political ideologies referring to communism, fascism or supportive of separatist and nationalist movements, but Turkey demonstrates that militant democracy might be used against political players with a religion-related agenda as well (it was not the case before mainly due to the fact that the presence of political parties affiliated anyhow with Christianity was normal for most of the European states).

4.2.3. Militant Secularism in Turkey: Business as Usual

Militant Democracy in Turkey: Business as Usual

A considerable number of political parties dissolved in Turkey within only couple of decades appear to be unprecedented practice for the European democracies. The Turkish activism in the business of banning political parties comes in contrast with the prevailing approach where the prohibition of political parties must be a measure of last resort for the governments with all procedural guarantees to be ensured in order to minimize the risk of abuse by the political branches in order to suppress political dissent and eliminate competitors from politics. The

⁵⁸⁹ Fazilet Partisi and Kutan v. Turkey (2006), Application No. 1444/02. The case was stroke out of the Court's list as applicant withdrew the application.

number of banned political parties in Turkey sends a strong signal that militant democracy is applied with some defects. This conclusion can be supported with numerous cases decided by the ECHR on party prohibition against Turkey.⁵⁹⁰

The situation with party prohibition in this particular jurisdiction has gained attention of not only those closely involved in monitoring and researching this subject-matter but of wide range of international organizations, including the Council of Europe. For example, in September 2008 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe sent a request to the Venice Commission “to review the constitutional and legal provisions which are relevant to the prohibition of political parties in Turkey”.⁵⁹¹ The request was motivated by the move to ban the governing AK Party.

The first flaw in the manner militant democracy logic is interpreted and applied in Turkey is that what should be an exceptional measure became a regular one and the Constitutional Court had to deal with party prohibition cases on regular basis. This is the partially a result of the regulatory regime – list of grounds to find party unconstitutional which goes beyond criteria recognized by the ECHR and Venice Commission; relatively easy procedure to initiate the case (without any substantive democratic control) – but not only. The Turkish Constitutional Court is also partially responsible for the current situation. This institution had a chance to establish a stricter test and interpret the party activities’ regulation to attain broader protection for political parties; including the interpretation given to the first three articles of the Turkish Constitution.

The case-law of the Constitutional Court of Turkey on political parties’ dissolution indicates that the foundational principles of the Turkish republic cannot be questioned even if it is done through peaceful democratic process. In general, the protection of the basis of the

⁵⁹⁰ For details see European Commission for Democracy through Law (Venice Commission). Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, *supra* note 224.

⁵⁹¹ *Ibid.*

constitutional order falls within the boundaries of militant democracy logic. However, it does not follow that the principle forming the basis of the constitutional order cannot be a subject of the political debate. It also does not mean that states can interpret constitutional principles in a way to ban any discussion over them. The principle of secularism and the indivisibility of the State were removed artificially from the public space and debate. This process was facilitated by the relevant constitutional provisions and jurisprudence developed by the Turkish Constitutional Court. In fact, principles of secularism and unity of the State are used in Turkey not to protect and guard the democracy only. Rather they are invoked in order to entertain Atatürk's dreams about the ideal society. Reference to militant democracy measures with such background is an abuse of the militant democracy concept. Militant democracy can be a useful tool to guard the constitutionally recognized principle of secularism, but it cannot be used as a justification to cut any debate on the role of religion and rethinking the relations between State and religious groups forever.

Militant Democracy in Turkey, or How Islam is Dangerous for a Predominantly Muslim Society

Apart from the practice of banning political parties on a regular basis there is another problematic aspect of militant democracy practice in Turkey which has more relevance to the headscarf ban than the previous one. According to the theoretical justification of the militant democracy given above, the State must have convincing arguments that the acts and consequences it tries to prevent are indeed dangerous for democracy. I believe this element is missing from the cases of party prohibition and headscarf ban coming from Turkey. The Constitutional Court insists on the statement that religion must be kept away from politics and any attempts to challenge it automatically qualify as dangerous for democracy.

First of all, the idea of secularism which is being kept away from any questioning was introduced into Turkish society in 1920s. It was dictated by the political situation and alleged

need for sudden changes in order to get in closer touch and cooperation with Europe.⁵⁹² Turkey wanted to convince its European neighbors that it is was a civilized and modern state, and elimination of religion from the public domain was considered as one of the ways to achieve these big goals. However, it is apparent that the political situation has changed considerably since then and the Atatürk reforms and ideas should be interpreted in a way to adjust it better to the current state of affairs. I do not argue here that Turkey should abandon the principle of secularism and allow religion flow immediately to the public sphere. Rather I would argue that probably it is not a bad idea to reconsider the ideas introduced about 100 years ago and see if they are still compatible and acceptable in society to the full extent. The attempts of the Turkish government to connect the headscarf ban debate with the current reality looks irrelevant and unjustified as it refers, for example, to the practice of France and its 2004 Law on the headscarf-hijab ban and its approach to this issue in general (France was never a country with a predominantly Muslim population and is not at the moment either).

It is apparent from the number of supporters of the Refah and AK parties that society strongly disagrees with the fashion principle of secularism being promoted and guaranteed in Turkey. I believe that no state can succeed in ensuring a secure and happy life for its citizens if it imposes principles and views people do not share and does not want to listen what is going on in the society (i.e. the problems of Kurdish minorities, the headscarf ban in the universities, etc). It looks somehow strange that the State, where 90% of the population affiliates with one religious group, insists on keeping any religious matters (including those related to Islam) away from the public domain and wants it to be internal matter people can talk about only in their homes. This goes for both aspects mentioned above: political parties with an Islamic agenda and the headscarf ban.

⁵⁹² McGoldrick, *supra* note 555, at 133.

I believe the Turkish government did not succeed in taking militant democracy actions. Not because it was a situation beyond the reach of militant democracy's protective potential, but because the government did not bring convincing arguments in support of such actions. First, it could not convince politicians and commentators that a political party with any religion-related agenda is, *per se*, dangerous for democracy; such a party is not necessarily undemocratic.⁵⁹³ In the Turkish example the problem is that Islamic parties and women wearing headscarves are considered dangerous for the democracy as such, and the government and judiciary do not see it necessary to establish the link between these activities and threat to the democracy. The government is not willing to accept the difference between a Muslim party advocating for better accommodation of religious beliefs and a party advocating to introduce Sharia and replace the existing legal system. Any references to religion in a party program and the speeches of its leaders are assumed to be a threat to democracy. This assumption causes the situation where certain types of political parties operate under the normalized threat of being banned and those advocating for abolition of the headscarf ban (at least in the universities) or women covering their head are perceived as enemies of the democracy.

Once again, I do not argue that Turkey or any other democracy should allow uncontrolled activities of religious parties; neither do I argue that a headscarf or any other religious clothing in public institutions should not be an issue (i.e. headscarf worn by teachers in elementary school is totally different from the mature female university student in a matter

⁵⁹³ The same conclusion was reached by the European Commission for Democracy through Law (Venice Commission). Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, *supra* note 224: "a political party animated by the moral values imposed by a religion, cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention, provided that means used to that end are legal and democratic and that the changes proposed is itself compatible with fundamental democratic principles."

of covering their heads).⁵⁹⁴ I only want to claim that the State cannot ignore political parties representing the interests of the majority of the population and ban it for advocating for a changes awaited by the society. The Constitutional Court deciding on prohibition of religious parties takes great responsibility as it, in fact, substitutes the will of the people who vote for this particular party with certain agenda and preferences. In order to justify such interference, the judiciary is expected to reveal indisputable and compelling reasons in support of the ban. It is well-known that political matters could not be handed to the majority only and sometimes militant democracy interference is needed. However, it is legitimate only when justified and proved to be a matter of survival.

The State cannot not hide any actions it finds necessary under the umbrella of militant democracy and argue that it is done for the sake of democracy; moreover, the State cannot be left alone in its business of protecting the democracy. Where the government is reluctant to prove that activities of a particular political party is dangerous and that women wearing headscarves in the university are able to destroy Turkish democracy, it could never qualify as proper militant democracy practice.

In conclusion to this section I would like to re-state my argument that militant democracy can be utilized to address the threat coming from religious extremism and I guess Turkey was a good choice to test it. This statement goes not only for the religion-affiliated parties but to other signs of religious extremism (i.e. wearing religious clothes). These phenomena can be banned and it could be justified by the need to sustain democracy. The principle of secularism is widely present in modern democratic constitutions and it basically means that State and religion exist and function separately. Militant democracy can be

⁵⁹⁴ For more detailed account on different approaches to Islamic headscarf see: Winfried Brugger & Michael Karayanni, *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (2007); McGoldrick, *supra* note 555; Christian Joppke, *State Neutrality and Islamic headscarflaws in France and Germany*, 36 *Theory and Society* 4 (2007).

perfectly utilized to guard these principles and prevent religion overtaking State and becoming a political ideology.

The example of the prohibition of political parties with direct reference to a particular religion/race/ethnic group can be justified in some circumstances and that could qualify as a proper application of the militant democracy concept in practice. However, militant democracy should not be interpreted in a way that any reference to the religion in the program/activities of the political parties should be prohibited and automatically considered as dangerous for democracy. Political leaders visiting church services and taking an oath on the Bible are not considered as enemies of democracy in many stable democracies. The same is applicable to the traditions of Christian Democratic parties in western democracies and conservative parties referring to Church support on many occasions. Secularism is not interpreted in a way that religion is not a matter for public debate and any references to it within political space are undemocratic. Therefore, exactly this interpretation of secularism should be allowed to be protected by militant democracy.

The principle of militant democracy should not be used by paranoid politicians entertaining a certain vision of the society dreamed long time ago by Atatürk. It is hard to justify when the matters of religion are kept away from politics especially where the majority of the population affiliates itself with a particular belief system. Militant democracy also does not cover automatic exclusion of certain matters from politics without any burden on the government to prove how they might be detrimental for the existence of democracy. Someone might object that fascism and communism (and some other ideologies) are also excluded from the political space and therefore states can sometimes veto some matters to be discussed and included into the political parties' agenda. However, the religious views and values shared by the super-majority of the population cannot be compared with fascist or

similar ideology with. Religious feelings cannot be banned by the law no matter how much governments may wish it.

Religious beliefs lead to particular values shared by the members of the same group and when these values are shared by some 90% of the population a state cannot keep them from being discussed only at homes. People will talk about it and politicians will have to refer to them from time to time and there are examples from other countries where issues of great controversy are discussed from a different point of view, including religious ones. Christianity is allowed to be taken into account on debates on different matters (like abortion or gay marriage) then why should the Turkish government should deny any interaction with religion and justify it by the need to protect democracy?

Turkey has the potential to protect its constitutional structure from the possible threat of religious extremism and re-establishing the Caliphate, etc. However, at the moment Turkey uses militant democracy first of all, too often, second, to protect corrupted version of secularism shaped by Atatürk's ideas some hundred years ago, and third, without observing the conditions of militant democracy legitimacy. Therefore, Turkey abused to some extent the possibility to protect its democracy through militant democracy means. However, the biggest problem with the Turkish example is that its actions were found legitimate by the supervisory body: the ECHR. Therefore, from the ECHR case-law point of view, the Turkish version of militant secularism does not look problematic as both cases – Refah Party and Leyla Sahin – were found to be decided by the Turkish authorities in accordance with European standards.

4.3. Mohamed comes to Strasbourg: On Militant Democracy and the Principle of Secularism in the Practice of the ECHR⁵⁹⁵

The ECHR is included in this case-study for various reasons. First of all, it is an international Court with binding judgments for 47 states which means that at least the general guidance on particular legal issues are given to the considerable amount of the European democracies which they must follow and abide by. Second, in the last couple of decades this institution has produced a substantive body of the case-law on the militant democracy related issues and problems. Third, this jurisdiction demonstrates many difficulties and challenges that democracy might face in combating alleged threats coming from growing fundamentalist and extremist religious movements and how difficult the task to address these threats while remaining true democracy is.

The ECHR jurisprudence on militant democracy in its classic version – prohibition of political parties – can be split into few groups depending upon the grounds for party dissolution: allegedly dangerous ideology advocating for which parties face dissolution procedure and types of limitation imposed on political parties through militant democracy justification. Not surprisingly, from the very beginning of the Court’s ‘life’ it had to deal mainly with cases concerning Fascist and (or) Communist ideologies supporters and fellows. In regards to these actors the Court developed a pretty consistent and rather simple line of argumentation. Most of such applications have been declared either manifestly ill-founded or were struck down under Article 17 of the Convention (the so-called abuse clause).⁵⁹⁶ However, democratization of the Central and Eastern Europe made the ECHR reconsider its established interpretation and application of militant democracy and do much more than refer to the abuse clause and strike down cases concerning the prohibition of political parties

⁵⁹⁵ “Mohamed Comes to Strasbourg” expression is adopted from Goldhaber, in *supra* note 213.

⁵⁹⁶ For details see Harvey, in *supra* note 52, at 413.

supportive of allegedly dangerous ideologies and ideas. However, the democratization in post-communist European states was not the only dimension of the Court's task to interpret and apply notions of militant democracy in its jurisprudence. At some point it was called to decide upon the prohibition of quite specific (at that stage) types of political parties, and on more general issues of state vs. religion. In what follows I am going to track how the militant democracy concept changed since early case-law and was extended to address the alleged threat coming from growing religious extremist movements.⁵⁹⁷ The major purpose of this case-study is to demonstrate that the militant democracy concept is more alive than it might appear and it is being extended beyond its traditional sphere of application. However the established standards and justification for militant democracy cases in the ECHR judgments have also changed together with the process of extending the paradigm of militant democracy.

4.3.1. Mohamed comes to Strasbourg, or How the Refah Partisi Case changed the Court's Attitude to the Issues of Political Pluralism, Diversity of Opinions and the Importance of Dialogue on Political Issues

Refah Partisi and Others v Turkey⁵⁹⁸ was the first occasion for the ECHR to support Turkey in its decision to dissolve a political party. The Refah Party case was discussed partly in the chapter on Turkey, so there is no need to repeat how the party appeared, how popular was it at the material time, and what it was banned for. At this point it is appropriate to concentrate on the findings in this case. However, it is important to note in the light of the discussion on the ECHR jurisprudence on militant democracy that the Refah Party had over four million of members, and therefore this judgment amounts to the largest single interference with the freedom of association on the number of people affected. The ECHR found that "Turkey

⁵⁹⁷ For jurisprudence on militant democracy in relation to political parties see Chapter 3.3.2 at 130.

⁵⁹⁸ Refah Partisi (Welfare Party) and Others v. Turkey (2001).

pursued legitimate aims listed in the Convention, namely - protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.”⁵⁹⁹ It was declared once again that “democracy requires that the people should be given a role”⁶⁰⁰; “only institutions created by and for the people may be vested with the powers and authority of the State”⁶⁰¹ and “statute law must be interpreted and applied by an independent judicial power.”⁶⁰² Article 11 must also be considered in the light of Article 10 (so, the Court is more than consistent in using this technique to decide party dissolution cases). The Court reaffirmed its earlier established principles: “no democracy without pluralism” and “freedom of speech protects also ideas that that offend, shock or disturb.”⁶⁰³ However, the Court for the first time systemized its views about how a political party may campaign for a change in the law or the legal and constitutional basis of the State:

- a) “the means used to that end must in every respect be legal and democratic”⁶⁰⁴
- b) “the change proposed must itself be compatible with fundamental democratic principles.”⁶⁰⁵

While these formulated principles are totally consistent with the previous jurisprudence of the Court, the way these principles were applied in Refah Partisi case is problematic and demonstrates the Court’s struggle in the application of militant democracy beyond the original paradigm (minor political parties being bullied by the dominating parties). The ECHR went to deep analysis in order to assess the alleged violation by the Refah party the principle of secularism in three dimensions: Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief; Refah wanted to apply Sharia to

⁵⁹⁹ Ibid., para 42.

⁶⁰⁰ Ibid., para 43.

⁶⁰¹ Ibid.

⁶⁰² Ibid.

⁶⁰³ Ibid., para.44.

⁶⁰⁴ Ibid., para 47.

⁶⁰⁵ Ibid.

the Muslim community and references made by Refah members to jihad (holy war) as a political method.⁶⁰⁶ One by one the ECHR found all intentions of the Refah party as incompatible with the Convention. In this case the Court positively answered the question on the necessity of the penalties imposed on the founding members of dissolved political party and considered them as having met a pressing social need as Refah's leaders had declared their intention of setting up a plurality of legal systems and introducing Islamic law (Sharia); also it had adopted an ambiguous stance with regard to the use of force to gain power and retain it. The Court took the view that

even though the margin of appreciation left to States must be a narrow one where the dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy, a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime.⁶⁰⁷

There is interesting and substantial dissenting opinions attached to the majority judgment (joint dissenting opinion of judges Fuhrmann, Loucaides and Sir Nicolas Bratza).⁶⁰⁸ The most important part of the dissenting opinion is the statement that there is lack of "any compelling or convincing evidence to suggest that the party, whether before or after entering Government, took any steps to realize political aims which were incompatible with Convention norms, to destroy or undermine the secular society, to engage in or to encourage acts of violence or religious hatred, or otherwise to pose a threat to the legal and democratic order in Turkey".⁶⁰⁹ Later this claim was addressed in the Grand Chamber judgment on the same case. However, dissenting judges were not alone in their disagreement

⁶⁰⁶ Ibid., para 69.

⁶⁰⁷ Ibid., para 81.

⁶⁰⁸ The Grand Chamber where the case as referred handed out the unanimous decision that there has been no violation of the Convention.

⁶⁰⁹ Ibid., at 47.

with the Court's findings and conclusion. The case was and is being widely criticized by many scholars, commentators, politicians, and Refah Party leaders and supporters.

Grand Chamber Decision⁶¹⁰

The Grand Chamber decision paid more attention as to whether the limitation was prescribed by law. It was found that the requirement 'prescribed by law' means first of all that the measure should have a basis in domestic law and it also refers to the quality of the law in question; requiring that it be "accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."⁶¹¹ The Court pointed out if "the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."⁶¹² The Court found that the applicants to the case were definitely in position to foresee the possibility of their party being dissolved (as they were experienced politicians and members of parliament). In addition, the Court elaborated on the issue of the litigiousness of a political party of the acts and speeches of its members. It held that the Constitution and program of a political party are not the only arguments to be taken into account. Rather it must be compared with the actions of the party's leadership. However, the main contribution of the Grand Chamber's decision is the approval of State's right of preventive intervention (militant democracy). The Court declared (in response to the dissenting opinion to the Chamber judgment) that a "state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and

⁶¹⁰ Case of Refah Partisi (the Welfare Party) and Others v. Turkey. Grand Chamber (2003). Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98.

⁶¹¹ Ibid., para 57.

⁶¹² Ibid., para 57.

democracy, even though the danger of that policy for democracy is sufficiently established and imminent.”⁶¹³

Then the Court provided a test on how to assess whether a political party poses a threat to democracy: 1) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent;⁶¹⁴ 2) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole;⁶¹⁵ and, 3) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a 'democratic society.'⁶¹⁶ Furthermore, the Court stated that historical context also has to be taken into account.⁶¹⁷

As I already mentioned above, the decision of the ECHR on the Refah case caused numerous critiques and attacks. The most controversial part is probably that the Court's statement that Sharia is not compatible with democracy and therefore there is no place for political Islam in the European project. From previous case law it clearly follows that freedom of association is not a dead letter. Turkey was found in violation of the Convention a few times in banning parties with a Kurdish agenda (the Communist Party, the Socialist Party, OZDEP, HEP, and DEP). In the Refah case the Court seems to depart from its established case-law and broad interpretation of associational freedom which includes the right to advocate for changes which are not compatible with the national Constitution.

The ECHR ruled against Refah by four to three votes, but later the judgment was confirmed by the unanimous decision of Grand Chamber. It was concluded that the Refah Party was advocating Islamic Law and violence to pursue this goal. The Court intensively

⁶¹³ Ibid., para 102.

⁶¹⁴ Ibid., para 104.

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid., para. 105.

cited party leaders' statements and speeches. It also referred to the history of antidemocratic parties in Europe which managed to seize the power through democratic means and it is still feasible that totalitarian political movements organized in the forms of political parties might abuse and destroy democracy through the democratic means available to them. It was found that the Turkish Islamists are popular enough and at some stage they could form the government without entering into any coalition. However, none of these arguments could fully justify the Court's provocative and aggressive statement that Islam and democracy are not compatible, and the presence of the former in politics excludes any possibility to coexist with the latter. Some commentators even expressed the opinion that such statement provokes anger and made accusations of Islamophobia.⁶¹⁸

The Strasbourg Court did not want to hear and accept the critique of its *Refah* judgment and kept on deciding cases with the assumption that Sharia is inherently undemocratic and Islamic laws are stable and not acceptable in a democratic state. The ECHR is indirectly promoting exactly this meaning and image of Islam in the other group of cases as well. The most evident part of the jurisprudence to demonstrate this statement is the decisions on headscarves bans coming to Strasbourg in fact not only from Turkey. The ban on Islamic headwear is a serious issue for many European states at the moment and the solution adopted by Strasbourg Court can be seen and analyzed through the lenses of militant democracy. In the next section I am going to discuss the ECHR jurisprudence on the limitation of religious clothes wearing with a purpose to demonstrate that militant democracy has migrated to a new domain and assess how much does it help to address the alleged threat of religious fundamentalism.

⁶¹⁸ Goldhaber, in *supra* note 213, at 93.

4.3.2. Headscarves, Religious Extremism, and Militant Democracy

In the previous sections of this chapter I was trying to demonstrate that the recent ECHR judgment on the Refah Party case suggests that militant democracy allows states to take preemptive measures to protect core features of the constitutional order, which includes now also constitutional commitments to a principle of secularism. It is clear from the Refah judgment that the idea of militant democracy is at the heart of the Court's argumentation. Therefore, the extension of the scope of the application was arranged through the classic militant democracy case from the first glance: party prohibition. However, the party in question had a 'pluralist agenda of religious nature' and therefore it inevitably involved the Court's assessment of the interrelations between secularism and democracy as well as the compatibility of particular expression of religious belief with the very concept of democracy. In the headscarf ban cases the ECHR continued its line of argumentation on how democracy can protect itself and the principle of secularism. All headscarf ban cases decided by the Strasbourg court could be justified only with militant democracy reasoning, but not freedom of religion. However, I believe the Court stopped halfway and applied the logic but left out the most important part of it: justification for such measures as necessary to rescue democracy.

The first case in the line of headscarf ban disputes was case of *Leyla Sahin v. Turkey*,⁶¹⁹ mentioned in the previous section on militant secularism in Turkey. I do not find it necessary to reveal the detailed statement of facts of the case here. However, it is important to stress that the case concerned a female medical student who was prohibited from attending lectures and taking exams while covering her head with an Islamic headscarf. The Chamber judgment of 29 June 2004 held unanimously that there had been no violation of the Convention and left Miss Sahin's religious feelings and belief unprotected and it was declared that there is no contradiction with the Convention if an adult female has to leave the

⁶¹⁹ *Leyla Sahin v. Turkey* (2004), Application no. 44774/98.

country and finish her higher education abroad for her refusal to remove the headscarf at the university campus. The case was referred to the Grand Chamber which ruled a bit more than year after that the Turkish authorities did not violate the Convention.

The main arguments of the Court to uphold the national authorities judgments were that freedom of religion manifestation can be limited in order to reconcile the interest of various religious groups⁶²⁰ and, therefore, Article 9 does not protect every act motivated or inspired by the religious belief,⁶²¹ and, while wearing a headscarf in general amounts to a protected form of religious practice, it was in pursuance of a legitimate aim to ban it.⁶²² While the case was decided in a militant democracy spirit the Court refers to Article 9 of the Convention and applied its usual and established techniques to handle freedom of religion cases. As a result, the Court mentioned that religious practice regulation vary from country to country, are context and culture dependent and this is a matter which Court usually leaves for the states to decide and regulate themselves. In ECHR terminology it means that Turkey was granted a wide margin of appreciation to decide on matters of religious attire to be worn. While this approach is usual for the freedom of religion cases, Sahin and subsequent cases are different from the other Article 9 cases because of the justification given by the governments and accepted by the ECHR: the limitation of wearing religious attire was dictated by the need to uphold the principle of secularism which is considered to be an important part of the wider notion of constitutional order, i.e. the headscarf ban was indeed as a militant democracy measure (no matter how the courts and government refer to it).

The Leyla Sahin judgment garnered substantive criticism from the legal and scientific community.⁶²³ However, the best summary of the weakness of the arguments given in the

⁶²⁰ Ibid., para. 97.

⁶²¹ Ibid., para. 66.

⁶²² Ibid., para. 67.

⁶²³ See for example: Antje Pedain, *Do Headscarfs Bite?* 63 Cambridge Law Journal 540 (2004).

Sahin judgment can be found in the dissenting opinion of Judge Tulkens. I find it important to give a summary of this opinion as it reflects the major problem in the Court's justification to support the ban of wearing a headscarf which is of relevance for this chapter in general. First of all she criticizes the comparative argument of the majority to justify the wide margin appreciation: unlike the Court stated, Judge Tulkens pointed out that there was a European consensus on this matter: none of the Member States has a ban on headscarves extended to university education.⁶²⁴ In addition, Tulkens J expressed her concern that in this particular case the margin of appreciation was interpreted in a way to free the Member State from the 'European Supervision.' As to the measures taken by the State to preserve the principle of secularism, the dissenting judge would like to see indisputable facts and reasons but not mere worries or fears.⁶²⁵ I agree with Tulkens J that there were no evidence that the applicant in this case was threatening the principle of secularism or that she conducted any act which contravened this principle. However, it is obvious that the case was not (and could not be) about wearing a headscarf by this particular applicant only. The issue in this case was much deeper and that is why the Court was supposed to give a stronger argument than mere assumption on how a headscarf is dangerous for democracy. I would agree with Judge Tulkens' statement that "merely wearing a headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols."⁶²⁶

The case of Leyla Sahin was not the furthest step towards applying militant democracy logic in freedom of religion cases. In the subsequent cases originating from France the ECHR continued its practice of reference to the militant democracy argument but at the same time moved even further away from the standards which make these measures

⁶²⁴ Leyla Sahin v. Turkey (2004). Dissenting Opinion of Judge Tulkens, para. 3.

⁶²⁵ Ibid., para 5.

⁶²⁶ Ibid., para.10.

legitimate and democratic. The latest development in ECHR jurisprudence was the recently decided case of *Dogru*⁶²⁷ The case of an eleven year old Muslim girl being expelled from school for refusing to remove her headscarf during physical education classes became a long-lasting battle where the French commitment to secularism (*laicite*) became the central issue. The case in general represents an example of the application of the well-settled jurisprudence on the freedom of religion and does not add anything in relation to the scope and nature of the rights protected by Article 9. The State was reconfirmed to have a wide margin of appreciation in these matters and therefore it is free to decide how it is going to ensure mutual tolerance between different religious groups. The regulation of the school wear, including possible alternatives for the Muslim girl to cover their head during the sports classes, was left within the margin of appreciation of the State.⁶²⁸ However, the case cannot be considered as a minor freedom of religion case as it is built around a theme of militancy being invoked to secure the principle secularism. The Court's argumentation is a bit puzzling as the school regulation concerned only sports classes and girls could wear head covers in other classes. However, instead of giving a justification of why a scarf might be prohibited in physical training classes for reasons of health and safety, the Court went on to conclude that wearing a headscarf constitutes an attitude that fails to respect France's constitutional commitment to secularism (which according to the *Refah* case falls outside the protection of Article 11). If we agree with the Court's argument that the main reason for the headscarf ban was to preserve the principle of secularism then it demonstrates another example of the pre-emptive measures which are in fact the application of militant democracy. However, the most troubling thing about the ECHR jurisprudence in applying militant democracy rationale to protect and preserve the constitutional commitment to the principle of secularism is the fact

⁶²⁷ Case of *Dogru and Others v. France* (2008), Application No. 27058/05.

⁶²⁸ *Ibid.*, para 75.

that it affects only one religious group: Muslims. It would probably be too much to say that the ECHR is biased and targets political Islam as a phenomenon that has to be eliminated from the European space. However, it is evident that the level of protection accorded to Christianity and Islam even in Article 9 jurisprudence differs substantially and I believe this could be resolved through the proper application of militant democracy measures. Before I would summarize my arguments on how militant democracy is applied in ECHR jurisprudence and how it should be changed, I will try to support my argument that the European Court can turn its jurisprudence on the principle of secularism to the instrument of maintaining a particular legal order within the European space which has a tendency to exclude particular religious groups from politics and accord it less judicial protection than to other more traditional confessions.

4.3.3. Militant Democracy in Strasbourg Jurisprudence: An Instrument to Maintain Particular Legal Order?

All cases discussed above were revealed with a purpose to demonstrate that the idea of militant democracy has migrated from the traditional domain. Both the Refah Party case and the headscarf ban cases clearly demonstrate that militant democracy logic is being used not only to ban parties committed to allegedly dangerous political ideologies but also political parties which fail to respect core features of a liberal constitutional order (formulated by the Strasbourg Court in quite vague terms);⁶²⁹ and even impose restrictions on public display of religious symbols. The only problem with the ECHR extended acceptance of pre-emptive measures to protect democracy (even through the upholding of particular principle rather than the system as a whole) is the fact that it affects only one religion: Islam. It would be an interesting task to speculate about how the Strasbourg Court would react to a political party

⁶²⁹ For more detailed account of Refah interpretation of liberalism see Macklem, in *supra* note 54.

ban if the party happens to have a pluralist agenda in mind similar to the one Refah had and that agenda would be also of religious nature other than Islam. The language of the Refah Party judgment and subsequent headscarf ban cases suggest that it might be different if the values of Christianity are at stake. I would agree with one of the concurring opinion in the Refah Party Grand Chamber judgment that the use of the expression like “Islamic fundamentalism” and similar should be avoided in the language of the international human rights court.⁶³⁰ One commentator even goes as far as to compare the conclusion about Sharia as inherently undemocratic with the US Supreme Court treatment of African Americans as a subordinate and inferior class of people (Dred Scott decisions of 1865), and suggests that history might prove it to be amongst the stupidest judicial generalizations.⁶³¹

Many scholars working on Islam issues agree that Shaira itself may be immutable, but its interpretation and application is variable and might be adjusted to democratic traditions and principles. Moreover, there are legitimate arguments and claims that the question of ‘whether Islam is compatible with democracy’ is inherently wrong to pose.⁶³² First of all it is hard to challenge the statement that the ‘Islam v. democracy’ debate centers almost exclusively on Islam (and notion of democracy is presented as free from any complexities).⁶³³ As there is nothing intrinsic in Islam or any other religion which makes them inherently undemocratic (or democratic) then the issue turns out to be about under which conditions Muslims can make their religion compatible with democracy, or anything else. In general, the question of religion and democracy relations is not new for social and political theoretical discourse. For example, some years ago it was believed that Christianity

⁶³⁰ See Concurring Opinion of Judge Kovler.

⁶³¹ Goldhaber, in *supra* note 213, at 95.

⁶³² Asef Bayat, *Islam and Democracy. What is the real Question?* 8 ISIM paper 9 (2007).

⁶³³ *Ibid.*

and democracy were incompatible.⁶³⁴ However, I would agree with the statement that the question of compatibility of religion with democracy “is not a matter of philosophical speculation, but of political struggle”.⁶³⁵ The ECHR jurisprudence on political parties with an Islamic agenda and limitations imposed on public display of religious symbols is a bright illustration of this political struggle with not the best outcome being promoted for the democratic order.

In fact, the worrying disparity in the treatment of the claims of majority and minority religious groups can be found already quite early in Article 9 jurisprudence.⁶³⁶ This inconsistency can be derived from the analysis of the cases involving protection of freedom of religious rights of those supporting Christianity (which is the dominant religious tradition in Europe) at least in litigations involving protection of religious sensibilities where freedom from injury to religious feelings was accorded the broadest possible protection.⁶³⁷ However, the language of the Court changes dramatically when it decided on the religious claims of Muslim communities.

The sequence began with decision in the 2001 *Dahlab v. Switzerland* case which was followed by the already mentioned *Refah Party*, *Leyal Sahin*, and *Dogru* cases. The courts at national level also eagerly adopted the ECHR approach and decided similar cases extensively relying on the ECHR jurisprudence (*Begum v. Denbigh High School*).⁶³⁸ Some of the mentioned cases were discussed in detail above and in all of them conclusions are based on assumption rather than legitimate justification on how the issue at stake (be it a political party or a female wearing a headscarf) represents a threat to democracy. And it is indeed very

⁶³⁴ Ibid.

⁶³⁵ Ibid., at 13.

⁶³⁶ For details see e.g. *Danchin*, in *supra* note 54.

⁶³⁷ See for example *Chouldry v. United Kingdom* (1991) Commission; *Otto-Preminger-Institute v. Austria* (1994); *Wingrove v. United Kingdom* (1996); *Kokkinakis v Greece* (1993) and other cases.

⁶³⁸ *Begum v. Denbigh High School* is the 2006 House of Lords Judgment concerning a demand to wear jilbab on the school premises.

troubling that the Strasbourg Court made these kinds of findings not about all religions or religion in general, but about a particular one. It follows from the ECHR jurisprudence that “the differential treatment of Islam and Christianity [...] is justified [...] because the former is a threat to, whereas the latter is compatible with, the right to freedom of religion and belief.”⁶³⁹

In relation to Muslim communities, the Court has adopted a mode of reasoning which might be called ‘liberal anti-pluralism,’ which means a narrow reading of Article 9 which has allowed the exclusion of claims to legal pluralism and collective autonomy in the *Refah* case and to deny the claims of Muslim minorities in Europe to manifest their religious belief through wearing particular type of clothes in the *Sahin* and *Dogru* cases.⁶⁴⁰ In cases involving Islam the Court has developed broad conception of public order so it can free the national authorities and the Strasbourg Court to protect religious feelings of Muslim women in Turkey, France, and other European countries, or the political rights and freedoms of the *Refah* Party supporters. That is why some commentators went on to conclude that the “Strasbourg Court can be seen to be acting not only as an independent protector of rights but also as instrument of governance maintaining a particular social order”.⁶⁴¹ Instead of treating the freedom of religion and importance of its protection for democracy, the Court went deeply into the business to reframe religious freedoms of a particular group and political rights of certain political parties as a threat to democracy.

The ECHR stepped away from its well-established doctrines and traditions that preemptive measures require stricter supervision and more limited margin of appreciation, and in fact had immunized states from the Strasbourg judicial interference. The problem is not, however, in militant democracy migrated to the substantive concepts of democracy

⁶³⁹ Danchin, in *supra* note 54, at 32.

⁶⁴⁰ *Ibid.*, at 33.

⁶⁴¹ *Ibid.*, at 35.

(liberal, secular, republican, or any other), but in the manner it was applied. I argue that the Strasbourg Court has stopped in the middle of its business to apply militant democracy. It invoked the justification but failed the other important part: to apply it properly in accordance with its legitimacy standards. Militant democracy cannot be justified only by referring to its major theme: the prevention of the threat to the foundation of the State, but it should be done in a proper way to ensure that it is not abused and does not allow national authorities to interfere with individual rights and freedoms without bothering to justify and prove the necessity to do so.

To conclude, the Strasbourg Court jurisprudence on preserving secularism is a bright illustration of my hypothesis that militant democracy could be potentially utilized to address the alleged threat coming from growing fundamentalist religious movements. This case-study demonstrates that this assumption is not mere theoretical speculation but that there are numerous attempts to realize it in practice. All cases mentioned in this section can be perfectly analyzed through the lens of militant democracy. The main similarity of the ECHR jurisprudence on principle of secularism with militant democracy is the justification given to such measures by national governments and supported later by the Strasbourg decisions. Both – dissolution of Refah Party (and its predecessors) and prohibition of headscarves in Turkey, France, or elsewhere – are being claimed to be measures of preemptive character employed to protect democracy. Therefore, it is easy to observe that the ECHR is familiar with the militant democracy notion and widely uses it in its Article 9 (and not only) jurisprudence. However, my other observation concerns the darker side of the militant democracy story in Strasbourg jurisprudence.

From the early case-law on party prohibition it is obvious that the Court was very brave to interpret associational freedom in relation to political parties in the broadest possible

way, but when the case was about some minor and unpopular parties. However, the Court failed to explain and justify why the appearance in Strasbourg of a party with strong popular support changes the scope and format of freedoms given to political parties. It is not clear why small parties can advocate for anything and propose even crazy changes (like restoration of Monarchy, secession, etc.) but popular party cannot do anything. The fact that the Refah's political agenda was of a religious nature and that religion was Islam makes the situation even more complicated. The Refah Party could become an unlucky accident in the Court's practice with its generalized conclusions on the compatibility of Islam and democracy; however, the subsequent case law on headscarf ban appears to signal that this strategy is well-planned and not going to change any time soon. The ECHR was extensively referring to the militant democracy logic to uphold the headscarf ban and the dissolution of Refah party; however it failed to establish the link between prohibited activities and the threat to democracy. I do not argue that the Court was totally wrong in finding Refah dangerous for the democracy or the threat of headscarves for democracy, but the ECHR could not prove it. I have already argued in the early chapters that militant democracy measures legitimacy is dependent on the manner in which it was applied. The preemptive measures imposing limits on fundamental rights and freedoms require legally strong justification. By no means is it acceptable to limit the scope of protection accorded by Articles 9-11 based on pure assumption on how some acts or party programs are dangerous for democracy. Militant democracy is designed to protect a very particular and important construction – constitutional order – however, it does not follow that the State should be freed from the duty to justify its actions. This is explained by the fact that states are taking actions in advance and are not required to wait until democracy is destroyed and more precautionary measures require more precautionary laws and control mechanisms.

Therefore, from this section I conclude that militant democracy is still a useful concept for ECHR jurisprudence. Unfortunately, to date the Court employed modified version of militant democracy where the right logic was used but without proper justification. The way the concept in question was interpreted by the Court demonstrates that the corrupted version was deployed in order to facilitate a particular political concept which the ECHR and the European community see appropriate at the moment. By no means was militant democracy designed to protect democracy through denial of rights of protection to particular groups (religious, ethnic, political, etc.) without giving any justification. The Strasbourg Court would produce less controversial judgments on Article 9-11 once it starts to uphold national authorities' decisions of a militant democracy character only when it is legitimate and justified, and where the link between the prohibited activities and threat to democracy is proven. Militant democracy can be easily turned into a weapon to eliminate not only political opponents, but religious and ethnic minorities if the Court will always buy the national authorities arguments that democracy should be protected by any means. This is exactly when militant democracy destroys rather than protects constitutional democracies and international human rights should be able to see and prevent it.

Conclusion

The case-study above demonstrates that militant democracy is of relevance for states' policies to address the threat coming from growing extremist religious movements. Where militant democracy is properly applied it might lead to more successful democratic solutions than are present in the described jurisdictions. The survey reveals that national legal systems as well as international institutions for human rights protection are familiar with the militant democracy concept and even implement some of its elements to justify state policies and

judicial decisions. However, the case-study demonstrates that a deeper and consistent understanding of the militant democracy notion as well as conditions of its application are missing from the jurisdictions analyzed above. In Russia militant democracy is applied for the purpose to protect an ideal vision of the society while in Turkey militant democracy is widely referred to in order to pursue a political ideal: secularism and unity of the state. Therefore, all jurisdictions need to reconsider their approach towards the alleged threat of religious extremism and implement militant democracy in a stricter way to ensure that not only the rational is applied but all conditions of its legitimacy are observed.

The situation with foreign religious groups in Russia is of relevance to be assessed through militant democracy lenses. Russia needs to reconsider its approach towards foreign religious movements. I argued that the laws should be interpreted and applied in a militant democracy fashion. It will help improve the situation and will leave minor religious groups alone in conducting their activities and their adherents could enjoy their religious freedoms. The militant democracy rationale applied in regulation of religious matters in Russia will make the government refocus its attention from protecting the spiritual well-being of the society (which is not exactly the State's function) to the protection of democracy. In this case the government will need to provide evidence in support of the claim that the presence of foreign and non-traditional religious movements is dangerous for democracy but not for the spiritual preferences of its citizens. Such an approach will force the government to give stronger justification in each given case to prove how particular religion are involved in extremism or anything else which harms the state of democracy. Threats coming from religious extremism are not only a matter of political speculation in Russia as the country has long-standing experience in fighting against terrorism and secessionist movements, and religious motives are often present. Therefore, the threat of religious extremism is present in

Russia and the government can take measures to prevent potential harm to democracy, including the use of militant democracy measures. The concept of militant democracy rationale employed by the governmental policies would bring the State's attention from the need to preserve the existing social order to real problems. This would also give stronger protection to various communities that are being suppressed in Russia at the moment as the government will have to justify the need for interference under a stricter test than at the moment.

In the case of Turkey the argument on the relevance of militant democracy and its extension to address the threat coming from political Islam was tested on a two group of cases: the prohibition of religion-affiliated political parties, and the ban on wearing headscarves. These cases were built around the alleged governmental necessity to protect the constitutional principle of secularism. As it constituted one of the bases of the Turkish constitutional order, militant democracy can be perfectly utilized to safeguard this principle and prevent religion overtaking the State and becoming a political ideology. The example of prohibition of political parties with direct reference to particular religion/race/ethnic group can be justified in some circumstances and could be an appropriate application of militant democracy logic. However, militant democracy should not be interpreted in a way that any reference to the religion in the program/activities of the political parties should be automatically prohibited and considered as dangerous for democracy. Secularism is not necessarily interpreted in a way that religion is not a matter for public debate and any references to it within political space are undemocratic; this interpretation of secularism should be allowed to be protected by militant democracy.

Turkey has the potential to protect its constitutional structure and principle of secularism from the possible threat of religious extremism and re-establishing the Caliphate,

etc. However, at the moment Turkey uses militant democracy too often, protects through it corrupted version of secularism, and does not observe the conditions of militant democracy legitimacy. Therefore, Turkey abused the possibility of protecting its democracy through militant democracy and, therefore, its approach should be reconsidered in order not make the State militant rather than democratic.

The jurisprudence of the ECHR suggests that militant democracy is relevant in its jurisprudence on religious parties' prohibition and the headscarf ban. In fact, it supports well my hypothesis that militant democracy could be potentially utilized to address the alleged threat coming from growing fundamentalist religious movements. This case-study demonstrates that this assumption is not mere theoretical speculation but that there are numerous attempts to realize it in practice. The main similarity of the ECHR jurisprudence on the principle of secularism with militant democracy is the justification given to such measures by the national governments and supported later by the Strasbourg decisions. Both – dissolution of the Welfare (Refah) Party (and its predecessors), and prohibition of headscarf in Turkey, France, or elsewhere – are being claimed to be a measures of a preemptive character employed to protect democracy. Therefore, it is easy to observe that the ECHR is familiar with the militant democracy notion and uses it in its Article 9 (and not only) jurisprudence. However, the Court has employed a modified version of militant democracy. The way it was interpreted by the Court demonstrates that the modified version was deployed to facilitate a particular political concept which the ECHR and the European community see appropriate at the moment. However, militant democracy was designed to protect democracy through the denial of rights protection to particular groups (religious, ethnic, political, etc.) without giving any justification. The Strasbourg Court would produce a less controversial judgment on Articles 9-11 once it starts to uphold national authorities' decisions of a militant

democracy character only when it is legitimate and justified and where the link between the prohibited activities and the threat to democracy is proven. Militant democracy can be easily turned into a weapon to eliminate not only political opponents, but religious and ethnic minorities if the Court will always buy the national authorities' arguments that democracy should be protected by any means. This is exactly when militant democracy destroys rather than protect the constitutional democracies and the international human rights institutions should be able to see and prevent it.

In conclusion, the case-study on militant democracy and religious extremism confirms my earlier statement that militant democracy is applicable beyond its traditional area of application. Properly interpreted and applied the notion of militant democracy might offer successful solution in cases where states want to prevent the growth of movements that use democratic means to establish not only totalitarian, but fundamentalist and coercive religions ideologies as well.

CHAPTER 5: MILITANT DEMOCRACY AND THE WAR ON TERROR

Introduction

This chapter presents another example of the potential use of militant democracy beyond its traditional scope of application. In what follows it will be discussed how militant democracy might be relevant for the theoretical debate and practical application of anti-terrorism policies. Anti-terrorism laws and techniques enacted worldwide might potentially cause undesirable consequences for the foundational principles of democracy. The chapter content will be limited to the analysis of counter-terror policies from a militant democracy perspective at the national level only, and will not appeal to the international cooperation in fighting against terrorism. The main purpose of this chapter is to demonstrate that militant democracy might be a useful guiding principle to lead the War on Terror to remedy some serious flaws of anti-terrorism policies, i.e. excessive curtails of fundamental rights, extended powers, and discretion of the executive, as well as a more general shift in separation of powers balance. This argument will be tested on three case-studies, Spain, Australia and Russia.⁶⁴² All jurisdictions differ substantially in their anti-terrorism policies and experience of the fight against terrorism; however, each of them represents a valuable example to test my hypothesis.

The chapter begins with the case of Spain where terrorism was not only a security issue but also a political problem. Militant democracy was utilized in this case to solve the problem of terrorism's presence within the political arena and it is an excellent example of how militant democracy can be applied to cope with terrorism. Spain represents a wonderful

⁶⁴² While the United States and the United Kingdom are also potentially interesting jurisdictions to test my argument, their anti-terrorism policies are overanalyzed to date and it is more challenging to analyze some other jurisdictions and to check the validity of my hypothesis on non-well-discussed anti-terrorism national policies.

case to study the constitutional migration of the idea of militant democracy to the domain of the so-called ‘War on Terror.’ The legislative novelty introduced the procedure to outlaw political parties and its immediate application was invoked as a remote anti-terrorism measure and it makes Spain a fascinating example to investigate here.

The second jurisdiction to test the argument of militant democracy’s relevance in the War on Terror is the example of Russia, a country facing the presence of terrorism for many years already. Russia is a country where the threat of terrorism remains real and has done for a relatively long time, therefore it might appear as though it should have developed a comprehensive mechanism of counter-terrorism policy, and should find it easier to justify the curtailment of human rights when the threat of terrorism is real. However, this is indeed an example which lacks a systemized approach to address the problem and it leads to the enactment of the chaotic policies with the granting of broad powers to the executive and it still does not aid coping with terrorism successfully. The purpose of bringing-up this example is to demonstrate how militant democracy would be helpful for this State to systematize its response to terrorism and handle it more successfully.

Towards the end of the chapter I will bring in the example of Australia. While being a country free of political violence and terrorism, Australia has adopted an incredible number of counter-terrorism laws of a preventive nature, and, within just a few years developed a comprehensive defensive mechanism. It would not be an exaggeration to say in relation to Australia’s anti-terrorism laws that “everything about them is exceptional.”⁶⁴³ Australia represents a good example to observe the consequences of legislating with urgency in anti-terrorism matters and to test how the situation would look differently if the government is driven by militant democracy logic in its preventive anti-terrorism policies. Moreover,

⁶⁴³ Matthew Sharpe, ‘Thinking of the Extreme Situations...’ on the New Anti-Terrorism Laws, or Against a recent (Theoretical) Return to Carl Schmitt, 24 Australian Feminist Law Journal 96 (2006).

Australia had experience with militant democracy⁶⁴⁴ application and it is worth analyzing if this experience can be taken into account while fighting the War on Terror.

5.1. The War on Terror and Militant Democracy: The Extension of the Concept Introduced

5.1.1. Anti-Terrorism Policies: Typology and Concerns

First of all, it is important to make a reservation that this overview and especially the part on concerns will be mostly related to the politics against the threat of terrorism as opposed to the real and active terrorism experienced presently in certain jurisdictions. The former is more problematic to justify due to the adoption and application of anti-terrorism measures to only a perceived or imagined enemy. Therefore, potentially it poses more concerns to the legitimacy of such measures compared with situations where terrorism is present within the State and its danger is not only a hypothetical one.

Since the September 11 events many western-type democracies have resorted to extraordinary emergency powers.⁶⁴⁵ The constitutional theory is familiar with the clear distinction between times of constitutional normalcy and states of emergency. However, the terrorist attacks on the United States in 2001 and states' reactions to these events challenge this traditional division and states seek for another legal regime to accommodate new anti-terrorism policies. I do not consider it necessary and relevant to list all the counter-terror techniques used by different states in the face of the threat of terrorism. This will go beyond the scope of this project and the aim of this chapter. However, it is important to review

⁶⁴⁴ Here I mean *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 decided by the High Court of Australia.

⁶⁴⁵ Michel Rosenfeld, *Should Constitutional Democracies Redefine Emergencies and the Legal Regimes Suitable for Them?*, in Austin Sarat (Ed.), *Sovereignty, Emergency, Legality* 240 (2010).

constitutional responses common for different jurisdictions to see where the War on Terror rhetoric is usually placed.

Andras Sajó introduced a typology of such measures.⁶⁴⁶ He offers seven paradigms states refer to in defending their state structures from being damaged or destroyed by terrorism. The starting point is the regime which could be characterized as ‘constitutional normalcy,’ where response to the threat of terrorism is accommodated by the existing rules (mainly through criminal law) but with some shift in the proportionality analysis.⁶⁴⁷ The ‘business as usual’ model presupposes that the legal system is capable of providing all necessary answers to any type of crisis without the need to resort to extraordinary powers.⁶⁴⁸ The second alternative mentioned by Sajó is the ‘twilight zone,’ or ‘times of stress’ model, where all counter-terrorism laws and their application remain within the judicial states but the model centers around “the proper standards to be applied by the judiciary in the constitutional handling of the terrorism problem”.⁶⁴⁹ There is also valuable and detailed account of the ‘times of stress’ model in relation to terrorism policies in Michel Rosenfeld works.⁶⁵⁰ Times of stress, according to Rosenfeld, differ from a state of emergency (he calls it ‘times of crisis’) primarily in terms of the severity, intensity, and duration of the respective threats involved.⁶⁵¹ The third model in Sajó’s typology is militant democracy applied to terrorism, which will be the main focus of this chapter. The model following militant democracy is that of a ‘preventive state’ which assumes mass detention as the preferred choice of action and all

⁶⁴⁶ Sajó, *supra* note 55, at 2257-2258.

⁶⁴⁷ A. Sajó also calls it ‘Business as usual’ and refers to Oren Gross description of this phrase: “The Business as Usual model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace.” In Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?*, 112 Yale Law Journal 1011, 1021 (2003).

⁶⁴⁸ See for example Gross, Id. and Aolain, *supra* note 222, at 252.

⁶⁴⁹ *Ibid.*, p.2259

⁶⁵⁰⁶⁵⁰ See for example Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing Diverse Approaches to the War on Terror*, 27 Cardozo Law Review 2085 (2006) or Rosenfeld, *supra* note 643, at 240-272 or Michel Rosenfeld, *A Pluralist Theory of Political Rights in the Times of Stress*, in Sadurski, *supra* note 167, at 12-54.

⁶⁵¹ Rosenfeld, *supra* note 643, at 241.

anti-terrorism measures are built around preventive considerations in a very broad sense. The three remaining models mentioned in Sajo's paper – 'the counter-terror state,' 'state of emergency,' and 'war' – would probably constitute extreme examples of anti-terrorism policies as all of them presuppose considerable departure from major democratic principles, including the separation of powers and fundamental rights guarantees, and are not likely to be invoked by liberal democracies, at least for a long period of time. While regimes differ in regards to the content of limitations and risk assessment standards, the boarder-line between regimes following each other is often blurred.

The arsenal of anti-terrorism measures varies from jurisdiction to jurisdiction as well as the level of curtailing of fundamental rights caused by such policies. However, there are some common troubling features for constitutional democracy present in the vast majority of counter-terror regimes (though they are not present to the same extent in all states).

First of all, anti-terrorism laws often represent a reactive response to acts of terrorism occurring elsewhere in the World.⁶⁵² Even nations that had anti-terrorism legislation well before 11 September 2001 enacted or amended the existing laws primarily in response to bombings or other terrorist activities in other states.⁶⁵³ While terrorism is a phenomenon we cannot ignore and measures should be taken to prevent future attacks, it should not mean that the legislator is encouraged to enact laws proposed by the government being driven by fear and panic from recently occurred terrorist attacks. The struggle against terrorism should not be only successful but lawful, too. The practice of many states facing the threat of terrorism demonstrate that governments' reaction motivated by devastation and fear do not make new

⁶⁵² For details see Ben Golder & Gerogre Williams, *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*, 8 *Journal of Comparative Policy Analysis* 45 (2006).

⁶⁵³ For example, the United Kingdom has enacted range of laws as response to the Irish Republican Army campaigns; New Zealand adopted counter-terrorism law after the 1985 bombing of the Greenpeace boat; the United States enacted in 1996 Antiterrorism and Effective Death Penalty Act in response to the events in Oklahoma and the World Trade Centre.

measures more effective but might create an atmosphere of distrust in a society which is no less significant a challenge for the governments than “achieving an effective counter-terrorism strategy”.⁶⁵⁴

In other words, there is nothing wrong with a government reacting to problems existing in society, but every piece of legislation should be assessed from the perspective of its necessity, effectiveness, reasonableness, and proportionality to the aim pursued. These elements are often missing from the law-making process when security is at stake, and especially when the threat of terrorism is present. It happens mainly because laws are initiated by the governments in the aftermath of the terrorist attacks, which is always very emotional and affects the ability to assess adequately the risk of future attacks, character of measure to be taken to find those responsible for committed crimes of terror, and prevent new attacks. Therefore, the reactive character of anti-terrorism laws does not only pose concerns for the principle of non-retroactivity of criminal laws, but also affect the quality of the enacted legislation. As a result anti-terrorism laws have “often qualified, and even departed from, accepted understanding of basic legal principles”.⁶⁵⁵

Second, legislating with urgency became a common feature of many anti-terrorism laws adopted in the post-September 11 era.⁶⁵⁶ Governments from many western-type democracies often insisted that parliaments enact the proposed anti-terrorism laws as quickly as possible. Needless to say that such speedy legislative processes resulted in shortened deliberations and many controversial aspects of counter-terrorism measures did not gain a chance to be remedied. While there are examples of parliaments successfully resisting this

⁶⁵⁴ Andrew Lynch & Nicola McGarity, *Counter-Terrorism Laws. How Neutral Laws Create fear and Anxiety in Australia's Muslim Communities*, 33 *Alternative Law Journal* 225 (2008).

⁶⁵⁵ Golder & Williams, *supra* note 615, at 44.

⁶⁵⁶ For example, the USA PATRIOT Act was enacted only six weeks after the 11 September attacks, see *Ibid.*, at 45.

trend and subjecting the counter-terrorism laws initiated by the government to closer scrutiny,⁶⁵⁷ the overall tendency is to enact such laws under the alleged urgency.

Third, new anti-terrorism policies affect the traditional concept of separation of powers and many anti-terrorism laws adopted in the aftermath of the events of September 11 amount to a substantial departure from the “long held understanding of how legal system should operate”.⁶⁵⁸ The anti-terrorism laws of many nations extended powers of the executive agencies, especially intelligence services, in relation to the prevention and investigation of crimes associated with acts of terrorism with a tendency to keep a judiciary away from this business. This is a troubling feature as it weakens the role of the judiciary where it should counterbalance the extended powers of the executive in serious limitations being imposed on individual rights and freedoms.

Another unfortunate feature common to most of the anti-terrorism laws worldwide is the tendency to trade away human rights in order to protect the community from future acts of terrorism. The tensions between national security and human rights start from the very definition of terrorism which in some jurisdictions might capture legitimate acts of industrial action or civil protest (for example in the United Kingdom and the United States).⁶⁵⁹ The extended powers of the police and intelligence services cause further concerns as it might go as far as to allow the short-term detention of non-suspects (i.e. preventive detention in Australia).⁶⁶⁰ The idea to limit human rights for legitimate aims, including national security, is not new, but it presupposes strong procedural guarantees before a state imposes such limits. The anti-terrorism policies in many democracies are based on the assumption that anti-

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid., at 44.

⁶⁵⁹ Ibid., at 47.

⁶⁶⁰ Moreover, as Kent Roach observes, there has been even flouting in international human rights law, derogating from rights protection instruments and even calls to legalize torture when necessary to prevent to prevent the catastrophe similar to the one of September 11. See Roach, *supra* note 55, 172.

terrorism measures infringing civil liberties will work.⁶⁶¹ However, curtailing civil liberties does not necessarily promote national security, often works only in a narrow sense, and there is little evidence that it will do more good than harm.⁶⁶² Anti-terrorism legislation could be counter-productive, for example, due to the reason that terrorists aim to provoke the State into disproportionate repression so the State loses its credibility and the support of the citizens. In this way, sacrificing human rights and freedoms, governments play into hand of the terrorists we try to fight.⁶⁶³ Moreover, drastic measures against certain communities represent also serious social cost, i.e. resulting in the resistance and alienation of the Muslim community.⁶⁶⁴

Apparently, the events of 11 September presented democratic states with a great challenge and test. Many jurisdictions across the world went too far in curtailing human rights in the name of national security. Partly it might be explained by the fact that many laws are passed in response to recent acts of terrorism and it is done in great haste. In such situations it is hard for the parliament to assess thoroughly the impact of such laws upon human rights and separation of powers principles. This situation is common to many states facing the threat of terrorism and it is evident that the counter-terrorism policies should be seriously re-considered. From the typology introduced above, the preventive state would be the closest model western democracies opted for. However, as was mentioned previously this approach not only represent a serious departure from the regime of constitutional normalcy, but is indeed a shift from the liberty regime to the security regime.⁶⁶⁵ However, there is no

⁶⁶¹ David Cole & James X. Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* 240 (2006).

⁶⁶² *Ibid.*, at 242.

⁶⁶³ Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?*, School of Human Rights Research Series No.34 128 (2009).

⁶⁶⁴ Sajo, *supra* note 55, at 2290.

⁶⁶⁵ The latter presupposes more wide-ranging list of rights limitation imposed by these regimes. The list of rights being restricted in counter-terror state is quite extensive and includes: freedom of movement, freedom of speech, religion and association, far reaching administrative surveillance is allowed as well as denial of due process and detention without trial. In addition counter-terror states might shift the burden of proof in criminal matters with

necessity to search for anything new to accommodate the anti-terrorism practices of the State. I argue that democracies could be more successful in fighting terrorism if they follow militant democracy logic in enactment and application of anti-terrorism laws. The following section demonstrates how the militant democracy debate is relevant for the War on Terror and why it could be considered as a better approach to guide it. This conclusion follows not only from the similarities between the perimeter militant democracy and anti-terrorism regimes guard, but also from the central theme of both regimes: prevention.

5.1.2. Militant Democracy: Improved Constitutional Framework for the War on Terror?

Taking into account that there is no constitutionally authorized regime for the counter-terror states, I believe that militant democracy would be an appropriate framework to accommodate the War on Terror theme. This will not only bring more legitimacy to anti-terrorism politics, but also will have a chance to cure some flaws of the existing regime. I do not argue that the fight with terrorism could be addressed only through the classical militant democracy measures like the prohibition of dangerous political movements. The claim is rather that states facing a permanent threat of terrorism should be allowed to depart from a state of constitutional normalcy, but such a departure should be authorized and driven by militant democracy logic. In general, this allows the adoption of measures of a preventive character, but when the necessity to invoke such measures and restrictions actually exists and under the regime of strict procedural guarantees. This should be applicable both to the content of the anti-terror laws adopted and the way they are applied.

The militant democracy concept with all the attributes required for the legitimacy of the concept might be a better approach to handle the War on Terror as it allows for many

strong reliance on government evidence together with limitation on access of information and far reaching implication on those affected by immigration rules (see Sajo, *Ibid.*, at 2274).

narrow rights limitations and is aimed at preserving the regular balance of powers between three chambers. In addition, the militant democracy concept applied properly permits taking preventive action but only when the threat is real and likely to occur, and limitations are necessary. While militant democracy regime also represents the departure from ordinary constitutionalism, such a departure is recognized by governments, is authorized by the constitutional legislation, and there are standards of applying such measures under the supervision of the judiciary.

Militant democracy and anti-terrorism have many features in common which allows us to speak about the relevance of militant democracy for the War on Terror. First of all, prevention is the main theme in both regimes. Ordinary laws and rights limitation cannot cope with threat of totalitarian movements and terrorism as long as they do not accentuate the reference to the preventive character of the measures. It is apparent that states cannot and should not wait until a dangerous political party, coercive religious movement, or terrorist group achieve their goals and destroy the system of governance (some commentators argue that the aim of Islamist terrorists is not only to abolish the State, but to defeat the democracy and replace it with a theocratic regime).⁶⁶⁶ States are allowed to take measures in advance as self-defense is a vital question of any democratic system.⁶⁶⁷ These are the main arguments in favor of considering militant democracy as a useful tool not only to cope with dangerous political parties but other threats which are potentially able to damage and subvert democracy.

Furthermore, both of these regimes claim to protect democracy from its enemies and this is the major aim behind the measures. Militant democracy's main idea is to protect the existing constitutional system by denying rights and freedoms to those who are believed to

⁶⁶⁶ See for example, Thiel, *supra* note 19, at 2.

⁶⁶⁷ *Ibid.*

abuse the system with the purpose of destroying or damaging it. Anti-terrorism regime and militant democracy aim to prevent and cure similar outcomes with the only difference in means that dangerous movements choose to damage democracy and constitutional order. Moreover, very close relations could be observed between terror and fundamentalist political movements.⁶⁶⁸ As Karl Loewenstein argued, emotionalism is glue that holds authoritarian regimes together and replaces the rule of law. In this regard, emotionalism of terrorist movements is not very different from what drives extreme political parties. In addition, the main methods used by terrorism – fear and intimidation – also create a kind of politics of emotion.⁶⁶⁹ Tolerance towards emotionalism attributed to extreme political parties and terrorist movements can be suicidal for democracy and there must be a mechanism present to subvert such activities. Militant democracy was introduced to constitutional theory and practice to remedy exactly this disease and its experience could be applied to the War on Terror, too.

To conclude, militant democracy as applied to terrorism would give more legitimacy to the anti-terrorism measures for the following reasons. First, a list of rights allowed to be limited will be shortened and will exclude at least fair trial rights. Second, militant democracy logic requires the preservation of the separation of powers balance without favoring the executive and denying the judiciary its traditional functions. Third, parliaments should be given the chance to speak on the matter and scrutinize the laws they adopted without pressure from the side of the executive. One of the biggest challenges for the parliaments in enacting and reviewing anti-terrorism laws is that it is very hard to control the executive and resist its pressure. For example, even the sunset clause of the USA PATRIOT Act did not serve its purpose and the validity of many controversial provisions was renewed more than once to

⁶⁶⁸ Sajo, *supra* note 55, at 2255.

⁶⁶⁹ *Ibid.*, at 2263.

date.⁶⁷⁰ At the moment, there are no signs that parliaments seriously consider the review of the previously adopted laws and remedies somewhat the problems posed by such laws. For example, in Australia the law-making has stopped for a while on this matter but “there has been no broad commitment to wind back, or even revisit, the laws.”⁶⁷¹ It does not happen even with somewhat ridiculous laws which are not actually being applied in practice (for example, in case of the Australian regime of preventive detention).

In addition, militant democracy is considered as an authorized departure from the ordinary constitutional regime allowed only in exceptional circumstances. The concept loses its meaning and legitimacy if it is invoked on a regular basis. Many counter-terrorism states face a situation of ‘normalization of exception’ through provisions of the anti-terrorism laws and their application.⁶⁷² However, adherence to the militant democracy concept would require states to follow the rule that exceptional measures should be invoked only in exceptional circumstances rather than becoming a regular practice.

Finally, militant democracy requires governments to give stronger justification for the proposed measures than in the anti-terrorism state. If anti-terrorism policy is placed within militant democracy framework then it would minimize executive privileges in deciding on what kind of measures to take, what rights to limit, and how far to go in lowering the level of rights protection. While it is an overall trend to pass the security matters to the executive, it should not go as far as to allow the detention of non-suspects for example. In other words, governments should re-shape their anti-terrorism policies and if they want to preserve the existing regime they should give better justification than probability of new terrorist attacks

⁶⁷⁰ See for details for example, US Congress votes to renew Patriot Act provisions. 27 May 2011. Available online at <http://www.bbc.co.uk/news/world-us-canada-13572833>.

⁶⁷¹ George Williams, *Britain is taking another look at its anti-terrorism laws, so why can't we?*, The Sydney Morning Herald. 14 April 2011. Available on-line at <http://www.smh.com.au/opinion/politics/britain-is-taking-another-look-at-its-antiterrorism-laws-so-why-cant-we-20110413-1ddzc.html#ixzz1OhfFvSAd>.

⁶⁷² Gross & Ni Aolain, *supra* note 222, at 228.

evaluated only on the secret information they cannot reveal to the public and even parliaments.

Therefore, militant democracy and anti-terrorism policies are alike in many instances and this is why the experience of militant democracy application might be relevant and useful for some states to reconsider anti-terrorism, policies or at least manner of their implementation, to make them more compatible with the major principles of democracy. The success of the War on Terror is of no less importance than its lawfulness. National governments should keep in mind and try to follow this statement, which however does not automatically mean the need to search for a new regulatory regime. Security is costly and it is hard to avoid the departure from ‘constitutionalism as usual’ in the War on Terror. However, it is better to constitutionally authorize such a departure based on a principle “the greater the departure the stronger the judicial control.”⁶⁷³ Militant democracy might be a useful hint to democratize anti-terrorism policies so states do not embarrass themselves with poor quality laws and hysteric political decisions.

5.2. Setting an Example? The Banning of Political Parties as Response to Terrorism: Lessons from Spain

There are few reasons to include Spain in the case-study on militant democracy application in the War on Terror. First of all, Spain has a long and painful history of struggles against terrorism, and the history of legislation against terrorism in this country goes back to as early as the end of the nineteenth century.⁶⁷⁴ Unlike many other modern democracies, the anti-terrorism policies in Spain were always directed against a particular internal enemy – the

⁶⁷³ Sajo, *supra* note 55, at 2291.

⁶⁷⁴ Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France* 183 (2009).

Basque Fatherland and Liberty group (*Euskadi Ta Askatasuna* (ETA)) – next to the IRA it is probably the biggest contemporary terrorist organization on European soil.⁶⁷⁵ ETA has been engaged in a violent campaign with a clear political purpose in mind: to establish an independent and separate Basque state.⁶⁷⁶ Spain did not react to the events of September 11 by rushing to adopt new anti-terror laws, and the legislative activism in this field was always driven by the need to combat Basque terrorism.⁶⁷⁷

Furthermore, Spanish constitutionalism was not familiar with the concept of militant democracy until recently and the country has practiced the widest tolerance towards political parties as a strategy against terrorism (from the defeat of the Franco regime to the adoption of the new Law on Political Parties in 2002).⁶⁷⁸ Therefore, Spain did not resort to militant democracy to strengthen its fragile democratic structure and protect itself against attacks at the very beginning of its existence.

However, the most important reason to include the Spanish case-study is the recent developments in the Spanish legislation on political parties. In 2002 a procedure to ban a political party was introduced for the first time into the Spanish legal order⁶⁷⁹ and it is argued that its content and practical application poses serious concerns for the concept of tolerance which existed and was practiced in the Spanish democracy for more than 25 years.⁶⁸⁰ However, the point of relevance for this chapter is the fact that the procedure to outlaw a political party was applied in relation to a single party allegedly having links with terrorism.

⁶⁷⁵ For detailed account of ETA's activities see *Ibid.*, at 104-108.

⁶⁷⁶ According to official statistics in the last four decades ETA has killed around 900 people, kidnapped more than seventy and injured more than 2000 people. See in Human Rights Watch, *Setting an Example: Counter-Terrorism Measures in Spain* 14 (2005).

⁶⁷⁷ Oehmichen, *supra* note 674, at 216. For details on the Spanish anti-terrorism legislation see *Ibid.*, at 183 onwards.

⁶⁷⁸ Sanchez, in *supra* note 52, at 9.

⁶⁷⁹ Organic Law 6/2002 on Political Parties (in Spanish Ley Organcia 6/2002 de 27 junio del Partidos Politicos)

⁶⁸⁰ See for example *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*. Mission to Spain (16 December 2008); Turano, in *supra* note 52, at 734-735.

Therefore, a traditional militant democracy measure was applied as part of an anti-terrorism strategy and indeed was a measure of a preventive character as the party was banned basically for the lack of condemnation of terrorism. Banning a political party for its silence represents, probably, even more remote a measure than the simple prevention theme in a militant democracy state. Therefore, Spain represents a clear example of how a traditional concern of militant democracy (party ban) is being transformed into new concern: the threat of terrorism.

5.2.1. Terrorism and Politics in Spain: Historical Background and Context

The history of the application of militant democracy in Spain is rather short. Even despite the fact that at least one political party was banned, Spain does not wish to accept that it was turned into a militant democracy state. Therefore, the process of reference to the militant democracy rationale within the framework of the anti-terrorism policies was accompanied by concerns that the militant democracy feature of Spanish democracy is not desirable. Therefore, it makes sense to provide some background information about process of the transition to democracy in Spain in order to accentuate the place and significance of the new regime of political parties' regulation in Spain.

The relatively recent Spanish transition from authoritarian regime to democracy can be characterized as unique and phenomenal for political, historical, and cultural reasons.⁶⁸¹ Until the establishment of the constitutional monarchy in 1978 “Spain has never experienced stable democratic regime and all attempts to establish and preserve democracy made before simply failed.”⁶⁸² That is why the Spanish transition to democracy was a remarkable historical fact. The regime of Generalissimo Franco was based on the explicit rejection of all

⁶⁸¹ See for example Laura Desfor Edles, *Symbol and Ritual in the New Spain: The Transition to democracy after Franco* 4 (1998).

⁶⁸² For details see for example Richard Gunther, Jose R. Botella, *Democracy in Modern Spain* 21 (2004). Edles, *Ibid.*, at 4.

traditional attributes of the democracy (i.e. free elections, political pluralism, free speech, etc.). The dictator was “the ultimate ruler of the country and the source of political authority.”⁶⁸³ Officially it was a single-party authoritarian state, but some authors argue that it was rather a “no-party regime.”⁶⁸⁴ The anti-democratic nature of the Franco regime during its existence was never contested, especially outside Spain.⁶⁸⁵

After Franco’s death the country turned towards establishing democracy “through a remarkably quiescent process of reform and strategy of consensus”.⁶⁸⁶ In June 1977 the first democratic elections took place, and, in 1978 the period of consensus was culminated by the adoption and ratification of the Spanish Constitution. The Spanish transition could be characterized as the ‘triumph of democracy,’⁶⁸⁷ and democracy as such was the main theme and slogan of this process. All major and minor political parties and groups that were competing for the places in the 1977 parliamentary elections built their programs and activities around symbols of democracy. Even the Communist Party adopted the slogan “To vote Communists is to vote democracy”.⁶⁸⁸ Therefore, the entire transition process was built around the authoritarianism vs. democracy dichotomy. It was accepted by all ideologies and groups that only through dialog and compromise it would be possible to avoid another civil war and successfully transit to democratic regime.⁶⁸⁹ For many political science

⁶⁸³ Edles, *supra note* 681, at 65.

⁶⁸⁴ Gunther, *supra note* 682, at 65.

⁶⁸⁵ It was well defined by the General Assembly of the UN in its resolutions and Spain was excluded from admission into the UN. Consider for example, Resolution 39 (I) adopted by the GA on 12th of December 1946 provided that “Franco Fascist Government of Spain, which was imposed by force upon the Spanish people with the aid of the Axis powers [...] does not represent the Spanish people [...]”

⁶⁸⁶ Edles, *Ibid.*, at 6.

⁶⁸⁷ See for example Paul Preston. *The Triumph of Democracy in Spain* (1986).

⁶⁸⁸ Edles, *Ibid.*, at 51.

⁶⁸⁹ The specific nature of the transition in Spain answers is an interesting case for the debate on militant democracy use during the transition. Why Spain did not introduce militant democracy measures to protect its young democracy and help it to survive? I guess it is legitimate to make parallels with post-WWII Germany and claim that the Spanish story is similar to the German one and therefore it would be logical to adopt some preventive measures after the defeat of Franco’s regime as was done in Germany through Article 21(2) of the Basic Law. However, Spain opted not to impose limits on any ideology and all of them were allowed to participate in political debate during and after the transition. The main argument was already brought above

commentators, Spain is the “very model of elite settlement”, a lesson on “consensual” transition from authoritarianism to democracy.”⁶⁹⁰

Unfortunately, the Spanish transition to democracy was not peaceful: the Basque separatist movement has always accompanied the transition process. Mindful of the comprehensive scheme of criminalizing acts of terrorism and other strategies to fight ETA, the activity of this group and its affiliates caused a significant number of deaths, injured and kidnapped people; thousands of people (who were not supportive of nationalist movement) including journalists, intellectuals, politicians, police officers, and members of the judiciary, lived under the threat of violence from ETA members.⁶⁹¹

The Basque Country was an unfortunate exception to the process of transition based on dialogue and consensus. While Catalan leaders, communists, and socialists gave up many of their traditional arguments and claims for the sake of transition and establishing democracy, the Basque leaders did not share this passion. For example, “Basque nationalist parties advocated that voters do not support the constitutional referendum of 1978, leading 54.5 percent of the Basque electorate to abstain from the vote.”⁶⁹² The Basque country had a long and complicated history of divisions and tensions between its populations. Moreover, under the Franco regime Spain was highly centralized and Basques were suppressed as a political unit of the State and as a unique ethnic group (as punishment for their opposition

dialog: compromise and consensus were considered as the main components of the new regime-building process. The democracy in Spain was too fragile at that point to introduce such measures and none of the existing ideologies were considered to be worse than Francoism. Moreover, as was already mentioned above, distinct from Germany, Franco was not elected by the people through the democratic elections. The dictatorship in Spain was imposed without any involvement of democratic processes and people’s participation. The German version of militant democracy was introduced exactly to address the experience when democratic processes were abused to impose totalitarian regime. As Spain did not have similar experience, the possibility to impose content-based restrictions of political parties’ programs and ideologies was not considered in post-Franco regime. This demonstrates once again that militant democracy is context dependant and its content, manner of application and interpretation is determined to large extend by the historical, political, social and cultural circumstances of societies at a given time.

⁶⁹⁰ Edles, *supra* note 681, at 6.

⁶⁹¹ Detailed account of anti-terrorism legislation could be found at Oehmechen, *supra* note 637, at 183 onwards.

⁶⁹² Gorka Espiau Idoiaga, *The Basque Conflict. New Ideas and Prospects for Peace*, 661 United States Institute of Peace Special Report 3 (2006).

during the Spanish Civil War).⁶⁹³ Franco's regime fully suppressed the Basque system of self-governance and "any visible elements of the unique, centuries-old Basque culture."⁶⁹⁴

The terrorist group ETA was formed in 1959 to fight for the Basque region's independence. From the very beginning ETA was expressing extreme and radical views on the matter and widely used violence and criminal activities to advance its goals. Since its first large operation in 1961, ETA is claimed to be responsible for more than 800 deaths in Spain. While ETA activities have substantially decreased in the last 15-20 years,⁶⁹⁵ the type of killing "has become more specialised."⁶⁹⁶ After the Northern Irish conflict, the Basque country remains one of the "the only regions within European Union where violent paramilitaries kill, hurt, destroy, and menace in order to achieve political goals, i.e. independence. This activity has seriously jeopardized democracy."⁶⁹⁷ There are also studies which present evidence of a negative economic impact of the terrorist conflict in the Basque Country.⁶⁹⁸ Moreover, the terrorist activities might substantially affect the stability of the democratic regime in general, and the predictability of the election results in particular (it is relevant to recall here the 2004 Madrid bombing occurred a few days before the national elections and affected the elections outcome).⁶⁹⁹ Therefore, by all accounts, domestic

⁶⁹³ For a more detailed history of the Basque Country see Edles, *supra* note 681, at 122-138.

⁶⁹⁴ Gorka Espiau Idoiaga United States Institute of Peace, *The Basque Conflict. New Ideas and Prospects for Peace*, Special Report 661, April 2006.

⁶⁹⁵ See for example Maria J. Funes, *Social Response to Political Violence in the Basque Country: Peace Movements and Their Audience*, 42 *The Journal of Conflict Resolution* 4 (1998) that demonstrates that there are grassroots reaction against violence in Basque Country that has built a pacifist protest.

⁶⁹⁶ Carlos Pestana Barros (Ed.), *The Timing of ETA Terrorist Attacks*, 28 *Journal of Policy Modeling* 337 (2006).

⁶⁹⁷ Ludger Mees, *Politics, Economy or Culture? The Rise and Development of the Basque Nationalism in the Light of Social Movement*, 33 *Theory and Society* 325 (2004).

⁶⁹⁸ Alberto Abadie, Javier Gardeazabal, *The Economic Costs of Conflict: A Case Study of the Basque Country*, 93 *The American Economic Review*, 1 (2003); William A. Douglass, Joseba Zulaika, *On the Interpretation of Terrorist Violence: ETA and the Basque Political Process*, 32 *Comparative Studies in Society and History* 2 (1990).

⁶⁹⁹ For more details see Valentina A. Bali, *Terror and Elections: Lessons from Spain*, 26 *Electoral Studies* (2007).

terrorism is a very unpleasant phenomenon not only for the security of the nation, but also for the stability of democracy and electoral processes.

Despite the considerable degree of freedom in political expression ETA has been an “unresolved challenge for the system”⁷⁰⁰ for many years mainly due to the fact Basque nationalist movement had ties (or rather had till 2003) with the political party Batasuna. The party was supported by the minority of the Basque population (in 2002 elections it gained 10-12 % of popular support and had 7 out of 75 seats in the regional Parliament). Batasuna very often defended and tried to excuse in its speeches the terrorist practices of ETA. Moreover, there is evidence that Batasuna and ETA had been sharing structures and information.⁷⁰¹ The Spanish government was always struggling to outlaw the Batasuna Party through the criminal law procedure as it would require a significant number of prosecutions in relation to individual party members with a rigid standard of proof of their guilt in committing crimes. Therefore, the Spanish Government opted for a ‘softer’ measure to deal with this situation and introduced a new law which contained the possibility to outlaw political parties. The new *Ley Organica de Partidos Politicos* considerably modified the much praised model of political pluralism and was adopted as a response to the troubling situation of the constant presence of terrorism in Spanish politics.

5.2.2. Spain: Towards Militant Democracy

The Spanish Constitution of 1978 incorporated some elements of militant democracy even if the political strategy is not to accept this fact.⁷⁰² For example, Article 6 of the Constitution is

⁷⁰⁰ Douglass & Zulaika, *supra* note 698, at 246.

⁷⁰¹ See, Comella, in *supra* note 52, at 134.

⁷⁰² The main argument in support of this position is the absence of constitutional norms protecting the Constitution from its total revision (which means that there is no norm protected from the possibility to be revised or abolished). For some reasons, Spanish Government sees it a decisive element in absence of which democracy cannot be called militant. The Spanish Constitution is divided into two parts: one is being easier to revise than the other. However, if we take a closer look at the Article 168 of the Constitution, it demonstrates that a total revision will cause serious consequences for the entire system of government of the country, so it is hard to imagine that it could ever happen in practice.

devoted to political parties. It demands that parties observe the Constitution and parties' internal structure must be democratic.⁷⁰³ Similar provisions were contained in the Law regulating the activities of political parties adopted almost at the same time as Constitution.⁷⁰⁴ However, the rights and privileges of political parties are not unlimited. The 1978 Law on Political Parties provided for the possibility to dissolve a political party when its activities fit into the definition of criminal association provided in the criminal law, and when organizations and activities of the party disregard democratic principles. However, the procedure to outlaw a political party under the 1978 Law was not applied at any time between 1978 and 2002.⁷⁰⁵ However, these provisions were not able to address the major challenge to the Spanish democracy: the Batasuna party and its connections with the terrorist organization ETA.⁷⁰⁶ The system was ineffective because it did not have preventive means (the previous law was dealing mainly with the process of formation). The criminal law provisions standing alone cannot address the threat of political parties with a dangerous political agenda unless its members commit a crime. The proscription of organizations (including political parties) through criminal law depends on the individual guilt of its members, so it could be applied only retroactively when a tragedy could have already happened. The situation was meant to be changed with the introduction of the new law: the gap – absence of preventive measures and the possibility to ban a legitimate but dangerous and undemocratic political party without need to wait for an occasion to apply criminal law provisions – was meant to be filled with a new law introduced to the Cortes (Spanish Parliament) in March 2002.

⁷⁰³ **Article 6:** “Political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic”.

⁷⁰⁴ Law on Political Parties (1978) (Ley 54/1978 de Partidos Politicos).

⁷⁰⁵ See Sanchez, in *supra* note 52, at 8.

⁷⁰⁶ Turano, in *supra* note 52, at 732.

The new Law on Political Parties: Extending Militant Democracy Application towards a New Paradigm?

The new Law on Political Parties (*Ley Organcia de Partidos Politicos*) was passed in June 2002. There is no doubt that the law appeared as a response to the presence of organizations supportive of terrorism in the Spanish politics. The enactment of this law was a result of a compromise between the governing party and the main party in opposition. The agreement between these two big political actors contained provision to introduce legal changes to address all possible forms of activities providing any type of support of terrorism.⁷⁰⁷ The most important innovations are to be found in Articles 6-9; however, Article 9 is of major interest for this case-study as this norm allows the possibility to declare a party illegal.⁷⁰⁸

The 2002 Law on Political Parties could be criticized on a few accounts which cast a shadow over its legitimacy and effectiveness. The first problematic conclusion is that law was adopted with the intention to outlaw a particular political group: the Batasuna party.⁷⁰⁹ The second critical remark on this law concerns the fact that the statute is unnecessary wide in the scope and imprecise in definition. While at first sight it might appear that the party was seeking to destroy the system of democratic government is legitimate ground for banning it, it becomes less convincing in the light of the activities described by the law as illegal. Some of the conduct prohibited by law appears not to be controversial, and it is reasonable and

⁷⁰⁷ For brief description of the new law see *Ibid.*, at 730-740.

⁷⁰⁸ **Article 9(2):** A political party shall be outlawed when its activity violates the democratic principles, in particular, when through its activity it seeks to deteriorate or destroy the system of liberties, or make impossible the democratic system, or eliminate it, through any of the following conduct, if they are realized in a reiterated and grave manner. Prohibited activities of political parties: a) violating fundamental rights by promoting, justifying, or excusing attacks on the life or dignity of the person or the exclusion or persecution of an individual by reason of ideology, religion, beliefs, nationality, race, sex, or sexual orientation; (b) encouraging or enabling violence to be used as a means to achieve political ends or as a means to undermine the conditions that make political pluralism possible; and c) assisting and giving political support to terrorist organizations with the aim of subverting the constitutional order.

⁷⁰⁹ Oehmichen, *supra* note 663, at 216.

legitimate to prohibit some behavior listed in the law.⁷¹⁰ However, some of the acts prohibited to be committed by political parties are not that uncontroversial. One of them is the prohibition to promote, justify or excuse attacks on the life or dignity of the persons, or the exclusion or persecution of an individual by reason of ideology, religion, beliefs, nationality, race, sex, or sexual orientation. This provision legitimately led some commentators to conclude that a political party advocating for criminal law sanctions to prosecute homosexual behavior (which might happen in the event of a political movement supporting and/or inspired by conservative religious views) could be outlawed under the new law.⁷¹¹

Not least controversial are provisions on the prohibition of ‘tacit support to terrorism’ and ‘legitimizing violence as a method to achieve political ends’ without specifying any geographical limitation and ends to be achieved through violence (what about support expressed for a foreign political movement fighting against a dictatorial regime?). It is obvious from the language of the provisions that the legislator wanted to cover the reason behind this law and attempted to demonstrate that the law would be equally applicable to Batasuna and any other dangerous political party. However, the broad language of the Law in question did not make it look more effective and legitimate and, in fact, it might capture much more than prohibition of Batasuna and similar parties. The law might pose a significant threat for the activities of political parties in the future if the statute is to be taken seriously. In certain political environments the law might be manipulated and easily applied to suppress political dissent. However, it is crucial to mention here that the wide and ambiguous language

⁷¹⁰ For example the prohibition of the following activities should be contested: including regularly in its directing bodies and on its electoral lists persons who have been convicted of terrorist crimes and who have not publicly renounced terrorist methods and aims, or maintaining among its membership a significant number of those who belong to groups with links to terrorist organisations; conceding to terrorist organisation the rights and prerogatives given by law to political parties; giving institutional support to any group that act systematically in accordance with terrorist or violent organisations or that protect and support terrorism and terrorists (Article 9.3).

⁷¹¹ Comella, in *supra note 52*, at 142.

is a usual (but unfortunate) attribute of most of the laws with anti-terrorism notes. For example, there is still no consensus on how to define terrorism, and all anti-terrorism laws in general tend to be broad, imprecise, and sometimes pathetic in their language.

The Batasuna Party Dissolution

As was mentioned above, Batasuna did not commit terrorist acts but allegedly had links with the ETA group: it defended and tried to excuse in its speeches the terrorist practices of ETA and there was evidence that Batasuna and ETA had been sharing structures and information.⁷¹² However, the Spanish Government found it hard to outlaw Batasuna through existing criminal law provisions. Article 515 of the Criminal Code provides a definition of criminal association and it might be dissolved by the Court under Article 520 of the same Statute.⁷¹³ To initiate this procedure it was necessary to prove that Batasuna had close connection with ETA and therefore is engaged in criminal cooperation which is equal to using criminal means to achieve its political program; these tasks seemed to be challenging for the Spanish government. Maybe that was a reason to look for an alternative option and legislators came up with idea to create intermediate regime and place it between criminal illegality and legality. Under the new law, if a political party is declared illegal it does not affect individuals but only party itself: it is dissolved and assets are given to the State. It was perceived as a better approach compared to criminal law means as in that case the severe criminal penalties would be imposed on individuals. As there is no issue of individual liberty at stake, the Spanish Government decided that it is possible to relax procedural guarantees compared to ordinary criminal procedure.

⁷¹² See, *Ibid.*, at 134.

⁷¹³ Spanish Criminal Code (1995) (Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal).

The Case to Outlaw Batasuna and the Validity of the Statute

Just a few weeks after the enactment of the new law, the lower house of Spanish Parliament approved the motion to require the government to bring action against Batasuna for its violation of the new law. The motion was prompted by Batasuna's refusal to condemn ETA's attack on August 4, 2002, in Santa Pola, in which a car bomb exploded and as a result two bystanders were killed. In September the case was brought to the special chamber of the Supreme Court assigned with power to political parties under the recently enacted statute. Most out of 23 charges constituting the case were related to Batasuna's reaction to the ETA's terrorist act of August 2002 in Santa Pola and Batasuna was accused mainly of tacit support of terrorism (due to the refusal to condemn terrorist attacks). Charges related to the events of August 2002 occurred after the enactment of the law, but it was obvious, nonetheless, that Batasuna was trying to be banned for its past activities.⁷¹⁴ The Supreme Court declared Batasuna illegal (unanimously).⁷¹⁵ The decision to ban Batasuna was based primarily on the charge of 'tacit support of terrorism.' It was established that the party had close links with the ETA group, they had substantially the same ideology, and it was closely controlled by that terrorist organization. The Supreme Court made reference to the criminal conviction of terrorism related crimes of some of the party members, the speeches of its leaders and members, and mainly to party leaders' refusal to condemn the attack in Santa Pola. The Supreme Court concluded that the Batasuna activities amount to assisting and giving political

⁷¹⁴ While the case was pending before the Sala Especial of the Supreme Court, the Basque regional government brought a complaint to the Constitutional Court and tried to challenge the constitutionality of the Law. In March 2003, the Constitutional Court upheld the validity of the Statute (unanimously). Decision of the Constitutional Court, STC 48/2003

⁷¹⁵ Decision of the Sala Especial of the Spanish Supreme Court, STC 27/ 2003.

support to terrorist organizations with the aim of subverting the constitutional order (Article 9.2(c) of the Law on Political Parties).⁷¹⁶

The decision to outlaw Batasuna was challenged later before the Constitutional Court on the grounds of alleged violation of the right to a fair trial; freedom of expression, thoughts, and association; and, of the principle of presumption of innocence. In addition, the impartiality of the judge of the Supreme Court was contested as he was involved in a report on the preliminary approval of the 2002 Law on Political Parties. By the judgment of 16 January 2004 made unanimously, the Constitutional Court dismissed the appeal.⁷¹⁷ Therefore, the Batasuna Party prohibition case involved actually three separate court procedures at the national level.⁷¹⁸ In addition, the Batasuna Party challenged the Law and its application in the ECHR which handed out judgment on November of 2009, finding no violation of the Conventions' provisions (the applicants claimed violation of Articles 10 and 11).⁷¹⁹

The reason to ban Batasuna party – tacit support of terrorism and lack of condemnation of terrorist acts – is a crucial point to demonstrate that militant democracy logic was extended by the Spanish legislator and judiciary beyond its traditional scope of application. The Batasuna dissolution is not exactly a traditional party prohibition case. Outlawing Batasuna for the reasons outlined above is rather an anti-terrorism oriented party ban employed as part of anti-terrorism strategies. This proves that anti-terrorism is not only about criminal jurisprudence but a lot more. Anti-terrorism is about prevention but not only in the context of terrorist suspects' preventive detention and investigations. States' policies to

⁷¹⁶ Interestingly, the Supreme Court also made reference to the Spanish constitutional system as not being a model of militant democracy and insisted that the new Law does not change the state of affairs as it only requires from political parties refraining from certain activities.

⁷¹⁷ Decision of the Constitutional Court, STC 5/2004

⁷¹⁸ The constitutional validity of the law itself was challenged, the special division of the Supreme Court issued a judgement on Batasuna Ban and later the Constitutional Court confirmed that the judgement to outlaw Batasuna is compatible with fundamental rights provisions of the Constitution

⁷¹⁹ Herri Batasuna and Batasuna v Spain (2009) (Applications no: 25803/04 and 25817/04).

prevent acts of terrorism could refer to quite remote pre-emptive measures beyond the procedure prescribed by criminal law.

Moreover, as was already mentioned above, militant democracy is present inherently (if not openly and formally) in any functioning democracy, including Spain. Taking into account the preventive nature of the new law (even though it requires waiting for some illegal activities to be committed, which ironically includes speeches for example), the inherent presence of militant democracy in modern constitutional orders and manner the new law was applied in Spain, I would conclude that Spain moved towards militant democracy and the remarkable fact about this move is that it happened through anti-terrorism policies.

5.2.3. Spanish Militant Democracy Model-Wise

It was accentuated above that Spain has practiced wide tolerance towards political groups and all players from the political arena were used to it and were not ready to radical changes via introducing the new legal regime. However, it was clear that the move to introduce the new Law on Political Parties was inspired and motivated by the presence of terrorism in Spanish politics. The Government was very motivated to eliminate Batasuna from political arena as soon as possible.⁷²⁰ The Constitutional Court of course handled this issue in such a way as to show that the intention to outlaw Batasuna was only the *occasio* but not the *ratio* of the law. It appears that the Constitutional Court had no reservations about the Law and its immediate application but tried to prevent similar situations in the future and ‘sent a message’ to the legislators so they would be careful next time. It would be embarrassing for the legislator and executive to hear from the Constitutional Court that the law was adopted to target a particular political party. But by stating that the intention to outlaw Batasuna was only the occasion, the Court extended application of this piece of legislation in the future to any political party

⁷²⁰ Comella, in *supra* note 52, at 138.

covered by the scope of this law which might be dangerous in the light of the ambiguous language of the Law's provisions.

It is hard to say in certain terms what option would be preferable: that banning of Batasuna was only the *occasio* or the intent to outlaw Batasuna was a *ratio* of the new law as neither option is a desirable and acceptable practice for a true democracy. There are some opinions that if the law was adopted only to make it possible to outlaw this particular party as soon as possible, then it does not do much harm for the democratic system.⁷²¹ This argument might be disputed on the ground that the mere fact that the Law was adopted with a particular target (group, party, race, region, etc.) in mind is, *per se*, an undesirable practice for democracy. The Spanish example is not unique, however, and we can find matching stories in other jurisdictions. If we consider the German example, it is obvious that the Basic Law and its Article 21 was also adopted with a specific enemy in mind. The Basic Law did not list any ideologies/groups prohibited, but there is no doubt that it was aimed at eliminating fascists' possibilities from coming back to power. The Spanish and German cases are different by some accounts, so it is not possible to conclude in certain terms whether both cases are necessarily bad practice for democracy. German Basic Law was adopted shortly after the defeat of the Nazi regime and its provisions on militant democracy clearly had a preventive character. Moreover, the result of absence of any control over political parties in Germany was drastic and had affected millions of lives. In contrast, in Spain the procedure to outlaw a political party was introduced during a state of constitutional stability. Therefore, the law targeting a particular political group was adopted in Spain in 2002 in the environment of wide political pluralism, a relatively stable functioning of democratic institutions, and constitution more than thirty years old. Therefore, the law is different from the German case and could be fairly criticized on these grounds.

⁷²¹ Ibid., at 148.

Spain might have referred to other solutions in its move to outlaw Batasuna. For example, the State could probably use criminal prosecution of the party members or the dissolution of the party by listing it as criminal organization. Adoption of a law providing for the possibility to dissolve a political party is always potentially dangerous practice as it might be abused to deter and suppress opposition. Taking into account the whole procedure to outlaw the party it might be concluded that in practice big parties in Spain are in generally immune from this statute's application. That is why the reason behind the adoption of the Law seems troubling. It might create a dangerous precedent if we accept this practice as a legitimate democratic measure. Minority parties would not be safe anymore as the mainstream parties can always invoke this legitimized practice and use it to facilitate easy and fast elimination of political opponents. This time it was the Batasuna Party with links to a terrorist organization, but nobody can guarantee that next time it will not be a party in opposition which is uncomfortable to have for the ruling majority. Therefore, any attempt to justify adoption of a law targeting a single political party is an undesirable practice for democracy. However, it would be interesting to speculate about what the reaction would be to this Law if there are few political parties in Spain allegedly having links with terrorist groups and would it be any different than it was in relation to Batasuna dissolution?

The situation does not look any better if we accept the Spanish Constitutional Court's argument that the intent to outlaw Batasuna was only the *occasio*. As was mentioned above, the text of the law suffers from serious flaws in its definitions and scope of application. The law does not match its name and purpose and "the law's content is disappointing as measured against its own name".⁷²² It is not a law regulating the activities of political parties in its traditional understanding: it does not deal, for example, with issues of party funds and is not

⁷²² Sanchez, in *supra* note 52, at 12.

precise about the requirements of a party' internal democracy; however, the law provides long and extensive list of proscribed behavior. The law attempts to demand from political parties a complete and clear turn away from terrorism which is absolutely legitimate to my mind. However, some forms of the proscribed behavior are broad and imprecise which makes its hard to foresee the possible consequences of the Law and its application in the future. Moreover, there is no procedure designed by the Law to signal the party that its behavior and activities might fall within the scope of the Law and it also substantially affects the effective functioning of a multi-party system which is the main purpose and result to be achieved by guaranteeing the political pluralism principle.

Spain: A Plausible Model to Follow?

What can constitutional theory and practice learn from Spain and the Batasuna Party prohibition case? For a few reasons, Spain does not have a plausible model of protective democracy to follow. If we accept that Spain did its move and further step (beyond inherit and implied limitations) towards militant democracy, we have to keep in mind that this case is problematic from the perspective of both elements of militant democracy doctrine: legitimacy and effectiveness. The Batasuna Party was banned mainly for its activities which occurred before the enactment of the law and it recalls serious critique if we adhere to the principle of non-retroactivity.

Moreover, there were alternative means available to deal with a political party through criminal law provisions and to declare a party a criminal association. It was not easy, but possible. For various reasons the government was not able (or was not willing) to work harder to invoke criminal law procedure. The non-reference to criminal law was justified mainly for serious consequences for the individual members in the case of declaring party a criminal organization. However, it is not clear why the State should care about consequences for people committing crimes of terror or connected to it. I believe the government cannot

accord legitimacy to its attempt to enact the statute to make it easier, faster, and more convenient to ban a political party. Moreover, if the Statute is to be applied in the future to any other political party, it poses many further questions as it speaks in general and abstract terms. Therefore, supporters of the Statute decided to sacrifice the concept of democracy and tolerance established in Spain after the dictatorship regime for the sake of making the government's life easier in its task of outlawing a party supportive of terrorism. I do not argue that Batasuna did not deserve to be banned, but the way it was done in Spain is not fully compatible with democratic principles and foundations.

The *Ley Orgánica de Partidos Políticos* cannot sustain criticism, even considering the fact that the ECHR supported the decision of the Spanish Government and did not find any violation of the Articles 11 and 10 of the Convention.⁷²³ The Court noted that the Supreme Court of Spain in its judgment to outlaw Batasuna Party did not confine itself only to refer to the lack of condemnation of terrorist attacks by ETA, but also presented a list of behaviors enough to conclude that Batasuna was a political instrument of terrorist strategy of ETA. The ECHR in its judgment classified the behaviors listed by the Supreme Court in two categories: those which fostered a climate of social confrontation and those which are supportive of terrorism activities of ETA. The ECHR supported the national court argument that the acts and speeches of the party leaders and members might cause confrontation within the Spanish society; possibly followed by the violent movements.

The very important finding for this discussion is the Court's finding in para. 87 of the judgment that actions of the Batasuna "must be analysed in their entirety as part of the strategy to carry out its political project which is in its essence contrary to the democratic principles enshrined in the Spanish Constitution". Towards the end of the judgment, the Strasbourg Court concluded that the prohibition of Batasuna was not based exclusively on its

⁷²³ Herri Batasuna and Batasuna v. Spain (2009).

silence about the terrorist acts. However, it was noted that even if the prohibition would have been based solely upon the lack of condemnation of violence and terrorism it would not be contrary to the Convention. The reason for such statement is the Court's belief that the behavior of the politicians includes not only their actions and speeches, but also their omissions or silence which might amount to a political position and opinion on a particular matter and could be equivalent to explicit support of action. In other parts of the judgment the Strasbourg Court revisited its earlier findings from similar cases: State does not need to wait until political party begin to implement its dangerous program and projects, political parties are important elements of the democratic system and they can campaign for changes of legislation and constitutional structures.⁷²⁴ Overall, the judgment was not unexpected and it would be a big surprise if the ECHR would have found Spain in violation of the Convention in this case.

To conclude, I do not claim that a political party engaged in terrorism should be immune from the possibility of being banned under a similar law as in Spain (and to be only criminally prosecuted). The major challenge for the State and democracy in this respect is, however, to avoid the misuse of similar measures. Few years passed since the Law was introduced and Batasuna was banned under this Law. The time proved that it was not a bad solution for Spain. The law was not invoked a single time since then (though there are parties with relatively radical agendas which could be easily captured by the Law in question) and the Batasuna ban did not cause any serious violent protests; did not become more popular, and members of the party did not achieve the status of super-heroes who suffered for freedom and democracy. After few years it seems to become accepted by the scholars, politicians, citizens.

⁷²⁴ ECHR mentions in its judgment at least *United Communist Party of Turkey and Others v. Turkey* (1998), *Socialist Party and Others v. Turkey* (2003), *Party of Freedom and Democracy v. Turkey* (1999), *Refah Partisi (the Welfare Party) and Others v. Turkey* (2001), etc.

However, the fact that it worked out in Spain this time does not make this solution universal and recommendable to other countries facing similar problems. This time it was used for good and it was the right solution for this particular situation. However, it is hard to predict who might win the election next time and for which purposes the Law in question might be used. The constitutionality of the Law on Political Parties and its application was approved by four judgments from three different Courts and there could be no more debate about its constitutionality and validity, so it might be utilized anytime the majority of the Parliament would agree on its necessity.

The major lessons constitutional theory can learn from the Spanish story are the following. First, the 2002 Spanish Law on Political Parties and its immediate application to dissolve the Batasuna Party represents to my mind a clear example of extending militant democracy to a relatively new type of threat. Despite the resistance of the Spanish judiciary to accept the militant character of the democracy in their country, this particular case demonstrates the application of the classical militant democracy measure not only to a political party with extreme political agenda, but to a threat of terrorism, too. The Law on Political Parties is of a preventive nature and incorporates a classical militant democracy technique but it was applied in the War on Terror. The Batasuna Party was not banned only for its criminal activities (or rather criminal activities of its members) but for keeping silence when it was expected to condemn the acts of terrorism. Silence was considered to amount the overall strategy or the political agenda of the party and was found to be a legitimate to outlaw the party. Second, this case-study demonstrates how terrorism can be disempowered (at least to some extent) without excessive curtailing of basic human rights and liberties (which is a case in many anti-terrorism regimes) and without shifting the balance between branches of power with active involvement of the judiciary.

A further lesson is that militant democracy introduced at later stages of constitutional democracy could be problematic. Spain is not the perfect example of how a dangerous movement can be eliminated from the political arena (meaning mainly the reason to adopt the law, its broad and vague language, and the way it was applied). The EHCR judgment in the case of the Republican Party of Russia v. Russia could be relevant here, as it was stated that for non-transitional countries limitations imposed on political participation rights are much harder to justify and more strict scrutiny should be exercised by the courts.

The Spanish example is not perfect to be followed, but this time and in a given setting this technique worked out. The most important conclusion for this project (despite the significant difference of Spanish terrorism from global terrorism) is that the militant democracy can be used as part of anti-terrorism policies and there is at least one practical example when it was applied and it actually worked may be better than many other available options.

5.3. Russia's War on Terror: Militant Democracy as a tool to Introduce a Systemized Approach to Anti-Terrorism Policies.

Introduction

While Spain opted to deal with presence of terrorism in its political arena through party-banning procedures, Russia represents a completely different approach to a very similar problem: terrorism as a tool to achieve territorial independence for a certain ethnic group. Russia was selected for the case-study chapter on terrorism and militant democracy for various reasons. First of all, this state has experienced numerous deadly terrorist attacks in the

past decade and they are still happening in Russia with worrying regularity.⁷²⁵ Second, the country's unfortunately long experience of fighting a War on Terror is an excellent opportunity to investigate the issues of response to a real presence of terrorism as opposed to the threat of terrorist attacks from the perspective of the balance of two potentially conflicting interests: national security and fundamental freedoms. Third, the case of Russia demonstrates those national governments constantly fail in fighting the War on Terror and it is partially the fault of the weak legislative regime existing at the moment. Despite being one of the countries in the World most affected by terrorism, Russia did not develop a comprehensive regime to address the threat of terrorism and I find it useful to see if militant democracy might be helpful to find a better theoretical approach which would lead to more successful legislative and law-implementing policies. In what follows I will introduce the existing anti-terrorism regime in Russia, underline major problems and concerns and attempt to analyze how militant democracy logic might potentially improve the situation.

5.3.1. Overview of the Existing Anti-Terrorism Regime

The Russian Federation anti-terrorism regime is compiled of a relatively modest list of laws, most of which have little to do with the tragic events of September 11.. Anti-terrorism in Russia is directed primarily towards internal terrorism: the operating and committing acts of terrorism within the territory of the Russian State. Unfortunately, terrorism as a method of achieving political goals became an inalienable attribute of the Russian transition to democracy and strengthening its territorial integrity.⁷²⁶ At the beginning of the transition, terrorism was actively used by some ethnic and religious groups to achieve independence, but

⁷²⁵ For example, 1290 terrorism-related crimes were committed in Russia in 1997 and 1728 in 2005. Number of terrorist acts committed in Russia grows dramatically every year: 18 acts of terrorism in 1996, 32 in 1997, 21 in 1998 and 356 in 2004. 50 biggest terrorist acts committed in Russia from 2001 to 2005 killed 1115 persons, 3358 were injured. For more statistical data see Kalinin B.Ju., *Terrorizm v Rossii v Konce XX - Nachale XXI Veka: Politiko-Pravovoj Analiz*, 11 *Zakonodatel'stvo i Ekonomika* (2007).

⁷²⁶ Russian terrorists are characterised by some commentators as targeting mostly symbols of oppression, i.e. being a territorial and political unity of the Russian Federation. See for example, Oemichen, *supra* note 637, at 125.

later this ethno-religious and territorial identification of the typical terrorists blurred and now terrorist groups appear to be more diverse in their members' identities and goals they claim to achieve through a policy of constant violence. According to the Strategy of National Security, until 2020 activities of the various terrorist organizations are still considered as one of the major threats to national security.⁷²⁷ Despite the fact of suffering from regular terrorist acts which result in numerous fatalities every time, Russia did not develop a comprehensive anti-terrorism regime aimed at the prevention of new terrorist acts from happening.

To the date, Russia's anti-terrorism regime complies with the provisions on crimes of terror as set out in the Federal Law on Counteraction to Terrorism of 2006,⁷²⁸ the Presidential Decree on Counter-Terrorism Strategies,⁷²⁹ and the Strategy of National Security until 2020. The prominent place in anti-terrorism policies is occupied by the anti-extremist legislation as terrorism is defined as one of the types of extremist activities, i.e. Federal Law of 2002 on Counteracting to Extremist Activities⁷³⁰.

Crimes of Terrorism

The Russian legal system was unfamiliar with crimes of terror until as late as 1994. The act of terrorism as a separate crime was introduced in the 1960 Criminal Law of Soviet Russia in 1994. The text of the article and especially the 'severity' of the punishment allow concluding that in 1994 the threat of terrorism was not taken seriously and it took another few years for the Russian legislator to take other more comprehensive measures.⁷³¹ The criminal legislation was modified substantially after Russia joined (ratified in 2006) the Council of Europe

⁷²⁷ Russian Federation Concept of National Security, *supra* note 492, Section 37.

⁷²⁸ Federal Law on Counteracting Terrorism (2006).

⁷²⁹ E.g. National Concept on Counteracting Terrorism. Approved by the President of the Russian Federation (2009), available online at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=92779>.

⁷³⁰ Federal Law on Counteracting Extremism (2002).

⁷³¹ Article 213(3) provided for example for punishment of 3 to 5 years of imprisonment for committing act of terrorism.

Convention on the Prevention of Terrorism.⁷³² The Convention imposes obligations on each party to adopt measures to establish public provocation to commit a terrorist offence as a criminal offence under its domestic law, to criminalize the recruitment and training for terrorism (Articles 5, 6, and 7 respectively). Therefore, the criminal provisions on terrorism had to be amended to meet the international obligations.

The current Criminal Code of Russia of 1996 includes a few crimes of terror in Chapter 24 (Crimes against public security): acts of terrorism (Article 205); assistance to terrorist activities including recruitment, training, and financial assistance (Article 205.1); incitement to commit acts of terrorism and public justification of terrorism (Article 205.2); hostage-taking (Article 206); and, false communication of acts of terrorism (Article 207). Russian criminal law is applicable for planned or intended crimes, so it can be argued that terrorism-related crimes listed in the Criminal Code are of preventive nature to some extent.

However, for a country suffering from terrorist attacks on a regular basis such modest list of crimes of terror looks somehow irresponsible especially if we analyze carefully provisions of Article 205.1 which includes all forms of assisting terrorism in the same sentence. Another interesting feature of this article is its reference to what amounts to terrorism as it classifies incitement to commit certain crimes as assistance to terrorism. According to Article 205.1 assistance of terrorism includes not only recruitment, training, financing, and assisting in committing an act of terrorism itself, but also incitement to commit acts of terrorism;⁷³³ hostage-taking;⁷³⁴ organization of illegal armed-forces and participation in their activities;⁷³⁵ hijacking (of an aircraft, ferry, or railway train);⁷³⁶ attempted murder of

⁷³² Text of the Convention available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>; Chart of signatures and ratifications available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=196&CM=8&DF=01/02/2011&CL=ENG>.

⁷³³ Criminal Code of the Russian Federation (1996), Article 205.2.

⁷³⁴ Ibid., Article 206.

⁷³⁵ Ibid., Article 208.

⁷³⁶ Ibid., Article 211.

a public figure;⁷³⁷ forcible seizure of powers or retention of powers;⁷³⁸ armed rebellion;⁷³⁹ and , attacks on persons or institutions enjoying international protection⁷⁴⁰.

By including all these crimes in the list corrupts not only the definition of terrorism and its distinct features as a crime, but also undermines and probably limits the values protected by those crimes. For example, hostage-taking might have nothing to do with terrorism and it is not clear why a group of people intended to commit crime of hostage-taking for purely pragmatic reasons (i.e. money) to force a person to do some acts or refrain from taking certain actions will be prosecuted under the crime of ‘assisting terrorism.’ This unclear construction of Article 205.1 might lead to two unfortunate conclusions: first, the text of the article was drafted under political and social pressure is a real hassle, and second, the way the article is composed might potentially distract the attention from real problems of terrorism if the law-enforcement bodies would investigate and report criminal activities committed for totally different motives as terrorism crimes.

The analysis of the Criminal Law provisions on crimes of terror allows us to conclude that at least the criminal law element of the War on Terror in Russia is not taken seriously by the Russian legislator. It does not give a clear understanding of what acts amount to crimes of terror in Russia, mixes up a few different crimes by nature and consequences, and does not provide details on the crucial elements of crimes, i.e. what is considered as training and recruitment for the purpose of criminal prosecution of terrorism? All this might leave one with the impression that Russia was only concerned with complying with international obligations at the minimum level and did not take the task as seriously as it should. The Russian authorities however took new actions nearly after all major terrorist attacks but it

⁷³⁷ Ibid., Article 277.

⁷³⁸ Ibid., Article 278.

⁷³⁹ Ibid., Article 279.

⁷⁴⁰ Ibid., Article 360.

usually was only about increasing the punishments for acts of terrorism and rarely the substance of the criminal provisions were at stake.⁷⁴¹ The moves to make the criminal punishment for a terrorist more severe is usually accompanied with the adoption of different concepts on contacting terrorism, programs to prevent crimes of terror, etc., which have no substantial legal importance and do not form an important part of an anti-terrorism regime.

Non-Criminal Anti-Terrorism Legislation

It is well-known fact that anti-terrorism measures cannot be built around only criminal law provisions. Russia is not an exception to this mode of actions. The first law dealing with anti-terrorism policies in Russia was adopted in 1998.⁷⁴² The law was adopted with the purpose of providing a legal and organizational basis to coordinate the fight with terrorism, and clarify rights and obligations of the citizens affected by the anti-terrorism policies.⁷⁴³ The law was the first step in the history of modern Russia to systemize its anti-terrorism policies but the law did not meet all the needs, was amended a few times (in 2000, 2002, and 2003), and was finally replaced with a new law which entered into force in 2006.

The new Federal Law on Counteracting Terrorism declares itself as setting basic principles of counter-terrorism policies, including prevention of terrorist attacks, liquidation and the minimization of consequences of acts of terrorism, and as the legal basis for the possible military intervention in the fight against terrorism. The law contains 27 articles most of which are devoted to the regime of counter-terrorism operation (for details and concerns on this law content see below). However, importantly the law also introduced the definition of terrorism, terrorist activities, and terrorist acts to be used by all legislative and law-enforcement bodies in their activities related to combating terrorism. The definitions given by

⁷⁴¹ See for example the most recent changes to the Criminal Code of Russia: Federal Law on Amendments to the Criminal Code of the Russian Federation, 1 December 2010 at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=107760;fld=134;dst=100010>.

⁷⁴² Federal Law on Combating Terrorism (1998).

⁷⁴³ Text of the law is available at <http://zakon.kuban.ru/private4/2001/130250798.shtml>.

the law are not perfect and pose some serious concerns as to the real range of activities the Law might capture potentially, which is nonetheless within the overall tendency of all modern states to include vague and unclear norms in anti-terrorism legislation. In addition, the 2006 Law provides for the possibility to outlaw terrorist organizations (Article 24), introduce measures of social protection for those involved in counter-terrorism activities (Article 23), and rewards citizens for assisting in the fight with terrorism (Article 25).

Another striking feature of the Russian anti-terrorism regime is its constant overlapping with counter-extremism legislation. The current Federal Law of 2002 on Counteraction to Extremist Activities lists terrorism as one form of extremist activities and therefore all norms on anti-extremist are to be applied in the War on Terror⁷⁴⁴. The provisions of the 2002 law which are of the most relevance for this section would be the possibility of issuing a warning to the public or religious organizations on the presence of signs of extremism in their activities; the possibility to suspend the activities of public or religious associations; and, serious limitations imposed on circulation of the allegedly extremist materials.

In general, the Anti-Terrorism Law of 2006 is disappointing in relation to its name and the situation with terrorism in Russia, as well as is the overall legislative anti-terrorism regime existing in Russia. It does not provide a real mechanism for resisting terrorism and preventing it. The legislative approach to issues of terrorism is really surprising if we take into account the frequency of terrorist attacks in Russia and the severity of their consequences. It is disappointing to see that most of the issues on counter-terrorism are left for law-enforcement agencies and different anti-terrorism committees and commissions at

⁷⁴⁴ According to **Article 1** extremism for the purpose of this Law includes public justification of terrorism and other terrorist activities. Among other forms of extremism the Law lists forced alteration of the constitutional order and territorial integrity of the state, incitement to hatred, social, racial, ethnic, religious and linguistic discrimination and some others.

federal and regional levels. It is well-known that under-regulation of such matters always means high potential for abuse and amounts to the absence of a systemized and unified approach on how to address the threat emanating from terrorist groups.

At the moment, the Russian anti-terrorism regime is mainly about measures taken in the aftermath of terrorist attacks and does not say much about the prevention. The overall trend of Russia's anti-terrorism strategy is the prosecution of crimes of terror and it is not feasible to identify any political strategy against terrorism.⁷⁴⁵ Moreover, federal governments seem to be willing to give up the responsibility for the failure to prevent new acts of terrorism on regional authorities in the Northern Caucasus republics and intelligence authorities.⁷⁴⁶ One might see the positive side of the Russian story as it seems that terrorism and its regular attacks on Russian citizens did not cause treating terrorism as anything different than any other crime against public security. Many modern democracies are criticized for taking too many unnecessary actions within their anti-terrorism policies and it amounts to assuming new character of terrorism since the 11 September events. However, Russia does treat terrorism differently and even introduced an exceptional regulatory regime which does not fit into anything allowed by the Russian Constitution. There are substantial inconsistencies in the Russian approach towards threat of terrorism which need to be addressed. But first, I would like to introduce a brief analysis of the existing legislation and approach to anti-terrorism policies.

As was mentioned above, counter-terrorism policies in Russia are influenced to a large extent by anti-extremism legislation. Unlike the Federal Law on Counteraction of Terrorism prevention theme it is very much present in the Law on Counteraction of Extremist Activities. For example, Article 3 of the Law states that anti-extremist policies include

⁷⁴⁵ Mihail Logvinov, "Bor'ba s Terrorizmom" kak Katalizator Terroristicheskoy Ugrozy v Rossii? (2011), available on-line at <http://www.regnum.ru/news/1381147.html>.

⁷⁴⁶ Ibid.

prophylactic measures to prevent extremist activities in general and detect and prevent extremist activities of public and religious associations, other organizations and individuals.⁷⁴⁷ Reading further provisions of the law does not clarify much apart from the clear indication that law is extremely wide-ranging in the area of its application which inevitably might lead to its arbitrary application in practice. The latter is unfortunately happening in Russia and the phenomenon of “illegal or unlawful anti-extremism” is accompanying the War on Terror.⁷⁴⁸

Moreover, the chaotic and arbitrary way to fight the War on Terror in Russia is accommodated by the fact that the overall national strategy is guided by executive decisions.⁷⁴⁹ Thus, in 2009 the President of the Russian Federation issued a Decree on the Concept of Counteracting of Terrorism.⁷⁵⁰ This state of affairs appears to be somehow neglecting the situation with terrorism in Russia as anti-terrorism legislation enacted by the parliament speaks in very general terms and includes only 27 short articles. Therefore the major regulation of counter-terrorism in Russia is vested with the executive. As was discussed above, an uncontrolled executive is never a sign of a healthy legal system where serious protection would be accorded to any rights and freedoms limitations.

5.3.2. Russian War on Terror: Problems and Concerns of the Existing Legislative Regime

The federal anti-terrorism regime in Russia at the legislative level consists of two elements: criminal law provisions and the 2006 Federal Law on Counteracting Terrorism. The content

⁷⁴⁷ **Article 5** further clarifies what does amount to the prophylactic measures and it includes educational, propagandistic measures directed at the prevention of extremist activities.

⁷⁴⁸ For example, different NGOs are widely speaking about abuse of anti-extremist legislation by federal and regional authorities as a method to silence any opinion which does not fit into the government does not want to hear. See for example, “Misuse of anti-extremism” archive of the Center for Information and Analysis “SOVA”, available at <http://www.sova-center.ru/en/misuse/>.

⁷⁴⁹ This competence of the President is prescribed by the Federal Law on Counteracting Terrorism (Article 5.1. states that the President of the Russian Federation determines the basics of the state’s counter-terror policies).

⁷⁵⁰ Russian Federation Concept of National Security, *supra* note 492.

of criminal law provisions was briefly discussed above and the major concern in relation to those norms and criminal approach towards terrorism is absence of a systemized approach and absence of important characteristics of the crimes of terror which affect their effective investigation and prevention. By the lack of systemized approach I mean a somewhat chaotic positioning of the crimes of terror within the Criminal Code: they do not follow each other and are not grouped around same chapter. The placement of the terrorism-related crimes in different parts of the criminal law is not wrong or terribly problematic as such, but it shows that the Russian legislator was not willing to systemize the criminal prohibition and punishment of crimes connected to the same issue. Moreover, some articles represent not one but at least three different criminal acts, as for example Article 205.1. The article was inserted in the light of Russia's ratification of the international convention. However, the Council of Europe Convention on the Prevention of Terrorism talks about public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism as separate crimes. While it does not mean that Russia had to follow exactly this approach, in the existing reality it would make sense to pay more attention to details and carefully draft the norms, aimed mainly at the prevention of terrorist attacks to occur in the future.

However, the most interesting for the purposes of this section would be the Federal Law on Counteracting Terrorism of 2006. As was mentioned above this legislative act replaced an earlier law on the same subject-matter but the recent law introduced significant changes, some of which are of a highly controversial meaning. The text of the law poses serious concerns from the perspective of liberal democracy and major democratic principles from the very first articles. Thus, Article 3 of the Law gives a definition of terrorism, terrorist activities, and acts of terrorism. The first noticeable feature of this law is the inclusion of the terrorist activities and ideologies in the definition of terrorism and terrorist activities. Thus,

terrorism is defined in Article 3 as “ideology of violence and practice of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action.”⁷⁵¹

It is not exactly clear why the Russian legislator decided to distinguish terrorism from terrorist activities and how it might make the War on Terror more effective. It would make sense if ‘terrorism’ is defined only as ideology as opposed to terrorist activities, but it also includes reference to certain practices. However, the definition of ‘terrorist activity’ given in the 2006 Law is broader than the one of ‘terrorism’ and includes “planning, preparation and committing acts of terrorism, propaganda of terrorist ideas; dissemination of materials or information which call to terrorist activity and justify or support the need for such activity; forming of illegal armed forces and participating in their activities and also informational or other types of aiding and assisting with regard to planning, preparation or implementation of a terrorist act.”⁷⁵² The definition of ‘terrorist activity’ combined with definition of ‘terrorism’ given in the same article might easily lead to a broad interpretation that includes political agenda incompatible with the governmental policies (especially in the Russian reality). Moreover, the ‘informational assistance’ in the absence of clear guidelines could be used to accommodate the need to filter the information communicated on the happening hostage or committed terrorist act and suppress the freedom of communication on terrorism-related matters.

The 2006 Law is of particular interest for this debate mainly for its provisions on the regime of counter-terrorist operation (Articles 11-17). The regime has been known in the

⁷⁵¹ **Article 3** reads as follow (in the original text): Терроризм - идеология насилия и практика воздействия на принятие решения органами государственной власти, органами местного самоуправления или международными организациями, связанные с устрашением населения и (или) иными формами противоправных насильственных действий. Available online at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=113621>.

⁷⁵² Federal Law on Counteracting Terrorism (2006), Article 3(2).

Russian legal system since 1998 and it was present in the previous Law on Counteracting Terrorism as well; however, the current law had modified the provisions on this strange legal construction. The regime of counter-terrorism operation appears to be very controversial and does not acquiesce with the text of the Russian Constitution on matters of states of emergency. Article 56 of the Constitution provides for possibility to impose certain restrictions on rights and liberties during a state of emergency. The procedure to introduce a state of emergency is provided in the Federal Constitutional Law on the State of Emergency: The President issues a decree approved by the Federation Council, with notification of the State Duma.⁷⁵³ The declaration of a state of emergency is subject to numerous restraints and controls imposed by the Law. The regulation of a state of emergency is in general compatible with international standards, i.e. the International Covenant on Civil and Political Rights, and the European Convention on Human Rights permit derogations from civil rights and liberties only in times of public emergency which must be officially proclaimed.

The major problem with the regime of counter-terrorism operation is that it goes beyond the ordinary rights restriction clause (Article 55(3)) on the scale of rights' limitations, but formally it does not qualify as a state of emergency as well. In fact, the regime of counter-terrorism operation imposes nearly the same restrictions on rights and liberties as during a state of emergency but without proclaiming a state of emergency and therefore without complying with procedural guarantees for such limitations. Moreover, unlike a state of emergency, the regime of counter-terrorist operation is not limited in time or location and there are no provisions on accountability or parliamentary control. The 2006 Law on Counteracting terrorism modified the previous law on this matter substantially: the previous law allowed derogations from ordinary human rights protection only in the area of counter-terrorist operation while the current law does not mention and define the 'area of counter-

⁷⁵³ Federal Law on State of Emergency (2001).

terrorism operation' at all. Therefore it does not impose in fact any limits on where special regime restrictions might be imposed and what could be declared as a 'zone of counter-terrorism operation'. Probably, the Russian authorities were unhappy about too narrow a definition of the 'counter-terrorist operation zone' and could not accommodate its large-scale operation nearly on the whole territory of the Chechen Republic. Therefore, new law of 2006 has removed this constrain for the law-enforcement bodies and the regime of counter-terrorism operation seems to be unlimited in terms of length (a state of emergency for example cannot be introduced for more than 30 days) and territorial location.

As to the restrictions of human rights and liberties during the regime of counter-terrorist operation they amount nearly to the same scale of rights limitation as during a state of emergency and some are unprecedented even for the latter. According to Article 11(3) the counter-terrorist regime might warrant:

- ID checks;
- removal of people for specified locations and towing of vehicles;
- screening of negotiations, letters and other communications, conducting searches of electric communication channels and the mail for the purpose to seek information about the committed act(s) of terrorism and prevention of others;
- use of means of transportation belonging to legal persons and in exceptional circumstances of the vehicles in the property of private individuals;
- seize of the industrial production using dangerous materials and components (i.e. chemicals, radioactive materials, etc);
- suspension of the communications for individuals or organizations from communication networks and devices;

- temporary evacuation of the residents from the territories affected by the regime of counter-terrorist operation;
- restrictions on movement of vehicles and pedestrians;
- unrestricted access by persons conducting a counter-terrorist operation to private homes and land plots, and to premises of all types of organizations for purposes of fighting terrorism;
- checks and searches at the entrance to the territory covered by the regime;
- restrictions or ban on the sale of certain goods, including guns, weapons, alcohol, etc.

The list of the limitations that can potentially be imposed during the regime of counter-terrorism operation is more than impressive and some should be mentioned separately as they go even beyond the limitations allowed even during a state of emergency. The first item is the screening of mail, phone conversations, telegraph and other communications. These types of limitations are in general allowed but in very limited cases and in the presence of strong judicial guarantees: it is possible only through obtaining a court order issued in relation to particular person or entity (Article 23(2) of the Russian Constitution). Blanket interference with the privacy of an unlimited number of individuals without seeking a court warrant is not permitted even in the regime of a state of emergency. As to the inviolability of home guaranteed by Article 25 of the Constitution, the new law takes it away from any judicial protection as State agents involved in counter-terrorist operation are allowed to access houses without any restrictions and warrants.

Another problematic area of the 2006 Law on Counteracting Terrorism is the failure of the law to provide clear guidance on who exactly should be in charge of the counter-terrorism operation.⁷⁵⁴ The magical figure, however, has enormous power as they coordinate

⁷⁵⁴ **Article 12** instructs the following about who can declare the regime of counter-terrorism operation and who, therefore, should be in charge of it: руководитель федерального органа исполнительной власти в области

the whole process and is personally responsible for how operation is conducted. Keeping in mind the limitations allowed during this regime and the frequency of terrorist attacks in Russia the possibility to apply these norms are far from being illusory. It looks very irresponsible from the side of the government and legislator to implement such laws especially in a state where the threat of terrorism is more than real and the law is of potentially frequent use. Ironically, vague provisions of the law make it really difficult to identify the person in charge of the operation and it is still unknown (at least to the public) who actually was responsible for counter-terrorist operation in Beslan in 2004.

The last point I want to draw attention to are the provision of Articles 7 and 8 which allow the country's military to fire on passenger planes or ships hijacked by terrorists. The legislative provision of this content can be found not only in Russia. For example, a similar norm was adopted in Germany (Section 14 of the Air Safety Act (*Luftsicherheitsgesetz*)).⁷⁵⁵ However, the Federal Constitutional Court of Germany found the law in violation of the German Basic Law and stated that Air Safety Act was incompatible with the Basic Law insofar as it affected the innocent passengers and crew of an aircraft.⁷⁵⁶ These people would be made objects not only of the hijacking but also of an action taken by the State in the course of defending people on the ground where the aircraft was aimed.⁷⁵⁷

обеспечения безопасности, либо по его указанию иное должностное лицо федерального органа исполнительной власти в области обеспечения безопасности, либо руководитель территориального органа федерального органа исполнительной власти в области обеспечения безопасности, если руководителем федерального органа исполнительной власти в области обеспечения безопасности не принято иное решение.

⁷⁵⁵ *Luftsicherheitsgesetz* (Air Safety Act), (2005).

⁷⁵⁶ For details on the Court's reasoning and judgement see Oliver Lepsius, *Human Dignity and the Downing of the Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 7 *German Law Journal* 9 (2006); and the follow-up on this publication by Manuel Ladiges, *Comment. Oliver Lepsius's Human Dignity and the Downing of the Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 8 *German Law Journal* 3 (2007).

⁷⁵⁷ For further details on the Court's Judgement and other controversial anti-terrorism measure in Germany see Raymond Youngs, *Germany: Shooting Down Aircraft and Analysing Computer Data*, 6 *International Journal of Constitutional Law* (2008).

I would suggest that the Russian authorities should follow the same line of argument, but to my knowledge there were no moves to challenge the constitutionality of Articles 7 and 8 of the 2006 Federal Law on Counteracting Terrorism. The suggestion to follow the German Federal Constitutional Court justification to quash these pieces of legislation allowing for gunning-down of an aircraft is based on the fact that operative basic rights provisions are very similar in both jurisdictions. Therefore, the dignity argument is not completely alien to the Russian reality and could be utilized in a similar way as it was done by the German constitutional jurisprudence.

To summaries, the regime of the counter-terrorist operation is of exceptional character mainly due to the fact of the possibility to impose far-reaching rights limitations without any control. The only guarantee given in the law is that the regime of counter-terrorism operation is to be announced immediately with giving precise information indicating the area and measures and restrictions involved. However, this requirement does not bear potential to provide any substantial protection against abuse as the format and procedure of such announcement is not specified in the law. The regime is in effect exceptional but it is not mentioned in the Constitution and it does not qualify as a state of emergency. Therefore, in Russia we can observe the tendency to seek extra-constitutional regime to address the threat of terrorism. The regime of counter-terrorism operation seems to be the only feasible option for the Russian authorities at the moment; there are no debates on its alteration or looking for a regulatory regime compatible with the Constitution of the Russian Federation. At this stage, Russia recognizes the exceptional character of terrorism and its threat, and therefore justifies through the unfortunate reality the necessity to sustain the regime of counter-terrorist operation. It is not easy to criticize the Russian government as it is in a difficult position and expends lots of effort and resources to address the threat of terrorism. Nevertheless, it cannot

justify the blanket limitations on individual rights and freedoms which sometimes can go even further than the regime of a state of emergency. Now I would like to address the Russian anti-terrorism policies from the perspective of militant democracy and see how it might be relevant for the Russian case.

5.3.3. Anti-Terrorism Policies in Russia: The Need for a Systemized Approach

From the analysis of the Russian anti-terrorism regime given above, it follows that Russia does not successfully perform the task of protecting its citizens from the threat of terrorism. The existing legislation and the way it is implemented are not consistent with the Russian reality and the necessity to take more coordinated actions. First of all, Russia relies mainly on criminal law as a means to fight its War on Terror. Criminalization of terrorist activities is an important and significant aspect of Russia's anti-terrorism policies; however it cannot be the ultimate solution to address the threat of terrorism; the Russian case demonstrates that it is not effective. Thus, many of the terrorist attacks committed in Russia involved suicide bombers and it is obvious that they do not care about the severity of the punishment, be it five or 50 of imprisonment, and criminal law cannot be used even to restore justice. Moreover, the Criminal Code provisions are spread over a few chapters which lead to conclusion that the Russian legislator did not put enough efforts into the present criminal aspect of an anti-terrorism regime as a systemized and coherent unit. Some crimes are identified as terrorism-related by mentioning them in other crimes' provisions. For example, attempted murder of a public figure might have nothing to do with terrorism, but the Criminal Code provision on assistance to terrorism lists planning and preparation of such crime as terrorism-related offence.

Secondly, the anti-extremism laws which guide the anti-terrorism policies can potentially target and prevent far more than needed. For example, the SOVA news archive

reveals that the major concern of anti-extremist activities is extending the list of anti-extremist materials and checking state and municipal libraries in order to detect the possession of such materials.⁷⁵⁸ The list is extremely long⁷⁵⁹ and there are multiple occasions when the same materials were banned twice or more by different courts or banned after the listing was successfully appealed.⁷⁶⁰ Apparently, Russia's War on Terror is more about limitations on speech and press rather than anything else.⁷⁶¹ Russia's counter-terrorism policies are being seriously criticized for such a shift in the focus of attention and it is claimed that the government widely abuses anti-extremist legislation mainly to chase minority religion instead of protection citizens from terrorism which is not only an imaginary threat in Russia but a real problem.⁷⁶² Moreover, it is argued that the overall anti-extremism strategy in Russia (as therefore anti-terrorism as well) does not have clearly formulated goals.⁷⁶³ In this respect, we can observe some similarities with the Turkish story, where protection of the constitutional principle of secularism is used to cover the hidden agenda of promoting and supporting a certain vision of the society endorsed in Atatürk's mind.

Thirdly, Russia unfortunately is not distinct from many other jurisdictions whose legal systems are familiar with anti-terrorism legislation. The Russian legislator also seeks to accommodate an anti-terrorism policy within a special regime introduced through the separate law. The 2006 Law on Counteracting Terrorism described above places one of the

⁷⁵⁸ Center for Information and Analysis "SOVA". Sankcii v otnoshenii sotrudnikov bibliotek, available online at <http://www.sova-center.ru/misuse/news/persecution/2010/05/d18706/>.

⁷⁵⁹ Federal List of Extremist Materials is published at the website of the Ministry of Justice and contains to date 891 items, including music albums, magazines, articles, books and brochures: <http://www.minjust.ru/ru/activity/nko/fedspisok/>.

⁷⁶⁰ Center for Information and Analysis "SOVA". Aleksandr Verhovskij, Bor'ba s Ekstremizmom ne Imeet Jasno Sformulirovannyh Zadach, available online at <http://www.sova-center.ru/misuse/publications/2011/05/d21668/>.

⁷⁶¹ See for example Center for Information and Analysis "SOVA". Archive on persecution of associations, mass media and individuals. Presledovanija Organizacij, SMI i Chastnyh Lic, available online at <http://www.sova-center.ru/misuse/news/persecution/>.

⁷⁶² See for example Center for Information and Analysis "SOVA". Galina Krylova Napominaet, Chto "Vmesto Zashity Mnirnyh Grazhdan ot Terrorizma FSB, Prokuratura, Minjust Presledujut Religioznye Men'shinstva", available online at <http://www.sova-center.ru/misuse/discussions/2011/04/d21527/>.

⁷⁶³ Verhovskij, *ibid.*

elements of anti-terrorism regime beyond ordinary the rights limitation clause, allows imposing substantial limits on rights and freedoms, similar to their content and effect of the measures imposed during a state of emergency. In that respect Russia is no different from other countries fighting a War on Terror, and its anti-terrorism policies represent the departure from ordinary constitutionalism. This is a valid point that the current War on Terror cannot be handled only through ordinary criminal law and preventive measures are needed; however, it does not assume the need for every state to invent its own regulatory regime to lead this war. This is the point where I find militant democracy relevant, including the case of Russian anti-terrorism policies.

Russia is familiar with the militant democracy concept and applies it to justify some of the measures taken in regards to political parties and groups as well as religious communities (both were analyzed in the preceding chapters). This is argument in favor of the possibility to implement militant democracy logic in the Russian War on Terror. Militant democracy is about protecting the foundation of the State by denying rights to those who aim to harm and destroy the system. The constant presence of terrorism in some regions of Russia and regular terrorist attacks are without any doubts harmful for the basis of the constitutional order of the country. Moreover, in the existing reality Russia can legitimately take serious preventive actions against threats of terrorism. The fact that the prevention theme is nearly missing from the anti-terrorism in Russia is really puzzling. This is not clear how the country is being subjected to regular terrorist attacks but does not have a decent preventive mechanism and most of the efforts are taken after tragic events happen.

I believe that militant democracy is of relevance for Russia, but for reasons different from what was said about Spain and Australia. First of all, if militant democracy reasoning is introduced in the anti-terrorism regime of Russia it will force the law-maker and executive to

reconsider the overall approach towards the threat of terrorism. Militant democracy allows creating system of preventive measures to safeguard the foundational qualities of the State. Once Russian government realizes that terrorism is of a threat not only for the life and health of its citizens but also for the State's structure, and that there are means to address it, the major theme of the anti-terrorism regime will shift. Unfortunately, there is no possibility to address the threat of terrorism without any preventive measures; therefore the theme of prevention must be introduced into the Russian regime of anti-terrorism policies. Furthermore, if the law-maker and government follows the logic of militant democracy, and the conditions of its legitimacy, then preventive policies would be governed by the test of presence of convincing links between the threat and measures being taken as well as stricter procedural protection in the case of precautionary measures. Therefore, a militant democracy possibility could modify the overall direction of anti-terrorism policies in Russia and would keep it within acceptable limits. It is of crucial importance to underline here that terrorism is present in Russia and it is not a matter of theoretical and political speculation only. It makes the argument in favor of militant democracy reasoning even more valid. There will be a legitimate possibility to establish a link between democracy's self-protective measures and the threat of terrorism.

Second, militant democracy might be relevant to reconsider the existing legislative provisions on counter-terrorist operations which appear to be the major anti-terrorism strategy at the moment. I mentioned a few times already that the War on Terror does not require seeking new regulatory regimes as it happens in many countries at the moment. Russia is not an exception from the general trend, and introduced its own counter-terrorism regime which does not fit into anything allowed by the Constitution. It might be legitimate to claim that the level of terrorism threat in Russia requires extraordinary measures and

probably counter-terrorism operation is one of the most effective measures available; however, it does not justify unauthorized departure from the constitutional rules on rights limitations issue.

The existing Law on Counteracting Terrorism must be assessed from the perspective of militant democracy and follow the principle of ‘the greater the departure from the constitutional normalcy the stronger the judicial protection and other forms of external control must be.’ The best option for the anti-terrorism policies would be to follow a constitutionally endorsed militant democracy model which constitutionally authorizes departure from ‘constitutionalism as usual’ by setting levels of departure and minimum procedural guarantees. Probably, in case of Russia it will not be easy to introduce another constitutional regime of exception (chapter 2 on fundamental rights is subject to a complicated amendment procedure), but at least it could be done through a proper piece of legislation which would not give powers to impose serious limitations upon rights and freedoms without any form of control, and without naming the state official responsible for leading and coordinating the counter-terrorism operation. However, militant democracy logic might be useful and relevant for Russian authorities to reconsider its approach to anti-terrorism policies and introduce a more coherent, logical, and effective model based on a constitutionally-compatible regime of prevention with strictly regulated levels of departure and strong judicial protection for precautionary measures against its great domestic enemy.

To conclude, Russia is familiar with the concept of militant democracy even though it is not utilized justifiably and effectively. The idea is known from the governmental practice of promoting an imaginary system of society, where only certain religious groups can be admitted and only nice things could be said about the government and its policies. The regulation of activities of political parties, religious associations and anti-extremism

legislation are used to protect and endorse an ideal vision of the society through denying rights to participate in public affairs those who disagrees with such a model. Therefore, the idea to protect the system from its enemies is not alien to the Russian legal and political system. If there are some efforts taken at the federal level, the idea could be turned into a valuable and useful guide on how to defend the fragile semi-democratic system from its real enemies and how to promote greater democracy. Taking into account that the threat of terrorism is real in Russia, the direction of anti-terrorism politics could be successfully refocused from the promoting an imaginary society to the real threat of terrorism, separatism, and racism widely present in the country.

5.4 Militant Democracy and the War on Terror: The Case of Australia

Introduction

Australia has been relatively untroubled by terrorist attacks over the years and it explains the fact that Australia belongs to the list of countries which never had anti-terrorism legislation before 11 September events (apart from those dealing with either crimes as murder, hijacking, bombing, or implementing international treaties on terrorism).⁷⁶⁴ However, the situation changed dramatically after 11 September attacks and the Australian government was quick to adopt a large number of the anti-terrorism legislation in a very brief period of time (since 2001 the Australian Parliament adopted 44 legislative acts directly dealing with counter-terrorism). Most of them were reactions to new terrorist attacks elsewhere in the World (Bali, the United Kingdom, and Madrid). Newly adopted laws amount to a significant departure from the previously existing regime and pose many questions and concerns about

⁷⁶⁴ For detailed list of anti-terrorism legislation see the Internet Recourse Guide 'Australian Terrorism Law' available online at the Parliament of Australia Parliamentary library webpage: <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrleg>

the necessity of such laws, their effectiveness, and appropriateness of the response.⁷⁶⁵ In fact, Australia has adopted one of the most rigid and unprecedented by many accounts anti-terrorism measures (amongst the western democracies).

This case-study has the purpose to investigate if militant democracy has a place in Australia's anti-terrorism policies, and how it might address the numerous concerns of the current situation. First, the regime itself and major concerns will be introduced to be followed by the overview of the most recent constitutional development in the field of anti-terrorism policies and conclusion on how militant democracy is relevant for the war on terror in Australia.

5.4.1. Overview of Australia's Anti-Terrorism Regime and Major Concerns

As was mentioned, since 2001 the Australian Parliament adopted 44 laws directly dealing with anti-terrorism. Currently, Australia's anti-terrorism regime includes: crimes of terror,⁷⁶⁶ intelligence services new powers,⁷⁶⁷ measures of pre-emptive policy,⁷⁶⁸ proscription of terrorist organizations,⁷⁶⁹ besides others. I will exclude the criminal aspects of Australia's

⁷⁶⁵ For example, the Australian Human Rights Commission warns about potential negative impact of exercise of on many individual rights and liberties, i.e. the right to a fair trial; the right to freedom from arbitrary detention and arrest; the right not to be subject to torture; the right to privacy; the right to freedom of association and expression; the right to non-discrimination; the right to an effective remedy for a breach of human rights (See "A Human Rights Guide To Australia's Counter-Terrorism Laws" (2008) adopted by the Australian Human Rights Commission at http://www.hreoc.gov.au/legal/publications/counter_terrorism_laws.html).

⁷⁶⁶ As a response to the events of 11 September 2001, in the very first package of the Government's anti-terrorism legislation Australia introduced a series of new crimes to capture the terrorist activities. Criminal Code Act (1995) was amended in its Schedule 1, Part 3.5 (Terrorism) to add Divisions 101-103 (The Security Legislation Amendment Act 2002 (Cth)). New provisions were added to define the terrorist act, introduce criminal offence of being involved in planning or committing of a terrorist act, criminalise individual's involvement or association with terrorist organisations. In addition, the Attorney-General was given the power to proscribe terrorist organisations.

⁷⁶⁷ After the 2003 Bill was adopted ASIO gained a new power to seek two kinds of special warrants: authorising the questioning and authorising detention and questioning of the person (Division 3, Part III Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003).

⁷⁶⁸ In the aftermath of the 2005 London bombings the new anti-terrorism legislation package was introduced in Australia⁷⁶⁸ and Divisions 104 (Control Order) and 105 (Preventive Detention) were added to the Criminal Code (Part 5.3) (The Anti-Terrorism Act (No.2) 2005).

⁷⁶⁹ Prior to 11 September 2001, the only possibility to ban an organisation in Australia (including the terrorist one) was the regime of 'unlawful association' established in the 1920s. However, in the aftermath of 11 September events two additional regimes were introduced: the first regime was adopted in response to the United Nations Security Council Resolution 1373 which required member states to take measures in relation to

anti-terrorism policies as militant democracy does not have the opportunity to be applied in criminal prosecution cases and will focus in my analysis on the preventive non-criminal aspects of the anti-terrorism regime. However, it is important to note that criminal aspects of the anti-terrorism package represent many serious concerns in regards of justification, legitimacy, and effectiveness of such measures.⁷⁷⁰

Australian Security Intelligence Organization and its New Powers

The Australian Security Intelligence Organization (ASIO) was established in 1949. Its major role is “to identify and investigate threats to security, wherever they arise, and to provide advice to protect Australia, its people and its interests”.⁷⁷¹ In the early stages of its operation the agency was concerned mainly with the possible threat of Soviet espionage and communism in general. However, after the 11 September 2001 the number of staff and the budget of the organization have been substantially increased in recent years;⁷⁷² moreover, its powers were substantially increased.⁷⁷³ The amendment was labeled “the most controversial piece of legislation ever reviewed by the Committee on ASIO, ASIS and DSD”.⁷⁷⁴ The strong opposition to the Bill caused long debates and deliberations and it took fifteen months to pass the Bill (so far it is the longest known parliamentary debate in Australia).⁷⁷⁵ The Original Bill went through serious transformation through parliamentary processes, i.e. the

terrorist organisations’ financial flows and the second regime – a scheme to proscribe terrorist organisations - was introduced by the Security Legislation Amendment (Terrorism) Bill 2002. Division 102 of the Criminal Code established a comprehensive scheme for proscribing an organisation and a list of offences for individuals involved in activities of proscribed organisations.

⁷⁷⁰ For detailed account of crimes of terror aspect see Andrew Lynch & George Williams, *What Price Security? Taking a Stock of Australia’s Anti-Terror Laws* 14-28 (2006).

⁷⁷¹ Australian Security Intelligence Organisation, “About ASIO: Overview”, <http://asio.gov.au/About-ASIO/Overview.html>

⁷⁷² For example, the Howard Government allocated A\$232 million to intelligence agencies in general and A\$131 million to ASIO in particular following the ASIO (Terrorism) Amendment Act 2003 (Cth), see Sarah Sorial, *The Use and Abuse of Power and Why We Need a Bill of Rights: the ASIO (Terrorism) Amendment Act 2003 (Cth) and the Case of R v Ul-Haque*, 34 Monash University Law Review 403 (2008).

⁷⁷³ Prior to 11 September 2001 ASIO powers and methods of work were regulated by the Australian Security Intelligence Organisation Act 1979. Shortly after the September 11 events the Howard government initiated and introduced to the Parliament on March 21, 2002 a Bill amending the 1979 Act.

⁷⁷⁴ A Human Rights Guide to Australia’s Counter-Terrorism Laws (2008), *supra* note 764.

⁷⁷⁵ Australian Security Intelligence Organisation Amendment (Terrorism) Act (2003) (Cth).

original Bill allowed for the detention of children (i.e. persons under 18 years) and did not allow entitlement to legal representation during preventive detention and questioning.⁷⁷⁶ Even though the final version of the Bill eliminated the most of the controversial provisions, it is substantially different from the original version and was meant to reach a compromise on all points, it still remains highly contested.

After the 2003 Bill was adopted ASIO gained a new power to seek two kinds of special warrants: authorizing the questioning, and detention and questioning of the person.⁷⁷⁷ A warrant must be obtained from the 'issuing authority' (a federal magistrate or judge appointed by the Attorney-General). However, before applying for the warrant the Director General of ASIO must seek the consent of the Attorney General. There is no need to suspect someone of being involved in committing or planning to commit an act of terrorism to issue the warrant in question. If person is believed to be able to 'substantially assist in the collection of intelligence information that is important in relation to a terrorism offence' it is enough to initiate the procedure. In the instance of applying for the warrant to detain and question, the Attorney General must be satisfied that if the person is not taken to the custody immediately they might divulge the investigation to other person(s) involved in committing a terrorist act, may not appear before the authorities for questioning, or may destroy or damage the thing that may be later requested to be presented to the authorities.

A questioning warrant might be issued for up to 28 days and questioning itself might last for up to 24 hours (in blocks of no more than eight hours each) or 48 hours with the interpreter. Under the questioning and detention warrant a person can be kept in custody for up to 7 days and questioning for no more than 24 hours in a maximum eight hours blocks

⁷⁷⁶ For detailed account of the changes to ASIO's powers during the parliamentary deliberation see Joo-Cheong Tham, K. D. Ewing, *Limitations of a Charter of Rights in the Age of Counter-Terrorism*, 31 Melbourne University Law Review 480 (2007).

⁷⁷⁷ Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), Division 3, Part III.

(without being suspected of committing a crime of terror). The latter is seven times longer than if a terrorist suspect is questioned by the Australian Federal Police under the regular criminal investigation procedure. In addition, the legislation in question imposes obligations after the warrant expired: it is forbidden to disclose that someone is subject to the warrant (without any exceptions for reporting by journalists, even if the report is about possible abuse or misuse of the warrant system).

The measures were accepted to be somewhat extraordinary even by the government and Parliament which is evident from the three years sunset clause set up in the Bill. However, in 2006, Parliament extended the sunset clause on the ASIO legislation for another 10 years (to July 2016). In addition, since 2003, five more laws were enacted to extend further ASIO powers (in relation to issuing search warrants, postal and delivery service warrants, and warrants to intercept the telecommunications of innocent people which the ASIO might find helpful in obtaining intelligence related to security). While there are no proven cases of ASIO abusing or misusing its powers, the risk that one day it might happen is always present.

Pre-Emptive Policy: Preventive Detention and Control Orders

Australia's pre-emptive policy can qualify as the example of the most controversial item in the anti-terrorism policy. No one would contest that the main purpose of the entire body of anti-terrorism legislation is the prevention of future terrorist attacks (and not only criminal prosecution of those who committed them). Therefore, many anti-terrorism measures are of a preventive character and states might take actions well in advance, for example, criminalize preparation for terrorist activities. However, serious concerns pose policies granting extended powers to governmental intelligence agencies where application of those powers could lead to the denial of the most fundamental individual rights and freedoms (especially those directly related to fair trial guarantees). In the aftermath of the 2005 London bombings the

new anti-terrorism legislation package was introduced in Australia⁷⁷⁸ and Divisions 104 (Control Order) and 105 (Preventive Detention) were added to the Criminal Code (Part 5.3).⁷⁷⁹

Control Orders

A Control Order is a measure of preventive character. The content and nature of the measure itself is not something unknown before; it might be imposed on persons recently released from the prison or on probation but in any case confirmed by the Court to have committed a crime or other offence. In other words, such measures are traditionally imposed on someone found guilty of serious wrongdoing and, therefore, authorities have legitimate grounds to keep some control over their actions and behavior. However, Australia uses this institution in quite a specific context: the person does not need to be charged or prosecuted for any kind of offence. At the same time, limitations imposed by the Control Order might affect many aspects of someone's liberty: it may require a person to stay in a certain place at certain times; prevent a person from going to certain places or talking to certain people, accessing or using certain types of telecommunications, from carrying out specific activities (including those relates to a person's work); or having to wear a tracking device.⁷⁸⁰

The power to seek an interim Control Order were granted to senior members of the Australia Federal Police only. First of all, the AFP member must have reasonable grounds to believe that making the order would 'substantially assist in preventing a terrorist act' or suspect that the person (over whom the Control Order is sought) has provided training for a proscribed terrorist organization, or received a training from it. The next step is to get written consent from the Attorney General to request an interim order from the Court (the Federal

⁷⁷⁸ Announced by the Prime Minister after an internal review of terrorism legislation. For more details see <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>.

⁷⁷⁹ The Anti-Terrorism Act (No.2) (2005) (Cth).

⁷⁸⁰ For details see Lynch & Williams, *supra* note 770, at 42-43.

Court, Family Court, or Federal Magistrates Court can issue such an order). The AFP member has to provide the Attorney General with details on what grounds the order is being sought and also reasons against such an order to be issued. Once the consent of the Attorney General is granted, the AFP member can request the interim Control Order from the Court. The request to the Court must be made in the same form as it was presented to the Attorney General. The Court will assess the reasonableness of issuing the Control Order only on the grounds presented by the AFP members' request. In order "to issue the interim control order the Court must believe, on the balance of probabilities, that it would substantially assist in preventing a terrorist act or that the person has received training from or provided training to the listed terrorist organisation."⁷⁸¹ In addition, the Court must ensure the order "is reasonably necessary, and reasonably appropriate and adapted" and to decide on it, "the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances [including the person's financial and personal circumstances]."⁷⁸²

The most controversial provision for setting up the Control Orders mechanism would probably be the power of the issuing Court to decide about the necessity to issue an order 'on the balance of probabilities.' The test itself is not a novelty, but traditionally it is a standard of proof for civil cases which do not affect individual liberties. Taking into account the character of the limitations imposed on individuals under the Control Order (which might actually amount to house arrest), such a relaxed test for the Court's assessment seems to be highly undesirable; it is indeed a serious departure from the generally recognized principles of criminal justice, and one of the major democratic principles – rule of law – in general. Another striking feature of the procedure is that the interim Control Orders are issued *ex parte*. So, the individual affected is not present in the Court and it is only for the Court to

⁷⁸¹ Criminal Code Act (1995) (Cth), Sections 104.4 paragraph (1)(d)

⁷⁸² Ibid, Sections 104.4 paragraph (2).

decide if there are exceptional circumstances described by the AFP member so the matter has to be decided *ex parte*.

Once an interim Control Order is issued by the Court, the AFP member has to decide if the order should be confirmed or not. In case the Control Order is to be confirmed, the AFP member has to go to the Court again and seek a confirmed order. This time, the person over whom the Control Order is sought will be given a 48 hours notice of the hearing, a summary of the grounds to seek an order, and copies of the documents given to the Attorney-General to get their consent. However, some information still might be hidden from the individual if revealing it will be considered to undermine national security or jeopardize operations of the police. In other words, even though the notice on the hearing and summary of the ground are to be sent to the person affected, there is still no guarantee that the person will be aware of all the evidence against them and here again we have serious concerns for fair trial guarantees. While the presence of the person in the courtroom when the Control Order is to be confirmed is a significant improvement of the original draft of the Bill, it still does not solve all the problems and concerns.

The Court might declare the order to be void if it finds that at a time it was made there were no grounds for it. This might be embarrassing if the Court itself finds that there were no grounds to issue an interim Control Order. Another possible outcome of the Court's hearing might be the removal of some measures/limitations imposed on the individual if the Court is satisfied that there were grounds to impose a Control Order but measures are not reasonably necessary, reasonably appropriate, and adapted. The third possible outcome is that the Court would confirm the interim Control Order fully and it may last up to twelve months (or three months for persons between sixteen and eighteen years of age). After an order has expired the AFP can make new requests following the same procedure. While the order is still in force,

the AFP may apply to the Court to modify the original order to add more obligations, limitations, or restrictions with no need for the Attorney General consent this time. The individual has a right to apply to revoke and modify the order (which does not make much sense if we keep in mind the procedure to confirm the order where the grounds for why the order could be not revealed to the individual over whom the Control Order is sought), or alternatively the confirmation of the original order can be appealed to a higher court.

The Australian model of the Control Order is based on the UK's scheme, however the major difference is that the UK carefully drafted it with the provisions of the Human Rights Act in mind⁷⁸³ while the Australian Parliament did not need to have to consider individual rights and freedoms as probable constrain on the contents of the laws it enacts. The Australian judiciary had a chance to review the constitutionality of the Control Orders regime, but in 2007 the High Court upheld the constitutionality of this regime in the Thomas case (see below).

Preventive Detention

The Preventive Detention Order (PDO) regime is set up and regulated in details by Division 105 of the Criminal Code Act⁷⁸⁴. The very purpose of the PDO is “to detain a person for a short period of time in order to prevent an imminent terrorist act to occur or preserve evidence of, or relating to, a recent terrorist act.”⁷⁸⁵ Initially a person can be taken into custody for up to 24 hours (but with the possibility of it to be extended up to 48 hours).

In order to obtain a PDO a member of the Australian Federal Police must apply to an issuing authority. The consent of the Attorney General is not required. For the initial PDO the issuing authority would be a senior member of AFP itself, but for the continued PDO it

⁷⁸³ See further Bronwen Jagers, *Anti-terrorism control orders in Australia and the United Kingdom: a comparison*, 29 Australian Parliamentary Library Research Paper (2008).

⁷⁸⁴ The Anti-Terrorism Act (No.2) (2005) (Cth)

⁷⁸⁵ Criminal Code Act (1995) (Cth), Sections 105.1 (a) and (b)

would be a serving or retired judge who gave consent to act in such a capacity⁷⁸⁶. While making, extending, or revoking the PDO, judicial officers do not act as members of their Courts, but are acting in personal capacities (mainly because Australian Constitution sets in very strict terms the list of powers those can be exercised by the judiciary).⁷⁸⁷ This looks somewhat unusual and strange that on the one hand it is important that the issuing authority must be a member of the judiciary, and on the other hand, the legislator attempts to disconnect the making of the PDO from the duties within the judicial office. The situation looks awkward. Is the exercise of non-judicial powers like making a PDO compatible with the individual holding judicial office, i.e. can the judge wear two hats and be judge and not a judge at the same time as the legislator requires? The case is easier for retired judges as they do not have links with the judicial office anymore, but for acting judges this might be a puzzling situation.

To issue a PDO a few conditions must be met. The first ground to initiate a PDO making procedure is the presence of a threat of committing a terrorist act which is imminent and is expected to be occurred in the next 14 days.⁷⁸⁸ In addition, “the issuing authority must be satisfied that there are reasonable grounds to suspect that the subject [of the PDO] will engage in a terrorist act; or possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or has done an act in preparation for, or planning, a terrorist act.”⁷⁸⁹ The issuing authority must also be satisfied that “making the order would

⁷⁸⁶ For details see *Ibid.*, Sections 105.2

⁷⁸⁷ To order detention or punishment after someone has been found guilty of a crime would be a classical example of judicial power exercise while the nature of the preventive detention order and procedure to impose it does not fit into the traditional domain of the Australian judiciary. This is why the construction of a judge acting in his or her personal capacity was introduced to the PDO regime (otherwise it would require granting additional powers to the judiciary).

⁷⁸⁸ Some commentators’ mention that these two conditions do not seem to be necessary included and the law could easily reach its goals with the latter only, see Lynch & Williams, *supra note 770*, at 49.

⁷⁸⁹ Criminal Code Act (1995) (Cth), Sections 105.4 paragraph (4) (a)

substantially assist in preventing a terrorist act occurring”⁷⁹⁰ and “detaining the subject for the period for which the person is to be detained under the order is reasonably necessary”⁷⁹¹ for the purpose of preventing a terrorist act. The second ground to make a PDO is for the purpose “to preserve evidence relating to a recent terrorist act [which occurred in last 28 days] and if the period of detention is necessary for this purpose.”⁷⁹² Once a PDO is issued the person is taken into custody; the officer taking the person into custody has the same range of powers as of arresting someone for committing a criminal offence. The person taken into custody must be supplied with the copy of the order and there are also general guarantees as to the condition of detention and the prohibition of torture. However, the person cannot be questioned under a PDO and this could be done only if a separate questioning warrant is obtained.

One of the problematic features of the PDO regime is the list of people the person taken into custody is allowed to contact: one family member (or housemate), an employer, or one business partner. However, while making these contacts the detainee cannot reveal the information about being detained and is allowed only to say that he or she is safe but cannot be contacted for the time being (needless to say how strange it might sound if someone’s family member deliver such a short and strange message during the phone call). The detained person can make a complaint to the Ombudsman and consult a lawyer about the conditions of their detention. However, the right to contact a family member or a lawyer can be limited in the interest of preserving evidence and preventing intervention to the process of gathering the information and other tasks carried out by the intelligence agencies in relation to an act of terrorism.

⁷⁹⁰ Ibid., Sections 105.4 paragraph (4) (b)

⁷⁹¹ Ibid., Sections 105.4 paragraph (4) (c)

⁷⁹² Ibid., Sections 105.4 paragraph (6)

Another interesting feature of the PDO regime is that it strictly prohibits disclosing to anyone the existence of the PDO (punishable by up to 5 years imprisonment) and it applies to the person subject to the order, the lawyer, police officers, and interpreters. The reasons behind such a regime might be understandable and it could be accepted as reasonable to some extent to prohibit contact of the detained person with potential terrorists, but the effectiveness of such a measure is legitimately contested by many commentators. A. Lynch and G. Williams in their book point out that even if we assume that the subject of the PDO is a member of a terrorist organization planning to commit or having recently committed an act of terrorism, then their disappearance and suspicious call about being safe but not able to be contacted would be a clear signal to the entire cell. While it is important to keep some secrecy over a crime of terror investigation and prevention, these measures still have to be reasonable and effective. Situations when a person shares the information with their partner (if they are not informed yet) about their child being detained under a PDO might be followed by the prosecution and imprisonment of up to five years. While these situations are not likely to occur and the government claimed it to be measure of the last resort but not to be used widely and on an everyday basis, the mere possibility of such causalities casts a dark shadow on such laws and makes them undesirable *a priori*. Another fact about the PDO regime speaks for itself: there were no preventive detention orders issued to date in Australia and it sends another message against laws adopted in a rush, fear, and misleading ambitions about the magic powers of super precautionary laws.

Terrorist Organizations⁷⁹³

Prior to 11 September 2001, the only possibility to ban an organization in Australia (including the terrorist one) was the regime of ‘unlawful association’ established in the

⁷⁹³ For more details on procedure, concerns and recommendation to improve the scheme see Andrew Lynch, Nicola McGarity & George Williams, *Proscription of Terrorist Organisations in Australia*, 37 Federal Law Review 1 (2009).

1920s.⁷⁹⁴ However, in the wake of 11 September events, two additional regimes were introduced and became important elements of Australia's anti-terrorism regime.⁷⁹⁵ The first regime was adopted in response to the United Nations Security Council Resolution 1373 which required member states to take measures in relation to terrorist organizations' financial flows. The second regime – a scheme to proscribe terrorist organizations – was introduced by the Security Legislation Amendment (Terrorism) Bill 2002. Division 102 of the Criminal Code established a comprehensive scheme for proscribing an organization and a list of offences for individuals involved in activities of proscribed organizations.

Terrorist Organization: Definition

According to the Section 102.1 a regulation specifying an organization as terrorist is made if it “is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act [whether or not a terrorist act has occurred or will occur]⁷⁹⁶ or advocates the

⁷⁹⁴ Crimes Act 1914 (Cth) Part IIA.

⁷⁹⁵ Banned organizations are: Abu Sayyaf Group - Listed 14 November 2002, re-listed 5 November 2004, 3 November 2006 and 3 November 2008; Al-Qa'ida (AQ) - Listed 21 October 2002, re-listed 1 September 2004, 26 August 2006, 8 August 2008 and 22 July 2010; Al-Qa'ida in the Arabian Peninsula (AQAP) - Listing to commence after disallowance period; Al-Qa'ida in Iraq (AQI) (formerly listed as Al-Zarqawi and TQJBR) - Listed 2 March 2005, re-listed 17 February 2007 and 3 November 2008; Al-Qa'ida in the Islamic Maghreb (AQIM) - Listed 14 November 2002, re-listed 5 November 2004, 3 November 2006, 8 August 2008 and 22 July 2010; Al-Shabaab - Listed 21 August 2009; Ansar al-Islam (formerly known as Ansar al-Sunna) – Listed 27 March 2003, re-listed 27 March 2005, 27 March 2007 and 17 March 2009; Asbat al-Ansar (AAA) - Listed 11 April 2003, re-listed 11 April 2005, 31 March 2007 and 17 March 2009; Hamas's Izz al-Din al-Qassam Brigades - Listed in Australia 9 November 2003, re-listed 5 June 2005, 7 October 2005, 10 September 2007 and 8 September 2009; Hizballah External Security Organisation - Listed 5 June 2003 and re-listed 5 June 2005, 25 May 2007 and 15 May 2009; Islamic Army of Aden (IAA) - Listed 11 April 2003, re-listed 11 April 2005, 31 March 2007 and 17 March 2009; Islamic Movement of Uzbekistan - Listed 11 April 2003, re-listed 11 April 2005, re-listed 31 March 2007 and 17 March 2009; Jaish-e-Mohammed (JeM) - Listed 11 April 2003, re-listed 11 April 2005, 31 March 2007 and 17 March 2009; Jamiat ul-Ansar (formerly known as Harakat Ul-Mujahideen) - Listed 14 November 2002, re-listed 5 November 2004, 3 November 2006 and 3 November 2008; Jemaah Islamiyah (JI) - Listed 27 October 2002, re-listed 1 September 2004, 26 August 2006, 8 August 2008 and 22 July 2010; Kurdistan Workers Party (PKK) - Listed 17 December 2005, re-listed 27 September 2007 and 8 September 2009; Lashkar-e Jhangvi (LeJ) - Listed 11 April 2003, re-listed 11 April 2005, 31 March 2007 and 17 March 2009; Lashkar-e-Tayyiba - Listed 9 November 2003, re-listed 5 June 2005, 7 October 2005, 10 September 2007 and 8 September 2009; Palestinian Islamic Jihad - Listed 3 May 2004, re-listed 5 June 2005, 7 October 2005, 10 September 2007 and 8 September 2009. Available online at <http://www.ema.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>.

⁷⁹⁶ Advocacy is defined as “directly or indirectly counsels, urges or providing instructions on doing terrorism act and directly praises terrorism in circumstances where there is a risk that such praise might have the effect of

doing of a terrorist act [whether or not a terrorist act has occurred or will occur]”.⁷⁹⁷ Legislative amendments conferring powers to proscribe a terrorist organization upon the Attorney-General gained significant community opposition and was even reported by the Senate Legal and Constitutional Legislation Committee as raising the most concerns.⁷⁹⁸ This measure of the anti-terrorism package legislation is quite different from many others described above as it was used quite extensively. By September 2008 nineteen organizations were banned through this procedure (eighteen of these organizations have Muslim affiliation).⁷⁹⁹ The situation around this scheme became even more controversial when parliament passed a law in 2004 removing the limitation of banning only those organizations that had been identified by the UN Security Council. The Attorney-General is allowed now to ban an organization if it is reasonably believed to be involved in terrorist activities and the prior consent of the Parliament is not needed.

After these amendments the Government gained nearly unlimited and uncontrolled powers to list, de-list and re-list an organization as terrorist. The Criminal Code provides some protection mechanism (like Reviews by Parliamentary Joint Committee on ASIO, ASIS and DSD)⁸⁰⁰ but it did not prove to be an effective remedy and as to date no disallowance of the Attorney-General decision to list an organization as terrorist was made. Someone may confront the statement about the unlimited character of new Attorney-General powers arguing that the organization can be de-listed as terrorist, but the argument is not very sustainable if we keep in mind that this procedure is also in the hands of the same official. The concerns are raised even further if taking into account the vague language of the

leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.”

⁷⁹⁷ Criminal Code Act (1995) (Cth), Section 102.1 paragraph 2 (a)(b)

⁷⁹⁸ Joo-Cheong Tham, *Causalities of the Domestic War on Terror*, 28 Melbourne University Law Review, 518 (2004).

⁷⁹⁹ A Human Rights Guide to Australia’s Counter-Terrorism Laws, *supra note 764*.

⁸⁰⁰ Criminal Code Act (1995)(Cth), Section 102.1 (a)

Criminal Code provisions defining advocacy of terrorism for example (which is one of the grounds to list an organization involved in it as a terrorist one).

The most crucial concern about the scheme briefly outlined above is that the listing of organization causes drastic consequences for its members as Subdivision B of Division 102 provides an extensive list of crimes for individuals affiliated with terrorist organizations. The procedure has lots of flaws and nearly every element of it could be seriously criticized, i.e. imprecise definition of ‘advocating a terrorist act’, the lack of clear criteria to guide the use of the Attorney-General’s powers, the lack of opportunities to oppose the intended proscription and seek an independent review of the decision to proscribe an organization.

To summaries, Australia has developed a comprehensive anti-terrorism regime in only few years and resorted to various measures, including crimes associated with acts of terrorism. The analysis of Australia’s anti-terrorism policies reveals that some laws are problematic by many accounts and major problems could be summarized, but not limited to the predominantly reactive response to terrorist attacks, poor quality of laws as a result of legislating with urgency,⁸⁰¹ a shift in the separation of powers and general interference with the established system of governance, and the negative impact on the protection of individual

⁸⁰¹ For example, the ASIO Legislation Amendment Bill 2003 was introduced to the Parliament on 27 November 2003 and passed only eight days later. For detailed information on the passage of the bill see Parlinfo Search, Parliament of Australia webpage at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=alphaAss;query=%28Dataset%3AbillsP%20revParl%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billh%20ome%22%29%20Title%3A%22ASIO%20Legislation%20Amendment%20Bill%202003%22;rec=0; Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003 was passed even quicker – only two days after it was introduced (and Senate was recalled for the purpose to pass the Bill). For detailed information on the passage of the bill see Parlinfo Search, Parliament of Australia webpage at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=alphaAss;query=%28Dataset%3AbillsP%20revParl%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billh%20ome%22%29%20Title%3A%22Criminal%20Code%20Amendment%20%28Hamas%20and%20Lashkar-e-Tayyiba%29%20Bill%202003%22;rec=0.

rights and freedoms. The listed problematic features of the anti-terror laws also provide the potential to create a climate of hate⁸⁰²

The human rights concern is being aggravated by the fact that Australia does not have a bill of rights and it has serious implications for the justification of the War on Terror. First, citizens cannot secure protection from excessive rights curtailed through the procedure of judicial review, and second, it weakens the comparative argument of adopting measures similar to other jurisdictions. While some anti-terror measures were enacted in Australia based on the UK model (i.e. Control Orders), Australia cannot offer the same level of human rights protection as the United Kingdom.⁸⁰³ In the absence of a written and assembled bill of rights the decision-maker is not going to take compatibility with human rights concerns seriously and to the moment this matter has received “inadequate attention.”⁸⁰⁴ The adoption of a bill of rights will not become a universal solution of all concerns and problems with Australia’s anti-terrorism regime, however it will indicate some limits for the government initiatives to introduce new draconian measures and will empower individuals by subjecting all the laws to proper procedure of the judicial review where anti-terrorism measures could be properly assessed against the human rights protection clause.

To conclude, there are some serious flaws in Australia’s anti-terrorism regime. There is no single measure that was not subjected to critical remarks and calls to be abolished or amended. While there is probably no example in the modern world where a government did not overreact and seek to expand its powers to fight terrorism, the Australian case is

⁸⁰² Commentators and scholars conclude that it “created fear and anxiety in Australia’s Muslim communities” (see for example, Lynch & McGarity, *supra* note 654, at 225) and anti-Muslim bias in Australian media is growing together with number of people reported to experience an increase in racism (see for example, Barbara Perry, Scott Poynting, *Inspiring Islamophobia: Media and State targeting of Muslims in Canada since 9/11*, TASA Conference paper, University of Western Australia & Murdoch University, 156 (2006). Moreover, the Australian Arabic Council’s racial hatred telephone hotline registered 20 times more complaints in a month following September 11 events (see John von Doussa, *Reconciling Human Rights and Counter-Terrorism-a Crucial Challenge*, 13 James Cook University Law Review 122 (2006).

⁸⁰³ For details see e.g. Jagers, *supra* note 744.

⁸⁰⁴ For details see Doussa, in *supra* note 763, at 122.

especially problematic and worrying. A country that has never experienced any act of terrorism in its territory adopted the most-unprecedented for the western-type democracies anti-terrorism measures in the lack of a statutory bill of rights. The government decided to sacrifice many founding principles of the State's structure and democratic principles in the name of identifying and catching terrorists.

Australia created an unknown to the constitutional theory regime between normalcy and a state of emergency. The departure from the regime of constitutional normalcy cannot be justified solely by the War on Terror rhetoric. In the absence of a real war a democratic state must be guided by the rule of law, human rights must be preserved, and the principle of separation of powers must ensure the accountability of the government and possibility for individuals to seek protection in the courts. Departure from all these principles proves that Australia is misguided by the fear of terrorism, and unless a state of emergency is introduced, the government's policy in response to terrorism should remain within the boundaries of constitutional normalcy. I argue that the militant democracy logic might be a helpful tool to guide the country in its War on Terror and could address many of the concerns outlined above.

5.4.3. Militant Democracy and Australia's War on Terror: From the Australian Communist Party Case to *Thomas v Mowbray*

5.4.3.1. Australian Communist Party Case: Relevance for the War on Terror Debate and Lesson Worth Remembering

The case was already mentioned above as an honorable example of judicial ability to stand against the government's actions undermining democratic principles in the name of protecting national security.⁸⁰⁵ The case is worth bringing into the War on Terror debate for a few reasons. First of all, I would agree that it is acceptable "to draw an analogy between the

⁸⁰⁵ See Chapter 3.1.2, at 103.

moral panic surrounding Communists and Communism is Australia in the 1950s, and the moral panic surrounding terrorists and terrorism today.”⁸⁰⁶ When the Menzies government called to proscribe the Communist Party it used strong rhetoric very similar to one used in the context of War on Terror. For example, communists were described as “the most unscrupulous opponents of religion, of civilized government, of law and order, of national security”⁸⁰⁷ while communism was pictured as “an alien and destructive pest.”⁸⁰⁸ It is easy to identify the similarities in the environment surrounding current anti-terrorism regime and rationale for its introduction. Nicole Rogers and Aidan Ricketts quote the Federal Attorney-General, Daryl Williams, who stated in 2002 that “terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy” and terrorists forces were described as “actively working to undermine democracy and the rights of people throughout the world.”⁸⁰⁹ Therefore, challenges posed by Communism to the western liberal democracies are easily comparable with those posed by terrorism.

Second, both Communist Party Dissolution Act and laws of Australia’s anti-terrorism package bear similar concerns about curtailing of rights and liberties while arguing to protect them. The warnings of Prime Minister Chifley in 1948 that “never is liberty more easily lost than when we think we are defending it”⁸¹⁰ in relation to dissolution of the Communist Party are equally applicable to the current War on Terror debate. Furthermore, the main issues before the High Court in the Australia Communist Party case were very similar to those arisen in the recent *Thomas v Mowbray* case (which was an attempt to challenge the validity of the most controversial measure from the anti-terrorism package: Control Orders). Both

⁸⁰⁶ Nicole Rogers, Aidan Ricketts, *Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy*, 7 Singapore Journal of Legal Studies, 167 (2002).

⁸⁰⁷ Ibid.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid., at 167-168.

⁸¹⁰ Ibid., at 168.

cases were about the scope of the defense powers and what different branches of power can and cannot do during the so-called times of stress.⁸¹¹ The outcome of these two cases however was totally different despite the fact of numerous similarities in the situation surrounding the enactment of the laws, their effect on individual liberties and balance of powers within the government. Therefore, I think it is important to bring the Communist party case in this debate and see how different the outcome in Thomas case would be if the former decision was taken more seriously, and what effect it would have in the general debate on anti-terrorism regime in Australia.

The ban of the Communist Party was a part of the Liberal Party election campaign in 1949.⁸¹² Once the party came to power and Robert Menzies became the new Prime Minister, the government started to plan the actions it promised to take. However, it was not an easy task. The Communist party existed in Australia for more than 30 years and the Federal Constitution did not provide a clear mechanism to do that (the situation was different during the war when the executive had the power to decide on dissolution of organizations of they pose a threat to security). However, in 1949 the war was over and the executive could not anymore refer to its extraordinary power to ban the Communist Party. Therefore, it was decided to outlaw the party through the ordinary legislative bill. In 1950 the Bill⁸¹³ was enacted and the party was declared an unlawful organization, party property was ordered to be seized, all affiliated organizations were to be dissolved and continuation of work for the party was punished by imprisonment for up to five years. Moreover, a person declared to be a communist could not work for the government or the military. It took half a year for the Bill

⁸¹¹ “Times of stress” construction was not used by the Court in any of these cases and is defined as such by the author as the country was not in situation of war but took measures similar to those given by the Constitution to be invoked in times of war.

⁸¹² Constituting the Legislature in David Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency*. 73 (2006).

⁸¹³ Australian Communist Party Dissolution Bill (1950) (Cth).

to be enacted and it was highly criticized and opposed by the labor party leader and members. Once the Act was enacted, the Communist Party of Australia and unions turned immediately to the High Court to seek an injunction against implementing the Act. After four months of hearing and judicial deliberations the High Court declared Communist Party Dissolution Act unconstitutional.

The Government was aware that it might have further difficulties with justifying the law if it is challenged, so it tried to draft it in a way to prove that it was within the scope of the government's defense powers to enact such legislation. Unsurprisingly the Court's judgment has nothing to do with freedom of speech, association, property, etc. The major concern for the Court was the scope of Commonwealth powers and namely whether the enactment of such a law is constitutional under the Section 51(vi) of the Constitution.⁸¹⁴

In general, the Communist party case can be seen as "an iconic statement about the importance of judicial review in the modern Australian democracy".⁸¹⁵ Despite the general judicial reluctance to deal with national security issues and implied assumption that Government knows better how to deal with such matters and all the efforts the Government undertook to present Communism as a real threat dangerous for Australian democracy, the High Court did not uphold the Communist Party Dissolution Act. The Government did not manage to persuade the Court that the threat posed by communists and communism in Australia was sufficient to extend the scope of the defense power so it would constitutionally allow enact the Act in question.

The Court had to examine very carefully the power to defend the existing system of government granted to the government. The High Court interpreted the Section 51(vi) of the Constitution in a way that it is unconstitutional to enact legislative provisions imposing

⁸¹⁴ Rogers, Ricketts, *supra* note 806, at 168.

⁸¹⁵ Pintos-Lopez, & Williams, *supra* note 283, at 108.

“penalties on individuals and bodies before they actually engaged in a particular course of conduct, or in particular activities”⁸¹⁶ unless the country is at war, which means that the Parliament might authorize the executive to exercise such powers in war times. However, during the times of peace it is unconstitutional to enact a legislation which “operates on the opinion of the Executive” and which “does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name or classification or characterisation [...] and does not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once and for all.”⁸¹⁷

In fact, the judgment precisely prohibits everything the Australian Government does within the framework of the War on Terror. Control and preventive detention orders, ASIO questioning and detention powers, proscription of terrorist organization and criminalizing of membership in those organizations amount exactly to the unsupported by the defense powers legislation as it was interpreted by the High Court in 1951. Therefore, in order to find the existing anti-terrorism regime in Australia constitutional it is needed to declare that Australia is currently not in times of peace and therefore the threat of terrorism could be constitutionally addressed through the exercise of the defense powers under Section 51(vi) of the Constitution. In that case the parliament can enact a legislation which operation would depend on the executive evaluation with all the consequences listed above.

The Communist Party case is an important lesson not only for Australia, but for all other western democracies. Despite the widely accepted and practiced deference of the Courts to the executive in the defense and national security matters, the 1951 High Court judgment “stands for the proposition that there are some things that governments are not

⁸¹⁶ Rogers & Ricketts, *supra* note 767, at 168.

⁸¹⁷ *Ibid.*, at 169.

entitled to do without the most compelling of circumstances.”⁸¹⁸ The High Court proved that the judiciary can stand for the rule of law and democracy even when traditionally in the same circumstances it would stay in the shadow. Consider the following passage of Dixon J:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally suppressed it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstructions or opposition or attempts to displace them or the form of government they defend.⁸¹⁹

The decision become even more valuable once we consider the development of the events in the wake of it. The Communist Party was not abolished as a result of the High Court invalidation of the Dissolution Act, and “yet did not overthrow the Australian State nor ever pose a significant threat of doing so.”⁸²⁰ The High Court of Australia proved the judicial ability to be “a guardian of the abiding values that lie at the heart of the Constitution.”⁸²¹ These are the lessons to be learnt for Australia’s War on Terror. But when the High Court had a chance to confirm the commitment to stand for democracy, rights and liberties by pointing out to the government the limits of its powers to fight a War on Terror this unfortunately did not happen.

5.4.3.2. War on Terror reaches the High Court of Australia

On August 2007 the High Court of Australia handed down the *Thomas v Mowbray* judgment. This was the first occasion for the highest court of the country to check the constitutional validity of the measure from the anti-terrorism package; in this case it was regime of control orders. The journey of the case began in November 2004 when Joseph Thomas from the State

⁸¹⁸ Pintos-Lopez, & Williams, *supra* note 283, at 109.

⁸¹⁹ As cited in Dyznehaus, *supra* note 812, at 72.

⁸²⁰ Pintos Lopez & Williams, *supra* note 283, at 108.

⁸²¹ *Ibid.*

of Victoria was charged with a number of terrorist offences under Part 5.3 of the Criminal Code Act (receiving funds from a terrorist organization, and intentionally providing support to a terrorist organization).⁸²² The final verdict on Thomas' charges was handed down in October of 2008⁸²³ and he was acquitted of terrorism offences but found guilty of possessing a falsified passport.⁸²⁴ However, the Thomas case is a remarkable event in the history of Australia's counter-terrorism regime as in August 2006, AFP Officer Ramzi Jabbour applied for an interim Control Order under Subdivision B of Division 104 of the Criminal Code. Federal Magistrate Mowbray subjected Jack Thomas to the interim Control Order on 26 August 2007.⁸²⁵ The main reason for the decision to impose a Control Order on Thomas was the fact that he had received training from Al Qa'ida in 2001-2002 (on his own admission). The procedure to issue a Control Order requires further confirmation of the interim Control Order. In the Thomas case hearing to confirm the Control Order was adjourned as Thomas decided to challenge the constitutionality of Division 104 of the Criminal Code Act in the High Court of Australia⁸²⁶.

In order to successfully challenge the constitutional validity of the Control Order regime, Thomas should have the High Court convinced that the legislative provision in question goes beyond the scope of the defense powers and that the content of the law is not constitutionally permitted in times of peace. Thomas based his arguments around three main allegations: 1) The federal courts were conferred non-judicial powers to decide on the imposition of the Control Order (which violates Chapter III of the Constitution); 2) Division 104 of the Criminal Code Act confers judicial powers on a federal court, but it instructs to

⁸²² For detailed account of Jack Thomas trials see <http://www.gtcentre.unsw.edu.au/resources/terrorism-and-law/joseph-thomas.asp>

⁸²³ R v Thomas [2008] VSC 620 (2008).

⁸²⁴ Passports Act 1938 (Cth), Section 9A(1)(e)

⁸²⁵ Jabbour v Thomas [2006] FMCA 1286 (2006).

⁸²⁶ It was a special case an adjunct to proceedings involving the original jurisdiction by the court, but not an appeal (see for details Pintos-Lopez & Williams, *supra* note 283, at 95).

exercise the power in a manner contrary to Chapter III; 3) Absence of the legislative powers (either express or implied) to enact laws establishing Control Order regime (i.e. the scope of the defense powers does not cover such measures).⁸²⁷

As to the source of the legislative power to enact laws establishing the measure in question, the plaintiff Thomas made the following submissions. Defense power under the Constitution is limited to defense against threats from foreign States (as opposed to the private groups and therefore War on Terror measures aimed to capture such organizations fell out of the government's defense powers); Commonwealth defense powers are to be directed to defend bodies of the politics but not citizens (residents) and their property; the words 'naval and military defense' in the text of the Constitution should be interpreted narrowly and cannot be extended to broader activities to protect the community.⁸²⁸

The government responded that the Control Orders scheme established by Division 104 was supported by the defense powers and that government is empowered to legislate to protect the nation (under s. 51 of the Constitution). A majority of the Court (5:2) ruled that Subdivision B of Division 104 of the Criminal Code Act was valid.

Thomas v Mowbray: Implications for the War on Terror and Disappointment of Great Hopes

While the Court's decision to support the mechanism of the interim control order did not surprise those who were following the story and interested in the developments in Australia's counter-terrorism regime, many were disappointed in their hopes to hear a word from the highest court on governmental policies in fighting the War on Terror. It was reasonably expected from the Court to give long awaited guidance for all branches of power to exercising their powers within the anti-terrorism regime. The Australia Communist Party

⁸²⁷ Andrew Lynch, *Thomas v Mowbray. Australia's 'War on Terror' Reaches the High Court. Case Note*, 32 Melbourne University Law Review 1189 (2008).

⁸²⁸ Pintos-Lopez & Williams, *supra* note 283, at 96.

judgment handed down over 60 years ago was a ground to hope that the judiciary would be able once again to raise a powerful voice and stand for better protection of democracy and human rights. However, in a somewhat disappointing judgment the highest court of Australia upheld the constitutionality of the regime of Control Orders under Division 104 of the Criminal Code Act.

First and probably the most important finding of the Court was that the defense powers under section 51(vi) of the Constitution did not empower to legislate to prevent external threat only. The High Court found by 6:1 (Kirby J dissenting) that the interim control order mechanism was a valid legislation under the defense power. It is possible to suggest that the interpretation given to the scope of the defense power in this case were informed to some extent by the circumstances of the case. There was an external threat aspect involved in the Thomas case: he had received training from a terrorist organization abroad. This fact probably influenced the Court's statement that "there need not always be an external threat to enliven the [defense] power."⁸²⁹ This conclusion is a departure from the interpretation given to the defense power in most of the previously decided cases related to Australia's defense, including the Communist Party case. Nevertheless, those who studied the case-law on this matter noticed that even prior to *Thomas v. Mowbray* "there was some authority for the extension of the defence power to matters of internal, as well as external security" and that the "enlarged conception of the defence power is endorsed in *Thomas v Mowbray*"⁸³⁰. Therefore, the High Court extended the limits of the defense power. In order to legislate using this notion the State does not need to be at war, threat need not come from another state, and even an enemy is not necessarily organized as a collective or a group⁸³¹.

⁸²⁹ Oscar I Roos, *Alarmed, but not Alert in the 'War on Terror'? The High Court, Thomas v Mowbray and the Defence Power*, 15 James Cook University Law review 176 (2008).

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*, at 177.

The second argument raised by the plaintiff in regards to the scope of the defense powers – confined solely to threats posed to the bodies politic rather than to persons or property – was also rejected by the Court with only one judge Kirby J dissented on it. The argument, at the first sight, might look as though taking the debate out of the major concerns. However, it could be an interesting development if the Court would agree with the plaintiff as it would place some pieces of anti-terrorism legislation outside the domain of the defense power. For example, Section 100.1 of the Criminal Code Act define as terrorist actions committed or intended to be committed with the intention to intimidate the public and not only force the government to take or not take particular measures. The major trend among the judges to justify the rejection of the plaintiff’s argument was that “a notion of a “body politic” cannot sensibly be treated apart from those who are bound together by that body politic, this being English law for centuries.”⁸³² In other words, if the threat is directed against a persons and (or) their property it is the same as to intimidate the government to force it to do something. Where a terrorist group intimidates and coerces the government, it poses no less threat to the people and their property than in the first case. While this observation given by the Court makes sense as it is not easy to divide the government from the governed, the dissenting judge was against such an interpretation as it might lead to an ‘effectively unlimited’ defense power.⁸³³

The last arguments in relation to the scope of the defense power – necessity to restrict it by reference to the words ‘naval and military’ – did not have many chances to succeed from the very beginning; mainly in the light of an existing approach (since *Farey v. Burvett*),⁸³⁴ and indeed not many judges addressed the issue.

⁸³² Pintos-Lopez & Williams, *supra* note 283, at 99.

⁸³³ *Ibid.*, at 100.

⁸³⁴ *Ibid.*

Thomas in his challenging move relied a lot on the strict separation of powers doctrine governing the interaction between the different branches but also setting the functions of each branch. Thomas argued that the power to impose an interim control order is not judicial in nature (because it allows imposing limitation on person on the basis of what person potentially might do in the future). The Australian judiciary had a chance to deal with issues of similar nature but the Court did not give a clear answer to the question if similar powers are judicial in nature.⁸³⁵ This time the High Court could not walk away without answering the question on the nature of the power to issue Control Orders as it was crucial for the outcome of the case and the decision on the validity of the measure in question. The majority found that power granted to the courts in issuing control orders judicial in nature and therefore the Division 104 cannot be invalidated. The findings of the Court in this matter were criticized as unsatisfactory, especially in respect of the observation of the Chief Justice that some powers are judicial by virtue of their exercise by judicial bodies and referring to examples of bail and apprehended violence orders.⁸³⁶ Andrew Lynch points out correctly that the drastic distinction of the Control Order mechanism: they might be imposed on individuals who have not been found guilty or even charged with any criminal offence.

The task for the Court to decide in this case was indeed about the standards applicable in determination issues under Division 104. The plaintiff Thomas argued that this provision authorizes courts to exercise judicial power in a way contrary to the Constitutional norms (Chapter III). The majority of the Court however decided that provisions in question do not ask from the Court more than they usually do and laws are often endorsing broad definitions, test standards, but it does not make Court unable to apply those laws. The validity of the interim Control Order regime was sustained.

⁸³⁵ For details see Lynch, *supra* note 827, at 1201.

⁸³⁶ *Ibid.*, at 1202.

There are no doubts that it was a significantly important case with lots of implications for the War on Terror rhetoric. First of all, the Thomas case represents a major expansion of the defense power in Australian history. It was declared that the defense power is not only about times of war or regulating the armed forces, their training, and financial support during the times of peace. After the Thomas case, the Commonwealth can legislate under the defense power umbrella even on matters which have nothing to do with the ‘immediate subject of defense’.⁸³⁷ Second, it was re-confirmed by the Court that the current threat of terrorism is sufficient to broaden and modify the traditional interpretation of the defense power even though Australia is far from being involved in a real war (and the dividing line between war and peace was blurred). Therefore, the Court did not say expressly but indeed agreed with the policy of the government to adopt laws sufficiently changing the established regime of interaction between branches of powers, and seriously curtailing rights and freedoms without proper institutional protection. The decision is a great ground for the future expansion of terrorism laws as it is not clear that anti-terrorism laws would be supported by the defense power. This was a somewhat predictable decision of the Court, as it would be somehow frustrating to hear from the Court that defense power does not extend to measures aimed at preventing terrorist attacks similar to those which occurred in other countries (for example 88 Australians were killed in Bali in 2002). So, the Court expanded the defense powers, so now it is adjusted to the ‘world of more complex threats.’⁸³⁸ The expansion of the defense power itself might be accepted as a right and necessary move, but the Court did not meet the hopes of many people by ignoring the question of the means by which expanded powers could be checked. The negative impact on individuals in case the anti-terrorism measures are applied might be really dramatic in some cases, however the Court did not find

⁸³⁷ Pintos-Lopez & Williams, *supra* note 283, at 102.

⁸³⁸ *Ibid.*, at 107.

it important to elaborate on how to prevent the possible abuse of such measure and impose some limits on substance of the new laws as well as on the fashion in which these laws are executed. George Williams for example suggests that the Court should limit the possibility to “invoke the defense power [...] threats must either be military in nature or be capable of causing harm of a comparable scale”.⁸³⁹ The Court would have done a much greater job if it applies the proportionality test more strictly.

Therefore, the High Court of Australia did not want to decide the case in the same manner as the Communist Party case. While there were not many doubts that the Court would expand the scope of defense powers to meet the threat of terrorism, it still could do more for the debate on anti-terror laws of Australia. For example, it could indicate some limits and approve the use of defense powers in the most serious cases but not to approve its regular use for the War on Terror. In case the High Court would have followed the logic of the 1951 judgment on the dissolution of the Communist Party that would be another excellent example of how the judiciary can raise its voice and stand for the democracy. But also that would be a wonderful demonstration of how militant democracy logic might be helpful to guide the War on Terror. Unfortunately it did not happen in Australia, so I will have to elaborate on how militant democracy is relevant to War on Terror and why it might be a better approach to lead governments during the times of the War on Terror.

5.4.3.3. Militant Democracy in Australia’s War on Terror: Useful Guidance to bring Anti-Terrorism Policies into the Regime of Constitutional Normalcy

From the overview and analysis of Australia’s anti-terrorism regime follows that this is a clear example of the State’s departure from the regime of constitutional normalcy in order to address the threat of terrorism. This conclusion is based on numerous concerns posed by current regime: legislating with urgency, extension of the executive powers, denial of active

⁸³⁹ Ibid.

judicial involvement, limitation of fundamental rights without proper safeguards, and some others besides. Unfortunately, despite extensive criticism of the existing regime, the Australian judiciary missed the opportunity to comment on State's policies and impose some limits in the form of tests or similar rules law-enforcement agencies must observe fighting the War on Terror.

I cannot contest the reality of the threat of terrorism for the Australian nation, but even if to accept that it is present, it does not give *carte blanche* to the government to protect national security at any costs. 'Times of stress' regimes are the perfect occasion when national governments can demonstrate its true adherence and commitments to the rule of law and democracy. Unfortunately, the Australian government failed to do so in its anti-terrorism policies, as well as many other states. Therefore, this State needs to reconsider its approach and seek for a constitutionally permitted framework to place anti-terrorism policies in order to make them closer to a state of constitutional normalcy rather than preventive state.

Militant democracy represents a conceptual framework that might be relevant to analyze Australia's War on Terror. The introductory section to this chapter has provided grounds to claim the relevance of militant democracy within the anti-terrorism policy debate in general and all stated above is fully applicable to the case of Australia. In the given circumstances and characteristic of Australia's anti-terrorism regime I find militant democracy a possible solution to lead the War on Terror. Militant democracy might be helpful to address most of the concerns posed by the current regime and improve the overall image of anti-terrorism policies adopted by the Australian government.

First of all, militant democracy does not amount to departure from the regime of constitutional normalcy which is one of the major problems for Australia's anti-terrorism policies. The level of allowed rights limitation combined with extraordinary powers granted

to the executive to decide exclusively on such limitation are very similar to what is allowed during a state of emergency. It is clear that no government at the moment can legitimately proclaim a state of emergency because of a terrorism threat, not only because of the time frame but mainly because a state of emergency presupposes real existence of exceptional situation (natural disaster, military attack from outside, etc.). In Australia the threat of terrorist attacks is, luckily, only a possibility at the moment. Therefore, it is not possible to use a state of emergency to justify the departure from ordinary constitutional regime to fight with terrorism. It causes serious inconsistencies between the legal status of the regime and its content. Militant democracy might cure this problem as it represents a theoretical concept and practical approach to the preventive politics a state might adopt without moving towards an emergency regime.

Militant democracy can be accommodated by the existing constitutional framework of the current Australian Constitution and be useful guide to lead the War on Terror. Moreover, Australia is familiar with this concept and has a brilliant example in its constitutional history of how militant democracy might be useful to address a threat to the State without compromising a democracy. Careful assessment of the immanency of threat and commitment to procedural guarantees in the case of rights limitation led in the case of the Australian Communist Party to successful solution of the problem.

Second, militant democracy is not considered as an exceptional regime; therefore it will not allow a serious shift in the balance of powers to implement preventive policies. The state apparatus functions as usual and every branch of power exercise its constitutionally established powers. Therefore, preventive policies in the name of national security remains in the hands of the executive predominantly, but at the same time militant democracy rational will subject it to the external scrutiny of the judiciary. The judicial interference in each and

every case is not necessary to ensure proper exercise of the executive tasks; however the mere awareness of the control mechanism existence could put some pressure on law-enforcement agencies to act in accordance with established guarantees. Militant democracy logic applied in a proper way would allow exercising preventive policies while preserving the regular balance of power, including more active role of the judiciary.

Third, militant democracy practice legitimacy is conditional and depends on the adherence to procedural guarantees established for the fundamental rights and liberties limitations. The concept allows preventive measures directed at denial of rights to those who abuse their rights in order to harm or destroy the existing system. The essence of the anti-terrorism measures is very similar to what is considered as the foundation of the militant democracy concept. A state can take measures to protect the system by denying rights to the system's enemies. However, in order to avoid the possible abuse of such measures to suppress opponents and undesired groups (ethnic, religious, gender, etc.) it is required that rights limitations are exercised with strong procedural guarantees. If this approach is applied in Australia's War on Terror, it will not claim that possible limitations of rights and freedoms should not be part of the regime; however, it will subject those limitations to stricter tests than 'reasonable belief' in something and similar relaxed standards of proof. This argument is especially relevant for Australia as the country does not have constitutional bill of rights and those affected by anti-terrorism laws cannot challenge them against a human rights claim. Therefore, militant democracy would bring more legitimacy in the preventive measures, more trust in the governmental policies, and potentially stronger protection for individual rights and freedoms.

Finally, militant democracy in its classical interpretation is considered as an exceptional measure; for example, dissolution of a political party is allowed only as a last

resort measure. In the case of the War on Terror this is not realistic to observe; however, if states follow this logic it will make them consider more carefully the measures taken against their necessity. Keeping in mind the extent of preventive measures in Australia, it should not become the everyday business of state agencies to detect and detain suspected terrorists, question them, torture people, waive fair trial guarantees, and convince the public that we live nearly in emergency situation. Moreover, militant democracy adopted by the State as leading theme in the War on Terror will enable the State to offer stronger justification for taken measures (including the adoption of new laws). This is not feasible to require states to prove the immanency of the threat before implementing anti-terrorism policies, however a more balanced solution for national security vs. adherence to democratic rules dilemma should be found.

To summarize, militant democracy appears to be a relevant framework for Australian anti-terrorism measures. It will place the existing policy within the regime of constitutional normalcy (as opposed to a state of emergency) where the shift in balance of powers will be minimized, rights limitations will be accompanied by strong procedural guarantees, and the government will be obliged to justify its actions and policy with stronger arguments than reference to secret information and acts of terrorism committed elsewhere in the world. Militant democracy as leading theme in the War on Terror in Australia will make the entire regime more trustable and compatible with major democratic principles. As a result Australia will demonstrate its true commitment to the rule of law, human rights values, and justice even during the times of stress such as the War on Terror.

Conclusion

The case-study of three jurisdictions demonstrates that militant democracy might play an extremely positive role in improving current the situation in relation to anti-terrorism policies

in very different settings. Russia, Spain, and Australia are all concerned with the prevention of the threat of terrorism and each jurisdiction created its own unique regime based on local situation and circumstances. The argument that militant democracy is of great relevance in the War on Terror was tested, therefore, in three different environment where the possibility of terrorist attacks, way a terrorist threat is expressed, and legal culture of the society differ substantially. However, I find it a strong supportive argument in favor of my hypothesis. Militant democracy can be utilized to guide the War on Terror and can accommodate states' preventive policies in different settings. This is due to the fact of substantial similarities of the War on Terror rhetoric and militant democracy concept.

Each case-study led to the conclusion that militant democracy might help to improve the situation in the event that it is properly applied by the legislators and law-enforcement agencies. While the concerns of the existing anti-terrorism regimes in three jurisdictions vary to some extent, nonetheless, all of them are about adherence to the democratic principles during times of stress. It was demonstrated that militant democracy might assist in bringing anti-terrorism policies into greater compliance with national constitutional regimes and institutionalize preventive measures to fight terrorism through the prism of this concept.

Therefore, there is no strong necessity to search for anything new to accommodate the anti-terrorism practice of different states. Militant democracy logic with all the attributes required for the legitimacy of the concept would be better approach to handle the War on Terror as it allows less rights' limitations and is aimed at preserving the regular balance of powers between three chambers. In addition, the militant democracy concept applied properly permits taking preventive action, but only when the threat is likely occur and limitations are necessary. As a result, militant democracy as applied to terrorism gives more legitimacy to the anti-terrorism measures for the following reasons.

Militant democracy and anti-terrorism policies are alike in many instances and this is why the experience of militant democracy application might be relevant and useful for some states to reconsider anti-terrorism policies, or at least the manner of their implementation to make them more compatible with the major principles of democracy. The success of the War on Terror is of no less importance than its lawfulness. National governments should keep it in mind and try to follow this statement, which however does not automatically mean the need to search for a new regulatory regime. Militant democracy is a useful hint to democratize anti-terrorism policies so states do not embarrass themselves with poor quality laws and hysteric political decisions.

CONCLUDING OBSERVATIONS

The Militant Democracy Principle: Democracy on its Guard against too much Optimism and Who are the Enemies?

The term ‘militant democracy’ was introduced in the 1930s when Nazis started to invade Europe. Democratic fundamentalism and legalistic blindness led to a situation where democracies were legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties. The only possibility to cure this unfortunate situation was turning democracy into a militant form, the solution especially needed at times of transition and stabilizing governments: “if democracy is conceived that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.”⁸⁴⁰ Loewenstein’s arguments formulated in 1930s are still valid for today’s reality, including the one on danger to neglect the experience of deceased democracies.⁸⁴¹

The overview of the current theoretical debate over militant democracy issues and constitutional practices from various jurisdictions demonstrated that militant democracy is by no means a ‘withering away’ concept but rather a lively and practical tool useful to protect democracy. The statement is supported further by the evidences from the constitutional practice on the extension of militant democracy beyond its traditional scope of application.

This project presented the analysis of major theoretical considerations on the concept of militant democracy with a substantive practical component investigating the practice of militant democracy in various jurisdictions, and on diverse aspects of militant democracy issues. The major conclusion of the project is that although militant democracy is admittedly

⁸⁴⁰ See Loewenstein, *supra* note 5, at 423.

⁸⁴¹ *Ibid.*, at 658.

a somewhat problematic concept, through considerate application it could become an important safeguard of democracy when it is threatened to be potentially harmed or destroyed by undemocratic actors.

For the purpose of this project militant democracy was defined as legal and political structure possessing opportunities to preserve democracy by taking preventive actions against those who want to overturn or destroy it through utilizing democratic institutions or procedures. As ‘militant democracy’ was turned many years ago into a practical constitutional phenomenon it was concluded that there is no practical distinction between militant democracy and a militant democracy state. Most of the examples, cases, and analysis in this project were based on practical observations, therefore the term ‘militant democracy’ was used not as a mere theoretical concept but rather as a manifestation of its major principles in the constitutional practice of modern democracies.

Constitutional theory does not offer much clarification in terms of what exactly militant democracy protects, and what it protects from, apart from vague phrases and expressions. Therefore answer to this question was postponed until the case-study element of this project was completed. The answer is not an easy one to give. First of all, the scope of militant democracy protection is interpreted differently in every democracy, also due to the fact that the definition of “democracy” still remains one of the fundamental questions of political theory, engaging statesmen and philosophers in debate since ancient times.⁸⁴² The case-study demonstrates that the militant democracy concept is context-sensitive and each state could offer various justifications to introduce militant democracy measures. However, it is feasible to make certain generalizations on who are the enemies and what militant democracy protects. Originally, militant democracy was argued to be introduced to the state structures to neutralize fascist movements. Later, the fear of communism made many

⁸⁴² Fox & Nolte, *supra* note 56, at 2.

countries adopt legislation against the possible rise of communism and even constitutional democracies with stable systems of governments were on the verge of trading-off the most cherished democratic principles for the sake of protecting their democracy (i.e. Australia and the United States). In the wake of the collapse of communist regime many young democracies in Central and Eastern Europe followed the German example and introduced various elements of militant democracy in their new constitutions, mostly in relation to restrictions imposed on political parties in the form of *a priori* prohibitions of parties adherent to certain ideologies or requirement to have party programs and activities compatible with major democratic principles.

Therefore, it is probably not correct to state that militant democracy aims to protect democracy from certain ideologies and movements, predefined as enemies of democracy. Militant democracy proved to be a dynamic concept, able to accommodate different type of threats in terms of their ideological foundations. Any movement which aims to harm the democratic structures and which the agenda of contradicts the democratic foundations of the State through abuse of the privileges to participate in political processes can become an enemy of democracy and provoke the application of militant democracy. An enemy of democracy is not necessarily a political party but any group, association, or movement which competes for being present in the public discourse and taking part in influencing the individuals “fundamental choices in structuring their social life.”⁸⁴³ Militant democracy measures might be potentially abused for political purposes, especially in democracies not yet stable; therefore, strong justification and procedural guarantees must be accorded to this procedure. This will prevent the potential labeling of unpopular or unwanted groups, or simply those in opposition to the government as ‘enemies of democracy.’

⁸⁴³ Sajo, *supra* note 128, at 210.

Legitimacy v. Effectiveness Revisited

Constitutional theory offers few justifications for the militant stand democracy can take towards its potential enemies. First of all, democracy has certain problems and weak points. Those being aware of the ideas of democratic fundamentalism might develop political technologies adjusted to such phenomenon and use it for the purpose to destroy or damage the democratic order. In order to avoid such unfortunate events, democracy should overstep its legalistic blindness and be prepared to neutralize one of the major enemies of democracy: the politics of emotions. While this enemy was identified in Karl Loewenstein's essays, political populism based on the politics of emotions still remains a troubling feature of many modern democratic states. Furthermore, a purely procedural view of democracy cannot guarantee that a majority will not decide to vote one day that a tyrant should rule and democracy should be abolished and replaced with another regime. The only possibility to prevent such developments is that democracy becomes substantive and takes into account the content of majority decisions. Militant democracy measures are invoked only towards disrespecting democratic rules. So, unless someone intends to use democratic institutions to abolish democracy, citizens and their associations are safe from being suppressed and limited in their freedoms under the militant democracy rational. This reaction of democracy is explained by the paradox of tolerance which means that unlimited tolerance towards democracy's enemies could be detrimental for democracy.

However, militant democracy can impose some limits not only on the substance of the majority decisions, but also prevent the situation of the 'majority captured by an intolerant minority.' There were examples in the past when intolerant minorities utilized the weaknesses of the democratic structure and managed to grasp the power and abolish the democracy without the support or consent of the majority (i.e. the Weimar Republic). The

preventive nature of militant democracy aimed at the preservation of the democratic structures and ultimate goal of protecting rights and dignity can ‘filter’ such movements and stop them before an intolerant minority empowers itself to the degree where it is able to damage or even abolish a democracy.

Furthermore, at the moment there are no realistic alternatives to militant democracy in the business of rescuing democracy when its existence is endangered. The idea that “democracy should refrain from providing legal regulations and measures of a ‘militant’ provenance and (mainly or solely) rely on self-regulative powers of the electoral and political processes”⁸⁴⁴ is of course very desirable, but does not sound realistic especially for young and transitional democracies. Moreover, the necessity to have certain self-preservation measures in democratic constitutions was proved by the tragic events of the past. While it is very unlikely that something like Communism or Fascism will hit the world and existence of democracy in foreseeable future and no declaration of rights risks today to be transformed into the ‘suicide pact.’⁸⁴⁵ The last few decades demonstrated that democracy is accepted worldwide as the only structure of the state even though it is yet not completely secured from ideological and physical attacks from within and outside. Therefore, keeping in mind the tragedies of the past and absence of any realistic alternatives, militant democracy appears to be a justified concept as long as it is “capable of excluding conceptually and institutionally the abuse of opportunities for restricting rights.”⁸⁴⁶

In addition to the absence of alternatives and historical argument, constitutional practice offers some further justification for militant democracy measures. For example, there are some signs of moving towards the perception of militant democracy measures as positive obligation imposed by the public international law which promotes a rather substantive view

⁸⁴⁴ Thiel, *supra* note 92, at 417.

⁸⁴⁵ Sanchez, *supra* note 52, at 6.

⁸⁴⁶ Sajo, *supra* note 128, at 211.

of democracy. There are at least a few examples from international treaties that can be cited in support of this argument, e.g. Article 22(2) of the *International Covenant on Civil and Political Rights*, Article 4 of the *Convention on the Elimination of all Form of Racial Discrimination*, EU accession criteria (known as Copenhagen criteria) and the Council of Europe membership requirement. Furthermore, Article 5(1) of the ICCPR and Article 17 of the ECHR lead to conclude that public international laws allow for actions against anti-democratic parties and states can do it pre-emptively by enacting democracy's self-protection legislation.⁸⁴⁷ A parallel can be made with widely accepted prohibition of hate speech and dangerous religious movements. In the same line of argumentation, Fox and Nolte bring an example of an international duty to "hold genuine periodic elections."⁸⁴⁸ Therefore, states are obliged at least to protect their democratic systems from the potential rulers who would be attempting to abolish this rule. Support for the justification of militant democracy in the public international law can be also found in jurisprudence of international courts, i.e. the ECHR judgment on the Refah Partisi (Welfare Party) could be interpreted in a way to allow states to practice a defensive democracy, including the possibility to ban political parties endorsed in constitutional legislation, is allowed. Rory O'Connell brings an example of recently decided case from Spain on the prohibition of Batasuna Party.⁸⁴⁹ He argues that the Court's judgment "leaves open the possibility to argue that the state may have a duty to ban certain political parties."⁸⁵⁰

However, apart from being perceived as useful, justified and legitimate tool to protect democracy from being destroyed, the concept of militant democracy is a seriously problematic one. First of all, militant democracy seems to be a self-contradicting concept as it

⁸⁴⁷ Fox & Nolte, *supra* note 56, at 59.

⁸⁴⁸ I.e. Article 25(b) of the ICCPR or Article 3 of the Protocol 1 to the European Convention on Human Rights.

⁸⁴⁹ O'Connell, *supra* note 153, at 277.

⁸⁵⁰ *Ibid.*, at 277.

limits rights and liberties in order to secure their existence. It is questionable whether democracy can behave in a militant way and remain a true democracy. Secondly, the justification of militant democracy in theory should not be confused with its effectiveness. In practice, the former does not presuppose the latter. Otto Pfersmann outlined this problem as one of the major dilemmas of militant democracy: how it works politically and legally. It is important to admit that the application of militant democracy can be surrounded by various difficulties affecting its effectiveness, i.e. banning of popular parties and leaving substantial number of voter non-represented in the parliament, concerns about fear breeding repression and repression breeding hate. It is also a serious dilemma if allegedly dangerous movements should be kept under control instead of being suppressed and illegitimated. Furthermore, it is hard to define the right moment to invoke militant democracy. It is never an easy task to draw a clear line between acceptable critiques of a democratic regime and a direct or indirect attack on it. How to define the point when democracy is endangered, who can decide on it and who should initiate the procedure? Last, but not the least, militant democracy is a concept of an extremely political nature and it inevitably poses a risk of being abused for political purposes. The critique of the doctrine can be outweighed by quite simplistic arguments. First of all, democracy cannot afford to remain inactive when its basic structures are being attacked and could be possibly abolished. Otherwise, democracy turns into self-contradiction. Moreover, there is a clear difference between those who disagree with some democratic policies and those who deny reliance on democracy as a primary process of decision-making.⁸⁵¹ Militant democracy targets the latter group only and the former enjoys the same level of protection as always. When it comes to the difficulty with defining a right moment to invoke militant democracy measures, the judiciary should be actively involved to assess the arguments of the government and take into account local conditions and degree of the threat. Judicial control is

⁸⁵¹ Sajo, *supra* note 128, at 211.

imperative as militant democracy measures may come dangerously close to limiting fundamental rights. The rule of law as one of the democracy's foundational principles presupposes judicial interference where rights are at stake. Courts should be cautious and insist on complying with all procedural rules and requirements before approving government's motion to impose limits on someone's political participations rights for the sake of democracy's self-preservation. The judicial control play a role of preventing political misuse of militant democracy measures and the judiciary is responsible to introduce legal standards of the practices to limit fundamental rights for the sake of protecting a democracy. The dilemma could be further effectively addressed in democracies where fundamental rights are institutionalized and perceived as the ultimate goal of the constitutional regime.

The Overall practice of militant democracy proves itself as a workable and plausible solution⁸⁵² and judiciaries have proved in many instances to be able to stand for democracy and resist governments in their unjustified intrusion into the exercise of political rights and freedoms. The latter statement is, however, applicable more to the cases where militant democracy measures were employed within its traditional area of application. At the same time, constitutional jurisprudence demonstrates that courts might be misled by governments when it comes to utilizing militant democracy against new enemies of the democracy: fundamentalist and coercive religions and threat of terrorism.

Democracy and its New Enemies: The Extension of the Militant Democracy

Principle to New Threats

The major contribution of this project was the analysis of the extension of the militant democracy principle beyond its traditional scope of application. The argument was tested on

⁸⁵² Such conclusion is made in the final chapter of the book compiled from case-studies of militant democracy measures in 13 jurisdictions, so appears to be somehow reliable and logical. See Thiel, *supra* note 92, at 417.

two case-studies devoted to the application of militant democracy to address the threat of growing fundamentalist religious movements and to fight the ‘War on Terror’.

The case-study on militant democracy and religious extremism demonstrated that the concept is of relevance for the states’ policies to address threats coming from growing extremist religious movements. Where militant democracy is properly applied it will lead to more successful democratic solutions than are present in the described jurisdictions. The survey reveals that national legal systems as well as international institutions for human rights protection are familiar with the militant democracy concept and even implement some of its elements to justify state policies and judicial decisions. However, the case-study demonstrates that deeper and consistent understanding of the militant democracy notion as well as conditions of its application are missing from the jurisdictions analyzed. In Russia, militant democracy is applied for the purpose of protecting an ideal vision of society, while in Turkey militant democracy is widely referred to in order to pursue a political ideal: secularism and unity of the state. The language of the ECHR changes radically when it has to decide on the ban of religious parties and goes as far as to declare certain religious attire as a symbol of an oppressive political regime. Not only are the local conditions ignored by the Court, but also it takes it upon itself to decide on matters not assigned for international judicial institution (i.e. Islam is not compatible with democracy, and similar conclusions).

Therefore, militant democracy is of potential use to guard the democratic perimeter from religious extremism. However, at the moment the judiciary is not equipped to go further than accepting the militant democracy rationale given by the government without undertaking a proper balancing exercise (i.e. how realistic is the threat to take militant democracy measures). Therefore, all jurisdictions included in the case-studies need to reconsider their approach towards the alleged threat of religious extremism and implement militant

democracy in a stricter way, to ensure that not only is the rational applied, but all conditions of its legitimacy are observed.

The second case-study on militant democracy and the War on Terror were inspired by the current anti-terrorism policies practiced by various states which very often go beyond existing constitutional paradigms of the constitutional normality and state of emergency. The basic proposition of this case-study was that there is no necessity to invent a new constitutional framework to place the so-called 'War on Terror' into, but to accommodate it through an adjustment of the militant democracy principle to a new reality. This will not only bring more legitimacy to anti-terrorism politics, but will also present an opportunity to cure some flaws of the existing regimes. I did not argue that the fight against terrorism could be addressed through the classical militant democracy measures like prohibition of dangerous political movements only. The claim was rather that states facing the threat of terrorism should be allowed to depart from the state of constitutional normalcy, but such a departure should be authorized and driven by militant democracy logic; which in general allows the undertaking of measures of a preventive character, but when the necessity to invoke such measures is present, and under a regime of strict procedural guarantees. This should be applicable both to the content of the anti-terror laws adopted and the way they are applied.

Further, both of these regimes claim to protect democracy from its enemies and this is the major aim behind the measures. Militant democracy's main idea is to protect the existing constitutional system by denying rights and freedoms those who are believed to abuse the system with a purpose to destroy or damage it. Anti-terrorism regime and militant democracy aim to cure and prevent similar outcomes with the only difference in means that dangerous movements choose to damage the democracy and constitutional order. Moreover, very close

relations could be observed between terror and fundamentalist political movements.⁸⁵³ As Karl Loewenstein argued, emotionalism is clue that holds authoritarian regimes together and replaces the rule of law at the end. In this regard, emotionalism of terrorist movements is not very different from what drives extreme political parties.⁸⁵⁴ In addition, main methods used by terrorism – fear and intimidation – also create a kind of politics of emotion.⁸⁵⁵ Tolerance towards emotionalism attributed to extreme political parties and terrorist movements can be suicidal for democracy and there must be mechanism present to subvert such activities. Militant democracy was introduced to the constitutional theory and practice to cure exactly this disease and its experience could be applied to the war on terror too.

Militant democracy as applied to terrorism would give more legitimacy to the anti-terrorism measures for the following reasons. First, list of rights allowed to be limited will be shortened and will exclude at least fair trial rights. Second, militant democracy logic requires the preservation of the separation of powers balance without favoring the executive and denying judiciary its traditional functions. Third, Parliaments should be given a chance to speak on the matter and scrutinize the laws they adopted without pressure from the side of the executive. One of the biggest challenges for the Parliaments in enacting and reviewing anti-terrorism laws is that it is very hard to control the executive and resist its pressure. At the moment, there are not many signs that parliaments seriously consider to review the previously adopted laws and remedy somehow the problems posed by such laws. For example, in Australia the law-making has stopped for a while but there is no expression of commitment to revisit the laws. It does not happen even with somehow ridiculous laws which are not actually being applied in practice (for example in case of the Australia's regime of preventive detention).

⁸⁵³ Sajo, *supra* note 55, at 2255.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ *Ibid.*, at 2263.

Finally, militant democracy requires governments to give stronger justification for the proposed measures than in the anti-terrorism state. If the anti-terrorism policy is placed within the militant democracy framework than it would decrease executive privileges in deciding on what kind of measures to take, what rights to limit and how far to go in lowering the level of rights protection. While it is an overall trend to pass the security matters to the executive, it should not go that far as to allow detention of non-suspects for example. In other words, governments should re-shape their anti-terrorism policies and if they want to preserve the existing regime they should give better justification than probability of new terrorist attacks evaluated only on the secret information they cannot reveal to the public and even parliaments.

The case-study of three jurisdictions demonstrates that militant democracy might play an extremely positive role in improving current situation with anti-terrorism policies in different settings. Russia, Spain and Australia are all concerned with prevention of terrorism threat and each jurisdiction created its own unique regime based on local situation and circumstances. The argument that militant democracy is of relevance in the war on terror was tested on three different environments where possibility of terrorist attacks, ways of terrorist threat is expressed and legal culture of the society differs substantially. However, I find it as strong supportive argument in favor of my hypothesis. Militant democracy can be utilized to guide the war on terror and can accommodate states' preventive policies in different settings. This is due to the fact of substantial similarities of the war on terror rhetoric and militant democracy concept.

Each case-study led to the conclusion that militant democracy might help to improve the situation in case it is properly applied by the legislators and law-enforcement agencies. While the concerns of existing anti-terrorism regimes in three jurisdictions vary to some

extent, nonetheless all of them are about adherence to the democratic principles during times of stress. It was demonstrated that militant democracy might assist in bringing anti-terrorism policies in greater compliance with national constitutional regime and institutionalize preventive measures to fight terrorism through the prism of this concept.

Conclusion

I want to finish this project by citing Karl Loewenstein, concluding with observations from his *Militant Democracy and Fundamental Rights II* essay. He was writing his paper with the danger of the Fascist movement in mind, nevertheless I find his remarks applicable to the present-day reality in the business of protecting democracy against its potential enemies. “Much has been done; still more remains to be done.”⁸⁵⁶ This statement is applicable not only to the fact that democracies are not immunized from the new types of threats appearing but also to the mastering of the current techniques by developing a more consistent and legitimate approach to the militant democracy principle in practice. I totally agree that democracy should not be over-optimistic about existing and potential future enemies of democracy. Democracy can successfully exercise this function even without regular reference to militant democracy measures in practice. The case-studies prove that the presence of militant democracy measures in the texts of the national constitutions does not automatically mean its frequent application. The overall tendency is that states are cautious regarding the banning of political parties and imposing similar limitations on participants of the political discourse. However, the presence of militant democracy arsenal in the constitutional structures affords more confidence to democracy, especially in the case of young democratic states.

I also do not have any problems agreeing with Loewenstein’s argument on the context-dependant nature of militant democracy: “successful defence [...] depends on too

⁸⁵⁶ Loewenstein, *supra* note 5, at 656.

many factors.”⁸⁵⁷ He lists at least “national traditions, economic considerations, the social stratification, the sociological pattern and the specific juridical technique of each individual country, as well as the trend of world politics”.⁸⁵⁸ This was the main reason I tried to avoid over-generalized statements about militant democracy practice in various jurisdictions throughout the whole project.

Furthermore, he argues that “salvation of the absolute values of democracy is not to be expected from abdication in favor of emotionalism, utilized for wanton or selfish purposes by self-appointed leaders, but by deliberate transformation of obsolete forms and rigid concepts into the new instrumentalities of “disciplined”, or even – let us not shy from the word – “authoritarian,” democracy.”⁸⁵⁹ In the end, Loewenstein argues that “democracy has to be redefined”⁸⁶⁰ and “liberal-minded men”⁸⁶¹ should apply the discipline of democracy “for the ultimate ends of liberal government: human dignity and freedom.”⁸⁶² It is detrimental for democracy’s survival to neglect the experiences of deceased democracies;⁸⁶³ therefore, constitutional theory and practice should be on guard to protect democracy from the unfortunate mistake of giving its deadly enemies the means by which they may destroy it.

⁸⁵⁷ Ibid., at 657

⁸⁵⁸ Ibid.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid., at 658

⁸⁶² Ibid.

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