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Afshin Ellian · Bastiaan Rijpkema
*Editors*

# Militant Democracy – Political Science, Law and Philosophy

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# Chapter 1
# Introduction


**Afshin Ellian and Bastiaan Rijpkema**

**Abstract** This chapter first outlines the two contexts that made the interest in militant democracy surge: 'terrorism and state overreaction' and, more recently, 'illiberal democracy'. The former mainly concerns the way militant democracy can be utilized in combating terrorism and the risks inherent in the state's response when it comes to human rights; the latter context came to the fore with the growth and/or the rise to power, of 'illiberal' parties in several democracies, such as Hungary and Poland. These illiberal parties are, as Cas Mudde has argued, not necessarily undemocratic, but *illiberal*; they take aim at 'minority rights, pluralism and the rule of law'. Subsequently, through briefly examining the recent NPD-decision of the German Federal Constitutional Court, the chapter argues for further deepening the growing debate on militant democracy by adding a multidisciplinary approach. The chapter then sets out to discuss the several contributions along the lines of the three disciplines brought together in this volume: political science, law and philosophy.

**Keywords** Militant democracy · Terrorism · Iliberal democracy · Political science · Law · Political philosophy

## 1.1 Militant Democracy: Origins

In 1937 German émigré scholar Karl Loewenstein published his two-part article 'Militant Democracy and Fundamental Rights'.[1] After analysing the collapse of European democracies in the 1920s and 1930s,[2] Loewenstein called upon democracies to become militant in confronting the autocratic threat that swept the

[1] Loewenstein 1937a, b.

[2] Loewenstein 1935a, b.

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continent.[3] They had to take legislative measures to remedy the weak spots of democracy,[4] these included the 'proscribing of subversive movements', in Loewenstein's view 'the most comprehensive and effective measure'.[5]

In his wake, an extensive literature has developed concerning the question if, and when, a democracy is allowed to actively confront antidemocrats. This can involve criminal law or it can mean curbing free speech, but typically militant democracy is associated with the banning of political parties. The freedom to form political parties, to participate in elections and to, potentially, enter parliament is *so* crucial to modern democracy that any restrictions on this principle ask for a solid justification.[6] The banning of antidemocratic parties can therefore rightfully be seen as the 'million-dollar question' of militant democracy.[7] At the same time, after the Second World War several democracies on the European continent actually *became* militant, in practice, 'arming' themselves against antidemocrats. For instance, France, The Netherlands, Portugal, Spain, Belgium, and most prominently, Germany, to name a few, have enacted legislation to confront antidemocrats.[8]

## 1.2 Shifting Contexts: Terrorism and Illiberal Democracy

Karl Loewenstein conceived the idea of militant democracy in the context of twentieth century fascism and communism. Although the concept retained its significance as an important constitutional principle in Germany[9] and in the high-profile banning cases of *Refah Partisi* in Turkey and *Batasuna* in Spain, on which the European Court of Human Rights decided in respectively 2003 and 2009,[10] two new contexts made the interest in the topic surge.

### *1.2.1 Terrorism and State Overreaction*

In 2004 András Sajó published his influential *Militant democracy*,[11] a collection of papers presented at a conference held at the Central European University in Budapest, Hungary. In his introduction to *Militant democracy,* Shlomo Avineri

[3] Loewenstein 1937a, p. 423.

[4] Loewenstein 1937a, p. 431.

[5] Loewenstein 1937b, p. 645.

[6] See also Müller 2012, p. 536–537.

[7] Rijpkema 2015, p. 15.

[8] Tyulkina 2015, p. 21; Müller 2012, p. 536; Vanden Heede 2004 p. 193 and note 2; Issacharoff 2007, p. 1409–1410; Klamt 2007, p. 133–134; Rijpkema 2015, p. 16.

[9] Müller 2012, p. 536.

[10] See ECtHR *Refah Partisi and Others v. Turkey*, 13 February 2003, 41340/98, 41342/98 and 41344/98; ECtHR *Herri Batasuna and Batasuna v. Spain* 20 June 2009, 25803/04 and 25817/04.

[11] Sajó (ed.), 2004.

places the concept of militant democracy against the backdrop of 9/11 and Islamic extremism.[12] This context is also present in Markus Thiel's *The 'Militant Democracy' Principle in Modern Democracies* (2009),[13] and Afshin Ellian and Gelijn Molier's *The State of Exception and Militant Democracy in a Time of Terror* (2012).[14] The 9/11 terrorist attacks dramatically introduced a new challenger of (Western) democracies, and so argues Avineri, it 'brought issues of "militant democracy" back into the center of political discourse'.[15] This time, the threat was different: no longer were democracies threatened by (communist) political parties internally, and by a hostile power, the Soviet Union, externally.[16] The danger of religious extremist terrorism was more 'amorphous', seemed to lure Western democracies into giving up on some basic rights and guarantees (e.g. Guantanamo Bay), thus giving rise to renewed debates on 'permissible defensive mechanisms' in 'non-conventional asymmetric warfare.'[17]

The religious extremist threat did not fade away – on the contrary, the so-called Islamic State (ISIS) revived and strengthened it. Although it can be hard to determine which terrorist attacks should be ascribed to ISIS, it is estimated that, between June 2014 and July 2016, this terrorist 'state' is responsible for (inspiring) more than 140 terrorist attacks globally, resulting in more than 2000 deaths.[18] With the establishment of a 'state' based on its extremist ideas, religious extremist terrorism got a new dimension.[19] ISIS' terrorism is more visible, and less 'amorphous', than Al-Qaida's terrorism of 9/11, resembling more closely the Cold War situation Avineri described, with the extremist ideology being personified in a 'state'. However, due to its terrorist attacks the war against ISIS remains asymmetrical for an important part.

It is important to note that it is not just terrorism that poses a threat, for the *response* to terrorism itself may also do harm to liberal democracy. Reports by, for instance, *Amnesty International,* raise concerns regarding the protection of human rights in the struggle against terrorism.[20] Militant democracy might provide a useful framework in this respect, providing more constitutional checks than, for instance, a 'state of exception'-rationale.[21]

At the same time, we should add, the very concept of militant democracy is *also* prone to misuse and can constitute a danger in itself. A democracy wielding 'auto-

[12] Avineri 2004, p. 2.

[13] Thiel 2009a, p. 2.

[14] Ellian and Molier 2012, p. 1.

[15] Avineri 2004, p. 2.

[16] Avineri 2004, p. 2.

[17] Avineri 2004, p. 2–3.

[18] Lister et al. 2017.

[19] As of June 2017, ISIS's 'state' was on the brink of defeat, see Cockburn 2017.

[20] *Dangerously disproportionate: the ever-expanding national security state in Europe*, London: Amnesty International 2017.

[21] Tyulkina 2015, p. 157 and 217–218; although one could question if 'militant democracy' is actually the right framework for addressing terrorism, see Engelmann 2012; Thiel 2009b, p. 380; Müller 2012, p. 538.

cratic powers' to protect itself, such as banning political parties, can be hard to distinguish from a *real* autocracy. The flagrant violation of human rights in Latin America, such as mass incarnations, under the banner of 'militant democracy' during the Second World War, in part under the responsibility of Karl Loewenstein himself, attest to this fact.[22] More recent examples include Turkey, where, until 2004, no less than 18 parties were banned because of their Kurdish standpoints,[23] or the repressive use of party bans in some democracies on the African continent.[24]

### *1.2.2 Illiberal Democracy*

More recently a new context emerged, in the form of the threat to liberal democracy posed by emboldened right-wing populist parties.[25] As Cas Mudde writes: 'The rise of populism has had important consequences for the state of liberal democracy in Europe. Although populism is not necessarily antidemocratic, it is essentially illiberal, especially in its disregard for minority rights, pluralism, and the rule of law';[26] a focus that leads to questions regarding the appropriateness of a militant democracy response.[27] Furthermore, it is important to note that the leaders of these parties, as Mudde adds, stick to their populist, and thus illiberal, programme when in power: '(…) Orbán has openly set about transforming his country into what he described in a 2014 speech as "an illiberal new state based on national foundations" (…).'[28]

If one wants to gauge the actual threat to 'liberal democracy' stemming from these 'illiberal parties', they can roughly be divided into two categories: 'illiberals in power' and 'illberals in opposition'. When it comes to the former category, Hungary is a case in point. Orbán's Fidesz party came to power in 2010 with a spectacular two-thirds majority in parliament.[29] The new ruling party quickly started an astonishing legal overhaul, amending the constitution 12 times to make way for a new constitution, and passing more than 700 laws[30] – with some laws presented and put to a vote in the same

[22] Greenberg 2014, p. 187–198.

[23] Tyulkina 2015, p. 171 and 180.

[24] Bogaards, Basedau and Hartmann 2010, p. 611 and 612; Basedau and Moroff 2011

[25] For a definition of populism, see Mudde 2004, p. 542–548, with Mudde's well-known definition of populism on p. 543: 'an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people.' See also Jan-Werner Müller's definition in Müller 2016b, p. 20: "In addition to being antielitist, populists are always antipluralist: populists claim that they, and only they, represent the people."

[26] Mudde 2016, p. 28.

[27] See Mudde and Rovira Kaltwasser 2017, p. 108–109

[28] Mudde 2016, p. 28.

[29] Scheppele 2013, p. 560.

[30] Scheppele 2013, p. 561.

week.[31] As Kim Lane Scheppele explains, these changes, which effected 'everything from the civil code and the criminal code to laws on the judiciary, the constitutional court, national security, the media, elections, data protection, and more', do not look particularly suspicious individually, but *taken together* they constitute 'a system in which it is nearly impossible for the opposition to win an election.'[32]

But Orbán even made bolder moves, specifically targeting the judiciary, media and academics. In 2012 Fidesz managed to oust Supreme Court President – and government critic – András Baka, 3,5 years before the end of his term, through a combination of supposedly neutral legal revisions.[33] It is important to note that Baka, in his capacity as Supreme Court President, was also head of the National Council of Justice, with the task of giving his opinion on legal reforms that were relevant to the judiciary – something he explicitly did, before the termination of his appointment.[34] When his case reached Strasbourg, the European Court of Human Rights (ECtHR), in reviewing the sequence of events, concluded that Baka's termination 'was prompted by the views and criticisms that he had publicly expressed in his professional capacity.'[35] And, in 2017, the Fidesz government targeted one of Hungary's most prestigious educational institutions, the Central European University in Budapest[36] – ironically, the very university where the conference was held that led to Sajo's *Militant Democracy*.[37] Assessing the overall developments in Hungary in 2015, János Kornai is utterly pessimistic:

> I believe that under Orbán Hungary has already moved from the subset of democracies into the subset of autocracies. To consider Orbán a dictator would be to misread Hungary today. It has a multiparty system; opposition parties function legally; newspapers opposing the government can be published. Political opponents are not imprisoned en masse, nor are they liquidated. We know all too well what real dictatorship is; we have experienced it. What we are experiencing now is different. Yet to consider Orbán the leader of a democracy would also be wrong. I do not even want to raise the question of whether Orbán, in the depths of his heart, is a true democrat or not. We must focus on what has actually happened. And what has already happened is enough for us to say that Hungary is now an autocracy.[38]

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[31] Kornai 2015, p. 35.

[32] Scheppele 2013, p. 561, see also Kornai 2015, p. 41 and Uitz 2015, p. 296.

[33] ECtHR Baka v. Hungary 23 June 2016, no. 20261/12, par. 33.

[34] ECtHR Baka v. Hungary, par. 13 and 145.

[35] ECtHR Baka v. Hungary, par. 151.

[36] Hungary passes a law to shut down a bothersome university. *The Economist* (online), 8 April 2017.

[37] Avineri 2004, p. 2.

[38] Kornai 2015, p. 42–43; see also Uitz 2015, p. 296: 'Thus, reaching beyond the comfort-zone of comparative constitutional law analysis reveals features of Hungary's recent constitutional transformation that are highly pertinent in comparative constitutional scholarship. Reflecting on the changes introduced by the new constitutional rules (rather than simply taking a snapshot of these rules) and accounting for the practical consequences of these changes, have revealed a pattern of elimination of constitutional constraints on the exercise of political powers and the resulting instances of self-perpetuation through constitution-making. A closer look at the exchanges with European constitutional actors have also shown that national responses to European interventions are driven not by a spirit of compliance but by the urge to establish exceptions, in the spirit of constitutional parochialism.'

Kornai further contends that there is a risk of spreading.[39] Pech and Scheppele warn for copying behaviour in Poland, where the Prawo i Sprawiedliwosc (PiS) threatens the judicial independence and has come under scrutiny of the European Union.[40]

Next to Hungary's Fidesz and Poland's PiS, we might place the politically eccentric President of the United States Donald Trump within the category of 'illiberals in power'. One striking difference, however, is that, in the early stages of his term (and during his election campaign), President Trump has mostly *said* illiberal things. He has not yet come close to anything as the all-out legal restructuring that Fidesz has brought about and that PiS is attempting. Among all his controversial and constitutionally dubious remarks,[41] one of his statements during the final election debate with Hillary Clinton, on 19 October 2016, was particularly remarkable.[42] In it Trump declined to confirm that he would accept the outcome of the 2016 election – an election he claimed was rigged against him.[43] Later on, he nuanced his statement by saying that he meant he would reserve the right to file a legal challenge in case there was no 'clear election result'.[44] After his election, Trump labelled the United States' media 'the enemy of the people',[45] with whom he was in 'a running war',[46] and held an individual judge – that blocked his January 2017 travel ban imposed on seven Muslim majority states – personally responsible for any terror attacks: 'If something happens blame him and the court system.'[47]

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[39] Kornai 2015, p. 43.

[40] Pech and Scheppele 2017; in December 2017 the European Commission triggered the 'Article 7'-sanction procedure with regard to Poland, see Rule of Law: European Commission acts to defend judicial independence in Poland, *European Commission Press Release*, 20 December 2017, http://europa.eu/rapid/press-release_IP-17-5367_en.htm

[41] For an overview, see Liptak 2016.

[42] Healy and Martin 2016.

[43] Healy and Martin 2016.

[44] Trump says he'll accept "clear" election result, reserves right to challenge, *Reuters* (online), 20 October 2016.

[45] 'Enemies of the people': Trump remark echoes history's worst tyrants, *BBC US & Canada* (online), 18 February 2017.

[46] Farhi 2017.

[47] Lawler 2017. For a thorough analysis of Trumps' eccentric policy and views, see Ellian 2017. Another prominent 'illiberal in power' outside the EU is obviously Turkey's ruling AK-party under the leadership of Erdogan, see on the situation in Turkey for instance the European Commission for Democracy Through Law (Venice Commission), *Turkey: opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, 10–11 March 2017 (110th Plenary Session): 'In conclusion, the Venice Commission is of the view that the substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey. The Venice Commission wishes to stress the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum.' In addition to his legislative transformation of the Turkish state, Erdogan stands out in terms of repression (in the wake of the failed 2016 coup), see Fisk 2016.

As said, besides 'illiberals in power', there are 'illiberals in opposition'. In several European democracies, illiberal parties did not enter government, but nevertheless grew stronger in 2017. In the Netherlands, the PVV of Geert Wilders became the second-largest party in the House of Representatives, Marine le Pen was the runner-up to Emmanuel Macron in the French presidential elections, and with the *Alternative für Deutschland* (AfD), a far-right party entered the German parliament for the first time since 1961.[48] Although they are not in power, the proposals they make would, *if* effectuated, threaten the rule of law. Geert Wilders' PVV is a striking example here. Its proposal to close down all mosques and Islamic schools openly contradicts several fundamental rights, i.e. equality, freedom of religion and the freedom of education – all enshrined in the Dutch constitution.[49] Moreover, the 'illiberal opposition' of the PVV tends to exert pressure on the rest of the political playing field, drawing it closer to the far-right.[50]

## 1.3 This Volume: A Multidisciplinary Approach

The debate on militant democracy has broadened and deepened since Sajó's *Militant democracy.* Both constitutional law and empirical political science show a growing interest in the subject.[51] And more recently, the normative dimensions of 'democratic self-defence' have increasingly become the object of attention.[52] This volume hopes to build on this development and bring together the perspectives of political science, law and philosophy in the study of militant democracy.

The 2017 NPD-decision of the German Federal Constitutional Court (BVerfG) provides a perfect example of a case where only one perspective, be it law or political science, does not tell the whole story. The BVerfG's decision *not* to ban the extreme right Nationaldemokratische Partei Deutschlands (NPD) because the party, in spite of being antidemocratic, is too insignificant to constitute a threat to German

[48] Connolly 2017.

[49] Respectively art. 1, 6 and 23 of the Dutch Constitution, see also Fennema 2016, p. 291. For an official translation published by the Ministry of the Interior and Kingdom Relations, in collaboration with the Ministry of Foreign Affairs, see: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008 For the PVV's proposals, see its one-page electoral programme for the 2016 Dutch parliamentary elections, available in: Kuik 2016.

[50] Mudde 2017.

[51] See on this Capoccia 2013.

[52] Malkopoulou and Norman 2017; Müller 2016a; Kirshner 2014; Tyulkina 2015; Rijpkema 2015.

democracy is a remarkable shift from its earlier jurisprudence.[53] In its ban of the Kommunistische Partei Deutschlands (KPD) in 1956 the BVerfG held that an anti-democratic party could be banned, regardless of its (electoral) potential.[54] One explanation might be found in political culture: a more mature democracy, as Germany has become, in contrast to the West Germany of the 1950s, does not need to ban political parties.[55] But the political science perspective does not show the whole picture. The interaction between German law and the law of the European Convention on Human Rights (ECHR) also offers a possible explanation. From a legal perspective, it was highly doubtful if the BVerfG's tough 1950s stance on militant democracy could stand up to scrutiny by the European Court of Human Rights (ECtHR), which, in last instance, reviews party bans in Germany under the ECHR.[56] So, where the development of German democracy certainly made a more lenient stance possible, such a stance, from a legal perspective, could also be explained as a move to bring its jurisprudence more in line with the ECtHR case law.[57]

As the example of the NPD-decision shows, militant democracy is a topic at the *intersection* of political science, law and philosophy. Integrating the work done on militant democracy in these disciplines could bring the academic debate on militant democracy a step further.[58] This volume explicitly brings together scholars from different disciplines, fostering the multidisciplinary discussion of militant democracy. The contributions in the present volume are categorized along the lines of the perspectives of political science, law and philosophy, and are introduced, summarized and briefly discussed in the following section.

## 1.4 Outline of the Volume

### *1.4.1 Political Science*

In the opening chapter *Angela Bourne* explores the question why it is that some democracies ban political parties while others do not. In terms of the recent NPD-decision: what explains the different approaches between the Germany of the 1950s and the Germany of the 2010s, the former banning the Sozialistische Reichspartei and the KPD, the latter *not* banning the NPD? Bourne first presents a comprehensive overview of all party bans in European democracies between 1945 and 2015, and subsequently, compares this data with explanations the literature offers on why

[53] BVerfG 17 January 2017, 2 BvB 1/13 (NPD II), par. 585–586 (online version, published by the *Bundesverfassungsgericht*).

[54] BVerfG 17 August 1957, E 5, 85 (KPD), p. 143 (Mohr Siebeck-edition).

[55] Currie 1994, p. 221 and Kommers 1997, p. 238.

[56] See in more detail: Ellian, Molier and Rijpkema 2017.

[57] Kingreen 2017, p. 505, see on the BVerfG and ECHR-compliance in general: Lübbe-Wolff 2006, p. 145–146.

[58] See for instance Capoccia 2013, discussing developments in law and political science.

parties are banned or not. Bourne concludes that several factors help explain why a democracy at a given time is more, or, by contrast, less inclined to ban a political party. Among those factors are the character of the targeted party, particularly its stance on political violence, a state's constitutional tradition, but also the predicted gains or losses for mainstream parties after a ban might play a role.

In addition, Bourne points to the pivotal role of political elites. For instance, an authoritarian past is often used to explain a democracy's tough stance on antidemocratic political parties. However, the data of post-World War Two party bans shows that countries with 'recent historic experiences of authoritarian rule (…) are just as likely to ban parties as those who have not had such experiences.' Bourne suggests that this can be explained by the way the political elite in a democracy utilizes the state's authoritarian past. Such a historical experience can serve as an argument *pro* banning – the strong German 'nie wieder' – or as an argument *contra* banning, associating the banning of a party with the authoritarian past that the people want to leave behind, of which the case of South Africa provides an example. Also important is the question of constitutional design: the larger the amount of so-called 'veto-players', i.e. institutional actors that can block a party ban, the less likely party bans seem to be. These factors vary between European states, and some states do not ban political parties *at all*, but Bourne contends that the data on party bans shows that 'party bans remain an important instrument within the contemporary armoury of militant democracy'.

But what happens if an antidemocratic party is not banned, is (very) successful in garnering votes, enters the parliament and tables a bill to *de facto* abolish democracy? In his contribution *Ivan Ermakoff* looks into the dynamics of collective abdication, i.e. the moment when a democracy decides not to decide anymore. From 1932 on, the NSDAP was the largest party in Weimar Germany, but when Hitler brought his Enabling Act (Ermächtigungsgesetz) to a vote on March 23, 1933 he did not have the required majority to let it pass.[59] The Enabling Act would give Hitler authoritarian powers and would do away with the separation of powers.[60] The far-reaching Enabling Act required a constitutional amendment, and thus a two-thirds majority. The Social Democrats were not going to cede these powers to Hitler. To complete this 'political revolution', the NSDAP needed the support of the Weimar-loyal Catholic Center Party.[61] And the Center Party gave in; it had always stood for the Weimar constitution, but now handed Hitler the powers he wanted, bringing the Weimar democracy to its definitive end.[62]

It is this dramatic decision by the Center party on which Ermakoff focuses to shed light on the question why a parliament would *de facto* abolish itself. In analysing the decision-making processes within the Center party in great detail, based on archival material, Ermakoff concludes that the collective action problems that arise when a democracy is confronted with an authoritarian challenge are part

[59] Bendersky 2014, p. 87.

[60] Bendersky 2014, p. 88.

[61] Bendersky 2014, p. 87.

[62] Bendersky 2014, p. 87.

of the very nature of democratic governance. In contrast to authoritarian governance, democracy relies on limited and, above all, *conditional* mandates. Politicians subject themselves to 'periodic reviews' in elections, where their mandates can be renewed. An 'authoritarian bid for power', i.e. a bill such as Hitler's Enabling Act, which would end democratic governance, is therefore something that is perceived to lay outside the limited mandate of the representatives in parliament. It raises the stakes of a collective response significantly. Adding to this is the fact that in contrast to an authoritarian party (such as the NSDAP), a democratic party (such as the Center Party) is organized along *democratic* lines. So, whereas the 'authoritarian challenger' can determine a strict course of action, by following instructions of the party leadership, the democratic parties in parliament, in response, first have to convene and discuss to establish what their position and course of action will be: 'they cannot presume the group's stance until this stance has taken shape.' Ermakoff shows, by using the example of the Center Party, how important prominent actors and their public stances are in this process. As 'informative focal points' they can push for a collective answer to the challenge.

These dynamics also elucidate why authoritarian challengers want to go through the bothersome democratic process of attaining a legal mandate, instead of seizing power by way of (violent) revolution. As Ermakoff explains, first, after a 'constitutional abdication' it is harder to resist the new regime on *democratic* grounds, i.e. by claiming to defend democracy, since it was democracy itself that 'decided' in favour of the new regime in the first place. Second, by letting prominent actors publicly renounce their democratic mode of governance in parliamentary proceedings a 'shared belief' of acquiescence is created, thereby undercutting the potential or resistance.

Ermakoff also discusses ways in which democratic collective action problems and the risk of 'collective abdication' can be reduced. He suggests that representatives can agree, beforehand, on a devolution mechanism, inside their group, for instances of authoritarian challenges, indicating which representatives will take the lead in determining the course of action of the group as a whole. Ermakoff also mentions the theory of 'constitutional dictatorship' as an option, a more far-reaching devolution, on the institutional level.

An alternative might be found in regulating the internal structure of political parties, as the German *Grundgesetz* does, thereby *formally* undercutting the top-down decision-making of authoritarian challengers.[63] At the same time there is, of course, no guarantee that members of a party with authoritarian aims will actually make use of such a (formally) democratic party structure. It can also be argued that, irrespective of party structure, the 'free mandate' of parliamentarians already provides a

[63] See article 21, paragraph 1 of the *Grundgesetz*: 'Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.' Translation by Christian Tomuschat and Donald P. Kommers, available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0120. At the same time, it must be noted that German practice shows that it is hard to effectuate this principle, see Elzinga 2008

form of protection: a party structure can be authoritarian, but when it comes to the actual deciding in parliament, the authoritarian party cannot give any binding instructions to its members of parliament.[64] But here too, ultimately it all comes down to the (conscience of the) individual representatives that have to act. Ermakoff is therefore probably right to conclude that: 'Democratic consolidation is not simply a matter of judicial resources. Ultimately it rests on the political capacity of those who have a stake in the preservation of a democratic mode of governance.'

In concluding the political science part of the volume, *Miroslav Mareš* looks into how militant democracy functions in combating right-wing extremism, by zooming in on the recent developments in Slovakia. The focus is therefore not so much on why democracies ban parties in the first place, as is the topic of Bourne's contribution, but rather on what happens *after* a (right-wing extremist) party is banned and how the effects could be measured.

Mareš first discusses the historical development of the concept of militant democracy and its interactions with the struggle against right-wing extremism. Militant democracy is, of course, firmly rooted in German constitutional law and practice after the Second World War, but the use of the concept expanded significantly thereafter to Eastern Europe, the EU, and also outside Europe, namely, to countries such as Israel. After the Cold War, for instance, militant democracy measures were used in the post-communist countries of Eastern Europe, first against those associated with the former regime, but later on, also against right-wing extremists. As Mareš describes, in a case concerning the spread of Nazi propaganda, the Czech Constitutional Court in 2011 explicitly referred to the concept of militant democracy, although, interestingly enough, the legal norms used in the case date from the communist era.

After taking stock of research done on militant democracy instruments and the reasons for using its heaviest instrument, the ban of a political party, Mareš develops a conceptual framework to assess the success of party bans, discerning between several scenarios that can occur after a party is banned.

According to Mareš, we see a 'white scenario' when 'the extremist scene is weakened or eliminated' and there is 'limited potential for a renewed rise after the ban.' When the targeted party disappears, but a *new* 'radical or populist movement' arises, Mareš contends that it is more appropriate to speak of a 'grey scenario', mentioning the example of Austria, where Neo-Nazi activities were successfully curbed, but the right-wing populist *FPÖ* became a political power to be reckoned with. There are also two 'black scenarios', the first occurring when the *same* party reappears, stronger than before, due to their new 'martyr status', and the second when the party does not return, but the extremists find new and *more effective* forms to organize themselves.

Mareš concludes his contribution by utilizing this framework to analyse the rise of, and measures taken against, the Slovakian extreme right-wing political party *Kotleba – People's Party Our Slovakia*. The party gained 8,04% of the vote in the Slovakian elections of March 2016, and entered the Slovakian National Council (the

[64] Stam 2017 and Waling 2016.

Slovakian parliament) with 14 seats (out of 150). In 2006 the party *Slovak Togetherness – National Party* was banned by the Supreme Court of the Slovak Republic, for having advocated the unequal treatment of minorities and having strived for a corporatist state. However, a ban of the association that launched the political party, the *Slovak Togetherness*, failed on procedural grounds. This association, led by right-wing extremist leader Marian Kotleba, decided to re-launch its political party, albeit under a different name, with Kotleba operating in the background at first. After several transformations, in 2015 the party changed its name to a name prominently featuring its extremist leader, *Kotleba – People's Party Our Slovakia*, and got elected into the Slovakian parliament for the first time a year later.

Mareš argues that both black scenarios can be seen in the case of *Kotleba – People's Party Our Slovakia.* The first black scenario is present, since the party is still *de facto* the same as the banned *Slovak Togetherness – National Party*, which enables Kotleba to cultivate the proceedings against him and his party as part of his 'martyrdom'. The renewed party only grew stronger and, as Mareš explains, demonstrates a 'growing self-confidence' by trying to use militant democracy instruments against its political opponents. The party even placed former neo-Nazis group members on its candidate list and worked together with a paramilitary group, with their leader running as 'no. 88' on the party's list for the Slovakian parliamentary elections. Mareš maintains that the second black scenario also played out: via a web of organisations around *Kotleba – People's Party Our Slovakia*, the party is quite effective in pursuing its projects without much interference of the Slovak authorities.

### *1.4.2 Law*

As we have seen in Mareš' contribution, militant democracy is an increasingly international concept, manifesting itself, for instance, at the EU level. International law reflects this development: legal norms concerning militant democracy are increasingly international. In the section on law this trend is analysed in detail.

In his contribution, *Christian Walter* examines the international legal dimensions of militant democracy. Walter discusses several international legal documents, but on the basis of his analysis one could conclude that the 'internationalization' of militant democracy mainly takes place in two important international legal 'sites'. The first is the European Convention on Human Rights (ECHR); this important European treaty on human rights protection, encompasses 47 states on the European continent, and has its own judicial institution in the highly-regarded European Court of Human Rights (ECtHR), which has the final authority in European human rights cases. The ECHR, so Walter argues, provides a legal basis for militant democracy, in article 17 ECHR, as well as a basis for limiting the use of militant democracy measures, in article 11 ECHR. The first bars applicants from invoking protection by convention rights, if the ECtHR concludes that the applicant aims to use the rights protected by the ECHR against those same rights. Walter contends that it therefore

'embodies the concept of militant democracy'. The second is the article under which the ECtHR primarily scrutinizes party bans. On the basis of ECtHR jurisprudence, Walter maintains that the ECtHR monitors militant democracy measures quite strictly and thereby 'influences domestic decisions to a significant extent'. Walter points to the BVerfG's NPD-decision, and its thorough discussion of the ECtHR's jurisprudence, as a clear example of such influence.

The second 'site' of development is the European Union. Article 7 of the Treaty of Lisbon (TEU) creates a 'sanctioning' mechanism that makes it possible to intervene when there is a 'serious breach' of the values, such as democracy, in Article 2 TUE. As Walter explains, Article 7 TEU may be seen as a legal response to the 'Haider Affair', when EU member states, in the absence of applicable legal norms, adopted *ad hoc* bilateral sanctions against Austria, because the FPÖ had entered the governing coalition. Although Article 7 TEU has not yet been used and there are unmistakable difficulties in bridging the varying democratic traditions of the EU member states to find 'a common core', Walter argues that the purpose of the article (i.e. protecting democratic governance in EU member states) is clearly one that fits the idea of 'militant democracy'.

For Walter, these developments evidently show the 'internationalization of militant democracy'. This 'internationalization' has hitherto had a distinct 'European dimension', given the fact that the main drivers of this 'internationalization' are the ECHR (including its court, the ECtHR) and the EU. The discussed developments also show, so Walter argues, that human rights, and, more specifically: the increasing importance of human rights obligations within national legal orders, are central to the internationalization of the concept.

With respect to the interaction between international and national legal norms on militant democracy, the Dutch legal order is an interesting case study, as it is traditionally very open to, and strongly influenced by, international law.[65] Dutch democracy is normally, in the Netherlands and internationally, considered to be a relatively *procedural* democracy. As a Dutch study, commissioned by the Dutch government, puts it:

> As far as it is possible to speak of a Dutch concept of democracy, this seems to be – in contrast to, for example, the German concept – more procedural than substantive. As said, positive law offers little safeguards aimed specifically at the protection of democracy. The possibilities for bans and deprivation of voting rights are limited.[66]

[65] See, for instance, in the Dutch constitution, article 93: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published', and article 94: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' The translation are taken from the official translation, published by the Ministry of the Interior and Kingdom Relations, in collaboration with the Ministry of Foreign Affairs, is available at: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008

[66] Van der Woude 2009, p. 76 (translation by the authors).

There is a lot of truth to this, and consequently, the Netherlands usually does not play a prominent role in studies of militant democracy.[67]

Still, this is not entirely justified. The Netherlands has a provision on the banning of political parties, and although it is not specifically designed for political parties (it concerns associations in general), it is used relatively often. As Bourne's overview in this volume demonstrates, depending on definitions, after the Second World War, the Netherlands banned 4 or 3 political parties, in contrast to the 2 banned parties in Germany, the prototypical militant democracy.[68] In addition, there are some interesting, somewhat coincidental solutions to questions of militant democracy 'design' to be found in the Dutch system.[69]

In his discussion of the Dutch law on banning political parties *Gelijn Molier* accordingly rightly argues that Dutch democracy should be seen as a substantive, militant democracy. To find the Dutch legal norm on the banning of political parties one has to consult Article 2:20 of the Dutch Civil Code (BW), a rather odd location for such a constitutional, or public law, issue. As Molier explains, however, this has to do with the fact that this legal norm functions as a banning provision for political parties *and* regular associations. So, in the Dutch system, motorcycle clubs such as the 'Bandidos' are banned on the basis of the same provision as political parties.[70]

Examining the legal history of Article 2:20 BW, Molier argues that the Dutch militant democracy is based on a substantive conception of democracy, i.e. it incorporates fundamental values, such as particular fundamental rights. As Molier shows, this has important consequences for the width of the banning provision: under Article 2:20 BW not only antidemocratic, but also anti-*constitutional* parties could be banned. This is relevant in light of the shifting contexts of militant democracy discussed at the beginning of this introduction, and the position of the Geert Wilders' PVV in particular, a case Molier discusses at length.

Molier is, however, critical of the current Article 2:20 BW.[71] He argues that banning political parties on the same grounds as regular associations is unfortunate, since it does not allow for a more tailored approach to specifically defending *democracy.* Furthermore, the Government, in a recent memorandum on the interpretation of Article 2:20 BW, used the ECtHR-criterion for the timing of party bans ('an imminent danger' to democracy) in their reasoning, providing an interesting example of the interaction between legal norms and the 'internationalization' of 'militant democracy', as discussed by Walter. In response to this development, Molier argues for explicitly incorporating the ECtHR-criterion into Dutch law.

Next to the legal specifics of Dutch militant democracy, Molier also discusses some of the philosophical aspects of militant democracy. As said, Dutch militant democracy is based on, and implicitly justified, by a substantive conception of

[67] See for instance Fox and Nolte 1995; Klamt 2012; Tyulkina 2015.

[68] This picture changes if, next to political parties, one adds (political) *associations* to the calculation. For instance, in the wake of the KPD-ban, by 1964 Germany had banned 328 associations, see Greenberg 2014, p. 207.

[69] See on this in more detail: Rijpkema 2015.

[70] Nagtegaal 2017.

[71] See also Molier and Rijpkema 2017.

democracy. Molier, however, contends that such substantive definitions of democracy ultimately lack a foundation (besides one in natural law) – or in other words, a *final* argument; nor does universal consensus exist on the right definition. Molier therefore suggests an interesting alternative justification that does not depend on how one defines 'democracy'. Based on the work of German legal philosopher Gustav Radbruch, Molier argues that a justification for militant democracy can be found in an epistemological relativism regarding political values. This epistemological relativism holds that, in an absolute sense, one cannot 'prove' that one political system or political opinion, is superior to another. Following Radbruch, Molier, subsequently, argues that epistemological relativism logically leads to a 'principle of political equality': since all opinions are relative, it follows that a state (or political party) may never end the struggle of ideas, which entails that democracy needs to be protected. As Molier states: 'relativism demands and constitutes a democratic state.' Thus, so Molier concludes, Radbruch 'provides a theoretical justification for banning political parties in a democracy irrespective of the definition of the concept of democracy to which one adheres.'

Molier's interpretation of Radbruch constitutes an interesting contribution to the normative debate on militant democracy. A topic for further discussion, however, might be the extent to which the 'definitional problem' Molier ascribes to substantive justifications of militant democracy can *ultimately* be resolved by invoking Radbruch's epistemological relativism. It may be argued that grounding the justification in epistemological relativism, instead of in a conception of democracy, *transposes* the discussion to a different arena, namely, epistemology, where definitive answers are no less lacking than in the debate on democracy. Additionally, it also seems to *double* the problem, since one now also has to prove, why epistemological relativism would necessarily lead to the binding norm of 'political equality' and the obligation to uphold democracy; different conclusions might be equally justified.

### *1.4.3 Philosophy*

Someone who explicitly drew a different conclusion from relativism is the Austrian legal philosopher Hans Kelsen. For him, too, democracy was the political translation of relativism, but Kelsen held that tolerating all opinions, *also* meant tolerating the abolishment of democracy. Kelsen's political philosophy is discussed in the opening contribution of the philosophical part of this volume. In his chapter *Bastiaan Rijpkema* introduces a forgotten theorist of militant democracy, the Dutch constitutional thinker George van den Bergh. In 1936 Van den Bergh held his inaugural lecture as professor of constitutional law at the University of Amsterdam. In this lecture he developed a concept of militant democracy, in response to the dominant relativistic idea of democracy at the time, of, among others, Kelsen, and the tragic fate of several democracies on the European continent.

Combining historical analysis and philosophical argument, Rijpkema examines the contribution of Van den Bergh to militant democracy theory. First, Loewenstein's

theory of militant democracy is briefly discussed. Loewenstein's contribution to militant democracy is evident, as the 'father' of the concept, a thorough analyst of militant democracy measures from a comparative political and legal perspective, and promoting our understanding of the nature of democratic self-destruction.[72] Rijpkema, however, argues that Loewenstein largely neglected the more philosophical question of how to justify intervening in the democratic process. Loewenstein does offer a justification for democracy 'becoming militant' by drawing a parallel with an external war in which 'legality takes a vacation'. This is where the importance of Van den Bergh's contribution comes to the fore. Van den Bergh sets out to find a political philosophical justification to reconcile the banning of political parties with our idea of democracy.

Rijpkema starts his discussion of Van den Bergh with an important methodological distinction he made between violent and non-violent antidemocratic parties. Van den Bergh only wants to focus on the latter, since violent antidemocratic parties are not a truly interesting topic when it comes to philosophical justification – there is no serious discussion on outlawing political violence. When it comes to Van den Bergh's stance on how to justify banning non-violent democratic parties, Rijpkema offers two interpretations.

The first interpretation, which Rijpkema calls 'principled democracy', draws a parallel between having a conversation and participating in democracy. To *actually* have a conversation, interlocutors first have to agree on: 1) wanting to have a discussion, and 2) at least one common, fundamental principle. Van den Bergh argues, so explains Rijpkema, that the same goes for a democracy, people have to agree on: 1) wanting to 'peacefully coexist' in a democracy, and 2) on a fundamental principle against which ideas can be tested. So, a democracy presupposes some form of commitment to fundamental principles. For Van den Bergh, these fundamental principles are the freedom of thought (comprising freedom of religion and freedom of belief) and equality before the law – they constitute the 'touchstone and foundation' of democracy.

The second interpretation, 'democracy as self-correction', is based on what Van den Bergh sees as a unique quality of democracy, its capability to revoke decisions. Van den Bergh argues that if we envisage all possible decisions in a democracy through this lens, we will quickly realize that one specific decision stands out, namely the decision to abolish democracy all together – it is the one truly irrevocable decision in democracy. Of course, other decisions, too, can have *consequences* that cannot be undone – Rijpkema gives the example of demolishing a monument –, but in these cases the underlying decision itself can still be revoked (and the consequences tempered), in contrast to what happens if democracy is abolished, in which case the whole framework that made democratic decision-making possible is lost. Rijpkema argues that the second interpretation of Van den Bergh provides the most

[72] See for instance, on Loewenstein's ideas on the nature of 'emotionalism' in democracy: Sajó 2012

fruitful and original basis for a theory of militant democracy.[73] Rijpkema also compares Van den Bergh with the ideas of Milan Markovitch, a French legal theorist, who arrived at similar, but different conclusions on democratic self-defence in 1933.

Rijpkema then discusses the harsh initial reception of Van den Bergh's inaugural lecture in the Netherlands, and, in doing so, also gives an impression of the Dutch interwar debate on democracy.[74] Rijpkema concludes his contribution with Van den Bergh's 1960 farewell lecture. After the Second World War, Van den Bergh, who had spent part of the war in the German concentration camp Buchenwald, did not publish anything on the topic of militant democracy again. In his farewell lecture, however, Van den Bergh explicitly looked back on the reception of his thinking. In contrast to the interwar discussion, the post-war reception of his ideas was far more favourable, with several constitutions and human rights documents (including the European Convention on Human Rights) embracing the idea of militant democracy; Van den Bergh modestly concludes that he 'cannot be dissatisfied'.

In his contribution *Afshin Ellian* delves deeper into the meaning of crucial concepts in our thinking on democracy, before arriving at conclusions on the defence of democracy. He presents a fundamental, political philosophical analysis of democracy as a political regime *and* as a form of society.

First, the idea of a 'regime' is studied by analysing the key political philosophical texts of Plato and Aristotle. Ellian contends that in antiquity, democracy as a regime did not go uncontested, but was seen as a regime that constitutes a society that is fundamentally open to the unexpected, to the 'possibility'. In doing so, Ellian draws on the work of Martin Heidegger and Jacques Derrida. Heidegger inverts the Aristotelian ontology, with the 'possible', and not the 'actual', taking the ontological center stage. This ontological reversal fits perfectly into democracy: democratic openness is an openness to the future, to the unexpected and 'possible'.

This means, however, that there is also a great risk in democracy. The 'possible' in democracy can be very undemocratic. This prompts Ellian to discuss the 'Weimarian' debate between Kelsen and Carl Schmitt on democracy and the possibility of a 'constitutional dictatorship'. Ellian defends 'dictatorship' in its classical sense, i.e. as a Roman legal concept in order to defend the state and the legal order during a state of emergency. The *temporary* nature that is fundamental to this classic conception of 'dictatorship', by definition, excludes tyranny, which is to say: in a philosophical sense – all depends, of course, on *how* it is used in practice. Ermakoff, in his contribution, also arrives at the conclusion that some form of 'constitutional dictatorship' might help defend democracy, although, both arrive at this conclusion in different ways. Ellian comes to this conclusion after a philosophical study into what a democratic regime and society are, while Ermakoff arrives at the idea of a

[73] Elsewhere, Rijpkema takes this idea as the starting point for a comprehensive theory of militant democracy that pays attention to the justification of militant democracy, the effects of party bans, procedural safeguards, the legal design of militant democracy provisions, and, importantly, the difficult position of judges that have to decide on party bans. See Rijpkema 2015.

[74] See on this topic extensively: Joris Gijsenbergh's recent dissertation, Gijsenbergh 2017.

'constitutional dictatorship' after analysing the collective action problems in democratic self-defence.

To conclude his contribution, Ellian discusses militant democracy as a possible defence mechanism of democracy. Building on his ontological analysis of democracy he argues in favour of a minimal militant democracy concept, protecting free speech and outlawing political violence.

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# Part I
# Political Science

# Chapter 2
# Militant Democracy and the Banning of Political Parties in Democratic States: Why Some Do and Why Some Don't


**Angela K. Bourne**

**Abstract** This chapter examines contemporary practices of militant democracy in the case of party bans. This focus is pertinent insofar as party bans tend to be seen as the most militant, intolerant, or repressive measure to be deployed against anti-system parties or movements, and as such, the riskiest in terms of effects on democratic quality. After an overview of party ban cases in postwar Europe, the chapter evaluates explanations for why some democracies have banned parties while others have not. More specifically, it focuses on the distinctive experiences of new democracies, party orientations to violence, historical experiences of authoritarianism, the effectiveness of alternatives to party bans, the role of securitization discourses and the dynamics of democratic competition. The advantage of focusing on such explanations for party ban practices is that it permits the analyst to look beyond official rationales for party bans to understand how variation in political context, decision-making rules, political discourses and constellations of actor interests may influence what is ultimately a grave decision to limit access to both political power and the public sphere.

**Keywords** Party bans · Democratization · Securitization · Political violence · Constitutional traditions · Vetoplayers · Historical legacies

## 2.1 Introduction

At first sight, the concept 'militant democracy' seems a contradiction in terms. The model of liberal, representative democracy is founded on the promotion of free competition between political projects, underpinned by commitments to free speech and association, and principles of pluralism and tolerance. The democratic method entails the peaceful resolution of political conflicts as well as a privileging of civil society and delegitimisation of a role for the state in the selection among political

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projects. In contrast, 'militant democracy', alternatively a legal concept and normative position, legitimises state interventions restricting competition between political projects, free speech and association, actively encourages intolerance towards targeted political projects, and in some cases, leads to a deprivation of individual liberties through incarceration and restrictions on civil rights. Militant democracy is officially justified as democratic self-defence and has, in the contemporary era, targeted those promoting authoritarian political forms or violent regime change, serving the interests of foreign powers, undermining democratic commitments to pluralism and equality among citizens, attacking the security of vulnerable groups, or seeking to undermine the territorial integrity of the state. However, measures of militant democracy – such as banning parties and associations, criminalization of certain speech acts or restricting access to public employment – resemble the hallmarks of authoritarianism. It is, therefore, not surprising that using the tools of militant democracy is controversial, and raises questions about the motivations of those who yield them and the longer-term implications for the democratic system itself.

Conceptions of militant democracy have become much broader in recent years.[1] Its origins are usually traced to Karl Loewenstein's appeal for robust responses to the rise of fascism in 1930s Europe.[2] In the post-war period, the German Basic Law limited the rights of those seeking to damage or destroy the 'free democratic basic order', which lay the foundations for the articulation of militant democracy as legal doctrine in Federal Constitutional Court rulings banning the neo-fascist Socialist Reich Party (1952) and Communist Party of Germany (1956). The model was subsequently adopted elsewhere and endorsed in various rulings of the European Court of Human Rights.[3] Over the post-war period, the meaning of militant democracy has tended to expand from a narrow focus on fascist and communist parties using democratic entitlements to gain control of the state[4] into shorthand for a much wider range of measures employed against all kinds of extremist threats, including religious fundamentalists and separatist movements.[5] There have also been various attempts to create typologies distinguishing more 'militant' or 'intolerant' responses to political extremism from other, less restrictive, responses.[6] In these typologies, the proscription of political parties tends to be seen as the most 'militant', 'intolerant', 'aggressive' or 'repressive' measure that can be employed against anti-system movements and parties. Party bans are often seen as the most risky in terms of possible damage to the overall quality of the democratic system.[7] As such, questions about why democracies ban parties are particularly pertinent in an examination of contemporary practices of militant democracy.

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[1] Bourne 2012a.

[2] Loewenstein 1937, p. 417.

[3] Brunner 2002, p. 15; Fox and Nolte 2000, p. 389; Thiel 2009; Harvey 2004, p. 407; Macklem 2010.

[4] Loewenstein 1937, p. 417; Kommers 1996, p. 238.

[5] Sajó 2004; Thiel 2009; Macklem 2010; Bligh 2013.

[6] Fox and Nolte 2000; Pedahzur 2004; Capoccia 2005; Downs 2012; Bourne 2012a.

[7] Downs 2012, p. 49; Capoccia 2005, p. 59.

In this chapter I address this question, firstly by presenting an overview of party ban cases in post-war Europe. I then evaluate arguments in the literature on the question of why some democracies ban parties while others do not, including arguments focusing on experiences of new democracies, party orientation to violence, historical experiences of authoritarianism, the effectiveness of alternatives, the role of public discourse and veto players, and the dynamics of democratic competition.[8]

## 2.2 Democracies *do* Ban Parties

While the proscription of political parties is usually seen as a mark of tyranny, Bourne and Casal Bértoa's survey of post-World War II party bans in Europe shows that it is more common than is often assumed.[9] As Table 2.1 shows, no less than nineteen European countries have banned a party at some time during this period. Banned parties are typically parties of the extreme right (particularly neo-fascist and racist parties), of the extreme left (particularly orthodox communist parties) and substate nationalist parties (including those linked to terrorist groups, but not exclusively so). These patterns can also be observed elsewhere, including in Turkey and Israel, although in both countries religious fundamentalist parties have also been banned.[10]

Banned parties vary considerably in size and salience. Many banned parties are very small and have made little impact in electoral terms, while others, including former ruling authoritarian parties, have been enormously powerful but have not regularly faced fair electoral contests. As Table 2.1 shows, most banned parties are 'minor' parties, only able to capture, at most, one or two percent of the vote when banned. Nevertheless, a significant number of banned parties could be considered 'salient' parties, namely those whose vote share potentially permitted them to influence the dynamics of electoral behavior, party competition or government formation at the national level, or in federal or semi-federal states, at a regional level.[11] Banned parties of this type include the Flemish Block in Belgium, communist parties in Greece and Germany, and radical Basque nationalist parties in Spain. Bans have targeted 'hegemonic parties', namely former ruling mass fascist parties banned immediately after World War Two and the former ruling communist parties banned following the breakup of the Soviet Union. A smaller number of parties were banned after World War Two for collaborating with Nazi occupiers although their influence varied and is difficult to quantify.[12]

[8] For a more detailed discussion, see Bourne 2018.

[9] Bourne and Casal Bértoa 2017.

[10] See Casal Bértoa and Bourne 2017; Brems 2006; Rosenblum 2007; Navot 2008.

[11] Bourne and Casal Bértoa 2017.

[12] Niesen 2012.

**Table 2.1** Party bans in Europe 1945–2015

| Countries | Banned parties (year) | Ideological orientation | Party salience at time of ban | Banning state's level of democratization at time of ban | Experience authoritarian rule other than short-term occupation |
|---|---|---|---|---|---|
| Austria | German National Socialist Workers Party (DNSAP) (1945) | Extreme right | Hegemonic | New democracy | Yes |
| | National Democratic Party (NDP) (1988) | Extreme right | Minor | Established | Yes |
| Belgium[1] | Flemish National Union (1945) | Extreme right/ substate nationalist | Collaborationist | Established | No |
| | Parti Rexiste (1945) | Extreme right | Collaborationist | Established | No |
| | Flemish Block (VB) (2004) | Extreme right/ substate nationalist | Salient | Established | No |
| Bulgaria | United Macedonian Organization/ Ilinden-Pirin (OMO) (2001) | Substate nationalist | Minor | Established | Yes |
| Croatia | Serbian Democratic Party (SDS) (1995) | Substate nationalist | Minor | New democracy | Yes |
| Czech Republic | Workers´ Party (DS) (2010) | Extreme right | Minor | Established | Yes |
| France[2] | Nationalist Party (1959) | Extreme right | Minor | Established | No |
| | Proletarian Left (1970) | Extreme left | Minor | Established | No |
| | Revolutionary Communist League (1973) | Extreme left | Minor | Established | No |
| | Enbata (1974) | Substate nationalist | Minor | Established | No |
| | Corsican movement for self-determination (1987) | Substate nationalist | Minor | Established | No |
| | Radical Unity (2002) | Extreme right | Minor | Established | No |
| Germany[3] | Socialist Reich Party (SRP) (1952) | Extreme right | Salient | New democracy | Yes |
| | Communist Party of Germany (KPD) (1956) | Extreme left | Salient | New democracy | Yes |

(continued)

**Table 2.1** (continued)

| Countries | Banned parties (year) | Ideological orientation | Party salience at time of ban | Banning state's level of democratization at time of ban | Experience authoritarian rule other than short-term occupation |
|---|---|---|---|---|---|
| Greece | Communist Party of Greece (KKE) (1947) | Extreme left | Salient | Incomplete | Yes |
| Italy | National Fascist Party (PNF)/ Republican Fascist Party (PFR) (1947) | Extreme right | Hegemonic | New democracy | Yes |
| Latvia | Communist Party of Latvia (LKP) (1991) | Extreme left | Hegemonic | New democracy | Yes |
| Lithuania | Communist Party of Lithuania (1991) | Extreme left | Hegemonic | New democracy | Yes |
| Moldova | Communist Party of the Republic of Moldova (CPRM) (1991) | Extreme left | Hegemonic | New democracy | Yes |
| The Netherlands[4] | National Socialist Movement in The Netherlands (NSB) (1945) | Extreme right | Collaborationist | Established | No |
| | National European Social Movement (NESB) (1955) | Extreme right | Minor | Established | No |
| | Dutch Peoples Union (NVU) (1978) | Extreme right | Minor | Established | No |
| | Centre Party´86 (CP´86) (1998) | Extreme right | Minor | Established | No |
| Norway | National gathering (1945) | Extreme right | Collaborationist | Established | No |
| Romania | Communist Party (*Nepeceristi*) (PCN) (2008) | Extreme left | Minor | Established | Yes |
| Slovakia | Slovak Community-National Party (SP-NS) (2006) | Extreme right | Minor | Established | Yes |
| Spain[5] | *Herri Batasuna* (2003)/ *Euskal Herritarrok* (2003)/ *Batasuna* (2003)/*Eusko Abertzale Ekintza (2008))*/ Communist Party of the Basque Territories (2008)/ *Askatasuna (2009)* | Substate nationalist | Salient | Established | Yes |

(continued)

**Table 2.1** (continued)

| Countries | Banned parties (year) | Ideological orientation | Party salience at time of ban | Banning state's level of democratization at time of ban | Experience authoritarian rule other than short-term occupation |
|---|---|---|---|---|---|
| Turkey | Turkey Comfort Party (THP) (1983) | Pan-Islamist | Minor | Incomplete | Yes |
| | United Communist Party of Turkey (TBKP) (1991)/ Socialist Union Party (DBP) (1995) | Extreme left | Minor | Incomplete | Yes |
| | Socialist Party (SP) (1992) | Substate nationalist | Minor | Incomplete | Yes |
| | People's Labour Party (HEP) (1993)/Freedom and Democracy Party (ÖZDEP) (1993)/Democratic Party (DEP) (1994)/ People's Democracy Party (HADEP) (2003) | Substate nationalist | Minor (except HADEP, salient) | Incomplete | Yes |
| | Socialist Turkey Party (STP) (1993) | Extreme left/ (minority) nationalist | Minor | Incomplete | Yes |
| | Democracy Party (DP) (1994) | Substate nationalist | Minor | Incomplete | Yes |
| | Democracy and Change Party (DDP) (1996) | Substate nationalist | Minor | Incomplete | Yes |
| | Labour party (EP) (1997) | Extreme left | Minor | Incomplete | Yes |
| | Welfare Party (RP) (1998)/Virtue Party (FP) (2001) | Pan-Islamist | Salient | Incomplete | Yes |
| | Democratic Mass Party (DKP) (1999) | Substate nationalist | Minor | Incomplete | Yes |
| | Democratic Society Party (DTP) (2009) | Substate nationalist | Salient | Incomplete | Yes |

(continued)

**Table 2.1** (continued)

| Countries | Banned parties (year) | Ideological orientation | Party salience at time of ban | Banning state's level of democratization at time of ban | Experience authoritarian rule other than short-term occupation |
|---|---|---|---|---|---|
| UK | *Sinn Féin (1956)*/Republican Clubs (1967) | Substate nationalist | Minor | Incomplete (Northern IreIand) | No |
| | *Fianna Uladh (1956)* | Substate nationalist | Minor | Incomplete (Northern Ireland) | No |
| Ukraine | Communist Party of Ukraine (KPU) (1991) | Extreme left | Hegemonic | New democracy | Yes |
| | Russian Bloc (RB) (2014) | Substate nationalist | Minor | Incomplete | Yes |
| | Russian Unity (RY) (2014) | Substate nationalist | Minor | Incomplete | Yes |
| | Communist Party of Ukraine (KPU) (2015)[6] | Extreme left | Salient | Incomplete | Yes |

**Source:** Adapted from Bourne and Casal Bértoa 2017

**Notes. 1.** Following the general line of the existing literature the rather ambiguous case of *Vlaams Blok* (Flemish Block) is included in the list of banned parties.(Bale 2007; Bligh 2013; Rosenblum 2007) As Bale argues, this case constitutes an additional category of party ban – the 'effective (if not technical)' party ban. (Bale 2007, p. 114; see also Downs 2012, p. 95.) The Belgian courts ruled that the party violated anti-racism legislation, a decision which could have led to withdrawal of state funding and limits on access to the media, public buildings and even the postal service (Bale 2007, p. 152.) The party then dissolved itself and reemerged as *Vlaams Belang* (Flemish Interest). **2.** It is difficult to distinguish between parties and associations among the large number of proscribed organisations in France because banned organisations have mostly been very small and only rarely participated in elections, if at all. The table shows a sample of illustrative cases of banned parties in France that preliminary investigation suggests were political parties. **3.** In the case of Germany, the far-right Free German Workers Party and National List were excluded because the Federal Constitutional Court ruled that these were associations. **4.** It is a grey area whether NVU was actually banned. It was characterized as a prohibited association in 1978, but the Dutch Supreme Court later ruled that because, it was not formally dissolved, it could no longer be excluded from participating in elections.(Van Donselaar 1993, p. 95) **5**.This list includes banned political parties, party lists and most electoral groupings, as well as parties denied registration for being successors of HB, Batasuna and EH. It excludes cases where proscription by the Supreme Court was overruled by the Constitutional Court (i.e., *Iniziatiba Internazionalista - Herrien Elkartasuna, Bildu* and *Sortu*). **6.** The KPU was the same party banned in 1991 but permitted to reemerge in 1993. The ban in 2015 was justified on the basis of the party's separatist goals and for purportedly undermining constitutional values

Several classes of party bans may be distinguished on the basis of the degree of democratization in banning states.[13] Party bans can be observed in 'new democracies', or those at the transition stage of a process pursuing the transformation of an authoritarian regime into a fully consolidated democracy. In this context, former ruling parties have often been subject to proscription, as bans on the National Fascist Party in Italy, the German National Socialist Workers Party in Austria and communist parties in Lithuania and Latvia illustrate. More predictably, bans also occur in 'incomplete democracies', or those which set out on a process of democratic reform and obtain some – but not other – features of established or consolidated democracies. A contemporary illustration is the proscription of Russian Bloc and Russian Unity Parties in 2014 in Ukraine, but other notable examples include bans in Turkey and Russia.[14] Parties may nevertheless face proscription in 'established' democracies, or those which take place many years, sometimes decades, after the initiation of democratic reforms, and where democracy has become 'the only game in town'.[15] Recent examples include the proscription of Herri Batasuna and its successors in Spain from 2003 and the Workers' Party in the Czech Republic.

Official rationales for the proscription of parties have changed over time, as Bligh's distinction[16] between 'Weimar' and 'legitimacy' ban paradigms illustrates.[17] Weimer-inspired 'militant democracy' rationales justify the proscription of 'parties that seek to abolish democracy wholesale' and aim to 'prevent anti-democratic parties from coming to power and implementing their anti-democratic agenda'.[18] It applies to Nazi, fascist and communist parties and, more recently, Islamist parties, which explicitly seek to dismantle democratic regimes.[19] However, as Bligh points out, many contemporary proscription cases involve parties that do not openly promote anti-democratic ideologies or stand a real chance of winning governmental power.[20] Rather a 'legitimacy paradigm' has emerged, justifying proscription if parties 'threaten certain elements within the liberal constitutional order, such as the commitment to equality and non-discrimination, the absolute commitment to a non-violent resolution of disputes or secularism'.[21] These bans aim 'to deny extremist parties the forum of institutional expression, the legitimacy, and the aura of respectability that is naturally granted to political parties in modern democracy'.[22]

[13] Bourne 2012b.

[14] Bourne and Casal Bértoa 2017; Bourne 2012b.

[15] Linz and Stepan 1996, p. 15–16.

[16] Bligh 2013.

[17] See also Niesen 2002; Rosenblum 2007, p. 23–24.

[18] Bligh 2013, p. 1326.

[19] Ibid, p. 1330.

[20] Ibid, p. 1326; see also Rosenblum 2007, p. 23–4.

[21] Bligh 2013, p. 1345.

[22] Ibid, p. 1365.

## 2.3 Why Do Democracies Ban Parties?

Democracies in Europe clearly *do* ban parties, even if it is relatively rare. On the other hand, it is apparent that nearly as many democracies have chosen *not* to ban parties; indeed, Bourne and Casal Bértoa's survey[23] identifies seventeen European states that had *not* banned parties in the post-war period, namely Albania, Bosnia-Herzegovina, Cyprus, Denmark, Finland, Hungary, Ireland, Kosovo, Macedonia, Montenegro, Poland, Portugal, Slovenia, Serbia, Sweden and Switzerland. It is also notable that parties of similar types have been banned in some democracies, and in some distinctive historical contexts like the Cold War, but not others. Fascist, neo-Nazi and far-right parties have been banned, stripped of political rights or forced to dissolve in Italy, Germany, Austria, The Netherlands and Israel. Such parties have not, for instance, been banned in Sweden, Denmark or Britain. During the Cold War, communist parties were banned in Germany and Greece. After the collapse of the Soviet Union, communist parties in Russia, Latvia, Lithuania, Estonia and Ukraine also faced proscription. Yet, communist parties in Italy and France, at their peak both highly successful mass parties, were not subject to ban proceedings. Nor has the successful Czech Communist Party of Bohemia and Moravia been proscribed. Finally, while *Sinn Fein*, the political wing of the Irish Republican Army, was banned in 1956 and legalised in 1974, *Herri Batasuna* and various successors serving as the political wing of the terrorist group *Euskadi Ta Askatasuna* (ETA), were legal in the democratic period except for the ten years between 2003–12.[24] Separatist and/or minority nationalist parties have also been banned in Bulgaria.

These observations raise a series of questions: Why do some democracies ban parties, while others do not? Why are parties of similar types banned in some countries but not in others? And why are the same parties legal at some points of time but banned in others? The existing literature suggests a number of answers to these questions.

### *2.3.1 Authoritarian Past*

Many have argued that historical experiences of authoritarianism or military rule make democracies more likely to employ militant measures such as party bans against extremists. Such arguments are often inspired by the paradigmatic case of German 'militant democracy'. Backes' argument illustrates such reasoning:

> …the trauma of threat and destruction of the democratic constitutional state, which are nourished inside a society, continues to have an effect on European states. This especially applies to Germany, where a deeply inhumane mass movement led to a moral and material catastrophe, the aftermath of which still occupies Germany society more than 60 years later.

[23] Bourne and Casal Bértoa 2017.

[24] Bourne 2018.

> A totalitarian movement succeeded in gaining political power to a large extent through legal means. The fathers of the constitution therefore broke with the procedural understanding of democracy from the Weimar Republic, which was anchored in an untouchable core of values and rules in the constitution that ought to form [an] uncrossable boundary for the legality of extremist parties.[25]

Many other authors have observed that the legacy of Nazism in Germany has had an impact on the subsequent implementation of constitutional provisions of militant democracy.[26] In some comparative studies, these observations have been generalized into the argument that democracies with recent experiences of authoritarian rule (or serious threats to democratic institutions) tend to adopt more militant responses to political extremism.[27]

Against such expectations, however, Table 2.1 suggests that countries with relatively recent historic experiences of authoritarian rule (other than short-term occupation) are just as likely to ban parties as those which have not had such experiences. Citizens in most European democracies have lived in states that have experienced significant periods of authoritarian or military rule and yet similar ratios of states have banned parties in states with such experiences and those without them. This points to one of the problems with arguments linking an authoritarian past with a propensity to institutionalize or use militant measures such as party bans against political extremists. This is that historical experiences may also justify a rejection of militancy. For instance, in a study of militant democracy in South Africa, Kemmerzell argues that part of the reason why the South African constitution did not include provisions for party bans was due to 'the particular historical experience with bans during apartheid [which] holds great symbolic importance in the South African collective memory' and as such 'restrictions on associational freedom tend to be seen as an undesired legacy of the old, unjust regime'.[28] Similar arguments have been made in relation to the Spanish experience of dictatorship under General Francisco Franco.[29] More fundamentally, as Art shows,[30] democratic states with similar historical experiences may subsequently respond rather differently to political extremists. Art explains differences in the reactions of political parties to the breakthrough of far right parties in Germany and Austria - both of which had similar experiences of Nazi rule - with reference to the 'legitimacy of far right ideas and movements in democratic politics' developed in the post-war period.[31] The more restrictive responses of German elites, and the more permissive stance of Austrian elites, towards far right parties were the product of 'dramatically different ways in which

[25] Backes 2006, p. 279.

[26] E.g. Kirchheimer 1961, p. 137–8; Braunthal 1990, p. 9; Kommers 1996, p. 218; Klamt 2007.

[27] E.g. Downs 2012, p. 106; Klamt 2007, p. 154; Bleich and Lambert 2013, p. 144–145; Karvonen 2007, p.445.

[28] Kemmerzell 2010, p. 701.

[29] Ferreres 2004, p. 141.

[30] Art 2007.

[31] Art 2007, p. 338.

German and Austrian elites confronted the Nazi past'.[32] This work suggests that it is important to examine how political elites mobilize historical experiences, whether this is strategically through instrumental appeals to historical experiences in order to achieve their political ends or in ways that reflect taken-for-granted assumptions about the meaning of historical experiences.

### *2.3.2 Party Bans in New Democracies*

The exigencies of democratization provide an important context for party bans.[33] 'New democracies', or those in transition from an authoritarian to a democratic regime, typically face problems which make the option of proscribing a political party more compelling. New democracies are typically characterised by uncertainty, polarization, political tension and significant disagreement over the pace and forms of democratization.[34] Furthermore, in new democracies there is often a great deal of uncertainty about 'which interests will prevail and what the outcome of the democratic process will be'.[35] Sometimes there is a strong possibility that anti-democratic forces might prevail.[36] The marginalisation of extremist and anti-system parties is often regarded as a benchmark for democratic consolidation.[37] Another distinctive feature of new democracies is the challenge of 'dealing justly with the previous non-democratic rulers'.[38] Indeed, the proscription of political parties is one aspect of broader considerations of transitional justice, which may require a response to demands to punish agents of the old regime responsible for human rights violations or to purge them from the armed forces, bureaucracy and the civil service.[39] These characteristics of democratic transitions suggest new democracies may be more likely to ban parties when the threat of violent counterrevolution is substantial[40] or, as Niesen argues in the case of the post-war ban on re-establishing the Italian Fascist Party, in order to symbolically demarcate an authoritarian past, 'disclose a new republic's understanding of the paradigmatic wrongs of the old regime' and 'specify the new regime's normative orientation to the future'.[41]

Table 2.1 above shows that party bans have been relatively frequent in new democracies. In Western Europe, new post-war democracies in Germany, Austria and Italy banned parties, as did post-communist 'new democracies' in Latvia,

[32] Ibid; Kestel and Godmer 2004, p. 136.

[33] Bourne 2012b; Karvonen 2007, p. 437.

[34] Karl and Schmitter 1991, p. 270.

[35] Morlino 1994, p. 572.

[36] Rustow 1970, p. 354; Linz 1990, p. 153; Huntington 1991, p. 109–164.

[37] Linz 1990, p. 158; Diamond 1999, p. 67–68.

[38] Linz 1990, p. 158; Huntington 1991, p. 209.

[39] Linz 1990, p. 158; Huntington 1991, p. 211–231.

[40] Bourne 2012b, p. 1074.

[41] Niesen 2002, p. 275.

Lithuania, Ukraine, Moldova and Croatia. Not surprisingly, most parties banned by new democracies were former ruling parties or their successors, with proscription of the Communist Party of Germany being an interesting exception. Many new democracies do not, however, ban parties. This was the case for Bulgaria, Czech Republic, Romania, Slovakia, Spain, Albania, Bosnia-Herzegovina, Estonia, Hungary, Kosovo, Macedonia, Montenegro, Poland, Portugal, Slovenia and Serbia, for instance, when they were new democracies. Considering differing 'modes of transition' may help explain why some new democracies respond to the challenges of democratic transitions with party bans while others to do not. Huntington observes that different 'modes of transition' are associated with different approaches to the issue of purging and punishing protagonists of the old regime: in the case of 'third wave' *regime transformations* (regime reformer-led change) former officials of the authoritarian regime were almost never punished.[42] In case of *replacement* (opposition group-led change) they almost always were. In what Huntington calls *transplacements* (regime reformer- and moderate-opposition-led change) this was an issue to be negotiated. Similar arguments have been developed explicitly in relation to party bans. In their work on party bans in Africa, Hartmann and Kemmerzall develop the hypothesis that:

> the more consensual modes of transition should inhibit the introduction of party bans because more parties are involved in the transition itself and are stakeholders that cannot be excluded by legal fiat. The victory of one 'party', whether a popular opposition movement, a revolutionary military force, or a clever former authoritarian leader, should, in contrast facilitate the use of party bans, as these bans could become one instrument to formalise the victory and to systematically exclude the opponents from further competition.[43]

### *2.3.3 Orientation to Violence*

Banned parties, or those subject to ban proceedings, often refuse to unambiguously reject the use of violence, coercion or force as a means for pursuing political goals. Comparative studies of legal rules on party bans show that a party's actual promotion of violence, or a party's potential to incite or provoke it, are among the main justifications inscribed in law for party bans.[44] Furthermore, many of the parties listed in Table 2.1 were directly involved in acts of political violence through links with terrorist groups, or as participants in coup attempts, or were associated with groups which previously, contemporaneously, or might potentially, commit acts of political violence. Former fascist parties banned in Germany, Austria and Italy banned after their defeat in World War Two had been implicated in political crimes, mostly mobilised through their control of the coercive apparatus of the state. The communist parties of Latvia and Lithuania supported the August 1991 coup against

[42] Huntington 1991, p. 211–231.

[43] Hartmann and Kemmerzell 2010, p. 648.

[44] Brems 2006; Issacharoff 2007; Rosenblum 2007.

Gorbachev and pro-independence authorities in the countries. The communist party of Greece was banned after it launched a revolutionary insurrection and civil war (1946–9).[45] The National Democratic Party (Austria) was banned for reactivating national socialist ideas, but also conducted a terrorist campaign pursuing the return of the predominantly German-speaking region of South Tirol to Austria.[46] The radical Basque nationalist party *Herri Batasuna* and its successors were banned for integration in the terrorist group ETA[47] and the Irish nationalist party *Sinn Féin*, banned between 1956 and 1974 in Northern Ireland, was banned for integration in the Irish Republican Army.

In other cases, something less than direct implication in violent acts may contribute to justifications for proscription.[48] This was the case for party bans in Germany, where 'the use of violent methods is in no way a prerequisite for bans'[49] and where neither of the parties banned in the 1950s were considered to present a clear and present danger.[50] However, it could be argued that in such cases attitudes to violence were integral to what made the anti-democratic ideology of the party undesirable.[51] The ideological orientation of many of the parties subject to proscription have often, if not always, been associated with revolutionary struggle, terrorism, militarism and the glorification of violence, which suggests support for, or at best ambiguity over, the appropriateness of, violent political struggle is highly likely. Ambiguity often takes the form of at least rhetorical commitments to democratic practices in the short term, but revolutionary ambitions for an unspecified future time. More contemporary examples of proscription have been made on the basis of fears that parties may provoke 'societal unrest and perhaps ultimately violent conflict'.[52] This could include, according to Bligh, proscription procedures launched against the National Democratic Party of Germany in 2001 and 2013, insofar as the party's apparently 'symbolic'– rather than systematic organizational – links to violent far-right groups created a situation in which violent actions seemed more likely.[53] Bligh also argues that proscription of parties inciting racism and discrimination addressed a more generalised threat, namely the danger that such parties will contribute to the creation of a climate of violence or a climate of hate.[54]

[45] Kousoulas 1965.

[46] Degenhardt 1983, p. 402, 455.

[47] Bourne 2015.

[48] Rosenblum 2007, p. 49; Finn 2000, p. 60–61.

[49] Backes 2006, p. 274.

[50] Kirchheimer 1961, p. 151.

[51] See e.g. Rosenblum 2007, p. 49.

[52] Brems 2006, p. 169.

[53] Bligh 2013, p. 1349.

[54] Ibid p. 1348.

### 2.3.4 Constitutional Traditions

Other scholars have examined constitutional traditions, particularly contrasting traditions of 'substantive' and 'procedural democracies'.[55] According to Fox and Nolte,[56] a 'procedural model' draws on Schumpeter's conception of democracy as an institutional arrangement for choosing leaders and determining the political preferences of majorities. Majority rule is the basis for legitimacy, which limits state authority to select among competing views. Tolerance is a transcendent norm and there are no guarantees that democracy will always prevail. This 'rough approximation of actual state practice'[57] takes concrete form in specific constitutional features, principally a lack of restrictions on the scope of constitutional change.[58] In a 'substantive democracy', by contrast, democratic procedure is conceived as a means for creating a society where citizens enjoy core rights and liberties. It draws on Mill, Rawls and others in its insistence that rights should not be used to abolish other rights, and that a democracy need not tolerate the intolerant when its core values are at stake. A substantive democracy's legal system characteristically prohibits amendment of core constitutional commitments to democracy (or other core principles such as territorial integrity or secularism). Arguably, the very definition of procedural democracy – characterized by a commitment to 'open debate and electoral competition among all ideological factions'[59] - and its contrasts with a substantive democracy generate the expectation that procedural democracies are less likely to ban political parties.[60]

Similarly, some scholars have contrasted measures addressing the *Sein* or 'being' of a party or group – the ideological character of the party –, and its *Handeln* or 'acting' – which mainly regards unconventional, illegal or violent nature of political behaviour and strategies.[61] In light of this distinction and given democratic commitments to freedom expression, pluralism and tolerance, on the one hand, and to the rule of law and non-violent negotiation of political differences on the other, it is reasonable to expect that democracies will be more reluctant to ban parties for their anti-democratic ideology than for anti-democratic behavior.

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[55] Fox and Nolte 2000; Thiel 2009; Downs 2012; Bourne 2012a.

[56] Fox and Nolte 2000.

[57] Ibid p. 406.

[58] Ibid p. 406–8.

[59] Ibid, p. 389.

[60] Bourne 2012a; see also Thiel 2009, p. 389.

[61] Capoccia 2001, p. 13; Mudde 2004; Issacharoff 2007.

### 2.3.5 *Effectiveness of Alternatives*

Many authors argue that important alternatives to party bans are effective at marginalising or encouraging the moderation of anti-system parties and movements and some explicitly argue that certain alternatives to party bans are more effective. Most of these purportedly effective alternative strategies are classified as less repressive, more tolerant and more accommodative than party bans.[62] In some contexts, for instance, electoral rules, such as use of the plurality formula in single member constituencies or electoral thresholds, may be more effective for dealing with anti-system parties than militant measures like party bans.[63] The so-called 'cordon sanitaire', a political practice whereby mainstream parties collude to keep anti-system parties out of office, has been seen as 'stingily successful' at achieving this goal in some instances[64] even if arguments are mixed regarding its ability to undermine the electoral success of anti-system parties themselves.[65] Others have argued that strategies favouring collaboration between mainstream and anti-system parties in government may encourage moderation,[66] 'expose' anti-system parties as 'ill-prepared to deal with the responsibilities of everyday policymaking',[67] or unleash debilitating internal tensions within anti-system parties.[68] Husbands suggests that 'criminal prosecution and imprisonment of individual members of the leadership [may be] more effective or may by default amount to the same thing [as proscription]'.[69] More generally, longer-term strategies against anti-system parties and movements, including state support (financial or otherwise) for civil society initiatives against messages and activities of anti-system parties, or the implementation of longer-term educational and social initiatives, such as anti-racism campaigns and 'civics' classes, may be more effective insofar as they address causes rather than symptoms of anti-system support.[70] Where such strategies build a 'vital "civic culture", anchored in civic virtues and a general consensus on the fundamental values and rules', Backes argues, this 'ought to set narrow boundaries for extremists' attempts to gain influence'.[71]

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[62] E.g Downs 2012; Capoccia 2005.

[63] Sartori 2001, p. 99; Downs 2012, p. 23; Backes 2006, p. 281; Navot 2008, p. 747; A. Gordon 1987, p. 395; Pedahzur 2004, p. 118.

[64] Downs 2012, p. 109; see also Art 2007, p. 332.

[65] Compare e.g. Downs 2012, p. 21, 84, and Art 2007, p. 332.

[66] Downs 2002, p. 49; Downs 2012, p. 21; Van Spanje and Van der Brug 2007; De Lange 2007, p. 34; Bale 2003, p. 70.

[67] Downs 2012, p. 21.

[68] De Lange 2007, p. 27, 23; Kestel and Godmer 2004.

[69] Husbands 2002, p. 61.

[70] Husbands 2002; Pedahzur 2004.

[71] Backes 2006, p. 281.

### 2.3.6 Securitization Discourses

Given the predominance of security metaphors like 'militant democracy' and 'defending democracy' in academic and public discourse on responses to political extremism, it is not, perhaps, surprising that processes of securitization may be relevant for understanding party ban decisions.[72] Securitization theory, in its several variations, is premised on a conception of 'security' as intersubjective and socially constructed.[73] In their seminal work, Buzan *et al.* argue that 'security' occurs when 'an issue is presented as posing an existential threat to a designated referent object (traditionally but not necessarily the state, incorporating government, territory and society)'.[74] While 'the invocation of security has been the key to legitimizing the use of force', it has also 'opened the way for the state to mobilize or to take special powers, to handle existential threats'.[75] A public issue becomes *securitized* when 'presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure'.[76] In contrast, *desecuritization* 'shifts the issue out of emergency mode and into the normal bargaining process of the public sphere',[77] and no longer represents the issue as 'threats against which we have to take countermeasures'.[78]

An analysis of discourse on party bans in Spain, in relation to the Basque nationalist party *Herri Batasuna* and its successors, illustrates such securitization processes.[79] Two paradigmatic constructions of appropriate responses to the 'proscription dilemma' may be observed, involving distinctive constructions of the nature, appropriateness and possible consequences of proscription. A 'discourse of intolerance' conceived proscription as a law and order problem, which would help end violence. *Herri Batasuna* and successors were deemed 'abnormal' and thus unworthy of entitlements granted to democratic parties. The 'discourse of intolerance' framed the banned parties as one and the same as the terrorist group ETA and the parties were seen not only as a threat to the physical security of individuals subject to terrorist violence but as an existential threat to the institutions and practices of democracy itself.[80] This discourse did not go unchallenged. A contrasting 'discourse of tolerance' emphasized all parties' role in the representation of social interests and the exercise of free speech. In this discourse, proscription was seen as inimical to the

[72] Bourne 2015.

[73] Buzan et al. 1998, p. 30–31; Balzacq 2011, p. 1–4.

[74] Buzan et al. 1998, p. 21.

[75] Ibid, p. 21. Interestingly, Rosenblum uses similar concepts to refer to a category of party bans directed at parties posing 'an existential threat to the state's ethnic or religious or secular character', Rosenblum 2007, p. 58.

[76] Ibid, p. 23.

[77] Ibid, p. 4.

[78] Ibid, p. 29.

[79] Bourne 2015.

[80] Bourne 2015.

resolution of conflicts underpinning violence. A ban was seen as something that strengthened militants insofar as it fostered 'victimism' and the creation of martyrs, which would prevent the political wing leading the military wing out of violence; and a measure only appropriate in more serious circumstances.[81] However, in the Spanish debates, the 'discourse of intolerance' prevailed until radical Basque nationalist parties were permitted to reemerge under the banners *Euskal Herria Bildu* and *Sortu*.[82]

### *2.3.7 Veto Players*

In most democracies, the judiciary and often Constitutional Courts, make decisions about whether a party ought to be banned. This is not surprising, given the constitutional significance of party ban decisions. It also reflects strong normative justification for removing ban decisions from those involved in direct competition for power with targeted parties, as the European Commission for Democracy through Law has recommended.[83] Indeed, under such conditions it is striking that not all such decisions are made by the judiciary. In a few instances, notably in France and Britain,[84]

[81] Ibid.

[82] For more details, see Bourne 2018.

[83] European Commission for Democracy through Law (Venice Commission), Guidelines on Prohibition and Dissolution of Political Parties and Analogous measures, adopted 41st plenary session, (Venice, 10–11 December, 1999).

[84] Article 4 of the French constitution states that parties shall 'respect the principles of national sovereignty and democracy' and parties are regulated as associations and different laws establish different procedures. In accordance with article L212–1 of the Internal Security Code, the Council of Ministers may dissolve by decree groups or associations if they are involved in armed street demonstrations, take the form of combat groups or private militias, aim to undermine territorial integrity or the republican form of government, collaborate with the enemy, incite discrimination, hatred or violence on grounds of ethnicity, race, religion or engage in acts of terrorism. However, in accordance with article 7 of the Law 1 July 1901 on associations (amended), the High Court, at the request of an interested person or the public minister, determines the dissolution of associations founded for unlawful objectives that are contrary to morality or which aim to undermine the national territorial integrity and republic form of government. Decisions can be appealed in the Council of State. In the United Kingdom, parties have been banned as 'unlawful associations' in Northern Ireland under the Civil Authorities (Special Powers) Act of 1922 and in the UK as 'proscribed organizations' in the Northern Ireland (Emergency Provisions) Act of 1973 and currently under the Terrorism Act 2000. In this legislation, respectively, the Home Office Minister (in Northern Ireland) with approval by both House of Northern Ireland parliament; the Secretary of State for Northern Ireland; and the Home Secretary could proscribe organizations. In accordance with the Terrorism Act of 2000 organizations may be proscribed if the Home Secretary believes the organization commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism (including unlawful glorification of terrorism) or is otherwise concerned with terrorism. Organizations can apply to the Home Secretary for de-proscription and if that application is refused, the applicant can ultimately appeal to the Court of Appeal. De-proscription must be approved by both the House of Commons and the House of Lords.

the executive plays a decisive role, with little interference from the Courts. In other cases, such as Germany and Spain, parliamentary authorities may also play a leading role in the initiation of party bans.[85]

Knowledge of formal rules and identification of key players in party ban decisions provides the foundation for understanding the role of institutions in party ban decisions. As the vast 'new institutionalist' literature attests, there are a variety of ways in which institutional frameworks can enable and constrain the activities of those responsible for public policy, including those deciding whether or not to ban a party. Among other things, institutional rules can affect how (and whether) a party ban decision reaches the political agenda and who the veto players are. More specifically, an analysis of party ban procedures permits the disaggregation of party ban decisions and the consideration of the nature and number of veto players. According to Tsebelis, veto players are 'actors whose agreement is required for a change in the status quo'.[86] Tsebelis distinguishes between institutional veto players, or those empowered by formal constitutional rules (such as parliaments and presidents), and partisan veto players, or those 'generated by the political game' (such as parties in a coalition government).[87]

In Europe, there are currently only two cases in which a single veto player may emerge to take party ban decisions; namely, in France, where ban decisions are made by the Council of Minister in accordance with article L212-1 of the Internal Security Code and if the president and parties of government are from the same party, and in the UK under current Terrorism legislation, if the government (and thus the Home Secretary) and parliamentary majority are from the same party. In all other cases, party bans involve multiple veto players. According to the veto-player theory, this increases the likelihood that party ban cases, once initiated, might fail, given that, as Tsebelis predicts, policy change is more difficult in polities with multiple veto players than in those with just one.[88] It also means that agenda setters have significant control over whether or not party bans will be pursued, provided that agreement with other veto players is possible.[89]

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[85] According to article 21(2) of the German Basic Law, parties can be banned if they 'seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany'. While the Federal Constitutional Court would determine the constitutionality of a party, article 43 of the 1951 Law on the Federal Constitutional Court (amended) further establishes that the *Bundestag*, the *Bundesrat* and the federal government may separately apply for the Court to decide whether a party is unconstitutional, as may a Land government in the case of a party whose organization is limited to the territory of that Land. In Spain, according to articles 10 and 11 of the Organic Law 6/2002 on Political Parties, both the government and Public Prosecutor are entitled to initiate proceedings in the Supreme Court in cases where they believe a party violates obligations to establish democratic internal structures or for acts violating democratic principles, damaging the 'regime of liberties' or the democratic system. The government is obliged to initiate a case if one of the two houses of parliament, the Congress of Deputies or Senate, call for it. Supreme Court decisions can be appealed in the Constitutional Court.

[86] Tsebelis 2002, p. 17.

[87] Ibid, p. 19.

[88] Ibid, p. 5.

[89] Ibid, p. 2.

The importance of this logic may be observed by comparing the role of different actors in party ban cases in single veto-player and multiple veto player system. In the single-veto player system of Northern Ireland, the Ulster Unionist Party (UUP)-led executive authorities in Northern Ireland were able to ban Sinn Fein (1956) and Republican Clubs (1967) without interference from the UUP-dominated parliament.[90] Things were more complicated, however, in the more recent examples of party ban efforts in multiple veto player systems of Spain and Germany. Spanish government efforts to ban *Herri Batasuna* in 1984 by denying it formal registration as a political party were blocked by the Courts.[91] As a consequence, Esparza argues, the government avoided pursing the proscription of *Herri Batasuna* for many years.[92] Similarly, in 2001, the federal government and both houses of the German parliament submitted applications for proscription of the far right National Democratic Party of Germany (NPD). In March 2003, however, the Federal Constitutional Court dismissed the case on procedural grounds. During the course of proceedings it emerged that in their evidence against the NPD, the applicants had used statements by NPD members who were simultaneously paid informants of the domestic intelligence services.[93] In a second NPD ban case in 2017, the Federal Constitutional Court was willing to rule on the legality of the party, but the Court decided against banning the NPD because it did not consider it a serious enough threat to the basic liberal democratic order.[94]

### *2.3.8 Dynamics of Democratic Competition*

In circumstances where governing parties and/or parliamentary representatives may initiate ban proceedings it is pertinent to examine the strategic context within which parties make the decision to support proscription of other parties. Party elites supporting bans invariably appeal to noble and compelling reasons – 'defending democracy', protecting vulnerable citizens, or national security – but their opponents (and targets) often impute political motivations related to vote or office seeking goals. Such arguments are also found in the academic literature, albeit usually in rather underdeveloped form.[95] The broader academic literature on political responses to extremism addresses the strategic context underpinning party choices more systematically, but focuses on strategies of 'co-option' ('stealing' policies attractive to extremist parties' voters) and the 'cordon sanitaire' (collusion among mainstream parties to exclude extremist parties from government),[96] rather than specifically that

[90] Bourne 2018.

[91] Esparza 2004, p. 145.

[92] Ibid, p. 146.

[93] Rensmann 2003, p. 1121.

[94] Bourne 2018.

[95] Downs 2012, p. 175; Kirchheimer 1961, p. 158; Müller 1993.

[96] Bale 2003; Downs 2002, 2012; De Lange 2007; J. Van Spanje 2010.

of party bans. Capoccia[97] explicitly addresses party system variables on anti-extremism strategies of democracies in the interwar period, but focuses exclusively on cases of 'polarized pluralism', a party system type relatively scarce in the post-war period.[98] Addressing a wider range of party system types, Downs examines party system effects on mainstream parties' choices of 'engaging' or 'disengaging' with 'pariah' parties.[99] However, Downs does not differentiate between strategies of 'cordon sanitaire' and party bans (both strategies of 'isolation'), and as such fails to consider party system effects specific to the party ban. This is important, given that the 'cordon sanitaire' is a strategy permitting a party to contest elections but excluding it from government, while party bans have the potentially more substantial consequence of exclusion from both elections and government.

Building on this literature, Bourne and Casal Bértoa develop a model providing conceptual foundations for identifying which mainstream parties may 'win' or 'lose' from party bans and, what impact this may have on their support or otherwise for party bans.[100] While it is difficult to predict how the electorate will respond to party bans, the research nevertheless shows that when a relevant party is banned, mainstream parties can expect meaningful increases in electoral volatility, electoral and legislative concentration and often a change in the structure of partisan competition. Insofar as mainstream parties can estimate the effect of these changes for their own party, the strategic context of party competition may determine their support for a party ban.

An illustration of this logic may be seen in the proscription of the Socialist Reich Party (SRP) in 1952 by Konrad Adenauer's Christian Democratic Union/Christian Social Union (CDU/(CSU)-led government.[101] This ban increased votes for various right-wing parties in the SRP's former stronghold of Lower Saxony[102] and led to a change of government there from a Social Democratic Party-led to a CDU-led coalition government also including the Free Democratic Party (FDP), German Party (DP) and All-German Bloc/League of Expellees and Deprived of Rights (GB/BHE). In other words, the ban on SRP, initiated by the CDU/CSU-led federal government coalition (also including the FDP and DP and after 1953 GB/BHE) benefitted, at the regional level, some of the very parties that initiated ban proceedings. This is not to say that this advantage was *necessarily* a rationale for banning the SRP and indeed there is documentary evidence that the federal government was genuinely alarmed by the SRP's blatant neo-Nazism, in addition to foreign policy constraints.[103] Nor does this rationale explain why the same government banned the KPD, which was hardly likely to benefit the governing coalition in the same way. Here a decisive factor appears to be insistence by the CDU/CSU's coalition partners

[97] Capoccia 2005.

[98] Mair 1997, p. 203.

[99] Downs 2012.

[100] Casal Bértoa and Bourne 2017.

[101] Casal Bértoa and Bourne 2017.

[102] Stoss 1991, p. 113.

[103] Frei 2010, p. 251–276.

that both right and left-wing extremists be addressed equally.[104] Careful empirical analysis is needed to uncover the complex set of factors which explain party bans. Nevertheless, as the SRP case suggests, Bourne and Bértoa's model provides conceptual tools for understanding the implications that party bans may have for party competition, and for estimating *a priori* which parties may be considered the respective winners and losers of such changes.

## 2.4 Conclusion

The proscription of political parties is arguably one of the harshest measures a democracy can take to protect itself against those purportedly seeking to undermine its institutions, values, security or very existence. It is a grave act, challenging core features of democratic practices and collective understandings of what an identity as a 'democrat' entails. This is one of the principal reasons why party bans are not a universal practice and why party ban cases, over the long-term, are relatively few and far between. There are a wide range of other possible explanations for why some states, at some points of time, seem more inclined to ban parties than at other times. These include the nature of targeted parties, especially whether parties exist in the state that do not unambiguously reject violence to achieve their goals, and the nature of banning states, especially whether or not it faces the distinctive challenges of democratization and whether or not its constitutional traditions are more or less permissive with regard to party bans. The actions of political elites are likely to be decisive, especially when they decide: whether or not to frame targeted parties as existential security threats, whether and how to draw on historical memories in party ban justifications, and whether supporting for party ban will have implications for their electoral and office gains (and whether this matters). The availability of effective alternatives for marginalizing extremists and anti-system parties and movements and the opportunities and constraints created by the institutional context in which party ban decisions are made may also be important. While these conditions may vary among states, this chapter has nevertheless shown that party bans remain an important instrument within the contemporary armory of militant democracy.

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[104] Ibid; Niesen 2002, p. 255.

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# Chapter 3
# Frail Democracy


**Ivan Ermakoff**

**Abstract** This article elaborates the argument that a group committed to a democratic mode of governance is likely to experience incapacitating collective action problems when caught off guard by an authoritarian bid to state power. Unless they have a mandate to this effect, office holders cannot a priori presume the capacity or the right to determine the group stance. The rank and file for their part are likely to make their behavior conditional on one another's in order to fend off the risks inherent to a critical decision. In these conjunctures, democratic renunciation may arise from collective irresolution and indeterminacy. Investigating collective action challenges in times of authoritarian threats complements militant democracy arguments about legal and constitutional tools for democratic self-defense.

**Keywords** Center party · Collective action · Coordination · Commitment · Democracy · Regime transition · Renunciation · Weimar republic

## 3.1 Introduction

When caught off guard by an authoritarian challenge, democratic groups and institutions have to surmount collective action problems that originate from their mode of governance. Democracy in such circumstances experiences the frailty of its own making. The reason, I argue in this essay, is to be found in the type of power transfer constitutive of democratic governance: constituents in this type of setting *conditionally* devolve the right to regulate various action domains to elected office holders. They agree to transfer control over their action to an office holder conditional on their capacity to put an end to the devolution if they see fit. This modality is embodied in the institutional practice of periodic and competitive electoral contests. Were the devolution unconditional, office holders would not regularly submit themselves to the possibility of being dismissed through such contests (§3.2).

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Democratic governance impedes collective action in times of an authoritarian challenge as a result of two factors (§3.3). First, office holders cannot presume the ability to determine a collective response to the challenge *unless* they have been explicitly granted a mandate for this purpose. Second, given the stakes and the risks inherent to taking a stance in such a conjuncture, individuals facing the challenge have an incentive to make their actions conditional on one another's. Both factors are conducive to irresolution and indeterminacy at the very moment when time is the essence and circumstances call for action. Collective irresolution in turn opens up the range of possible outcomes including the possibility that the group collapses as a site of collective action or that it acquiesces to the prospect of relinquishing the institutional setting of democratic governance.

The present essay explores empirically this last point—the possibility of democratic renunciation arising from collective irresolution and indeterminacy—in light of two related examples. The first one is the decisional challenge faced by the members of the German Center party (*Zentrumspartei*) when Nazi activists throughout Germany were on a political rampage to take over local and regional organs of government in the wake of the March 5, 1933 parliamentary elections. The second example is the collective dynamics that emerged among the parliamentary delegates of the same party when these delegates became confronted with Hitler's request for a constitutional enabling bill on March 21–23, 1933 (§3.4).

Explicit acts of democratic renunciation by highly visible actors—political leaders, representative assemblies, parliamentary delegations, executive committees, or organization boards—have two characteristics that make them highly consequential. For one thing, they make the reshuffling of the state structure formally legal. In these conditions, it is difficult for groups and actors abiding by a norm of legality *not* to align. Second, since these acts of democratic renunciation are highly public events, polity members can assume these events to be part and parcel of their common knowledge and to signal the likelihood of their own collective allegiance (§3.5).

The analytical focus on collective action problems brings into relief issues of strategies and collective response that complement arguments about constitutional and legal provisions central to the militant democracy perspective.[1] Underlying this shift in focus is the claim that constitutional provisions without political clout—that is, without groups' mobilizing for the enactment of these provisions—have no leverage. Hence, the issue at stake is not only whether law provides resources to combat and defuse authoritarian bids. It is also whether groups that have a stake in democratic governance—either because they subscribe to a norm of self-governance or because democratic governance is conducive to the fulfillment of their group interests (e.g. ethnic or religious minorities)—have the collective capacity to engage in strategies of democratic resistance and consolidation.

Democratic groups take up the cudgels by preparing themselves for such collective action challenges. Doing so requires a twofold diagnosis regarding, first, the possibility of an authoritarian bid to state power and, second, the perils inherent to

[1] Loewenstein 1937, p. 638–658; Rossiter 2002, p. 291–294; Finn 1991, Chap. 1.

democratic governance when a bid of this kind comes to the fore. For both the rank and file and the group office holders, an authoritarian bid generates a collective conjuncture marked by the salience of a "critical decision": the choice is rife with individual and collective risks, and it commits the future by irretrievably altering the cost structure of subsequent choices.[2] As they ponder upon alternative courses of action and await a collective stance, rank and file and office holders lend themselves to equivocation and paralysis. They undercut the prospect of being trapped in such indecision by agreeing to pre-commit to a devolution mechanism vesting office holders with the mandate to take actions geared to the preservation of democratic governance (§3.6).

## 3.2 Democratic Governance

In the framework of this essay, a mode of governance designates a way of exercising control. The notion applies to any collective—a group, an organization, or a polity—in which individuals endowed with a decisional capacity affecting the collective as a whole (the "office holders") are differentiated from the rank and file. Governance is democratic when the rank and file have the last say regarding who is entitled to hold office. It is authoritarian when the rank and file are deprived of this capacity.

Whether governance is democratic or authoritarian, it implies a transfer of control from the rank and file to an office holder. No governance is possible without such a transfer. The rank and file *de facto* transfer control over their actions to the office holder.[3] However, depending on the type of governance at play, the modality of this transfer of control differs. In a democratic setting, the rank and file are entitled to repudiate the office holder if they see fit. "Under democracy, people invest governments with the power to rule because they can remove them".[4]

Three consequences follow. First, the office holder's right to rule, that is, her formally recognized capacity to edict directives, explicitly rests on the rank and file's endorsement. Absent this endorsement, the office holder cannot hold on to her office. Her ability to rule is effective insofar as the collective validates this ability through active consent. Second, the transfer of control to the office holder is conditional on this endorsement. By way of consequence, it is conditional on the formally recognized ability to dismiss the office holder. Third, the transfer of control is bound to be subject to reassessments. If not, it would become one-sided and unconditional.

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[2] Ermakoff 2008, p. xi; Ermakoff 2014, p. 236.

[3] This point parallels Coleman's analysis of collective behavior and leadership as resulting from a set of actors' voluntarily transferring the right to control their action to an actor or an organization, thereby endowing this actor or this organization with the factual capacity to orient or direct their behavior: Coleman 1990, p. 35–36, Chap. 9.

[4] Manin et al. 1999, p. 13.

Open, periodic and competitive electoral contests institutionalize these modalities of the transfer of control.[5]

1. Periodic electoral contests amount to periodic recalls. The office holder has to prove that she can pass the test. This institutional feature conveys a straightforward political message: no office holder is entitled to permanently claim her office or position.
2. In submitting herself to the possibility of being dismissed, the office holder makes herself accountable to the rank and file. Periodic recalls institutionalize accountability.[6]
3. The uncertainty inherent to open and competitive contests makes clear that in a democratic setting the transfer of control between the rank and file and the office holder by design is conditional on the rank and file's endorsement.

Quite different is the transfer of control in an authoritarian setting. Neither the office holder nor the rank and file assume that the transfer can be periodically reconsidered and questioned. The rank and file submit themselves to the prospect of following orders. There is no formal procedure enabling the rank and file to dismiss the office holder. In short, the transfer of control is unconditional.

## 3.3 Authoritarian Bids

Let us now examine a situation in which a democratic group, i.e., a group operating according to a democratic mode of governance as described above, is confronted with a threat to its integrity, its basic interests or its collective capacity. The challenge is high-stake and decisional. The situation calls for action. Group members cannot decide not to decide. Whichever behavioral stance they adopt, their choice will commit their future and they know it. They also know that this choice entails individual and collective risks. The decision is "critical" in the sense that it will be highly consequential and that the consequences at stake can prove very costly for the group as a whole and for individual decision-makers.[7]

Faced with a critical decision, group members develop a dramatic interest in coordinating their beliefs, actions and justifications. This interest in coordination gives way to acute uncertainty if the stance of the group appears to be indeterminate or open to question. The challenge motivates individual actors to make their line of conduct conditional on one another's in a situation in which their collective behavior remains undecided. The indeterminacy of each reflects, and intensifies, the

[5] Przeworski 1991, p. 10; Manin 1996, p. 224–233.

[6] Manin et al. 1999, p. 10.

[7] Ermakoff 2008, p. xi, xxvi, 332.

indeterminacy of all.[8] Insecurity and ambivalence undercut the prospect of collective action. [9]

Authoritarian bids to state power generate critical challenges of that kind. These bids are high-stake. If successful, an authoritarian claimant to state power has leeway to call individual and group rights into question. In addition, this claimant can be expected to crack down on democratic groups. How then shall those who have a stake in democratic governance react to an authoritarian bid? Passivity amounts to acquiescence. Opposition implies exposing oneself to retaliatory violence. Renunciation means reneging on the capacity for self-defense.

A case in point is the political situation created by the Nazi activists' attempt to take control of local and regional representative institutions in the immediate wake of the March 5, 1933 parliamentary elections in Germany. On Election Day, Nazi leaders did not achieve a parliamentary majority as they had hoped despite coercive measures targeting opponents affiliated with the political center and the left .[10] Yet, Nazi party activists throughout Germany interpreted the results as the green light to take over city councils and regional assemblies.[11]

For the members of the so-called "Weimar parties," that is, the parties that were endorsing the democratic principles of the Weimar Republic (the German Social Democratic Party, the Center Party, the German State Party), the Nazi offensive was a direct assault upon the rule of law, individual rights and the federal structure of the Weimar Republic. They had to figure out how to respond to such a challenge. Given the Nazis' propensity to resort to violence and intimidation, individual responses were particularly risky. The response needed to be collective.

Still, group members who lack an agreed-upon script for dealing with such challenges cannot rely on the shared presumption that they know what to do. Shall they oppose frontally the authoritarian claimant and his agents? Shall they attempt to negotiate the possibility of a deal? Shall they acquiesce? Consider the situation faced by both the rank-and-file members of the Center party and their parliamentary representatives in March 1933. Although not a confessional party, the German Center party was commonly viewed as representing and defending the interests of the Catholic minority. During the electoral campaign for the March 5 parliamentary elections, party officials denounced plans for dictatorship and pledged themselves to the defense of the Weimar constitution.

On March 18, 1933, the general secretariat of the Center party for the Rhine region located in Cologne sent out a circular letter worded as follows: "In this time

[8] Ermakoff 2015, p. 100.

[9] The coordination dilemmas generated by critical decisions are to be distinguished from the lack of cooperation resulting from (1) the centrifugal tendencies of a "polarized pluralistic" political system, (Capoccia 2005, p. 180); and (2) the divide-and-conquer strategies of would-be autocrats (Weingast 1997, p. 249). Actors experiencing a decision as critical develop an interest in coordination. By contrast, the failures of cooperation analyzed by Capoccia (2005) and Weingast (1997) result from the emergence of an incentive structure pulling apart constituencies that have much to lose from an authoritarian takeover.

[10] Evans 2003, p. 340.

[11] Allen 1965, p. 170–181.

of political decisions, it is our strongest desire to discuss the consequences resulting from the present situation as soon as possible with our collaborators and friends. *We ask for your understanding* if this is not possible yet. We hope to be able to extend to you an invitation to such a discussion in the next few days, after some negotiations have been concluded".[12] Obviously, the party rank and file was calling for guidance. Given their commitment to an orderly and legalist conception of politics, developments on the ground since Election Day were particularly troubling and destabilizing. It was unclear which stance they should adopt.

On March 21, 1933, the Hitler cabinet released the text of the enabling bill conferring on the chancellor (Hitler) extensive executive and legislative powers, including the ability to enact constitutional changes, without the supervision or control of parliament. Since the bill opened the way for constitutional changes, it could not be passed without a two-third majority in parliament. The Nazis and their conservative allies did not command such a majority. The outcome of the vote crucially hinged on the stance adopted by the Social Democratic party and the Center party parliamentary delegations. Were the Social Democrats to vote against the bill, the vote of the Center party delegation would become pivotal.

Upon taking cognizance of the content of the bill, Eugen Bolz, member of the Center party executive committee, wrote to his wife: "Whatever we do, it will be fateful … The content of the enabling bill surpasses all expectations" (letter dated March 21, 1933).[13] The next day, the Center party delegate Clara Siebert acknowledged to her colleague Georg Schreiber: "I cannot come to terms with the events. I no longer have the strength. I can only pray."[14] In his personal notes, Josef Wirth evokes a "time, in which probably no one had ever been more deeply shaken …".[15]

The terms of the dilemma become clearer when we pay attention to the decisional features of the challenge. First, the choice entailed individual risks. The Nazis had made clear that they were resolute to use violence for political purposes.[16]

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[12] Emphasis added. "Rheinische Zentrumspartei Generalsekretariat, Köln, den 18. März 1933 Ew. Hochwohlgeboren! Es ist unser dringender Wunsch, sobald wie eben möglich in dieser Zeit politischer Entscheidungen mit unseren Mitarbeitern und Freunden die sich aus der gegenwärtigen Lage ergebenden Folgerungen zu besprechen. Wir bitten Sie, dafür Verständnis zu haben, wenn das im Augenblick noch nicht möglich ist. Wir hoffen aber, Ihnen schon in den nächsten Tagen eine Einladung zu einer solchen Besprechung zukommen lassen zu können, nachdem gewisse Verhandlungen zum Abschluß gekommen sind" (Stadtarchiv Düsseldorf; Abteilung XXI-4: Rheinische Zentrumspartei).

[13] "Was wir auch tun, ist verhängnisvoll … Der Inhalt [des Ermächtigungsgesetzes] übertrifft alle Erwartungen" (Hauptstaatsarchiv, Stuttgart, Nachlass Eugen Bolz, Q 1–25, 7, handwritten letter dated March 21).

[14] "… sagte ich zu Prälat Schreiber, ich könne mich nicht auseinandersetzen mit den Geschehnissen, ich habe die Kraft nicht mehr, ich könne nur beten" (Kommission für Zeitgeschichte, Bonn, Tagebuchaufzeichnungen von Clara Siebert; reproduced in: Becker 1961, p. 208.

[15] "In dieser Stunde, in der wohl niemand nicht im tiefsten aufgerüttelt war ..." (Bundesarchiv, Coblence, Nachlass Wirth N1342/133, "Die historische Reichstagssitzungen vom 21 und 23 März 1933", p. 7).

[16] Ayçoberry 1999, p. 17.

Voting against Hitler's enabling bill meant exposing oneself to Nazi retaliations. Conversely, voting for the bill meant taking the risk of being viewed as a sellout by peers and constituents. The more isolated any of these two stances would be, the greater the risks.

Second, the bill was to have far-reaching consequences bearing upon the Center party's constituency and, more broadly, the fate of Germany. The constitution of Weimar had been a bulwark of minority rights. Many in the Center party viewed this constitutional setting as particularly congenial to the defense of the cultural and political interests of the Catholic minority in Germany. If, through their vote, the Center party delegates discarded these constitutional warrants, they undermined the party capacity to preserve, or act on behalf of, these interests.

Third, the decision would irremediably alter future options. Turning down the bill would deprive Hitler's bid for total power of the seal of legality. Passing the bill would endow Hitler with a blank check to legislate and remodel the state. Down the line, it would make the prospect of collective resistance futile. In a letter to his wife written on the eve of the vote, Bolz acknowledged the dilemma and the need for a collective stance: "Here *we* are, *every man for himself*, struggling with the position we should take regarding this unprecedented enabling bill. I cannot write the pros and cons. The constraints *we* face will probably lead us to vote for the bill" (letter dated March 22, 1933).[17]

## 3.4 The Possibility of Renunciation

In these highly volatile and indeterminate situations, different outcomes are possible. The absence of collective action can soon give way to splits and defections. The group then collapses as a site of collective agency ("collapse"). Alternatively, the group remains a locus of agency and adopts a collective stance. The content of this stance can be strikingly different though. A "resistance" scenario describes the group mobilizing against the authoritarian bid for state power. In a "renunciation" scenario, the group acquiesces to the authoritarian bid and, in so doing, compromises its commitment to democratic institutions. This multiplicity of outcomes invites us to investigate the interactional dynamics elicited by the shared experience of a high-stake challenge and, more specifically, the etiology of alignment processes.[18]

Two broad types of alignment processes underlie group behavior in times of challenge. One depicts individuals being influenced by those who have already

[17] Emphasis added. "Hier ringen wir, jeder für sich, mit der Stellungnahme zu dem unerhörten Ermächtigungsgesetz. Das Für und Wider kann ich nicht schreiben. Die Zwangslage wird uns wohl zu einer Zustimmung bringen" (Hauptstaatsarchiv, Stuttgart, Nachlaß Eugen Bolz, Q 1–25, 7, handwritten letter dated March 22, quoted in: Miller 1951, p. 450).

[18] Ermakoff 2008, Chap. 6.

opted for a course of action. Alignment is sequential. Actors observe how many of their peers have committed to a line of conduct. If, given the circumstances, they feel that this number is high enough to motivate their joining the bandwagon, they align as well. The scope of the phenomenon is a function of two group parameters: (a) the proportion of first movers and (b) the distribution of individual propensities for one course of action.[19]

A quite different type of alignment is based on inference-making and expectation coordination. Actors who remain uncommitted and uncertain because they do not find enough safety in the numbers of those who have joined a bandwagon in one direction or another, seek to anticipate how the group as a whole will behave. Since these uncommitted actors make their choice conditional on each other's, they seek to coordinate their behaviors and, for this purpose, to form convergent expectations. Alignment takes place when these actors become confident that they share a congruent assessment of the group's future behavior.

The public stances of highly visible group members play a key role in this process. A highly visible actor is for her peers strategically convenient in conjunctures of mutual uncertainty because her profile and political inclinations are common beliefs. Consequently, group members can presume that this actor's public stances will allow them to collectively gauge how she assesses the group's action preference. For instance, a prominent actor known for her opposition to authoritarian schemes decides to remain silent or to keep a low profile. Her peers have reasons to interpret this silence as revealing her belief that the group favors renunciation. They also have reasons to believe that this interpretation of her silence has wide currency among themselves. In so doing, group members tacitly coordinate their beliefs about their own future collective behavior.

To flesh out the significance of these dynamics, let us examine the collective behavior of the Center party parliamentary delegation on March 23, 1933. Personal accounts and testimonies underline the impact of two public stances. One was the party chairman's, Ludwig Kaas'. In his memoirs, Heinrich Brüning, former chancellor and member of the Center party executive committee, mentions the "great impact of [Kaas'] statement in the delegation meeting" and his ability to tip the scales.[20] Hélène Weber, who was parliamentary delegate in March 1933, reported to Paul Bausch that she viewed Kaas as "the main culprit for how things turned out. He had fallen prey to the promises Hitler had actually made in the parliamentary session."[21] Her colleague Heinrich Krone implicitly traces the delegation's stance to

[19] Granovetter 1978, p. 1421.

[20] Brüning 1970, p. 658.

[21] „[Kaas] sei der Hauptschuldige an der ganzen Entwicklung gewesen. Er sei auf die Versprechungen Hitlers, die er tatsächlich in der Reichstagssitzung gemacht habe, hereingefallen" (Bausch 1969, p. 117). Bausch mentions in these memoirs that he was very close to Hélène Weber and that she often talked to him about these few days.

Kaas[22] while Johannes Schauff, another parliamentary delegate, identifies him as the staunchest supporter of the enabling bill.[23]

The other stance was Brüning's. Jakob Kaiser, a parliamentary delegate, observes: "Brüning was seating next to Kaas and remained silent."[24] Clara Siebert makes the same observation: Brüning "did not speak a lot."[25] This observation is key. Kaas and Brüning were the most prominent members of the parliamentary delegation. Kaas had been party chairman since 1928. He had publicly criticized the Nazis and could not be suspected of ideological sympathies for them. In the previous months, he had been actively involved in various attempts to find a way out of the political crisis. Brüning had been chancellor between March 1930 and May 1932. The prominence he had gained through his chancellorship was undisputed. Furthermore, in the eyes of the rank and file delegates, both Kaas and Brüning were conservatives. They stood for the party mainstream.[26] In terms of visibility and political profile, thus, Brüning was on a par with Kaas.

The Center party delegation met twice on March 23, 1933. The first meeting, in the morning, preceded Hitler's presentation of the enabling bill in the Reichstag. During this meeting, Brüning expressed his doubts and suspicion vis-à-vis the prospect of signing Hitler a constitutional blank check. The second meeting took place in the afternoon, before the deputies were called to vote. It is at this second meeting that Brüning's silence struck his peers. Was not his silence indicative that much to his despair he expected a vote of acquiescence to prevail among his colleagues? Wirth alludes to this interpretation in his personal notes: "The whole thing was for him so dreadful that he wanted to see no one."[27] Clara Siebert's unpublished account of this meeting is explicit about the importance she was granting to Brüning's public demeanor: "What I was doing now was a depersonalized action relying on what Brüning was doing. Beyond all subjective considerations, beyond all bitter grief, above all the will to confess 'I cannot' stood now 'I do what Brüning does'".[28]

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[22] Archiv der Konrad Adenauer Stiftung, Sankt Augustin, Nachlaß Krone, I-028, 006/5: interview with Knopp and Gotto, p. 10.

[23] Draft of an interview with Kusch, Institut für Zeitgeschichte, Munich, Archiv Johannes Schauff, ED 346 Nr. 24.

[24] Bundesarchiv, Coblence, Nachlaß Kaiser N1018/246, p. 53: "Brüning hat geschwiegen."

[25] "Brüning sprach nicht viel in dieser Stunde" (Kommission für Zeitgeschichte, Bonn, Tagebuchaufzeichnungen von Clara Siebert, p. 111).

[26] "Brüning was a conservative, who from the start strove to bring the new social-Christian conservatism to victory" (Joseph Wirth) (Bundesarchiv, Coblence, Nachlaß Wirth N1342/18, III.22).

[27] "Brüning ... nahm die Sache so furchtbar ernst, daß er niemand sehen wollte" (Bundesarchiv, Coblence, Nachlaß Wirth N1342/18, III.29).

[28] "Jetzt war, was ich tat, entpersönlichte Handlung im Vertrauen auf das, was Brüning tat. Über allen subjektiven Erwägungen, über allem bittern Leid, über allem drängenden Willen zum Bekenntnis: 'ich kann nicht' stund jetzt 'ich tue was Brüning tut'" (Kommission für Zeitgeschichte, Bonn, Tagebuchaufzeichnungen von Clara Siebert, p. 112–113).

## 3.5 Regime Transition

The passing of Hitler's enabling bill on March 23, 1933 was an explicit act of democratic renunciation—a "constitutional abdication".[29] In legalizing an authoritarian bid, a constitutional abdication makes it utterly difficult for democrats to invoke the rule of law as a prime political motivation. The formal legality of the transition lends credence to the belief that consent will be widespread. Moreover, the visibility of acts of abdication contributes to their impact in a context marked by collective indetermination, in the same way a prominent actor's public acquiescence to an authoritarian bid gives way to the shared belief that the group is not ready for a fight.

The "horrendous" speed and the easiness with which the Nazis consolidated their grip over state institutions and German society in the spring of 1933 take on their significance in this light.[30] Within a few days, administrators, judges, and police officers became dutiful enforcers of a Nazi order.[31] It took a few weeks for organizations, associations, groups and parties to dissolve or shift their allegiance.[32] We cannot explain how quickly the Nazis were able to assert their political hegemony unless we relate the behavioral and ideological alignment that took place on a large scale in the spring of 1933 to the constitutional abdication that in the eyes of the polity as a whole sanctioned Hitler's bid for total power. By making the transition to a Nazi dictatorship formally legal, this event elicited shared expectations that acquiescence would prevail.

## 3.6 Coordination and Commitment

Investigating how democratic governance in times of crisis is likely to yield collective action problems has three implications for strategies of democratic self-defense. First, this line of inquiry complements the critique of a strict and formal adherence to democratic principles in such conjunctures.[33] The frailty of democratic groups and institutions faced with an authoritarian challenge can be traced to an in-built aversion for any form of executive command outside the bounds of a well-defined

[29] Ermakoff 2008, Chap. 2.

[30] Welzer 2005, p. 58.

[31] Bracher 1970, p. 197; Winkler 1989, p. 906.

[32] Bracher 1962, p. 261–278. German Catholics and Center party members were not immune to this process. As early as April 25–26, 1933, representatives of Catholic associations convening in Berlin mentioned widespread adhesions to the Nazi party among their constituents, Stasiewski 1968, p. 91; in his memoirs, Brüning 1970, p. 664, makes the same observation.

[33] Loewenstein 1937, p. 423–424; Finn 1991, p. 164.

mandate. In a democratic setting, no transfer of control can be deemed unconditional. Exceptional powers become acceptable, and thus legitimate, if endorsed through a process of collective decision-making.

The urgency inherent to high-stake confrontations, however, renders this decisional equation almost intractable. Not only is there little time for collective deliberation and decision-making. The stakes of the confrontation are moreover conducive to collective indecision and indeterminacy even when the members of the group under challenge expect to meet and deliberate, as the case of the Center party delegation in March 1933 illustrates. That is to say, the very logic of democratic governance jeopardizes its viability when it is under attack. It is by deviating from it that groups with a stake in this mode of governance can hope to salvage it.

This brings me to the second point: what is to be done? The focus on issues of collective agency underscores the need to prevent at once coordination problems within the democratic camp as well as the pusillanimity of elected office holders. In situations of collective indeterminacy prominent actors who, thanks to their political profile, become informative focal points, have the capacity to move the group in one direction of another. Their prominence makes them focal points and their political profile putative sources of information about the group's likely behavior insofar as their peers view them as staking their stance on the group's. Consequently, their public stand can decisively shape the dynamics at play.[34]

The importance acquired by these actors in such conjunctures is of course paradoxical in two respects. For one thing, group members overcome their indecision by making themselves extremely dependent on the signals of prominent actors. Lo and behold, in putting their collective fate in the hands of those who can direct them by eliciting the coordination of their behavioral stances, group members relinquish the ability to hold prominent actors accountable. The second paradox relates to the profile of prominent actors who acquire the capacity to direct: their peers view them as testing the waters before they take a stand. The situation is therefore one in which, due to the specifics of the conjuncture, the least committed might become the most influential.

Given the hazards of this type of relational configuration, it is worth considering how rank and file and office holders might avoid the trap of mutual uncertainty and collective indeterminacy in the first place. Office holders and the rank and file can agree ex ante on a devolution mechanism whereby office holders take upon themselves the responsibility to orient the group's collective action for the purpose of preserving its democratic setting. A pre-agreement of this kind has two advantages. On the one hand, it gives credence to the expectation that the group as a whole will preserve its capacity for collective action. On the other hand, it makes it more difficult for office holders to waver or take refuge in ambiguous stances.

The third point regarding democratic self-defense concerns the scope of the pre-agreements I have just mentioned. This point parallels the theory of constitutional dictatorship.[35] Devolution mechanism in situations of political emergencies should

[34] Ermakoff 2008, Chaps. 8, 9, Appendix A.

[35] Rossiter 2002, p. 8.

not be confused with unconditional transfers of control. In the same way the practice of constitutional dictatorship can be assessed in light of several validity criteria[36], mechanisms of power devolution within groups or institutions remain subject to two primary conditions. First, their only raison d'être is to fend off the vital threat posed by an authoritarian bid for power. Second, and correlatively, they are to be terminated when the threat has been overcome. In explicitly stating both requirements, rank and file and office holders reaffirm the basic tenet of their democratic commitment.

## 3.7 Conclusion

Individuals committed to democratic governance do not unconditionally transfer the right of control over their action to an office or one actor, in contradistinction to individuals abiding by an authoritarian power structure. As a result, in times of unexpected authoritarian challenge, actors operating in a democratic setting are more likely to make their actions conditional on one another's and to experience collective indeterminacy. In other words, groups and institutions operating according to rules of democratic governance may find themselves incapacitated at the very moment when action and counter-mobilization are most needed given the nature of the threat they face.

The possibility of inconsistent or irresolute stances on the part of democratic groups and institutions has been a staple of the critique of democracy, harkening back to Hobbes' observation that in representative assemblies "the absence of a few, that would have the Resolution once taken, continue firme […] or the diligent appearance of a few of the contrary opinion, undoes today, all that was concluded yesterday".[37] Although analysts of collective decision disagree about how frequent and consequential such voting inconsistencies might be,[38] the fact is that their possibility is inherent to the collective character of decision-making in democratic settings.

This essay has pursued a different, although related, line of inquiry by examining how the conditional character of power transfers in such settings magnifies collective action problems when group members face a critical decision. This analytical focus invites us to consider self-defense strategies not only in terms of repressive measures[39] and their normative underpinnings,[40] but also with regard to the factors allowing constituents and office holders to overcome moments of collective indecision and, in so doing, the possibility of their own democratic renunciation. Democratic consolidation is not simply a matter of judicial resources. Ultimately, it

[36] Rossiter 2002, p. 296–306.

[37] Hobbes Thomas, *Leviathan*, Oxford: Oxford University Press, p. 123.

[38] E.g. Riker 1982; Mackie 2005.

[39] Loewenstein 1937, p. 644–654; Capoccia 2005, p. 50–53, 55–62.

[40] Kirshner 2014, p. 33–60.

rests on the political capacity of those who have a stake in the preservation of a democratic mode of governance.[41]

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# Chapter 4
# How Does Militant Democracy Function in Combating Right-Wing Extremism? A Case Study of Slovakian Militant Democracy and the Rise of *Kotleba – People's Party Our Slovakia*

**Miroslav Mareš**

**Abstract** This chapter examines how militant democracy functions in countering right-wing extremism. A case study of the Slovakian extreme-right party Kotleba's – People's Party Our Slovakia (L'SNS) is used to explain the difficulties in using militant democracy to confront right-wing extremism. First, the history of militant democracy combatting right-wing extremism is outlined, including Karl Loewenstein's legacy of counter fascist measures from the interwar period. The situation in the Federal Republic of Germany is analysed and some critiques of political scientists and legal experts relating to militant democracy are discussed. Second, the author, building on this discussion, develops a conceptual framework for analysing the impact of militant democracy on right-wing extremism. He elaborates three scenarios that can play out after banning a political party or association: a positive "white scenario" (the elimination of right-wing extremism), a grey scenario (the rise of right-wing *populism*, instead of right-wing extremism) and two black scenarios (the recurrence of a party very similar to that which has been banned and the rise of new, effective organisational structures within the extreme-right scene). Third, to conclude, the author analyses the L'SNS and the countermeasures of Slovak militant democracy, a confrontation still in progress, against the backdrop of the three scenarios.

**Keywords** Right wing extremism · Militant democracy · Slovakia · Political parties · Freedom of association · Freedom of speech

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## 4.1 Introduction

The concept of militant democracy is closely connected to countering right-wing extremism. The origins of the term "militant democracy" as well as the roots of modern political science research into this phenomenon are associated with the reaction of Karl Loewenstein to the growing fascist threat in Europe in 1937.[1] The post-war and contemporary development of militant democratic principles and norms is strongly linked to trends in the development of right-wing extremism. Of course, the fight against left-wing extremism, separatist extremism and religious extremism (recently primarily focused on Jihadism or Islamist extremism) also determines the current character of militant democracy; this does not, however, derogate from the legacy of measures against right-wing extremism as an important pillar of discussion about this concept as a whole.

This chapter will first explain the impact of countering right-wing extremism on the development of militant democracy (§4.2). Subsequently, a basic conceptual framework of interactions between both phenomena will be outlined (§4.3), after which some controversial consequences of militant democratic actions against right-wing extremism will be analysed with the help of a case study from Slovakia (§4.4). This case study helps to understand the opportunities and limits of militant democracy; a political science approach will be used to explain trends within the right-wing extremist scene in reaction to militant democratic measures. In the final section, some more general conclusions are drawn regarding the history, legacy and future of militant democracy combating right-wing extremism (§4.5).

## 4.2 Militant Democracy against Right Wing Extremism: Historical Overview

The concept of militant democracy serves, in its ideal form, to counter all forms of political extremism.[2] Some researchers of extremism demand an equal approach against all these forms.[3] However, in various historical periods the discussions about militant democracy were predominantly instigated in reaction to the dominant threat at that time. Despite the fact that the roots of political thought on militant democracy can be found in ancient Greece,[4] the modern concept was born in the 1930s. The direct cause was the rise of the fascist movements and regimes in Europe, particularly the breakdown of the Weimar Republic in Germany and the seizure of power by the National Socialist German Workers´ Party (Nationalsozialistische Deutsche Arbeiterpartei, NSDAP).

[1] Loewenstein 1937a, b.

[2] Klump 2001.

[3] Backes and Eckhard 2005, p. 186–187.

[4] Klamt 2012, p. 25.

As mentioned above, Karl Loewenstein, a Jewish emigrant from Nazi Germany, published, stimulated by his discussion with the German lawyer and philosopher Carl Schmitt, his analysis of the reaction of several European democracies to the fascist movements in 1937, in the American Political Science Review.[5] Loewenstein used a combination of constitutional law and political science. These two approaches are typical of research into militant democracy up to now.[6]

Despite the fact that he also used examples of countering left-wing extremism (for example, the illegalization of the Communist party in Finland),[7] the dominant part of these articles deals with countering fascism. In Loewenstein's understanding, fascism was "not an ideology but a political technique",[8] but from a contemporary point of view we can subsume fascism under the banner of right-wing extremist ideologies.[9]

Loewenstein was not only a neutral analyst of the development of countermeasures against fascism, but also clearly supported the idea of militant democracy; in addition, he was an engaged activist and urged for more militancy. He wrote: "European democracy has overstepped democratic fundamentalism and risen to militancy. The fascist technique has been discerned and is being met by effective counteraction. Fire is fought with fire. Much has been done; still more remains to be done".[10]

However, in Europe, defeating fascism became a task for military forces, and not just militant democracy; in addition, one of the members of the anti-fascist coalition was the Soviet Union, operating on the basis of a Communist ideology. Shortly after the end of the Second World War, the Cold War started, which was framed as a clash between democracy and Communism. All these factors determined the development of militant democracy.

The victors of the Second World War, together with the new regimes in Germany and Austria, started a process of denazification and 'defascization'. In several Eastern European countries, the Communists rose to power with the help from the Soviet Union. In liberal democratic Western European countries Communist parties were allowed, despite the fact that they were perceived as a potential "fifth column" of the Soviet bloc (at least up to the beginning of the Euro-Communist reform struggle). Clearly post-fascist movements were oppressed, but new forms of the extreme right came to the political spectrum with relatively much leeway to carry out their activities (as, for example, the case of the French Poujadist movement shows). In southern Europe (Spain and Portugal) right-wing authoritarian regimes existed until the mid of the 1970s.

The specific situation in the Federal Republic of Germany (FRG) after establishing democratic regimes in the former Western occupation zones required countering

[5] Loewenstein 1937a, b.

[6] Capoccia 2013, p. 210–219.

[7] Loewenstein 1937b, p. 638.

[8] Loewenstein 1937a, p. 423.

[9] Bötticher and Mareš 2012, p. 298.

[10] Loewenstein 1937b, p. 656.

both the right-wing extremist political spectrum with links to the former Nazi regime, as well as left wing extremist forces with connections to the Soviet bloc. The idea of militant democracy was incorporated into the West German constitutional and legal order, and the dominant political culture of the FRG. Political scientist Eckhard Jesse has pointed out that, according to Karl Loewenstein and Karl Mannheim, militant democracy was a "crisis concept" (in the sense of being a reaction to a crisis situation). However, in Western Germany and, later, in other countries the existence of extremists is a "normality".[11] In this context militant democracy becomes permanent and is not activated only in times of crisis.

The first serious use of instruments of militant democracy against the right wing extremist scene in Western Germany occurred in the 1950s. In 1951 the Socialist Reich Party (Sozialistische Reichspartei - SRP) was banned. This party was founded in 1949 and in the early 1950s it served as a vessel for many former NSDAP-members. It won parliamentary seats in several regional elections. The party denied links to race, religion and the Nazi regime's hatred of Jews, but in its internal materials it spread Anti-Semitism and pleaded the introduction of a strong "Führer". In 1952 the SRP became the first banned party in the FRG.[12] Not only the ban itself is important from the point of view of militant democracy, but also the demonstrated capability of the German secret service to effectively use information sources from within the party.

Later expert and academic discussions about militant democracy in Germany mostly concerned either the activities against the extreme left or a debate on the equal approach of right-wing extremism and left-wing extremism.[13] The instruments of penal law against propaganda, including the use of symbols were, and are, used mostly against right-wing extremism in Germany, and nowadays also against Jihadism, but very rarely against left-wing extremism. Nevertheless, in 1956 the Communist Party of Germany (Kommunistische Partei Deutschlands, KPD) was banned.[14]

The so-called "Enactment on Radicals" (Radikalenerlass) from 1972 influenced the concept of militant democracy seriously. It was adopted by the Interior Ministries of the West German federal states. According to this norm, members of extremist organisations were excluded from employment in the governmental sphere (among others in the educational sphere).[15] The norm incited strong opposition, mainly in the left-wing scene. While measures against right-wing extremist were demanded, the impact on left-wing extremist employers was opposed by organisations such as the Committee against Professional Bans (Komitee gegen Berufsverbote).[16]

After the re-unification of Germany and a wave of right-wing extremist violence in the 1990s the right-wing extremist challenge was the topic of serious debates

[11] Jesse 2006, p. 499–501.

[12] Backes and Moreau 1994, p. 16–17.

[13] Mohr and Rübner 2010.

[14] Klamt 2012, p. 174.

[15] Brinkmann 1983, p. 585–587.

[16] Jesse 2006, p. 517.

within the context of German militant democracy. In 2003, the German Constitutional Court rejected the proposal for the ban of the National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands, NPD). This party was founded in 1964 and since the mid of 1990s the young neo-Nazi spectrum cooperated with the NPD. The party was successful, however, only at the regional level. The reason for the Court's rejection was the presence of informants of the German internal secret service Federal Office for Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV) at the top level of the party. Some of them played the role of "agent provocateurs" and they might have been responsible for some of the output of the party that was used as evidence for its ban. This case caused a debate on this type of deep infiltration of right-wing extremist parties.[17]

At the same time, the concept of militant democracy expanded in the Western world, thanks to, among other factors, the measures against right-wing extremism. Many countries applied various limitations on freedom of speech, freedom of assembly, freedom of association etc. These limitations are based on legislation on state protection, on international treaties protecting human rights (among others, the International Convention on the Elimination of All Forms of Racial Discrimination from 1969) and on interconnected hate crimes and hate speech law; the last decades have, in addition, witnessed the introduction of anti-terrorist legislation (related to propaganda of terrorist activities etc.). Despite the various historical and geopolitical roots of these norms, they can be subsumed under militant democracy.[18]

In several Western countries, the traditional state protection was enhanced by anti-extremist legislation and strategies. A specific case is the United Kingdom, which is usually not considered to be a militant democracy. However, in 2015 the UK Counter-Extremist Strategy was adopted, and in 2016 anti-terrorist measures were used against the right-wing extremist group National Action. According to the Home Office, "The group's online propaganda material, disseminated via social media, frequently features extremely violent imagery and language. National Action also promoted and encouraged acts of terrorism after Jo Cox's murder".[19] A connection between anti-terrorist legislation, which is traditionally not considered as a militant democratic instrument, and anti-extremist praxis is evident in this case.

Militant democracy was also adopted by post-Communist countries in East Central Europe, despite the fact that some norms were transferred from the Communist era. In the first years of transition the use of the lustration law against representatives of former Communist regimes dominated the discussions on protecting democracy. However, shortly after the rise of extreme nationalism and racist violence the instruments of militant democracy were used against right-wing extremism. For example, in 2011, the Constitutional Court of the Czech Republic used the concept of "militant democracy" to justify sentencing several perpetrators

[17] Eatwell 2004, p. 4.

[18] Thiel 2009.

[19] Home Office, Rudd, Hon Amber, *National Action becomes first extreme right-wing group to be banned in UK*. Government. 2016.

that spread Nazi propaganda,[20] despite the fact that the roots of those norms in the Czech penal code are found in the Communist era.

The pan-European reception of the fundamentals of militant democracy caused the transfer of this concept to the European level, at least as a subject of academic research.[21] Although the term "militant democracy" is not officially used in European institutions, the European Union nonetheless works with several anti-racist norms that can be used against right-wing extremism (mainly: the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law)[22] and with norms protecting its values (among others, in European party law).[23] The first serious discussion in 2016 was about the acceptance of "Europarty"-funding for extremist parties from the European budget, and concerned the Alliance for Peace and Freedom (AFP), consisting of several right wing extremist parties.[24]

The use of militant democracy to counter right-wing extremism is not limited to European democracies. The case of Israel shows the use of anti-terrorist norms for the purpose of combating right-wing extremist Jewish groups as the Kahane gang, Kach and Koach.[25] And, in 2008 the Knesset adopted a law against the spread of Nazi propaganda, after incidents with neo-Nazi activists from the group Patrol 36.[26]

This historical overview of how militant democracy instruments are used to counter right-wing extremism has shown how the roots of the modern concept are in the anti-fascist legacy, with the German experience having a strong impact on European countries, and subsequently, the step-by-step transfer of the militant democracy concept to the European level.

## 4.3 The Impact of Militant Democracy on Right–Wing Extremism: A Conceptual Framework

It is very difficult to evaluate the effectiveness of militant democracy against right-wing extremism. First, it is important to note that protection of democratic values is primarily directed against the aim of right-wing extremists to establish a dictatorship under their rule. However, only *part* of the contemporary far-right is clearly extremist. Modern right-wing populist parties, for instance, are not openly anti-democratic; many of them – mostly in Western Europe – strongly use "pro-liberal"

[20] Výborný 2012.

[21] Canu 1997, p. 316–323; Klamt 2012, p. 408.

[22] European Union, *Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law* 2008.

[23] Klamt 2012, p. 444–446.

[24] Nielsen 2016.

[25] Pedazhur 2001, p. 352–353.

[26] Kapusňák 2011, p. 68–69.

**Table 4.1** *Features of militant democracy with examples of use against right-wing extremism*

| | |
|---|---|
| Limits on the freedom of speech | Sentencing of David Irving in Austria in 2006 according to Prohibition act (3 h), penalization of denying National Socialist genocide or National Socialist crimes against humanity |
| Limits on the freedom of association | Dissolution of the Hungarian guard in 2009 according to Hungarian law II/1989 on the freedom of association |
| Limits on the freedom of assembly | Dissolution of the anti-Romani rally of the Slovak Togetherness in Šarišské Michalany in Slovakia in 2009 according to the law Nr. 84/1990 Col., on the freedom of assembly |
| Limits on employment in the governmental or public sphere | Withdrawal of the license for chimney-sweep Lutz Battke in Germany in 2007 due to his participation in right-wing extremist, anti-Semitic and racist demonstrations |
| Labelling of extremist activities and/or subjects in governmental documents | Activities of right-wing extremists in Poland related to the march of independence mentioned in the report about the security situation in Poland in 2011 |
| Hate crimes law (harder punishment for crimes with hate/bias motivation)? | Four perpetrators sentenced in the Czech Republic due to attempted murder (attack with Molotov cocktails against Roma family in Vítkov in 2009, a little Roma girl seriously injured), a harder punishment due to racial and ethnic motivation according to the Czech penal code |

Source: Mareš and Výborný 2013

rhetoric against Islam or Islamization. Equating groups as the Freedom Party of Austria (Freiheitliche Partei Österreichs – FPÖ) on the one hand, and a militant group as Combat 18 on the other, therefore seems to be questionable.[27]

The right-wing extremist challenge has led to the use of a broad spectrum of instruments of militant democracy. The first list of measures was elaborated by Loewenstein;[28] it was later analyzed by Capoccia.[29] If we summarize the current features of militant democracy, we can name several instruments. They are described in Table 4.1, accompanied by examples of their use against right wing extremism. Only "standard democratic instruments" are included, not the more specific measures of transitional democracies (such as lustration and historical memory institutes).

The last category – hate crimes law – seems to be questionable as an instrument of militant democracy. Its origins lie in the United States, which is usually considered an ideal model of tolerant democracy. However, the current spread of hate crimes law in European countries (including post-Communist Europe) and the use of this concept at the European level is deeply interconnected with the idea of militant democracy. Hate crimes are, according to the Organization for Security and Cooperation in Europe: "criminal acts motivated by bias or prejudice towards particular groups of people. A hate crime therefore comprises two distinct elements: it

[27] Eatwell 2004, p. 5.

[28] Loewenstein 1937b.

[29] Capoccia 2005, p. 47–67.

is an act that constitutes an offence under criminal law and in committing the crime, the perpetrator acts on the basis of prejudice or bias."[30]

One of the most significant instruments of militant democracy remains the ban of political parties, next to various other less severe restrictions targeted at political parties. The following list was elaborated by Eva Brems:

1. Refusal of registration;
2. Temporary ban on party activities;
3. Disqualification of a list submitted for elections;
4. The criminal conviction of a political party for dissemination of certain proposals from its party programme;
5. Exclusion of a political party from state subventions;
6. The criminal conviction of individual party members for acts of speech related to the party programme;
7. The criminal conviction of individual party members for their membership of the party;
8. Annulling the election result after the victory of an undesirable party;
9. The ban of the political party.[31]

The actual use of available militant democratic measures against real right-wing extremists depends on many factors. If we take into account the most typical instrument of militant democracy, the ban of political parties, a renowned expert in this field, Angela Bourne states:

> The 'militant democracy' paradigm cannot fully account for the proscription of political parties given that so-called militant democracies use proscription in widely differing contexts and that some states equipped with the instruments of militant democracy fail to use them at all.[32]

Gur Bligh identifies three main reasons for contemporary party bans: "constitutional banning regimes appear to be directed against three types of parties: parties inciting hate and discrimination, parties that support violence, and parties that pose a challenge to the state's identity".[33] All of the elements presented by Bligh can be identified in the reasoning of the Supreme Administrative Court of the Czech Republic in the ban of the small right wing extremist Workers' Party (Dělnická strana, DS) in 2010. The party initiated hatred riots, mostly against Roma minority, used paramilitary units (the so-called Protection Corps of the Worker's Party, Ochranné sbory Dělnické strany, OS Ds) and was connected to neo-Nazi movements with clear anti-democratic goals.[34] Several years later, in 2013, moderate populist movements were successful in Czech elections, while the successor party

[30] Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights 2008, p. 16.

[31] Brems 2006, p. 141–148.

[32] Bourne 2011, p. 20.

[33] Bligh 2013, p. 1358.

[34] Mareš 2012.

of the DS – the Workers' Party of Social Justice (Dělnická strana sociální spravedlnosti – DSSS) remained marginal.[35]

Angela Bourne partly mentions different reasons for party bans. According to her, democracies typically ban parties that "claim promote authoritarian forms and violent regime change, serve the interests of a foreign power, undermine the territorial integrity of the state or are racist".[36] The motivation for the ban can be the perception of and response to a concrete danger; however, also the symbolic aspect can be important (sending a message to the general public, to protected minorities, and abroad, to an European or international audience).

Banning extremist parties in democratic societies also has opponents. However, experts who reject banning parties for expressions of hate by their representatives usually do support banning *violent* parties and organisations. As Cas Mudde states: "don't ban extremist speech, don't ban democratic participation in extremist groups, do ban intrinsically violent extremist groups".[37] Mudde uses an example of the Greek right-wing extremist party Golden Dawn (Χρυσή Αυγή) and its alleged involvement in violent activities against political opponents carried out by internal militant party structures: "If this turns out to be true, Golden Dawn is both a political party and a terrorist paramilitary unit in one. This means that violence is indeed intrinsic to Golden Dawn as an organisation, and it should therefore be banned. At the same time, if a new party (e.g. National Dawn) would be founded that is an exact copy of Golden Dawn, i.e. openly anti-democratic and only slightly-veiled neo-Nazi, but without the terrorist paramilitary unit, it should be allowed to exist and contest election".[38]

The situation *after* the ban of an extremist party (or the use of a different militant democracy instrument) can be studied from a legal and/or political science point of view. Law experts can deal with the possible prohibition of successor organizations, the use of symbols of the banned organization etc. Political scientists should analyse the impact of the concrete measure on the organisation itself and the impact on the broader political spectrum and on political culture.[39]

The consequences of anti-extremist measures can be categorized according to their effectiveness. We can use the example of a party ban. If the extremist scene is weakened or eliminated, and if it has limited potential for a renewed rise after the ban, we can speak about a positive scenario (or "white scenario"). However, the possibility exists that, while "hardliner extremists" are eliminated, a new radical or populist movement arises. Here it is questionable if we could label such a development a complete success, so we should speak of a "grey scenario". The situation in Austria can be seen as an example – clear neo-Nazi activities are consistently

[35] Havlík 2014.

[36] Bourne 2011, p. 2.

[37] Mudde 2016, p. 130–134.

[38] Ibid p. 135.

[39] Botsch et al. 2013.

suppressed on the one hand,[40] while, on the other hand, the right-wing populist FPÖ party, with some controversial links to the extremist spectrum, remains a strong political force.

Finally, we may define two 'black scenarios'. The first consists in a recurrence of the same party, or one very similar to it, after anti-extremist measures have been used. The party being stronger in its reawakening, is able to use its status as a veritable martyr to achieve new success. This situation applies in the cases of the bans of the German National Party (Deutsche Nationalpartei, DNP) and the German National Socialist Workers' Party (Deutsche Nationalsozialistische Arbeiterpartei, DNSAP) in interwar Czechoslovakia and the subsequent establishment of the new and much more successful Sudeten German Party (Sudetendeutsche Partei), which won parliamentary elections in 1935. With support from Nazi-Germany it was able to destabilize Czechoslovakia in 1938.[41] The second black scenario occurs when the extremist scene is able to find new effective organisational forms and to represent their interests in a more effective way than before (sometimes with violence, sometimes with new propagandist methods etc.). The ban of the Radical Unity (d'Unité Radicale) in France in 2002 can be mentioned as an example. This association was banned after one of its supporters, Maxime Brunerie tried to assassinate French president Jacques Chirac on June 14, 2002. Former members of the banned group founded a new organisation, the Identitarian Bloc (Bloc Identitaire - BI) and the global Identitarian Movement arose from this group. The current Identitarian Movement has many national branches in the world and it is able to influence the public discourse due to the engagement of young radicals.[42] Both black scenarios are present in the case study of combating right-wing extremism in Slovakia that is presented in the next section.

## 4.4 Case Study of the Slovak Unsuccessful Use of Militant Democratic Measures against Right-Wing Extremist Parties

In March 2016, the political party Kotleba – People's Party Our Slovakia (Kotleba – Ľudová strana naše Slovensko, ĽSNS) entered the National Council of the Slovak Republic (the Slovak parliament) by gaining 8,04% of the votes, resulting in 14 out of 150 seats (in previous elections, in 2012, it received only 1,58% of the votes).[43] It was 10 years after the ban of the Slovak Togetherness – National Party (Slovenská Pospolitosť – Národná strana, SP-NS) in 2006. This SP-NS was founded in 2005 on the initiative of a civic association, the Slovak Togetherness (SP), which was officially

[40] Bailer 2013, p. 281–301.

[41] Capoccia 2005, p. 75–81.

[42] Casajus 2015.

[43] Kluknavská and Smolík 2016.

registered with the Slovak Interior Ministry in 1995. The founders came mostly from a post-skinhead milieu around a small organisation, the Slovak National Front (Slovenský národný front, SNF), the registration of which was refused by the ministry.[44]

The SP was one of many small right-wing extremist groups in Slovakia in the second half of the 1990s. It garnered public attention thanks to public demonstrations of its members in uniforms, which were partially similar to the uniforms of the Hlinka guard during the era of the Slovak clergy-fascist state in the Second World War. The leader of the SP at that time was Marián Kotleba (born 1977), a teacher of information technology at a high school in Banská Bystrica. An anti-governmental campaign with provocative demonstrations in 2003–2005 brought media and public attention to the SP, and the group strengthened its position within the Slovak right-wing extremist spectrum.[45]

As a result of this development the political party SP-NS was founded and registered on 18 January, 2005 (with Kotleba as its leader), while the original association SP kept its original character. Due to a confrontation with the political establishment and after protests of anti-racist civil society, the state attorney requested the ban of the SP-NS. The charge was justified by referring to the party statute with which the party was registered by the Interior Ministry several months before. The real activities of the party, with the exception of one of Kotleba's speeches, were not taken into account. The Supreme Court of the Slovak Republic, in its decision of 1 March, 2006, accepted two reasons for the ban: firstly, the plea of the SP-NS for an unequal approach of national minorities (based on "reciprocity" guaranteed for Slovak minorities in other countries) and, secondly, the aim of establishing a corporatist state which – according to court – did not respect the equality of voting.[46] The SP-NS argued that the corporatist principle is also included in the Irish and Slovenian constitutional systems,[47] but the Court did not accept this argument. The party was dissolved.

The SP continued its activities. In 2007 the new leader of this group was elected, Ivan Sýkora. The Interior Ministry tried to ban this association in 2008, however, the Supreme Court of the Slovak Republic decided on 1 July, 2009 that this dissolution was not legal due to a breach of procedural deadlines.[48] In the same year members of the SP again discussed the activities of the SP-NS. As a result of these discussions, several members of the SP joined the registered Party of Friends of Wine (Strana priateľov vína, SPV, it was founded in 2000) and this party changed its name to the People's Party of Social Solidarity (Ľudová strana sociálnej solidarity, LSSS) in 2009. In 2010, it adopted a new name, as the People's Party Our Slovakia (Ľudová strana Naše Slovensko - ĽSNS).[49]

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[44] Mikušovič 2007.

[45] Ibid.

[46] Najvyšší súd Slovenskej Republiky (Supreme Court of the Slovak Republic). 2006. Rozsudok 3Sž 79/2005.

[47] Slovenská pospolitosť – Národná strana. 2005.

[48] Najvyšší súd Slovenskej Republiky (Supreme Court of the Slovak Republic). 2009. Rozsudok 6Sr/1/2009.

[49] Nociar 2012, p 6.

The real party leader was, and is, Marián Kotleba, despite the fact that officially Martin Beluský was registered as its chairman. Kotleba was appointed as "electoral leader".[50] The Slovak police tried to charge Kotleba for racist anti-Roma and pro-fascist speech; all attempts were rejected, however, by either the state attorneys or by the Court.[51] Kotleba used these cases to build a "martyrdom" cult. A well-known case dates from 2009. During a speech at a demonstration in Bratislava, Kotleba used the greeting "On guard!" ("Na stráž"). The Slovak fascist movement of the first half of the 20th century used the same salute. The police charged him for expressing sympathies to movements that aim to suppress human rights (a criminal offence according to Slovak penal code). But the state attorney stopped this charge; she argued that lifting your hand is required to complete an actual fascist salute.[52]

During the electoral campaign in the Banskobystrický region in 2009, Kotleba used leaflets that, among other things, demanded the "elimination of special benefits for gypsy parasites". Kotleba was charged due to defamation of race, nation and conviction (a criminal offence in Slovak penal law), but the Supreme court of the Slovak Republic exonerated him in 2013. The judges argued that it was not clear if the whole Roma minority as such was defamed and if the term 'gypsy' (cigán, cigáň) was abusive itself and could be used synonymously with the term 'Roma' (Róm) in Slovak language.[53]

The ĽSNS organized provocative meetings in Romani settlements and promised the solution of the so-called "Gypsy question" to the Slovak public. Kotleba strongly criticized the Slovak establishment and his electoral potential was strongly underestimated by the establishment. A huge surprise came in 2013 when he was elected in regional elections in the second round as 'governor' (the Slovak term is "župan") of the Banskobystrický region, one of eight Slovak regions. The ĽSNS has its seat in the town Banská Bystrica in mid-Slovakia. Paradoxically, this town was the center of the anti-fascist Slovak national uprising in 1944, and Kotleba several times rejected the legacy of this event.[54]

Kotleba was able to win new supporters thanks to the migration crisis in 2015. He was the main speaker at a huge rally with more than 5000 participants in the Slovak capital Bratislava on 20 June, 2015 under the motto "Stop Islamization of Europe". This rally was not organized by the ĽSNS: the organizer was the association Civic Way. However, the ĽSNS organized a petition against migrants at that time. After the demonstration protesters turned to violence (many of them were football hooligans from the Czech Republic), targeting, among others, Arab tourists. One of the verbal hate attackers – Milan Mazurek – was later elected as deputy of the ĽSNS to the Slovak parliament.[55]

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[50] Kluknavská 2012, p. 9.

[51] Tódová 2013.

[52] Zelinka and Machovič 2010.

[53] Najvyšší súd Slovenskej Republiky (Supreme Court of the Slovak Republic). 2013. Uznesenie 4 Tdo 49/2012.

[54] Naxera and Krčál 2016, p. 35–36.

[55] Šnídl 2016.

In 2015 the party added the name of its leader to its official name, becoming Kotleba – People's Party Our Slovakia. An expression of growing self-confidence of the party can be seen in the attempt to use the instruments of militant democracy against its political opponents. In 2016 the party informed the police that an "unidentified perpetrator" propagated a movement aimed at suppressing human rights in Banská Bystric. The 'movement' turned out to be "Zionism" and the supposed 'propagation of suppressing human rights' took place at an anti-totalitarian exhibition in Banská Bystrica, organized by the civic association Post Bellum. The police did not start a criminal prosecution.[56]

In March 2016, the Kotleba – ĽSNS was elected to the Slovak parliament for the first time. On its candidate list were several former members of neo-Nazi groups, including perpetrators of racist violent attacks.[57] They won legitimacy in the eyes of many Slovak voters. However, the friendship between Kotleba – ĽSNS and the Slovak Togetherness (led by Jakub Škrabák) ended prior to the elections.[58] Kotleba cooperated with a new paramilitary group Action Group – Resistance (Akčná skupina Vzdor). Its leader Marián Magát was no. 88 on the candidate list. However, in the second half of 2016 this group stopped its activities.

In April of 2016 Marián Kotleba announced establishing the Patrols of the Peoples' Party (Hliadky Ľudovej strany) in trains in Slovakia. Allegedly it was a reaction to crime committed by one Roma against one young woman in a train. Unarmed men wearing party T-shirts travelled in trains to stop criminal offences. The party declared that these patrols respected the Slovak laws. They are used in party propaganda as a guarantee of safety, among others, against "gypsy extremism".[59] However, the Slovak Parliament adopted a change of the transport law as a reaction to these patrols. According to the new law, the security tasks in Slovak railways are a task only for governmental institutions.[60] But this change is very questionable, because, before this change, it was already only the Slovak state that had a monopoly on violence. Also, to find evidence about violating the Slovak law in the case of these patrols is very difficult.

With respect to this case it is also important to mention that in 2014 people around the ĽSNS tried to register the new civic association People's Guard (Ľudová stráž); however, the Slovak Ministry of interior rejected this registration. The use of the salute "Na stráž" was again discussed. The decision was supported by the decision of the Supreme Court of the Slovak Republic in 2016.[61] As in the case of the train partols, they did not use their own legal entity as a political party, but did succeed in presenting it as an initiative of the party.

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[56] Břešťan 2016.

[57] Motýl 2016.

[58] Slovenská pospolitosť 2016.

[59] Kotleba – Ľudová strana Naše Slovensko 2016.

[60] SITA 2016.

[61] Najvyšší súd Slovenskej Repibliky (Supreme Court of the Slovak Republic). 2016. Rozhodnutie 8 Sr/1/20 14.

After the electoral success of the Kotleba – ĽSNS a number of proposals for banning the party came from anti-racist and democratic groups; the Slovak supreme state attorney is, however, limited in its options by previous contestable interpretations of the relevant legal norms by Slovak courts.[62] In May 2017, the state attorney nevertheless asked the Supreme Court to ban the party, on the grounds that "the party's goal is to destroy the country's democratic system".[63] The trial had not started yet at the time of writing.

The whole growth of political groups around Marián Kotleba is stimulated by the struggle of Slovak governmental bodies to use norms of militant democracy against these groups. However, the rise of the party Kotelba – ĽSNS in the first half of the second decade of the 21st century was caused by the unsuccessful responses to societal and political problems which serve as a source of protest for right-wing extremism (and in addition, the corruption of the political establishment). The impact of the norms of militant democracy was also smothered due to the success of Marián Kotleba and his followers in adapting their political projects to the unstable development of the Slovak political and legal system.[64] The result is the presence of a "hard-line" right-wing extremist party in Slovak politics with links to neo-Nazi and vigilantes, and the potential of a future, further rise in the Slovak parliament.

## 4.5 Conclusion

Countering right-wing extremism is closely connected to the development of militant democracy since the interwar period. The German theory and praxis of militant democracy had a strong impact on this development, including many important "rounds of discussions" (the SRP-ban, "Radikalenerlass", the struggle for the NPD ban etc.).[65] The adoption of elements of militant democracy into the legal order and political culture of many countries, and on the European and international level, is an ongoing trend, still closely linked to the issues of right-wing extremism (for example, in the discussion about the EU funding of the AFP).

Militant democracy is used relatively effectively against the traditional neo-fascist and neo-Nazi spectrum on the one hand (maybe with some exceptions, as the case of the ĽSNS demonstrates), but it has limits in relation to excesses of the modern populist right on the other hand. The current and future development of the use of militant democracy against Jihadism might lessen the up to now dominant role of countering right-wing extremism, and partially left-wing extremism. However, the strong historical legacy of the use of instruments of militant democracy against right-wing extremism as well as the renewed challenges of right-wing extremism (as the case study of the Kotleba – L'SNS shows) make clear that the context of right-wing extremism will remain important for future research and the political evaluation of militant democracy.

[62] Jurič 2016.

[63] Geist 2017.

[64] Kluknavská and Smolík 2016.

[65] Brandstetter 2013.

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# Part II
# Law

# Chapter 5
# Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy


**Christian Walter**

**Abstract** The protection of human rights has become one of the main characteristics of international law of the post-World War II era and with the breakdown of the Soviet empire democracy itself is gradually moving into the focus of international legal analysis. Hence, it is necessary to conceive the concept of militant democracy also from an international legal perspective, which raises several fundamental questions: Do international human rights pose constraints on national constitutional norms designed to defend democracy, and if so, how do these limits look like? And conversely: can human rights be used as an argument in favor of militant democracy? Are there other international legal norms designed to preserve democracy? The Chapter, first, analyzes the impact that international human rights standards on the concept of militant democracy. In a second step, other forms of internationalized militant democracy, notably the mechanisms established by Article 7 of Treaty on European Union (TEU) and Article 8 of the Statute of the Council of Europe, are being looked into. The analysis leads to the conclusion that militant democracy is currently being internationalized as a legal and political concept.

**Keywords** Loewenstein, Karl · Human rights · Forfeiture of political parties · Banning of political parties · Refah party · Austria · Poland · EU: New Framework to Strengthen the Rule of Law · Council of Europe · Organization of American States · African Union · Economic Community of West African States · Ukraine · Egypt

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## 5.1 Introduction

When Karl Loewenstein wrote his famous "Militant Democracy and Human Rights" in 1937 he argued from a comparative perspective regarding the threats to democracy posed by international fascism on the one hand[1] and the reactions by democracies against these threats on the other.[2] At the time, international law was basically conceived as a law of co-existence between states with little or no impact on the internal structure of these states.[3] Hence, in spite of what today's reading of Loewenstein's title might suggest, the notion of "human rights" does not refer to international guarantees but rather means human rights standards existing in national constitutional law. As international law was not concerned with internal governmental structures at the time, it had no role regarding the establishment, promotion or defense of democracy either.

Today, these basic premises of international law have changed. The protection of human rights has become one of the main characteristics of international law of the post-World War II era,[4] and with the breakdown of the Soviet empire democracy itself is gradually moving into the focus of international legal analysis.[5] Hence, it is necessary to conceive the concept of militant democracy from an international legal perspective as well, which raises several fundamental questions: Do international human rights pose constraints on national constitutional norms designed to defend democracy, and, if so, what do these limits look like? And conversely: may human rights be used as an argument in favor of militant democracy? Are other international legal norms designed with the purpose of preserving democracy? Finally, it may be asked whether there already exists an international legal concept of militant democracy. The following chapter is structured along these general questions. It starts off by analyzing the impact that international human rights standards may have on the concept of militant democracy. The second step consists in looking into other forms of internationalized militant democracy, notably the mechanisms established by Article 7 of Treaty on European Union (TEU) and Article 8 of the Statute of the Council of Europe, in greater detail. In sum, the analysis will lead to the conclusion that militant democracy is in fact being internationalized as a legal and political concept.

[1] Loewenstein 1937a, p. 417–432.

[2] Loewenstein 1937b, p. 638–658.

[3] See the classical analysis, Friedmann 1964, p. 4–5, 7 and 369–70.

[4] Tomuschat 2014, p. 2; Alston and Goodman 2013, p. 59.

[5] Groundbreaking: Franck 1992, p. 46–91; see also Fox and Roth 2000; Wheatley 2010; Petersen 2009; Ehm 2013; Ehm and Walter 2015; Von Ungern-Sternberg 2017 (forthcoming).

## 5.2 International Human Rights as Basis for and Limitation on Militant Democracy

Any concept of militant democracy necessarily implies limitations on human rights and fundamental freedoms. Typical instruments of militant democracy[6] are the forfeiture of human rights,[7] the banning of political parties[8] or other forms of restricting their activities.[9] All these instruments result in restrictions on human rights, such as freedom of opinion, freedom of association and assembly, and the right to vote and to stand for elections. Hence, it is necessary to justify these limitations under the restriction clauses of the human rights just mentioned. On the other hand, however, human rights concerns may also serve as a basis for the justification of such restrictions.

This ambiguity of human rights with regard to the concept of militant democracy is aptly reflected in the wording of Article 17 ECHR, according to which "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 of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." A closer look at the jurisprudence of the European Court of Human Rights reveals that the Court uses the rights and freedoms guaranteed in the ECHR for the development of a concept of militant democracy at the level of the Convention (I), but also to scrutinize concepts of militant democracy existing within the domestic legal order of the member states (II).

I. *Article 17 ECHR as Legal Basis for a Convention Concept of Militant Democracy*

In order to better understand how Article 17 ECHR operates, it is helpful to contrast the provision with its German counterpart in Article 18 of the German Basic Law. Under the German provision, the forfeiture of human rights is made subject to a specific procedure which is concentrated in the Federal Constitutional Court and – if successful – results in a decision declaring which fundamental rights the respon-

[6] For an overview of the various instruments of militant democracy, see: Pfersmann 2004, p. 55 et seq.

[7] E.g. Article 18 of the German Basic Law, which reads: "Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court."

[8] The banning of political parties is an instrument existing in a number of European countries. See, for instance: Article 69 (VI) of the Turkish Constitution; Article 21 (II) of the German Basic Law; Article 6 of the Spanish Constitution (in conjunction with Articles 9 and 10 of Act LO 6/2002 of 27 June, 2002); Article 13 of the Polish Constitution; Article 29 (III) of the Slovakian Constitution (in conjunction with Act No. 47/1993).

[9] E.g. restrictions on public funding as provided for by Article 69 (VII) of the Turkish Constitution, as amended by Act No. 4709 of 3 October, 2001.

dent has forfeited. The Court may limit the forfeiture to a specific period of time, not shorter than one year. It may also impose upon the respondent restrictions of clearly specified content and duration, provided that they do not adversely affect fundamental rights other than those which the respondent forfeited.[10] As can be easily seen, the requirement of a specific procedure in the Federal Constitutional Court places a considerable burden on the application of the provision. In fact, throughout the existence of the German Basic Law only four such proceedings were initiated, none of which was successful.[11]

In contrast, the application of Article 17 ECHR is not made subject to any specific procedure but simply operates as an additional limitation of Convention rights. As a result, the European Court of Human Rights uses Article 17 ECHR much more frequently.[12] When Article 17 is applied the applicant is denied the protection of the Convention and the Court does not enter into a closer examination of the case and the reasons for the government to restrict the Convention rights of the applicant.[13] From a historical as well as a teleological point of view, Article 17 was indeed clearly designed to combat any re-establishment of fascist or otherwise totalitarian regimes:

> On the preliminary question of the usefulness of such a collective guarantee, the Committee replied in the affirmative, considering that this guarantee will demonstrate clearly the common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy; it will contribute to the development of their solidarity; it will fulfil the longing for security among their peoples; it will allow member States to prevent – before it is too late – any new member who might be threatened by a rebirth of totalitarianism from succumbing to the influence of evil, as has already happened in conditions of general apathy.[14]

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[10] For these legal consequences see § 39 of the Federal Constitutional Court Act [BVerfGG] of 12 March, 1951 (Federal Law Gazette I, p. 243) as published on 11 August, 1993 (Federal Law Gazette I, p. 1473) last amended by Article 8 of the Regulation of 31 August, 2015 (Federal Law Gazette I, p. 1474).

[11] Federal Constitutional Court, Decision of 25 July 1960, BVerfGE 11, 282 (282); Decision of 2 July, 1974, BVerfGE 38, 23 (24); Decisions of 18 July, 1996, 2 BvA 1/92 and 2 BvA 2/92.

[12] As of February 2017, abuse of rights under Article 17 was discussed (not: applied!) in 288 of the ECtHR's judgments (See: HUDOC Database. http://hudoc.echr.coe.int/. Accessed 28 February, 2017); for an analysis of specific cases involving freedom of speech, see: Cannie and Voonhoof 2011. The Abuse Clause and Freedom of Expression in the European Human Rights Convention. *Netherlands Quarterly of Human Rights* 29: 54–83.

[13] ECtHR, Decision of 12 June 2012, Application No. 31098/08 (Hizb ut-Tahrir and others v. Germany), para. 74: "[T]he Court considers that the first applicant attempts to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, the Court finds that, by reason of Article 17 of the Convention, the first applicant may not benefit from the protection afforded by Article 11 of the Convention."

[14] Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights,* Vol. I 1975: Report presented by Mr. Teitgen in the name of the Committee for Legal and Administrative Affairs, p. 192. The Hague: Martinus Nijhoff; see also the statement by the Swedish representative Mr. Hedlund at the Consultative Assembly: "It is against dictatorship that we wish to defend our peoples through a guarantee of human rights and fundamental freedoms." Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights,* Vol. V 1979, p. 332. The Hague: Martinus Nijhoff.

As a result, Article 17 ECHR may be qualified as an international human rights norm that embodies the concept of militant democracy[15]; this is further underlined by the Court's holding that there is a "very clear link between the Convention and democracy" which makes it necessary to ensure that "no one may be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society."[16]

The assumption that elements of militant democracy form an inherent part of human rights regimes is not an exclusively European approach. While the ECtHR's jurisprudence on this matter is certainly the most elaborate at the international stage, elements of militant democracy are also present in other human rights instruments, most notably in the form of abuse clauses similar to Article 17 ECHR. For instance, Article 5, para. 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prescribe that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights of freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."

In line with the ECtHR's reasoning on Article 17 of the Convention, the Human Rights Committee, as the monitoring body for the International Covenant on Civil and Political Rights, held that the reorganization of a dissolved fascist party was "removed from the protection of the Covenant by article 5 thereof."[17] Likewise, the Inter-American Commission on Human Rights, when addressing "representative democracy and political rights" as an area in which steps need to be taken in order to improve the protection of human rights in its Yearbook of 1990, stated that governments were generally obliged to permit and guarantee the organization of all political parties "unless they are constituted to violate human rights",[18] thereby implicitly excluding political parties from the Convention's protection if they aim at perpetrating human rights violations.

It can thus be summarized that the general international human rights instruments contain provisions which manifest the concept of militant democracy by

[15] See: EComHR, Decision of 20 July, 1957, KPD (Communist Party of Germany) v. Germany, Application No. 250/57: "[T]his fundamental provision of the Convention is designed to safeguard the rights listed therein by protecting the free operation of democratic institutions (quoting the statement by the Italian Representative Mr. Benevuti at the Consultative Assembly, "It is necessary to prevent totalitarian currents from exploiting, in their own interests, the principles enunciated by the Convention; that is, to invoke the rights of freedom in order to suppress Human Rights." See: Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights,* Vol. II 1975, p. 136. The Hague: Martinus Nijhoff).

[16] ECtHR, Kasymakhunov and Saybatalov v. Russia, Judgment of 14 March, 2013, Application Nos. 26,261/05 and 26,377/06, para. 104; for the link between the Convention and democracy see also below 5.3.2.a).

[17] Human Rights Committee, Decision of 10 April, 1984, M.A. v. Italy, Communication No. 117/1981, para. 13.3.

[18] Inter-American Human Rights Commission, *Inter-American Yearbook on Human Rights*, Leiden/Boston: Martinus Nijhoff 1990, p. 384

removing certain forms of anti-democratic conduct from the scope of protection of the respective human rights regime. On the other hand, however, international human rights provisions may also serve as a limitation on domestic concepts of militant democracy, which becomes most evident in the ECtHR's jurisprudence on the banning of political parties.

## II. *The ECHR as a Limitation on Domestic Concepts of Militant Democracy – analyzed on the Basis of the Jurisprudence on Banning Political Parties*

While there are no provisions under the ECHR which specifically regulate rights of political parties, there is no doubt that political parties may rely on freedom of expression and freedom of association as guaranteed in Articles 10 and 11 ECHR. In the Court's view, this follows from the fact that political parties are a form of association essential to the proper functioning of democracy.[19] According to the Court, the role of political parties in the political debate forms a specific aspect of freedom of expression which is closely linked to their institutional protection as independent entities under Article 11 ECHR: "Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention."[20] Because of this close interrelatedness between institutional and substantive aspects, Article 11 needs to be interpreted in the light of Article 10 ECHR.[21] Against this background, the dissolution or banning of a political party undoubtedly constitutes an interference with Convention rights[22] and accordingly requires justification.

Given their essential role in the functioning of democracy, restrictions to the activities of political parties under Article 11 are interpreted narrowly and strictly by the European Court of Human Rights.[23] The Court requires "convincing and compelling reasons" for such restrictions and accords only a limited margin of appreciation to the member states,[24] which "goes hand in hand with rigorous European supervision."[25] Based on these criteria, the Court considered that "a political party

[19] See for instance: ECtHR, Judgment of 30 January,1998, United Communist Party of Turkey and others v. Turkey, Application No. 19392/92, para. 25; ECtHR, Judgment of 25 May, 1998, Socialist Part and others v. Turkey, Application No. 21237/93, para. 29

[20] ECtHR, Grand Chamber Judgment of 13 February, 2003, Refah Partisi (Welfare Party) and others v. Turkey, Application No. 41340/98 i.a., paras. 89 et seq.

[21] ECtHR, Judgment of 25 May, 1998, Socialist Part and others v. Turkey, Application No. 21237/93, para. 41; ECtHR, Grand Chamber Judgment of 8 December, 1999, Party of Freedom and Democracy (ÖZDEP) v. Turkey, Application No. 23885/94, para. 37; ECtHR, Judgment of 9 April, 2002, Yazar and others v. Turkey, Application No. 22723/93 i.a., para. 46; ECtHR, Judgment of 30 June. 2009, Herri Batasuna and Batasuna v. Spain, Application No. 25803/04 i.a., para. 74.

[22] ECtHR, Judgment of 30 January, 1998, United Communist Party of Turkey and others v. Turkey, Application No. 19392/92, para. 36.

[23] ECtHR, Grand Chamber Judgment of 08 December 1999, Party of Freedom and Democracy (ÖZDEP) v. Turkey, Application No. 23885/94, para. 44.

[24] ECtHR, Grand Chamber Judgment of 13 February 2003, Refah Partisi (Welfare Party) and others v. Turkey, Application No. 41340/98 i.a., para. 46.

[25] ECtHR, Grand Chamber Judgment of 8 December, 1999, Party of Freedom and Democracy (ÖZDEP) v. Turkey, Application No. 23885/94, para. 44.

whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds."[26] It should be noted that the Court listed these criteria as alternatives, implying that policies aimed at the destruction of democracy or the flouting of rights and freedoms of others may result in sanctions against a political party even where no incitement to violence occurs.

The position of the Court is reinforced by the activities of the European Commission on Democracy Through Law ("Venice-Commission"), which has produced a number of documents setting out standards for the dissolution or banning of political parties.[27] The Court explicitly referred to these documents and included them into its own assessment of whether or not a pressing social need for banning a political party exists in a given case.[28] On the basis of these criteria, the Court did accept the banning of the Turkish *Refah Party* because of its attempts to replace the existing secular order by a system based on sharia rights.[29] In contrast, it considered sanctions against several parties which pursued separatist aims unjustified when these parties did not take recourse to violence in the pursuit of their political activities.[30]

An analysis of the jurisprudence of the European Court of Human Rights thus reveals that domestic concepts of militant democracy are closely monitored and scrutinized from the perspective of freedom of expression and freedom of association as internationally protected human rights in order to ensure that such provisions are not misused to improperly suppress oppositional groups. That the Court's jurisprudence now influences domestic decisions to a significant extent is well-illustrated by the German Constitutional Court's recent judgment in which it decided not to ban the right-wing NPD Party. The Court referred expansively to the ECtHR's juris-

[26] ECtHR, Grand Chamber Judgment of 13 February, 2003, Refah Partisi (Welfare Party) and others v. Turkey, Application No. 41340/98 i.a., para. 98.

[27] Venice Commission, Strasbourg 10.1.2000, Guidelines on prohibition and dissolution of Political Parties and analogous measures, CDL-INF(2000)1.; Venice Commission, Strasbourg 15.4.2004, Guidelines and explanatory report on legislation on political parties: some specific issues, CDL-AD(2004)007rev.; Venice Commission, Strasbourg 28.1.2009, Code of good practice in the field of Political Parties, CDL-AD(2009)002; Venice Commission, Strasbourg 3.7.2009, Code of good practice in the field of Political Parties and explanatory report, CDL-AD(2009)021; Venice Commission, Strasbourg 25.10.2010, Guidelines on Political Party regulation by OSCE/ODIHR and Venice Commission, CDL-AD(2010)024; Venice Commission, Strasbourg 16.10.2013, Compilation of Venice Commission opinions and reports concerning Political Parties, CDL(2013)045.

[28] ECtHR, Judgment of 12 January, 2016, Party for a Democratic Society (DTP) and others v. Turkey, Application No. 3840/10 i.a., paras. 80, 101.

[29] ECtHR, Grand Chamber Judgment of 13 February, 2003, Refah Partisi (Welfare Party) and others v. Turkey, Application No. 41340/98 i.a., para. 132.

[30] For instance: ECtHR, Judgment of 8 December, 1999, Party of Freedom and Democracy (ÖZDEP) v. Turkey, Application No. 23885/94, para. 40

prudence and explicitly argued that the criteria it developed on the banning of political parties were in line with the criteria developed by the Strasbourg Court.[31]

## 5.3 Other International Norms Relating to Militant Democracy

Beyond the human rights context the concept of militant democracy also plays a role in the institutional law of international organizations. The most elaborate concept has been established in the context of the European Union, but other international organizations have also developed strategies to cope with undemocratic changes of government or undemocratic policies in their member states.

### *5.3.1 Article 7 TEU as an International Instrument of Militant Democracy*

With the entry into force of the Treaty of Lisbon, the EU conceived itself as a community of values, among which democracy is given a prominent place (Article 2 TEU).[32] The values enshrined in Article 2 are protected by a sanctioning mechanism, which had originally been introduced by the Treaty of Amsterdam, and was later renewed and enhanced with a preventive mechanism by the Treaty of Nice. Historically, the mechanism of Article 7 TEU may be seen as a reaction to the experience made when the "XIV EU Member States" adopted sanctions against Austria following the inclusion of the right wing FPÖ ("Freiheitliche Partei Österreichs") into the Austrian Federal Government.[33] The mechanism established by Article 7 TEU consists of both substantive (a) and procedural (b) components, and is comple-

[31] Federal Constitutional Court, Judgment of 17 January, 2017, 2 BvB 1/13, paras. 607 et seq. A Press Release summarizing the judgment in English can be found here: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17–004.html. Accessed 07.03.2017.

[32] The principle of democracy entered the law of the European Union in 1992 with the Treaty of Maastricht, which, in its Article F, para. 1, understood democracy horizontally as a requirement relating to the member states, "whose systems of government are founded on the principles of democracy." With the Treaty of Amsterdam this wording was changed and the Union itself was expressly included: "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." The current wording of Article 2 TEU leaves open whether the principle of democracy is addressed to the Union and/or the Member States. As the background of Article 7 TEU reveals, it can only be understood as comprehensively addressing both, the Union and its Member States, see Hilf and Schorkopf 2013.

[33] For a comprehensive analysis of these developments see: Schorkopf 2002; Sadurski 2010.

mented by an EU Framework to strengthen the Rule of Law (c).[34] Taken together, these elements may be qualified as a mechanism of militant democracy at the level of the European Union (d).

(a) *Substantive Requirement: Clear Risk of Serious Breaches of Democratic Values*

Article 7 TEU formulates a substantive threshold for triggering the mechanism. There must be indications for the existence of a "clear risk of a serious breach by a Member State of the values referred to in Article 2." The wording "serious breach" implies that not any occasional or minor violation of one of the foundational principles of the Union is sufficient. What is required are breaches of a certain degree and with a certain impact. In scholarly writings, the notion of "systemic deficiency" has been used to further circumscribe the threshold.[35] It has been taken up by the European Commission when dealing with the recent situation in Poland. In its first formal recommendation the Commission spoke of a "systemic threat to the rule of law in Poland", resulting from the fact that the Polish Constitutional Tribunal is prevented from fully ensuring an effective constitutional review.[36] For the present purposes it is not necessary to enter into a debate on whether this assessment is correct or convincing. In any event, the recommendation by the Commission exemplifies that the procedures established by and on the basis of Article 7 TEU reveal clear elements of militant democracy. But what does the mechanism look like procedurally?

(b) *Procedural Structure: Three Steps Towards Sanctions*

Article 7 TEU envisages a three-step procedure which may finally lead to concrete sanctions. The centerpiece of the mechanism is the second step of the procedure and consists in the formal determination of "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2" (Article 7, para. 2 TEU). This decision has to be taken unanimously in the Council[37] and with the consent of the European Parliament. It is preceded by the first step of the mechanism consisting in the determination that "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2" (Article 7, para. 1 TEU). Again, this decision has to be taken by the Council, though a majority of four fifths of its members is sufficient after consent by the European Parliament is obtained. The third step consists in concrete sanctions, most notably the suspension of certain rights of the Member State concerned under the EU Treaties. The decision on sanctions is taken in the Council by a qualified majority (Article 7, para. 3 TEU).

[34] Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM(2014)158 final.

[35] Von Bogdandy and Ioannidis 2014.

[36] European Commission, Recommendation of 27 July, 2016 regarding the rule of law in Poland, 2016/ 1374, Official Journal of the European Union L 217/53, para. 72.

[37] Excluding the vote of the member state upon which sanctions might be imposed.

The whole procedure is characterized by a certain political discretion on the part of Council and Parliament in deciding on whether or not to proceed to the next step of the mechanism.[38] All in all, the procedure under Article 7 is thus not only lengthy but also contains a significant procedural hurdle with the unanimity requirement to determine the existence of a breach.

(c) *The New EU Framework to Strengthen the Rule of Law*

In the Summer of 2014, the European Commission therefore came to the conclusion that, given the rather high thresholds in Article 7, paras. 1 and 2 TEU, a mechanism applying to earlier stages would be required since "[r]ecent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State."[39] The "New Framework to strengthen the Rule of Law" therefore takes up the notion of "systemic deficiency" and introduces a dialogue between the Commission and the Member State concerned, which may result in recommendations by the Commission and a follow-up procedure.

Again, the new mechanism creates a three-step procedure. In the first step, the Commission assesses whether there are clear, preliminary indications of a systemic threat to the rule of law in a particular Member State. If the assessment is in the affirmative, the second step consists in the adoption of a recommendation by the Commission, which may include specific indications on ways and measures to resolve the situation within a prescribed deadline.[40] The follow-up phase provides for a monitoring by the Commission of whether or not the recommendation was satisfactorily implemented by the Member State. If the Commission concludes in the negative, it may trigger the application of Article 7 TEU. The New Framework to strengthen the Rule of Law thus also serves as an instrument for the assessment of the conditions in Article 7, para. 1 TEU, i.e. whether there is a "clear risk of a serious breach of the values enshrined in Article 2 TEU." The New Framework to Strengthen the Rule of Law was used for the first time regarding the conflict between the Polish government and the Polish Constitutional Court.[41]

(d) *Evaluation: Militant Democracy at the Level of the EU*

It is particular the Polish case which now gives rise to substantial criticism of the European approach to militant democracy. Obviously, any mechanism of militant democracy operating at the European level necessarily differs from domestic

[38] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 5/6.

[39] A new EU Framework to strengthen the Rule of Law (note 34), 6.

[40] A new EU Framework to strengthen the Rule of Law (note 34), 8.

[41] European Commission, Recommendation of 27 July 2016 regarding the rule of law in Poland, 2016/ 1374, Official Journal of the European Union L 217/53; European Commission, Complementary Recommendation of 21 December, 2016 regarding the rule of law in Poland, 2017/146, Official Journal of the European Union, L 22/65.

concepts of militant democracy. Even within the European Union – though an international organization with a rather coherent profile – there is a great variety of different democratic structures and constitutional orders.[42] A European concept of militant democracy may thus only operate on the basis of common core democratic values which are necessarily less specific than domestic concepts, which makes it significantly harder to apply them to specific cases. Moreover, the fact that there is no independent institution to monitor the democratic performance of EU members and eventually could initiate sanctioning proceedings[43] renders the EU-mechanisms even more susceptible to policy considerations.[44]

This also explains why, in spite of repeated political demands,[45] formal proceedings under Article 7 TEU have never been initiated so far. Further, it is important to bear in mind that full sanctions under Article 7 may only be imposed once a breach of the values in Article 2 has already occurred. It is thus a retroactive instrument with little or no preventive impact. To a certain extent, the Framework established by the Convention is designed to mitigate this problem by introducing a dialogue at an earlier stage. The effectiveness of the Commission's approach is, however, seriously doubted especially by the observers of the Polish case.[46]

While the practical effects of the mechanisms establishes by Article 7 TEU and the Framework to strengthen the Rule of Law are thus currently being put under a

[42] For an overview of different national concepts of democracy see Classen 2013, p 42–56; for a specific analysis of different domestic concepts of militant democracy see: Thiel 2009.

[43] Notably, the ECJ has a quite limited role in the procedure under Article 7 TEU, see Article 269 TFEU.

[44] Bugarič 2016, p. 94. Some authors have therefore suggested establishing a specialized institution in the form of a "Copenhagen Commission" which could serve as guardian of the EU's democratic values. See notably: Müller 2014, p. 161.

[45] Accusations of a violation of the values enshrined in Article 2 were inter alia raised against France in 2010 following the deportation of Roma migrants, see: Statement by Viviane Reding, Vice-President of the European Commission of 14 September 2010, Speech 10/428; against Romania in 2012 following a conflict between the Government and the Constitutional Court, see: Report from the European Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM (2012) 410 final; against Hungary in 2013 following the constitutional and legislative reforms of the Orbán administration, see: European Parliament, Report on the Situation of Fundamental Rights: Standards and Practices in Hungary, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Rui Tavares, 24 June 2013, A7–0229/2013; and against Poland in 2016 following the constitutional and legislative reforms of the PiS administration, see: European Commission, Recommendation of 27 July, 2016 regarding the rule of law in Poland, 2016/ 1374, Official Journal of the European Union L 217/53, para. 72.

[46] There are divergent views in literature on the appropriateness and the effectiveness of the path chosen by the Commission. Skeptical in view of the procedure's effectiveness in general: Kochenov and Pech 2015. And with regard to the Polish case: Hofmeister 2016, p. 869–875 (874 et seq.); Scheppele and Pech 2017.

stress test, their mode of operation clearly falls within the concept of an internationalized notion of militant democracy irrespective of the outcome of that test: The purpose of these mechanisms coincides with the overall aim of the concept of militant democracy. They are meant to contribute to the preservation or restoration of democratic structures and the rule of law.[47] Since their targets are the national constitutional structures of the EU Member States, they constitute an international instrument designed for defending democracy at the domestic level.

### *5.3.2 Elements of Internationalized Militant Democracy in Other International Organizations*

While Article 7 TEU certainly is the most elaborate form of militant democracy outside national constitutional law, there are other international organizations in which elements of militant democracy may be found. A prominent example is Article 8 of the Statute of the Council of Europe, dating back as early as 1949. Similar mechanisms have also been established in several other regional organizations in more recent years.

(a) *Article 8 of the Statute of the Council of Europe*

According to Article 8 of the Statute, a member may be suspended from its rights of representation or even be requested by the Committee of Ministers to withdraw from membership if it seriously violated Article 3. According to 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 human rights and fundamental freedoms." It should be noted that the link between rule of law, human rights and democracy was already very much present in 1949, which can be seen in the Preamble of the Statute of the Council of Europe, where the Member States reaffirm "their devotion to the spiritual and moral values which are the common heritage of their peoples *and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy*."[48] The triangle of human rights, rule of law, and democracy has continuously been a characteristic element of democracy in the international context.[49] It is against this background that Article 8 of the Statute of the Council of Europe should be read. The intrinsic nexus between human rights and militant democracy in the Council of Europe system was highlighted by A.H. Robertson in the following terms:

[47] Hillion 2016, p. 65.

[48] Emphasis added.

[49] See in general: Ehm and Walter 2015, p. 22 et seq. And exemplary: Vienna Declaration of 25 June, 1993, adopted at the World Conference on Human rights, stating in para. 8 that "[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."

> 1949 was very close to 1945, when all of Europe was suffering from another form of tyranny. Many of the leading statesmen and politicians of the immediate post-war epoch had been in prison or in the resistance and were acutely conscious of the necessity to prevent any recrudescence of dictatorship in Western Europe. They knew that as long as human rights are respected, democracy survives and the danger of dictatorship is remote; but that the first steps towards dictatorship are the gradual suppression of individual rights – infringement of the freedom of the press, prohibition of public meetings, trials behind closed doors, and so on – and that once this process has started, it is increasingly difficult to bring it to a halt.[50]

Article 8 of the Statute of the Council of Europe was complemented in 1995 by an internal mechanism established within the Parliamentary Assembly, adding the possibility of adopting sanctions in the Parliamentary Assembly ranging from the non-ratification of a national parliamentary delegation's credentials to a recommendation to the Committee of Ministers requesting it to take the appropriate action provided for in Article 8 of the Statute of the Council of Europe.[51] On the basis of this provision, the Parliamentary Assembly took practical action in the context of the Russian military intervention in Chechnya and regarding the Crimea crisis.[52] When allegations of irregularities became known during the Ukrainian national elections of 2004, the Parliamentary Assembly issued a warning that it might request the Committee of Ministers to suspend Ukraine's membership in the Council of Europe in accordance with Article 8 of the Statute of the Council of Europe.[53]

Just as the TEU-mechanisms, Article 8 of the Statute of the Council of Europe and the internal practice of the Parliamentary Assembly thus reveal elements of an internationalized concept of militant democracy. While the mechanisms for the protection of human rights established under the European Convention are also taken into account, the institutional system of the Council of Europe provides for additional sanctioning mechanisms in case of serious breaches of democratic standards.

At least in the European context, there are thus clear signs for an international approach towards militant democracy, which becomes most evident in the establishment of various mechanisms sanctioning anti-democratic developments at the domestic level.

(b) *Protection Against Undemocratic Change of Government in Other Regional Organizations*

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[50] Robertson 1961, p. 55 et seq.

[51] Parliamentary Assembly, Order No. 508 (1995) on the honouring of obligations and commitments by Member States of the Council of Europe, Strasbourg, 26 April, 1995; cf. Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, Doc. 13,488 of 9 April, 2014. http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID = 20,868&lang = en. Accessed 1 March, 2017.

[52] Concerning Chechnya: Recommendation 1456 of 6 April, 2000 and Resolution 1221 of 29 June, 2000; Concerning the Crimea: Resolution 1990 (2014) of 10 April, 2014 (suspending, among others, the Russian delegation's voting rights until the end of the 2014 session).

[53] Resolution 1364 of 29 January, 2004.

Since the end of the Cold War, however, the idea of militant democracy has spread beyond the European context. In fact, a number of regional organizations have introduced mechanisms in order to counteract undemocratic changes of government. The notion of "undemocratic change of government" is slightly narrower than the concept of militant democracy which is specifically directed at combating the (ab)use of democratic structures in order to change the governmental structures from democracy to autocracy.[54] In contrast, the concept of undemocratic change of government as it is applied in the OAS, the OAU and other regional or sub-regional contexts presupposes that the change of government is brought about by undemocratic means, i.e. in violation of the constitution. While the notion is thus somewhat more limited than the concept of militant democracy, it nevertheless contributes to the overall aim of preserving democracy. For that reason, the development of mechanisms to counteract undemocratic changes of government at the level of international organizations may be conceptually included into the notion of militant democracy in a broader sense.

The first organization to develop a mechanism against unconstitutional changes of government in the member states was the Organization of American States (OAS). The organization formally amended its founding Charter in 1992 in order to include a mechanism for sanctioning an undemocratic change of government in a member state.[55] The idea was further developed in Article 19 of the "Inter-American Democratic Charter",[56] which was adopted by the General Assembly but – in contrast to the OAS-Charter – is not itself a binding document. Notwithstanding, the General Assembly of the OAS has taken a clear stance against undemocratic change of government:

> […] an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.

A similar approach was taken within the African Union (AU).[57] While the Charter itself remains limited to a general reference to democracy and to condemning "unconstitutional" changes of government,[58] the AU Assembly adopted the "African

[54] In this chapter "militant democracy" is understood as a concept aiming at the protection of democracy against its abolition through democratic means, for other concepts of "militant democracy" see Cliteur and Rijpkema 2012, p. 227–272 (249 et seq. and 265 et seq.).

[55] For an analysis of the practical application of this provision see: Petersen 2009.

[56] Organization of American States 2000, p. 1289–1294.

[57] For an early reaction by the then still existing Organisation of African Unity (OAU): Decision on Unconstitutional Change in Member States, adopted by the OAU Council of Ministers, CM/Dec. 483 (LXX), 1999.

[58] Article 30 of the Constitutive Act of the AU reads: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union." References to democracy can be found in Art. 3 lit. g) and 4 lit. m) as well as in broader terms in the Preamble.

Charter on Democracy, Elections and Governance",[59] which, in its Article 23, clearly refers to "democratically elected governments." Furthermore, Article 25, para. 1 also contains a mechanism for suspending the participation of a state party in which an unconstitutional change of government occurred. In addition, the AU mechanism contains procedural provisions involving a decision by the African Security Council on the existence of an unconstitutional change of government and notably, an obligation for all other members of the AU to contribute to the prosecution and punishment of the perpetrators (Article 25, paras. 8–10, and Article 14, paras. 2 and 3).[60] The "ECOWAS Protocol on Democracy and Good Governance"[61] also provides for the possibility of sanctioning undemocratic changes of government (Article 45), albeit with a less elaborate system than the AU. Finally, a similar approach is also included in the "Millbrook Commonwealth Action Program on the Harare Declaration."[62]

The AU Mechanism, for instance, was applied to Egypt in July 2013. When the government of elected President Mohamed Morsi was overthrown the AU reacted by suspending the participation of Egypt in the AU activities until the restoration of constitutional order.[63] The suspension was lifted in June 2014 after a positive report by an AU High-Level Panel on the developments in Egypt between July 2013 and June 2014 had been received.[64] Of course, it remains difficult to assess the concrete impact that the AU sanctioning decision had on the developments in Egypt. Irrespective of such an immediate and direct impact, however, the political signal in support of democracy, which is inherent in such sanctioning, should not be underestimated.

## 5.4 Summary: Towards an Internationalized Concept of Militant Democracy

Taken together, the developments analyzed in this Chapter clearly point towards an internationalization of militant democracy. While there can be no doubt that ensuring the defense of democracy against its abolition essentially remains a task which must be addressed at the domestic level, important steps have been taken to support

[59] African Charter on Democracy, Elections and Governance, adopted by the Assembly of the AU on 30 January, 2007, entered into force on 15 February, 2012.

[60] For an assessment of the situation in Africa, see Petersen 2009, p. 111 et seq.

[61] Economic Community of West African States, Protocol A/SP1/12/01 on Democracy and Good Governance, adopted by the Heads of State and Government of ECOWAS on 21 December, 2001.

[62] Millbrook Commonwealth Action Programme on the Harare Declaration, adopted by the Heads of Government, 12 November 1985, para. B.3.

[63] Peace and Security Council of the African Union, Communiqué of 5 July, 2013, PSC/PR/Comm. (CCCLXXXIV), para. 6.

[64] Peace and Security Council of the African Union, Communiqué of 17 June, 2014, PSC/PR/Comm.2 (CDXLII), para. 8.

and strengthen such domestic processes at the international level.[65] The increasing role that international human rights obligations play within domestic legal orders signifies an internationalization of the concept through human rights. For instance, international human rights instruments support militant democracy by excluding attempts at the abolition of democracy from their scope of protection. At the same time, by scrutinizing national measures purportedly adopted in defense of democracy with regard to their compatibility with freedom of association and freedom of opinion, they establish an additional layer of control to the concept of militant democracy.

Furthermore, the concept of militant democracy has spread beyond the purely domestic realm by being introduced into a number of international organizations that increasingly have the legal possibility to sanction anti-democratic developments in their Member States most importantly through the suspension of membership rights. While the actual impact of such sanctioning mechanisms certainly varies depending on the concrete circumstances of the case, the international organization concerned and the political options available to the actors involved, these developments nevertheless show that militant democracy is being internationalized both as a legal and as a political concept.

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[65] See also: Tyulkina 2015, p. 51 et seq.

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# Chapter 6
# Justifying Militant Democracy: Philosophical and Legal Reflections on Dutch Militant Democracy


**Gelijn Molier**

*Democracy is surely a praiseworthy good, while the rule of law is like the daily bread, like water to drink and air to breathe; what is best in democracy consists in this that only it is suitable to secure the rule of law.*

*(Gesetzliches Unrecht und Übergesetzliches Recht (1946), in Radbruch 1973, p. 350, translated by the author.)*

**Abstract** The rise of right-wing populist parties in Europe on the one hand and Muslim fundamentalists on the other requires governments to reflect on the issue of how to deal with extremist organizations and movements whose ideas or ideologies are diametrically opposed to fundamental democratic principles and the rule of law. In a case study of Dutch militant democracy, two issues are explored: how can banning an antidemocratic party be justified and what is the present legal regime regarding the banning of parties in the Netherlands? It is argued that Gustav Radbruch's legal philosophy may provide a convincing political-philosophical justification for a party ban. Subsequently, it is defended that, on the basis of current Dutch law, not only *antidemocratic* parties may be banned, but also those which oppose the *rule of law*. In that respect, the Dutch legal order is, contrary to how it is often characterized, based on a conception of a substantive, and not so much a procedural, democracy.

**Keywords** Dutch militant democracy · Gustav Radbruch · Antidemocratic party · Substansive democracy · Dutch legal order · Rule of law

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## 6.1 Introduction

'Militant democracy' has made a renewed appearance. Both from a practical and a theoretical perspective, there is a growing interest in the idea that democracy should be able to defend itself against its foes. Developments in European societies show a rise of right-wing populist parties as well as Muslim fundamentalists, necessitating governments to reflect on how to deal with extremist organizations and movements whose ideas or ideology are diametrically opposed to the fundamentals of liberal democracies. In the Netherlands, Bastiaan Rijpkema boosted the academic and public debate with his 2015 doctoral dissertation on the issue of banning political parties in a democracy.[1] In Dutch politics it has been discussed for some time whether salafi organizations should have a place in a liberal democracy.[2] A more recent debate that merits attention involves the question of how the election programme of Geert Wilders' Party for Freedom (*Partij voor de Vrijheid*, abbreviated hereafter as PVV), is to be evaluated in the context of the Dutch liberal democracy. Prime minister Rutte, for instance, recently remarked that the PVV electoral programme constitutes a threat to rule of law.[3] Tilburg scholar of Islam and Arabic Jan Jaap de Ruiter even labeled the PVV an antidemocratic party, stating: "Wilders' 'party programme' is no harmless scribble. It is symptomatic of a worldwide movement which basks in the comforts of democracy and yet has no qualms about killing off that same democracy should the circumstances invite such a course of action."[4]

It should be clear, however, that the PVV does not seek to abolish democracy; in fact, it promotes *more* (direct) democracy. Section 3 of its electoral program provides an illustration; it states: "Introduce a binding referendum; give more power to the citizens."[5] At the same time, section 1, titled "De-islamize the Netherlands", states: "Close all Islamic schools and mosques, ban the Koran, detain radical Muslims preemptively."[6] It does not take a legal scholar to observe that the issues pointed out contravene the Dutch Constitution, and more particularly the freedom of education (article 23), the freedom of religion (article 6), the freedom of expression (article 7), the principle of equality (article 1) and the principle of legality (article 16). So the programme conflicts with fundamental principles of our

[1] Rijpkema 2015.

[2] See, e.g., "Notitie antidemocratische groeperingen", in: Dutch Parliamentary proceedings II (House of Representatives), 2014/15, 29,754, p. 226.

[3] http://nos.nl/artikel/2129934-rutte-pvvprogramma-is-bedreiging-voor-de-rechtsstaat.html

[4] The original text reads: "Het A4-tje van Wilders is geen onschuldig schrijfseltje. Het past in een wereldwijde beweging die zich senang voelt in de democratie om, mochten de omstandigheden daartoe de gelegenheid geven, diezelfde democratie om zeep te helpen." Jan Jaap de Ruiter, "Wilders' program is geen onschuldig A4", *NRC Handelsblad*, September 3, 2016.

[5] "Nederland weer van ons", published on Wilders' Facebook page on 25 August 2016, see https://www.facebook.com/geertwilders/photos/a.222674408130834.1073741828.202064936858448/227859140945694/?type = 3&theater, see also: http://nos.nl/artikel/2131725-pvv-vierkeer-per-jaar-bindend-referendum.html

[6] "Nederland weer van ons".

Constitution rather than with democracy, which means that it is more appropriate to characterize the party as anti-constitutional, than antidemocratic.

From the quotation of Radbruch's work at the beginning of this article it is apparent that Radbruch, if faced with the choice of preserving either the rule of law or democracy, choose the former. This can easily be understood given his experiences with National Socialism, but even nowadays we should still be aware of the perils of a radical approach to democracy insofar as it considers the will of the people as the greatest wisdom. In fact, it is precisely today, now that the will of (the majority of) the people has become the universal benchmark, and indeed virtually the only truth criterion, that it is of the utmost importance to make clear the importance of the Constitution and fundamental rights as a 'dam' and a restriction against the tyranny of the majority. This does not derogate from the fact that when an anti-constitutional party has risen to power democratically, a clear tension exists between the rule of law on the one hand and democracy on the other. From a political-philosophical point of view, it is by no means evident that democracy will in that case be subdued and the rule of law will be victorious.

Accordingly, it is my goal in this article to discuss the following three questions. First, on what basis can a political-philosophical justification to ban a political party in a democracy be construed? Second, what is the present legal criterion for banning a party under Dutch law? And finally, what is the adequate moment to ban a party? Can such a moment be specified in legal terms or will this issue always be one of political opportunity?

## 6.2 The Political–Philosophical Justification of a Party Ban

On what basis may it be justified to exclude a political party that has acquired its seats democratically from the *democratic* procedure? Is this not the undemocratic measure *par excellence*, which may not be justified in any way within a democratic state? The foundation or justification of a party ban is decided by the conception of democracy to which one adheres. An analysis of the literature on militant democracy, shows that *grosso modo* three conceptions of democracy may be discerned.[7]

The first of these is the conception of formal or procedural democracy; adherents of this conception consider democracy as a mere decision-making procedure; the vote of the (elected) majority is decisive, regardless of the contents of the decision.[8] In such a conception, there is no room to ban a party that seeks to abolish democracy or deprive certain minorities of their rights.

[7] See Rijpkema 2015, p. 131–136 and 148–156, an interesting survey of the various conceptions of militant democracy can be found in Thiel 2009, p. 1–11, p. 379–421; Fox and Nolte 1995, p. 1–70.

[8] A representative of the conception of formal democracy to whom is often referred is Hans Kelsen. Examples of his work are the following articles: "Verteidigung der Demokratie", in: Kelsen 2006, p. 237; Kelsen 1957, p. 23.

A second conception of democracy is substantive democracy, which deems democracy as a form of decision-making inherently intertwined with certain constitutional values, such as freedom and equality.[9] Since democracy is predicated, under this conception, on equality and freedom, the essence of democracy is not only corrupted when a political party seeks to terminate the democratic process, but also when it seeks to withhold certain liberties from a specific minority. Critics of the substantive democracy conception argue that its adherents conflate democracy and the rule of law. Their main criticism, however, consists in the fact that the adherents of substantive democracy present freedom and equality as absolute values without, according to their critics, being able to secure those values on a solid basis without appealing to some sort of rational natural law.

A third, less known, conception of democracy can be found in the principle self-correction.[10] The essence of democracy is here considered to lie in the fact that democratic decisions may be undone or corrected by new political majorities. At its core, democracy is a permanently open process; the organization of society is not fixed once and for all, but continuously subject to change as a result of ever shifting majorities. Should a party seek to abolish democracy, it would terminate this permanent process of self-correction and thereby corrupt the essence of democracy. Such a party may accordingly be banned under this conception of democracy.[11] One may aver, however, that no compelling argument can be put forward why this position should be considered superior to the alternative position that holds that democracy means that the vote of the democratically elected majority vote is decisive, even if that vote should result in the decision to terminate the procedure of self-correction.[12] The conception of substantive democracy provides,the furthest-reaching grounds to ban political parties; the conception of democracy as self-correction is located somewhere between the conceptions of formal and substantive democracy.[13]

To sum up, then, the question of whether banning a political party is compatible with the system of democracy depends strongly on the definition of democracy one upholds. What is considered to be the core or essence of democracy provides, at the same time, the basis or justification for a ban. The crucial problem this approach faces, however, is that no generally accepted and authoritative definition of democracy exists.

In this contribution, therefore, I want to propose an alternative justification for militant democracy, before discussing the legal specifics of the Dutch militant democracy. One that not takes the definition of democracy as a starting point, but epistemological relativism. I will argue that Radbruch's 1934 essay *Der Relativismus in der Rechtsphilosophie* can provide a fruitful foundation for a theory of militant

[9] See, e.g., Sottiaux and Rummens 2012, p. 115.

[10] See in particular Rijpkema 2015, Cliteur & Rijpkema 2012, p. 227–272, and Rijpkema 2012, p. 93–96, where such a conception is derived from the work of George van den Bergh, see Van den Bergh 1936. See in this context also the idea of 'democracy as legislative self-restraint' that Quoc Loc Hong bases on a re-interpretation of the work of Hans Kelsen: Hong 2012, p. 329–366.

[11] See Rijpkema 2015, p. 176–177.

[12] See, e.g., Ten Napel 2016, p. 8–9.

[13] See Rijpkema 2015, p. 155–156.

democracy.[14] Radbruch is best known as a philosopher of law, not as a thinker of militant democracy. Radbruch opposed the phrase "the law is the law" after World War II, a phrase characteristic of legal positivism, claiming that the attitude corresponding with it left German lawyers defenseless against nefarious laws[15]; instead he presented the so-called 'Radbruch formula': if positive law does not aspire to justice and if the equality which is the essence of justice is knowingly denied, the law is not merely 'false law', but lacks the very nature of law.[16] What is little known, by contrast, is the fact that Radbruch, around the same time as Karl Loewenstein[17] and George van den Bergh,[18] took a stand for defending democracy, associating it with human rights, the rule of law, popular sovereignty, freedom and equality,[19] with his epistemological relativism resulting in an idea that could serve as a convincing justification for militant democracy.

### *6.2.1 Radbruch's Militant Democracy Concept*

Radbruch's militant democracy theory is based on epistemological relativism. Following Kant, Radbruch strictly distinguishes 'Sein' from 'Sollen', 'is' from 'ought', and 'fact' from 'value'. Science and scientific experiments can never prove what *ought* to be; they can only predict or explain, and as a result no political system can claim to represent the absolute 'truth'. Values and political truths are located in this notion of 'Sollen'. Consequently, one can never define which values are superior or inferior to others. In other words, science can offer no answers when we enter the sphere of morality: science can neither affirm nor reject the propriety of a political system.[20] Epistemologically speaking, we now enter a sphere of relativism. This sphere is also Radbruch's starting-point, and in this respect his theory does not differ from Kelsen's. However, Radbruch does infer a number of positive values. How does he manage to do this?

First, Radbruch describes how science could never ascertain the material truth of different political ideologies. This entails, according to Radbruch, that the different ideologies must be considered of equal value; this is, after all, the logical consequence of the lack of a scientific criterion on the basis of which 'the truth' of a politi-

[14] Included in: Radbruch 1957, p. 80–87. This issue is dealt with more extensively in: Molier 2018.

[15] The original text reads: "Der Positivismus hat in der Tat mit seiner Überzeugung 'Gesetz ist Gesetz' den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts." "Gesetzliches Unrecht und Übergesetzliches Recht", 1946, in: Radbruch 1973, p. 344.

[16] Radbruch 1973, p. 346.

[17] Loewenstein 1937a, p. 417–432 and Loewenstein 1937b, p. 638–658.

[18] Van den Bergh 1936.

[19] Radbruch 1957, p. 87.

[20] Cf. Russell 1946, p. 800.

cal ideology, in contradistinction to another, may be determined. Second, the fact that different political ideologies should be regarded as equal implies that the people that adhere to these different political ideologies should also be treated equally. Legally, this results in the principle of equality before the law. However, in the political reality, the equality of people can only be approximated; the absolute realisation in the form of unanimity or consensus is impossible. Therefore, the principle of political equality logically results, according to Radbruch, in the majority principle, and, accordingly, in democracy. In other words, relativism demands and constitutes a democratic state.[21] In turn, democracy presupposes relativism. Indeed, if there were one comprehensible political 'truth', a dictatorship would suffice to realise that political truth.[22] However, democracy consists in the willingness to give any political ideology the opportunity to become a majority and, as a result, democracy is willing to give political power to a majority without evaluating or considering its content.[23]

At the same time, Radbruch acknowledges that this entails an unsolvable contradiction: relativism presumes the practical equality of all political and social ideologies and systems, including the equality of the liberal democratic state, the dictatorship, and the corporative state. Yet, relativism results in the equality of relativism and democracy, provided that they presuppose each other. The solution to this dilemma is to be found, according to Radbruch, in the formal character of democracy. It is characteristic of the idea of freedom that one may freely abandon one's freedom.[24] That is why a dictatorship may be based on a democratic foundation, given that this is realized in freedom. The paradox, according to Radbruch, is therefore that democracy is one of the possible forms of government on the one hand, but on the other hand it is the foundation of all other forms of government.

However, given that democracy is not only the foundation for the *existence*, but also for the *survival* of all different forms of government, no form of government might ever definitely and irrevocably abandon its democratic foundation.[25] This entails that today's majority cannot install a dictatorship that would tie all future majorities as well. Democracy can, admittedly, relinquish itself and allow a dictatorial constitution, but it can never give up its right to decide on that constitution.[26] This is not only impossible on a sociological level, but also on a legal level: "The right of the plebiscite to judge the constitution is an unwritten law, a silent and

[21] Radbruch 1957, p. 85.

[22] Cf. Kelsen 2002, p. 107, 108: "The situation would, in fact, seem hopeless for democracy if we assumed that cognition of *absolute truth*, insight into *absolute values*, were possible. For in the face of the overarching authority of the absolute good, what can exist besides the *obedience* of those to whom it brings salvation; unconditional and thankful obedience to him who, possessing the absolute good, knows and demands it."

[23] Radbruch 1957, p. 85.

[24] Radbruch 1957, p. 85. See, for a contrary view, John Stuart MillSpiltIndexTerm ID="ITerm44"Spigt: "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 1997, p. 121.

[25] Radbruch 1957, p. 85.

[26] At this point, a relation with Van Den Bergh may be identified; he regards the essence of democracy to be democracy's ability of self-correction. See Van den Bergh 1936, p. 10.

self-evident component of any constitution."[27] In other words, the people remain sovereign. Sovereignty of the people is therefore the starting-point of relativism. This does not conflict with the possibility of a majority putting a dictatorship in place at a certain moment in time. Hence, Radbruch considers that democracy is capable of anything, except definitively renouncing itself.[28]

In the same way, relativism tolerates every opinion, except the one that claims to be absolute. This enables Radbruch to formulate the attitude that democracy should adopt towards anti-democratic parties. A democratic state tolerates all opinions and therefore political parties, as long as they are willing to debate with each other on an ideological level, which entails that they recognise each other as equal. However, if a political opinion posits itself as absolute and considers *this* to be a basis to seize or maintain power without considering the majority, it has to be fought with its own means; not only by means of ideas and discussion, but also with the power of the state.[29]

This approach is very similar to the one of George van den Bergh. Considering anti-democratic political parties, Van Den Bergh states that "[…] democracy is allowed to employ the means of dictatorship for only one purpose, namely to defend itself *against* dictatorship."[30] Radbruch similarly states that: *"Relativism is the general tolerance – except the tolerance of the intolerant*."[31] However, their approaches are different: Van den Bergh's theory starts with the concept of democracy as a form of government. Accordingly, he situates the essence of democracy in its ability to correct itself, so that he demands that parties that affect this principle be banned. Radbruch's point of departure is relativism, from which democracy logically ensues. The strength of Radbruch's argument lies in the fact that his methodological view of relativism is very convincing from an epistemological perspective; in *that* sense we are all 'neo-Kantians' and we no longer 'believe' in the possibility to know the universal, eternal and unchanging values and principles.[32]

However, this does not entail that all values are relative as well. Relativism's paradox is, then, not that it creates a lack of conviction, but that it leads, on the contrary, to a very *strong* conviction. Radbruch phrases this as follows: "Relativism does not, however, belong to practical but rather to theoretical reason. It means a renunciation of scientific foundations of final positions, not a renunciation of the

[27] The original text reads: "Das Recht des Plebiszits über die Verfassung ist ein ungeschriebenes Gesetz, ein stillschweigender und selbstverständlicher Bestandteil jeder Verfassung." Radbruch 1957, p. 86.

[28] Radbruch 1957, p. 86.

[29] Radbruch 1957, p. 86.

[30] The original text reads: "[…] dat de democratie de machtsmiddelen der dictatuur mag aanwenden voor één enkel doel, namelijk tot verdediging *tegen* de dictatuur." Van den Bergh 1936, p. 26.

[31] The original text reads: "*Relativismus ist die allgemeine Toleranz – nur nicht Toleranz gegenüber der Intoleranz*." Radbruch 1957, p. 86; Van den Bergh 1936, p. 26: "[…] that the principle of tolerance entails a battle against intolerance." ("[…] dat het beginsel der verdraagzaamheid mèt zich brengt, strijd tegen de onverdraagzaamheid").

[32] Van den Bergh also distances himself from natural law theories and his philosophy could be more adequately be located in a culural law theory tradition. Van den Bergh 1936, p. 26–28.

positions themselves."[33] Moreover, it is relativism that provides a means to test positive law to and it results in a number of criteria to which positive law has to adhere.[34] It is precisely because the legislator does not hold the ultimate truth and his decision is always to be considered an act of volition or authority that he may declare a decision, if there is a majority, to be binding, but not to be the truth. In other words, he cannot end the battle of opinions as such, but only the political struggle for power about a certain conviction at a certain moment in time. Consequently, the ability to make laws is only given to the legislator under the prerogative that he will not touch upon the ideological battle between different opinions.[35]

This means that relativism limits the legislative power of the state, since it obliges the state to continuously consider certain freedoms of citizens, such as the freedom of religion and the freedom of expression. In that sense, Radbruch can argue that relativism results in liberalism or the rule of law.[36] Just as these freedoms limit the power of the State, they also limit the citizens in the sense that they can only invoke these freedoms if they grant the same freedoms to others. This in turn implies that there can be no absolute claims on truth. As soon as the reciprocity of freedoms is no longer accepted, freedom comes to a halt and this allows the State to limit certain rights and freedoms. Therefore, epistemological relativism results in the formulation of a number of unconditional fundamental values. Radbruch phrases this as good and eloquent as possible in the final sentences of his paper: "We have inferred absolute consequences from relativism, namely the received consequences of classical natural law. In contrast to the methodological principles of natural law, we have succeeded in underpinning the objective consequences of natural law: human rights, the rule of law, the separation of powers, and the people's sovereignty. Freedom and equality, the ideas of 1789, have emerged once again from the flow of skepticism in which they seemed to drown. They are the indestructible foundations from which one may alienate oneself but to which one must always return."[37]

Radbruch himself does not further develop his ideas into a theory of militant democracy. As a result, a number of questions remain unanswered. However, his discussion adds a valuable notion to the militant democracy theory in that he pro-

[33] The original text reads: "Der Relativismus gehört aber der theoretischen, nicht der praktischen Vernunft an. Er bedeutet Verzicht auf die wissenschaftliche Begründung letzter Stellungnahmen, nicht Verzicht auf die Stellungnahme selbst." Radbruch 2003, p. 17–18.

[34] The notion, mostly positioned by Hart, that Radbruch transformed from being a legal positivist before World War II into a natural law philosopher appears to be false. See, Hart 1958, p. 616–618.

[35] Radbruch 1957, p. 82–83.

[36] Radbruch 1957, p. 83.

[37] The original text reads: "Wir haben aus dem Relativismus selbst absolute Folgerungen abgeleitet, nämlich die überlieferten Forderungen des klassischen Naturrechts. Im Gegensatz zum methodischen Prinzip des Naturrechts ist es uns gelungen, die sachlichen Forderungen des Naturrechts zu begründen: Menschenrechte, Rechtsstaat, Gewaltenteilung, Volkssouveränität. Freiheit und Gleichheit, die Ideen von 1789, sind wieder aufgetaucht aus der skeptischen Flut, in der sie zu ertrinken schienen. Sie sind die unzerstörbare Grundlage, von der man sich entfernen kann, aber zu der man immer zurückkehren muß." Radbruch 1957, p. 87.

vides a theoretical justification for the prohibition of certain political parties, regardless of how the notion of democracy is framed in a given state. The most valuable element Radbruch offers is, however, that an epistemological view of relativism does not necessarily lead to value relativism. In fact, it is, according to Radbruch, epistemological relativism, which enables a defence mechanism in democracy, together with a number of fundamental values and norms.

A political-philosophical justification may prove to be important, precisely because Dutch law, in contradistinction to German law, does not contain a separate (constitutional) rule to ban political parties. The Dutch judiciary accordingly faces the difficult task of deciding under what circumstances a (political) association should be banned.

## 6.3 Dutch Law and the Party Ban

Dutch law at present lacks specific regulation to realize a ban on political parties, which brings with it that no separate legal criterion exists for banning a political party. Accordingly, few contributions have been made in this respect by legal philosophers; Rijpkema's abovementioned dissertation is an exception. Anyone who wants to find out whether a political party may be banned under Dutch law needs to consult the Dutch Civil Code (Burgerlijk Wetboek, BW) with respect to legal entities. Article 20 of the 2nd Book (hereafter: 2:20 BW) stipulates that a legal entity whose activities conflict with the public order is to be prohibited and disbanded by the Court at the request of the Public Prosecution Service. This means that the criterion for a party ban is based on the general norm of 'conflicting with the public order'. It remains unclear under which circumstances this applies. The Government's explanation of 2:20 BW in the parliamentary discussion on the adoption of this provision provides some clarity:

> Only actions that infringe on the generally accepted foundations of our legal system can justify the prohibition of an association or other legal entity, to wit, the unjustified infraction of the freedom of others or of human dignity. The use or threat of violence directed against the public authority or those with whose convictions one disagrees, be it on sound grounds or not, falls under its scope, and the same is true of racial discrimination or another type of illegal discrimination. […]. Finally, utterances such as inciting to hatred and proclaiming ideas that constitute illegal discrimination or an undignifying goal such as the example, provided in the literature, of a plea to decriminalize killing certain groups of people are deemed to contravene the public order and public morals. All of these examples have in common that they signify a violation of the principles considered essential to our legal system, which, if applied on a large scale, would prove to be disruptive to society.[38]

[38] The original text reads: "Slechts handelingen die inbreuk maken op de algemeen aanvaarde grondvesten van ons rechtsstelsel, kunnen het verbod van een vereniging of andere rechtspersoon rechtvaardigen: ongerechtvaardigde aantasting van de vrijheid van anderen of van de menselijke waardigheid. Gebruik van geweld of bedreiging daarmee tegen het openbare gezag of tegen degenen met wier opvattingen men het, al dan niet op goede gronden, oneens is, valt eronder, evenals rassendiscriminatie en andere verboden discriminatie […]. Ten slotte behoren als strijdig

The criterion to decide whether an action contravenes the public order is, then, whether the 'generally accepted foundations of our legal system' are violated, or, to quote the final line, whether there is 'a violation of the principles considered essential to our legal system' which might in time be disruptive to society in the sense of undermining it. The latter situation will present itself if the actions in question take place on a large scale as well as systemically. The examples the legislator provides also point to a conception of substantive democracy: it is not just (political) associations which pose a threat to democracy as a decision-procedure by the people, but also those which violate certain values of the rule of law (to wit, freedom, equality including anti-discrimination and human dignity) that may be banned.[39]

If we direct our attention to the most recent ruling in which an association was banned, namely, the *Martijn* case, the following becomes apparent.[40] In contradistinction to the Court, the Court of Appeal considered that an association may only be banned if two conditions are met: (1) its conduct conflicts with the principles considered essential to our legal system *and* (2) it *disrupts society or is on the verge of doing so*. So the Court of Appeal interpreted the 'disruption criterion' as a necessary condition for a ban.[41] Remarkably, the Supreme Court did not adopt the Court of Appeal's two-step model, but exchanged it for an alternative criterion, derived from the ECtHR system to restrict rights, which entails that a ban must be *necessary* in a democratic society for the protection of the rights of others. Using this criterion, the Supreme Court reached the following ruling: "[…] that it is, balancing all relevant rights and interest, necessary, in a democratic society for the association to be banned and disbanded in the interest of the protection of health and of the rights and interests of children."[42]

Although the Supreme Court's consideration may be construed as it having deemed the criterion of 'violation of the principles considered essential to our legal system' to have been met,[43] it does not judge Martijn's conduct, in the final analysis, by the 'disruption criterion' but rather by the 'necessity criterion' from the ECtHR.

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met de openbare orde en de goede zeden te worden aangemerkt uitlatingen zoals het aanzetten tot haat en uitingen die verboden discriminatie inhouden of een mensonterend streven zoals het in de literatuur gegeven voorbeeld van een pleidooi om het doden van bepaalde volksgroepen straffeloos te maken. Al deze voorbeelden hebben gemeen dat zij een aantasting inhouden van de als wezenlijk ervaren beginselen van ons rechtsstelsel die, indien op grote schaal toegepast, ontwrichtend zou blijken voor de samenleving." Dutch Parliamentary proceedings II (House of Representatives) 1984/85, 17,476, 5, p. 3, par. 8.

[39] The idea that the Dutch legal order is based on a conception of substantive democracy is defended in Molier 2014.

[40] Supreme Court, April 18, 2014, *AB* 2014/348. The Association Martijn was an association for pedophiles which was declared illegal by the Assen Court on June 27, 2012, at the instigation of the Public Prosecution Service.

[41] The issue is dealt with in detail in: Molier 2013, p. 1502–1509.

[42] The original text reads: "[…] dat het, bij afweging van alle betrokken rechten en belangen, in een democratische samenleving noodzakelijk is dat de vereniging wordt verboden en ontbonden in het belang van de bescherming van de gezondheid en van de rechten en vrijheden van kinderen." Supreme Court, April 18, 2014, consideration 3.11.3. (Italicization G. M.)

[43] Supreme Court, April 18, 2014, par. 3.11.3.

The downside of this approach is that this makes it unclear what the precise status of the latter criterion is.[44] The Supreme Court has neglected to clarify the issue, but, strikingly, it was precisely this criterion that led the Court of Appeals *not* to conclude to banning Martijn.

In my view, it is possible to reach a solution with respect to the issue of whether the disruption criterion should be considered a cumulative condition for a ban on the basis of article 2:20 BW or not. Turning to the Governmental reply to Parliament, there is no mistaking. It says, interpreting this article, that: "[…] only actions that infringe on the generally accepted foundations of our legal system [may] justify the prohibition of an association or other legal entity."[45] So the criterion 'infringement on the generally accepted foundations of our legal system' or 'violation of the principles considered essential to our legal system' is the substantive criterion. If this criterion is met, a ban is *de jure* possible. The issue of whether one should proceed thus must be decided by the relatively formal disruption criterion, namely, whether the association's conduct in question is so serious that an immediate danger exists for society to be disrupted by it or to be on the verge of being disrupted. The disruption criterion is not, then, part of the substantive test, but is rather concerned with the more formal issue of whether the seriousness of the situation warrants an actual ban. This means that the time has come to pay attention to the next issue, of the *moment* when a party ban may be imposed. This is the topic of the next section.

## 6.4 The ECtHR vis-à-vis the Party Ban

One of the most significant rulings of the European Court of Human Rights (ECtHR) regarding the freedom of association (article 11 ECtHR) is the *Refah Partisi* case of 2003.[46] The Turkish Constitutional Court banned the Islamic party Refah Partisi (the Welfare Party) in 1998. The Turkish Constitution dictates that political parties may not act contrary to secular principles. At that time, Refah Partisi was the largest party, and the poles showed that it was liable to obtain 67% of the votes, thus obtaining a supermajority in the next elections. The party was banned by the Turkish Constitutional Court on account of it having become the center of activities contravening the principle of secularism. Not only did the ECtHR consider the ban on the Refah party a justified restriction of the freedom of association, it also – more generally – made it clear under what circumstances a political party may be banned under the ECtHR. The ECtHR also distinguished between a substantive and a more formal criterion to decide at what time intervention might take place, so that a sort of principle of opportunity applies.

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[44] See Brouwer & Molier 2014, p. 2154–2157.

[45] The original text reads: "[…] slechts handelingen die inbreuk maken op de algemeen aanvaarde grondvesten van ons rechtsstelsel, het verbod van een vereniging [kunnen] rechtvaardigen."

[46] ECtHR, February 13, 2003, Applications nos. 41,340/98, 41,342/98, 41,343/98 and 41,344/98 (Refah Partisi/Turkey). Henceforth it will be referred to as the *Refah Partisi* case.

The substantive criterion may be derived *a contrario* from section 98 of the ruling, where the ECtHR "[…] considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles."[47] The Refah party turned out *not* to meet either of the ECtHR's demands. Still, this was not a sufficient reason for it to be banned; the ECtHR presented the additional demand, in section 102, under heading (ε), dubbed *The appropriate timing for dissolution*, that the moment for the state to be justified to intervene has come when it has been established that a party poses an immediate threat to democracy.[48] This need not, incidentally, mean, according to the Court, that one has to wait for a political party to have actually risen to power and to have commenced realizing its antidemocratic political programme.[49] In the case of the Refah party, the timing of the ban was justified according to the Court, given the fact that "[…] at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition."[50]; "While it can be considered […] that Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate."[51]

In conclusion, the following can be said. The Refah party was, substantively speaking, a candidate for a party ban, but the moment for it to be actually banned was decided by the fact that it would be able in the short run to effectuate its programme, considering that it would on the basis of the prognosticated forthcoming election results gain a supermajority. The ECtHR applies, then, in addition to a substantive criterion, a more formal criterion, similar to the 'disruption criterion', to decide what the moment of a party ban should be: an antidemocratic agenda and course of action as such are not sufficient, for it is also necessary for there to be an immediate danger to democracy and the fundamental principles associated with it. The result of this approach is that small and insignificant parties with an antidemocratic and anti-constitutional agenda will not (lightly) be banned.

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[47] This second condition as formulated by the ECtHR bears, then, a close resemblance to the material criterion that there is to be no violation of 'the principles considered essential to our legal system'.

[48] *Refah Partisi* case, Section 102: "[…] the danger of that policy for democracy is sufficiently established and imminent." In section 104 the Court presents a slightly different formulation: 'whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was *sufficiently* imminent.' This formulation is repeated in ECtHR, June 20, 2009, Applications nos. 25,803/04 and 25,817/04 (Herri Batasuna and Batasuna/Spain), par 83 and in ECtHR, July 9, 2013, Application no. 35943/10 (Vona/Hungary), par. 55, albeit again slightly differently; in both par. 83 and par. 55 we read: "(i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently and *reasonably* imminent, (…)." Italicization G.M. Henceforth they will be referred to as the *Batasuna* case and the *Vona* case.

[49] *Refah Partisi* case, Section 102.

[50] *Refah Partisi* case, Section 108.

[51] *Refah Partisi* case, Section 110.

## 6.5 Towards a Specific Criterion for a Party Ban?

As I have indicated, no specific legal criterion for banning political parties exists under Dutch law. There has only been one instance of a judicial ruling resulting in banning a political party. In 1998, the Amsterdam Court banned and disbanded the National People's Party/Centre Party '86 (Nationale Volkspartij/CP'86) for having committed "[…] actions that contravene the generally accepted foundations of our legal system, such as the unjustified violation of other people's freedom or human dignity."[52] The Court ruled that the activities of the National People's Party/Centre Party '86 "[…] only intend to call for and incite to or promote the discrimination of people of non-Dutch origin, which is to be considered to conflict with the public order as intended in 2:20 BW."[53]

Thus the Court merely used – as I have dubbed it – a substantive criterion; the disruption criterion did not play any role whatsoever in effectuating the ban. A clear substantive conception of democracy may be inferred from the Court's ruling: the party was prohibited on account of its activities conflicting with certain constitutional principles, in particular the principle of equality including anti-discrimination. So this was an instance of an anti-constitutional party rather than of an antidemocratic one. It may be inferred from the ECtHR case law that a substantive conception of democracy also underlies the ECtHR.[54] What is interesting is that the Dutch Government also took the position, in a recent publication in which it was questioned whether salafistic organizations may be prohibited under Dutch law, that a substantive conception of democracy underlies the Dutch legal order.[55]

Additionally, and perhaps even more importantly, it presented a separate criterion for banning a political party. In the *Memorandum on Antidemocratic Groupings* (*Notitie Antidemocratische Groeperingen*) of 2015, it concludes that a ban on organizations is justified if the following conditions are met: "[…] organizations

[52] The original text reads: "[…] handelingen, die inbreuk maken op algemeen aanvaarde grondvesten van ons rechtsbestel, zoals bijvoorbeeld ongerechtvaardigde aantasting van andermans vrijheid of menselijke waardigheid." Amsterdam Court, November 18, 1998, considerations 4.3 and 4.4.3.

[53] The original text reads: "[…] niet anders wordt beoogd dan het oproepen en aanzetten tot, dan wel het bevorderen van discriminatie van allochtonen en dat dit dient te worden aangemerkt als in strijd met de openbare orde als bedoeld in artikel 2:20 lid 1 BW." Amsterdam Court, November 18, 1998, consideration 4.4.3.

[54] This is illustrated, e.g., by Section 99 of the *Refah Partisi* case: "The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention *and thus bring about the destruction of democracy*. In view of the *very clear link between the Convention and democracy* no one must be authorized to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society." Italicization G. M. Section 99 of the *Refah Partisi* case is confirmed in par. 54 of the *Vona* case.

[55] The original text reads: "Het Nederlandse rechtsstelsel bevat op zichzelf voldoende waarborgen om – als sluitstuk op het zelfreinigende vermogen van de democratie – omverwerping en afschaffing van de democratische rechtsorde te voorkomen." Dutch Parliamentary proceedings II (House of Representatives) 2014/15, 29,754, 226, p. 19.

with (a) goals that inevitably lead to a suspension of our democratic legal order, […] if there are (b) concrete actions which are (partly) intended on that outcome and further – in case of political parties – (c) it has been shown to be likely for the danger of a policy to realize such goals to democracy to be *sufficiently imminent*."[56] In other words, a separate criterion is needed to effectuate a ban on a political party.[57] This means that the Government effectively transformed the criterion of 'disruption of society', which is generally applicable to legal entities, to – referring to the context of a political party in particular – what I would, for the sake of convenience, call the criterion of 'the danger to the liberal democracy'.

On the basis of the Government's criterion, there was no need to ban the National People's Party/Centre Party '86 in 1998, considering that this party never had a following worth mentioning and did not even *de facto* exist at the time of the ban,[58] so that at that time there was no '*sufficiently imminent* danger of our democratic legal order being suspended.'

### *6.5.1 Testing the Government's Criterion against the PVV's Party Programme*

Observing the objectives in the PVV's election-programme referred to in the Introduction, we cannot but conclude that their realization would lead to the 'suspension of our democratic legal order.' The PVV does, however, in contradistinction to the National People's Party/Centre Party '86, have a large following; the party became the second-largest party at the 2017 Dutch parliamentary elections, gaining 20 seats.[59] Given this fact it should not be ruled out that the third condition for a party ban, as recently formulated by the Government, namely that the danger of a suspension of our democratic legal order is 'sufficiently imminent' is met as well.[60]

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[56] The original text reads: "[…] organisaties met (a) doelstellingen die onvermijdelijk leiden tot het terzijde schuiven van onze democratische rechtsorde, (…) mits sprake is van (b) concrete handelingen die daar (mede) op zijn gericht en voorts – in het geval van politieke partijen – (c) aannemelijk is gemaakt dat het gevaar van een beleid ter realisering van dergelijke doelstellingen voor de democratie *voldoende naderend* is." Dutch Parliamentary proceedings II (House of Representatives) 2014/15, 29,754, 226, p. 19. (Italicization G. M.)

[57] Dutch Parliamentary proceedings II (House of Representatives) 2014/15, 29,754, 226, p. 19.

[58] See Amsterdam Court, November 18, 1998.

[59] 'Officiële uitslag Tweede Kamerverkiezing 15 maart 2017', Dutch Electoral Council, 15 March 2017, see: https://www.kiesraad.nl/actueel/nieuws/2017/03/20/officiele-uitslag-tweede-kamerverkiezing-15-maart-2017

[60] This applies all the more now that Wilders has been convicted on the basis of his question to a crowd of people whether they desired more or fewer Moroccans in the Netherlands (to which they replied: "Fewer!") (The Hague Court, December 9, 2016). To illustrate, in the prohibition of the National People's Party/Centre Party '86 one of the relevant elements was that several (former) board members and members had been convicted for committing punishable acts such as deliberately insulting a group of people on the basis of their race or religion (article 137c of the Dutch Penal Code). See Amsterdam Court, November 18, 1998, considerations 1.9, 4.4.2 and 4.4.3.

It may be argued, of course, that the PVV would, on the basis of its 2017 election result, does not come close to achieving a simple majority, let alone a supermajority, a situation that *did* occur in the Refah case, and that the PVV will not be able to realize its policy of closing down all Islamic schools and mosques, detaining radical Muslims preemptively and banning the Koran, as long as it will have to cooperate with other political parties to form a coalition government. Such a restrictive interpretation of the criterion 'that the danger of a suspension of our democratic legal order is sufficiently imminent' does not, however, seem obvious, for this would mean that, in practice, no political party in the Netherlands could ever be a candidate for a ban. Given the political landscape and the Dutch electoral system, its highly unlikely, that one single party will (ever) gain a majority by itself. Furthermore, the PVV itself has made clear that it wants to circumvent the restrictions of representative democracy by trying to accomplish its anti-constitutional ideas by means of a binding referendum, whose outcome it would, moreover, see included in the Constitution.[61] The referendum could then be utilized as a political means to abolish the rule of law.

### 6.5.2 *The Government's Criterion in Terms of Article 2:20 of the Civil Code*

The benefit of the Government's take is that it provides clarity on the issue of when a political party is a candidate for a ban, and the issue of whether the disruption criterion is a necessary condition for a ban does not need to be addressed. If we consider what all these things (namely, the Government's and legislator's stance[62] as well as the ECtHR's case law) mean in light of 2:20 BW, the following criterion – applicable to political parties – may be formulated: in order for a political party to be banned, its actions must: (1) entail a violation of the principles considered essential to our legal system (which is the substantive criterion) and (2) constitute an (imminent) danger to the continuation of the liberal democracy (which is the formal criterion).[63] This means that not only political parties that seek to abolish the extant

[61] As the PVV itself phrases it: "If citizens let their voice be heard in favor of some measure, it should be included in the Constitution forthwith." (The original text reads: "Als burgers zich voor een bepaalde maatregel uitspreken, zou dat meteen in de grondwet moeten worden opgenomen." http://nos.nl/artikel/2131725-pvv-vierkeer-per-jaar-bindend-referendum.html.)

[62] Dutch Parliamentary proceedings I (Senate) 1986/87, 17,476, 57b, p. 4 par. 14.

[63] What is striking is that the Minister of Justice, in the Governmental reply to Parliament just referred to, responding to questions from members of the Dutch Labor Party fraction, suddenly ceases to speak of *society* and phrases his statement in terms of the *liberal democracy*: "[…] not every violation of the law, even if it is committed systematically, may be qualified as conflicting with the public order. For this to apply there must be activities whose continued employment and emulation cannot be condoned in a *liberal democracy* lest it be disrupted." (The original text reads: "[…] niet iedere wetsovertreding, zelfs niet indien stelselmatig gepleegd, kan worden aangemerkt als strijdig met de openbare orde. Het moeten werkzaamheden zijn waarvan de ongestoorde voort-

democratic procedure may be banned once they (are liable to) become powerful enough to actually realize their plans; it also applies to political parties that would abolish certain fundamental constitutional values or principles.

## 6.6 Conclusion

The first part of this contribution (§2) was focused on the issue of how banning a political party may be justified in a democratic system. The central response was that this depends on the definition of democracy that lies at the basis of one's analysis. As the conception of democracy becomes more substantive, the room to ban political parties increases correspondingly. The downside to this approach is that there is no consensus with respect to the question of what is to be considered the essence or core of democracy It was suggested that a fruitful justification can be found in Radbruch's text *Der Relativismus in der Rechtsphilosophie*, whose great import lies in the fact that he provides a theoretical justification for banning political parties in a democracy irrespective of the definition of the concept of democracy to which one adheres. He concludes, from an epistemologically relativistic point of view, that democracy can and must defend itself against its enemies. Those enemies are identified as the parties, which do not recognize others as persons with an equal value and refuse to take up the ideological fight with them. Such parties will exclude others from that ideological fight once enabled to do so; according to Radbruch, the state is authorized to combat them by any means available, and thus to prohibit them.

The second part concentrated on Dutch law (§3 to 5), which continues to struggle with the issue of when a political party may be banned. The starting-point is 2:20 BW, which regards prohibiting legal entities in general. Up to the Martijn case, the legal phrase 'activities conflicting with the public order' appeared to be interpreted as: activities that signify a violation of the principles which are considered essential to our legal system and (cumulatively) which, if applied on a large scale might be disruptive to society. The Supreme Court exchanged the disruption criterion in the Martijn case for the necessity criterion. This necessity test, as it originates from the ECtHR's system of limiting freedoms, is, however, more opaque and less concrete than the disruption criterion, resulting in a lowering of the threshold for banning an association and consequently a political party. Added to this, it has now become unclear what the legal status of the disruption criterion is.

In my view, a way out of this impasse may be found by specifying two elements in the legislator's phrasing, namely a material and a formal criterion, the latter referring to the moment the ban should be imposed. Once it has been determined that a (political) association acts in conflict with the generally accepted foundations of our

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zetting en navolging in een *democratische rechtsstaat* niet kunnen worden geduld op straffe van ontwrichting.") Dutch Parliamentary proceedings I (Senate) 1986/87, 17,476, 57b, p. 4 par. 14. (Italicization G.M.) The legislator thus also points out that for a ban to be realized, disruption of the liberal democracy rather than of society must be involved.

legal system, a sufficient legal basis for a ban exists in principle; the final decision to actually take action is subsequently determined by the disruption criterion. In the specific case of a political party, the crucial issue to decide this matter is whether its actions result in a violation of the principles considered essential to our legal system and an (imminent) danger to the continued existence of the liberal democracy. This criterion of 'danger to the liberal democracy' may be inferred from the government's and legislator's position as well as from the ECtHR's case law.

On this basis, judges have an instrument to, for example, rule that no room exists for certain political parties in our liberal democracy without, at the same time, having to impose a ban immediately. In this way, a clear signal is given that such parties do not operate within the confines of liberal democracy while doing justice to the democratic process as long as possible. It is only once the danger to liberal democracy exceeds the negative democratic impact of banning a party that a ban becomes appropriate; at that point, the falling axe may be put in place.[64]

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[64] Cf. Rijpkema 2015, p. 197–198.

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# Part III
# Philosophy

# Chapter 7
# Militant Democracy *beyond* Loewenstein: George van den Bergh's 1936 Inaugural Lecture


**Bastiaan Rijpkema**

**Abstract** The German émigré political scientist and lawyer Karl Loewenstein is widely recognized as the 'father' of the concept of militant democracy. This is understandable, given his impressive comparative work on legal measures to protect democracy and the fact that he published in English and in internationally well-known journals. However, around the same time, other thinkers also wrestled with the same democratic dilemma of how to defend democracy against antidemocrats. This chapter introduces a largely neglected Dutch theorist of militant democracy: George van den Bergh. His 1936 inaugural lecture as a professor of constitutional law at the University of Amsterdam offers important insights on militant democracy, and, more importantly, it presents precisely that what is lacking from Loewenstein's work: a political-philosophical justification for confronting antidemocrats. First, Loewenstein's approach is outlined. Second, Van den Bergh's work is introduced and contextualized (as a response to Kelsen's relativist conception of democracy), before offering two interpretations of his ideas. It is argued that the second interpretation, 'democracy as self-correction', offers his most original and fruitful contribution to the militant democracy debate. This conception is then further elaborated by comparing it with another virtually unknown, but interesting, participant in 1930s debates on the defense of democracy, Van den Bergh's French

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contemporary Milan Markovitch. The chapter concludes by discussing the harsh reception of Van den Bergh's ideas in the Dutch interwar debate on democracy, and his 1960 farewell lecture, in which he addresses the issue for the first, and last time, after the Second World War.

**Keywords** Militant democracy · Democracy · Loewenstein · Van den Bergh · Kelsen · Markovitch · Political Theory · Political Philosophy · Law · History of Ideas

## 7.1 Introduction

Weimar and the Europe of the 1930s had lost their confidence in parliamentary democracy on a large scale. One budding democracy after another collapsed: Albania (1923), Yugoslavia (1929), Portugal (1926), Poland (1926 to 1935) and Romania (1938) became dictatorships.[1] In 1936, the year of Van den Bergh's inaugural lecture, the British newspaper *The Times* concluded, 'it may be that the system of parliamentary Government which suits Great Britain suits few other countries besides.'[2] Democratic pessimism lay over large swathes of the continent.[3]

At this undemocratic point in time, on 28 September 1936 the young Amsterdam law professor George van den Bergh (1890–1966) gave his inaugural lecture. He refused to conform to the intellectual trend in Europe, united in fatalism and dislike of democracy. The title read, *De democratische Staat en de niet-democratische partijen* (The democratic state and the non-democratic parties).[4]

There was overwhelming interest. All seats were taken in the auditorium of the University of Amsterdam. Former Minister of Justice Jan Donner, Leiden professor of law Roelof Kranenburg, the mayor of Amsterdam, aldermen, members of the House of Representatives, judges and lawyers had all come to hear what this new professor had to say on such a sensitive topic.[5] Van den Bergh led those present

[1] See Keane 2010, p. 570–575; Loewenstein 1935, p. 574; Van der Grift 2010, p. 21–28; Wheeler 1978, p. 3.

[2] Cited in Keane 2010, p. 570.

[3] A.A. de Jonge writes of a 'minor crisis' (in the functioning of government institutions) and a 'major crisis' which really 'damaged the idealistic foundations of democracy': 'firstly only among a few thinkers, but soon in broad swathes of society: instead of democratic thinking, the opinion gains ground that the average man on the street is *not* rational and thus not capable of political judgement, that the great mass is eternally immature and merely in need of hard guidance by the small group of the more highly talented, that political freedom is thus also harmful and that people are not equal but in fact *unequal* by nature.' See de Jonge 1968, p. 9–10, see also Keane 2010, p. 570.

[4] Van den Bergh 1936a.

[5] The description of the ceremony given here is based on a report in the newspaper *Het Volk*: 'Grote belangstelling voor prof. v.d. Bergh's rede' ('Great interest in Professor Van den Bergh's speech'), *Het Volk*, 29 September 1936, and 'Democratie en Dictatuur' ('Democracy and Dictatorship'), in *Het Christelijk Historisch Weekblad*, 17 October 1936. All newspaper and magazine articles relating to Van den Bergh can be found in the International Institute of Social History: G. van den Bergh, Archief George van den Bergh (Archive of George van den Bergh): ARCH00037, box 3, and/or digitally via the Delpher database: <www.delpher.nl> (up to 1995), and/or via LexisNexis Academic NL (covers 1990 to present).

along to his conclusion: banning antidemocratic parties can be justified both from the perspective of political philosophy and that of the law.

After the ceremony, there was quite a storm. The speech was to keep many newspaper editorial offices and commentators busy for weeks, months even. 'An important question', 'sharp' and 'impressive' was the verdict by some, while others deemed it 'dangerous' and 'political'.[6]

Then things went quiet. Van den Bergh did not publish any more on the subject himself and after the war the lecture which had caused such a stir at the time was rarely mentioned.[7] Outside the Netherlands, in the meantime, in the wake of the German émigré political scientist and lawyer Karl Loewenstein, a new, influential tradition of democracy known as militant democracy developed. Although Van den Bergh formulated his idea of a militant democracy around the same time as Loewenstein,[8] his inaugural lecture, presumably due to the language barrier, never made its way into the international academic debate on militant democracy,[9] and was largely forgotten in the Netherlands.[10] This is unfortunate. Van den Bergh's inaugural lecture has to offer some important insights on militant democracy. Most importantly it presents an original and cogent political-philosophical justification for militant democracy, which is absent from Loewenstein's work, and much of the literature that follows.[11]

This chapter provides an introduction to the work of George van den Bergh, his relevance for the militant democracy debate, the context in which he developed his ideas and the reception of his thinking. First, the work of Karl Loewenstein, the 'father' of militant democracy, is discussed (§7.2). Then, after some preliminary remarks on the definitions Van den Bergh uses and the distinctions he makes

[6] 'An extremely interesting question', the newspaper the *Haagsche Post* thought, in 'Hoe kan ik u weer kwijt?' ('How can I get rid of you again'?), 3 October 1936; *Vrijheid, Arbeid, Brood* called it 'sharp' and 'impressive' in 'Een dictator aanstellen is gemakkelijk genoeg' ('Appointing a dictator is easy enough'), 1936 (exact date unknown, appears in G. van den Bergh, *Archief George van den Bergh* (Archive of George van den Bergh), Internationaal Instituut voor Sociale Geschiedenis: ARCH00037, box 3); 'Dangerous proposition' was the headline in *De Amsterdammer: Christelijk Volksdagblad* on 7 October 1936; 'Political science' was the title of a critical piece in the *Nieuw Rotterdamsche Courant* on 14 October 1936.

[7] In 1956, for instance, in a Dutch news report on the banning of the communist party in West Germany referred to Van den Bergh's lecture; see 'Verboden partij' ('Banned party'), *Het Vrije Volk*, 6 October 1956. Van den Bergh has also been mentioned in Dutch discussions of party bans; see for instance: Elzinga 1982; Bellekom 1982; Nieuwenhuis 2003.

[8] Greenberg shows that, even before his famous two-part article on militant democracy (published in 1937, as discussed below), Loewenstein already pleaded to ban antidemocratic parties on a conference of German constitutional scholars (with Jellinek, Kelsen and Radbruch present, among others), see Greenberg 2014, p. 180.

[9] Van den Bergh's ideas on militant democracy are discussed in Rijpkema 2012, p. 93–96 and Cliteur and Rijpkema 2012.

[10] Van den Bergh's inaugural lecture was re-issued (in Dutch) as Van den Bergh 2014.

[11] Although, recently there is an increasing interest in the normative dimension of militant democracy, see: Müller 2016, p. 249–265, with Kirshner 2014 being a prime example, see also the discussion of his theory in Rijpkema 2015, p. 102–108, and Rijpkema 2018, p. 83–87.

(§7.3.1), Hans Kelsen is briefly discussed as the main interwar proponent of a relativist, procedural conception of democracy (§7.3.2). Subsequently, two possible interpretations of Van den Bergh's answer to relativist democracy are given (§7.3.3 and 7.3.4). The second interpretation, 'democracy as self-correction', is then elaborated in more detail by comparing it with Van den Bergh's French contemporary Milan Markovitch, who seems to arrive at a similar, but in the end different, concept of democracy (§7.3.5). The discussion of Van den Bergh's theory is continued by explicitly evaluating both interpretations and paying attention to his ideas on the procedural safeguards needed when political parties are banned (§7.3.6 and 7.3.7). The contribution ends by examining the reception of Van den Bergh's ideas (§7.4), the role he played in democratizing his political party, the Social Democratic Workers' Party (SDAP), the present Labour Party (PvdA), and his take on the issue of militant democracy after the Second World War (§7.5).

## 7.2 Karl Loewenstein: Father of Militant Democracy

In 1937 Karl Loewenstein published his famous call to action for European democracies in *The American Political Science Review*,[12] recommending democracies to adopt legislation which would fortify its weak spots: 'democracy must become militant'.[13] Loewenstein gives an extensive overview of the measures that different European countries have already taken.[14] These are a range of different legislative restrictions on fundamental freedoms such as that of the press, individual expression and association,[15] as well as legislation against the glorification of political criminals.[16] If these measures are taken, they render fascism powerless.[17] This might seem satisfying from an empirical, comparative and even legal perspective, but something does not sit right. Is it not remarkable that a democracy, the system of the level playing field and equality of beliefs, should suddenly deprive a particular group of its citizens of their liberties? That requires a political-philosophical justification. How is the restriction of 'democratic rights' reconcilable with the essence of democracy?

[12] Loewenstein 1937a, b.

[13] Loewenstein 1937a, p. 423.

[14] Loewenstein 1937b, with an overview of the different countries on p. 638–644 and a thematic discussion on p. 644–656.

[15] See for example Loewenstein 1937b, p. 652–654. These measures are not unproblematic: due to vague concepts and narrow dividing lines between the legal and illegal use of political rights, judges are forced to pass judgement on what should be political problems by using judicial reasoning (p. 654).

[16] Loewenstein 1937b, p. 654. As an example of such glorification Loewenstein mentions Hitler's expression of support for a political murderer who had been condemned to death in 1933.

[17] Cliteur and Rijpkema 2012, p. 238.

Loewenstein is aware of this tension,[18] and even ventures a solution, but he does not entirely succeed. In his view, the restriction of freedoms in a democracy would be justified by an analogy with emergency measures against an external enemy in a war: in emergency situations 'legality takes a vacation'.[19] His comparison with an 'external war', however, appears to be on the wrong track for two reasons.

Firstly, in a war of that kind there is an external enemy. In that situation democracy defends itself, as a whole, against an external entity as a whole. In the case of powers which threaten democracy *from inside*, democracy fights an internal battle. The enemy is an intrinsic part of democracy. Can a democracy, in such a battle against an 'internal enemy', deprive a *specific* group of citizens of their fundamental rights? It seems that we need a better justification.

There is another important difference between a war and an internal antidemocratic threat. In war the survival of the state, its sovereignty, is threatened, generally by violence, for an identifiable period, from the declaration of war until peace, ceasefire or surrender. In the case of an antidemocratic threat it is not so much sovereignty which is at stake, but the form of government, democracy, by citizens hostile to democracy, not necessarily using violence, and for a period which is not clearly limited. When does the threat begin and when does it end? Surely there will *always* be groups or individuals who hold antidemocratic ideas. When is the expression of those sympathies sufficient to form a threat? Under Loewenstein's justification, you could, in principle, always continue to fight internal antidemocratic forces; no population is one hundred percent pro-democracy. The answer is therefore elastic and vague, which is never a good thing when it comes to intervention. As a result, citizens hostile to democracy are threatened with the loss of their fundamental rights in the long term, if not permanently. Something that did not only remain a 'theoretical risk', but also became very real in the way the United States, under the influence of Loewenstein's theory, gravely violated the human rights of thousands in Latin America during the Second World War.[20]

Despite these serious shortcomings, Loewenstein has come to be seen internationally as the father of the concept of militant democracy.[21] Much work on the subject points to him as the person who introduced the concept, or at least the one who coined the term.[22] There are various possible explanations for this. The fact that

[18] See Loewenstein 1937a, p. 431.

[19] Loewenstein 1937a, p. 431–432; for part of the following discussion, see Cliteur and Rijpkema 2012, p. 238–240.

[20] See Greenberg 2014, p. 209, see also Chou 2013, p. 68, who points to the risk of escalation inherent in Loewenstein's theory.

[21] The Hungarian sociologist Karl Mannheim (1893–1947) is sometimes mentioned alongside him. In 1943 he argued in his *Diagnosis of Our Time: Wartime Essays of a Sociologist* for a 'militant democracy', see Thiel 2012, p. 275 and Klamt 2012, p. 31; Klamt sees Mannheim more as a descriptive sociologist who offers no clear solutions.

[22] This involves more or less *all* literature on militant democracy in law and political science; to gain an impression, see among others Tyulkina 2015, p. 13; Kirshner 2014, p. 2; Capoccia 2013 208, Bourne 2012, p. 1080; Klamt 2012, p. 2; Thiel 2009 p. 4; Issacharoff 2007, p. 1409; Sajó 2012, p. 562; Klamt 2007, p.133–134; Sajó 2004, p. 210; Pfersmann, 2004, p. 48.

Loewenstein wrote in English, and in a leading, more widely available American journal, undoubtedly plays a role. His articles from the 1930s were also impressive in their analyses and predictive power. No doubt the international reputation he enjoyed due to his work as a constitutional lawyer further contributes. In fact, some even see him as 'one of the most important thinkers on rule of law in the 20th century'.[23] As a member of the American occupying force he also had a leading role in the judicial reconstruction and the denazification of post-war Germany.[24]

In Loewenstein, however, militant democracy has had a somewhat unfortunate father.[25] That is particularly palpable in the literature on the subject. Many writers follow in Loewenstein's wake, with ideas on positive law, providing important and interesting contributions,[26] but the theoretical side of the problem tends to be short-changed. This makes it all the more interesting that in 1936 Van den Bergh's *De democratische Staat en de niet-democratische partijen* (The democratic state and the non-democratic parties) was published, which does address the problem from the angle of political philosophy.

Loewenstein himself, however, seems oblivious to this. In an article published in 1938 he actually mentions Van den Bergh's speech in a footnote in discussing judicial measures against extremism in the Netherlands.[27] Loewenstein praises Van den Bergh: 'The legal aspect of excluding anti-democratic parties inimical to the existing constitutional order of the state from participation in public life in the Netherlands is competently discussed (...).'[28] What is more interesting is that Loewenstein also remarks that, to his knowledge, Van den Bergh's lecture is the only European contribution on militant democracy which comes to conclusions comparable to his own articles. That is remarkable: Van den Bergh's lecture differs significantly from Loewenstein's articles. Substantial attention is focused on the very points which were absent from Loewenstein's work: the political-philosophical justification for militant democracy.

## 7.3 George van den Bergh's Concept of Militant Democracy

In the opening paragraphs of his inaugural lecture Van den Bergh first outlines what is at stake in the defence of democracy by referring to a definition given by professor of criminology and sociology Willem Bonger, in his influential work *Problemen der demokratie* (Problems of democracy) (1934):

[23] Papier and Durner 2003, p. 345. See also Loewenberg 2006, p. 599–601.

[24] Greenberg 2014, p. 198–200. Kostal 2011, p. 46–51, is more cautious, with more attention for Loewenstein's frustrations over American policy in occupied Germany.

[25] See also Cliteur and Rijpkema 2012, p. 240, and Eskes 2011.

[26] See for instance: Thiel 2009 and Tyulkina 2015.

[27] Loewenstein 1938, p. 617, note 90, see Cliteur and Rijpkema 2012, p. 240–241.

[28] Loewenstein 1938, p. 617, note 90.

> Democracy is a form of government involving collectivity and self-government, in which a large proportion of its members participate either directly or indirectly, freedom of thought and equality before the law are safeguarded, and the members are convinced of this idea.[29]

Van den Bergh's lecture can be seen as an extension of Bonger's *Problemen der demokratie*, as Van den Bergh starts out from a question which Bonger touched upon, but left open in his book: what do we need to do, concretely, with antidemocratic forces?[30] What measures can be taken? And how can they be justified?

### *7.3.1 Violent and Non–Violent Parties*

What these measures should be, is clear to Van den Bergh: the prohibition of antidemocratic political parties. But what makes a political party antidemocratic? It is the propagation of 'the idea of dictatorship'. Concretely that means wanting to change the democratic government system into a *non*-democratic variant, be it the German, Italian or Russian style. This definition of dictatorship, however, is not entirely pure, as Van den Bergh complains. After all, a dictatorship, in an academic, legal sense, means the *temporary* transfer of the 'fullness of power' by a community to one individual.[31] It is what Carl Schmitt calls a 'commissarial dictatorship'; a constitutional form familiar since the Romans, which had as its aim the safeguarding of the constitution by means of temporary suspension of that same constitution.[32] In order to avoid confusion Van den Bergh nevertheless opts to use the popular terminology, thus making dictatorship synonymous with autocracy; the polar opposite of democracy.

Confusion also lies in wait elsewhere. Two other issues must be stated clearly. Firstly, those who do not openly preach dictatorship but who try to sell it under the guise of 'true democracy' should be reprimanded: it should not make any difference to us whether they attack democracy openly or secretly.[33] To put it another way, we

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[29] Van den Bergh 1936a, p. 3–4; Bonger 1934, p. 17, for a discussion of the definition, see p. 10–17. Within the Social Democratic Workers' Party, Bonger's book became the most important work on democracy and was used as material on courses for party officials, see: Hartmans 2012, p. 205. See also Bart van Heerikhuizen 1983, p. 131.

[30] Bonger 1934, p. 129.

[31] Van den Bergh 1936a, p. 4.

[32] See Schmitt 2014, p. 1–2 and 86–87; for the concept of 'commissarial dictatorship', as opposed to *sovereign* dictatorship, in Schmitt 2011, see De Wilde 2008, p. 96; see also Schmitt's reading of Article 48 of the Weimar constitution in these terms: Schmitt 2011, in particular p. 310–312, also published as an appendix in Schmitt 2014, and on this subject De Wilde 2010, p. 144–145. See also Schreuerman 1999, p. 31–32.

[33] Van den Bergh 1936a, p. 4–5. On the definition of 'antidemocratic parties' see also Tromp 1991, p. 85–87. Tromp also makes a distinction between groups which reject democracy outright and those which support a *different* idea of democracy (a 'true democracy'). The former group consists of those who seek to go 'back in time', thus defending the *ancien regime*, while the latter are antidemocrats that want to move 'forward', towards a new 'democratic order', consisting of a left-

must not allow ourselves to be misled into Giovanni Gentile's idea that the fascist state is the 'democratic State *par excellence*'.[34]

The second clarification is the most important and can be contrasted with Loewenstein's work. There is a great deal of literature on which measures a democracy can take against *violent* antidemocratic parties. The answer to that question is simple: that's what we have criminal law for.[35] One might debate the best methods of combat, Van den Bergh suggests, but it is not a matter of principle.[36] The really interesting question pertains to antidemocratic parties which are in principle *non-violent*, i.e. parties which claim to be willing to play the democratic game.

How does one respond to such parties? According to Van den Bergh it is these parties who form the 'great, fundamental problem', not the violent parties.[37] This sets the discussion on the right track. The importance of this distinction can hardly be overestimated; until this moment the easiest question (that of the violent antidemocratic party) and the most difficult (that of the non-violent) were muddled. An answer to the easier question was seen as valid for both, as 'antidemocratic' seemed to coincide with 'violent', at least in Loewenstein's work,[38] but this would render one powerless against a party which professed to be non-violent, or would impose exhausting conflicts of proof.

### *7.3.2 Hans Kelsen: Relativist Democracy*

Despite the paradoxical nature of non-violent antidemocratic parties (they demand all the rights of the democratic state which they wish to deny to their opponents), democrats still tend to believe that they must be respected. They must be recognized alongside other parties as 'holding equal rights'.[39] In the view of some democrats this is in fact an indisputable truth, 'an axiom'.[40]

Van den Bergh acknowledges that he himself had 'until recently been tempted' by these ideas.[41] At a conference of the Social Democratic Workers' Party (SDAP),

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wing variant (anarchism and particular forms of socialism) and a right-wing variant (fascism and national socialism).

[34] Gentile 1928, p. 302. See also Müller 2012, p. 537.

[35] And at the time criminal justice was equipped for the task in more or less all European countries; see Loewenstein 1937b, p. 645.

[36] Van den Bergh 1936a, p. 5–6. See also Eskes 1988, p. 248–249.

[37] Van den Bergh 1936a, p. 6.

[38] See for example Loewenstein 1937a, p. 424–425; see also Cliteur and Rijpkema 2012, p. 241–242.

[39] See Van den Bergh 1936a, p. 7.

[40] See Van den Bergh 1936a, p. 7. With respect to Germany see also Greenberg 2014, p. 174: 'In the eyes of Germany's leading liberal scholars and politicians, democracy was founded on political relativism, the conviction that in a secular world no political ideology was superior to any other.'

[41] See Van den Bergh 1936a, p. 8.

of which he was a prominent member, in spring 1936 he even plainly stated that democracy can only be defended by democratic means.[42]

This dominant view was represented by the Austrian legal philosopher Hans Kelsen (1881–1973), one of the key figures in the democracy debate in the Weimar Republic of the 1930s[43] – and also the main target of Loewenstein's polemics.[44] In a key passage from *Vom Wesen und Wert der Demokratie* (second edition, 1929), Kelsen deals with the theoretical basis for the democratic idea:

> For that is the great question: *whether* there is cognition of absolute truth, insight into absolute values. That is the conflict between *Weltanschauung*s and views of life under which the conflict between autocracy and democracy can be subsumed ... Those who hold absolute truth and absolute values to be inaccessible to human cognition must consider not only their own, but also foreign, opposing opinions to be at least possible. Thus *relativism* is the *Weltanschauung* that the *democratic idea* presumes. Democracy values each person's political will *equally*, just as it respects equally any political belief, any political opinion, which is after all expressed by the political will. It therefore gives every political conviction the same chance to be articulated and to *compete* freely for people's minds and hearts.[45]

When Van den Bergh discusses the *communis opinio* among democrats, it is *these* thoughts that he means, represented here in their most authoritative formulation, by an ideologically related thinker.[46] Without attaching the same relativism to this as Kelsen and without explicitly mentioning him, Van den Bergh states that for many democrats 'the pride and glory of democracy' appears to be that 'all honest beliefs are equal', or 'all principles are of equal value'. It is the 'peaceful battle of intellects' which must decide between them.[47]

From this hard logic, it follows that even non-violent antidemocratic parties must be admitted to the 'peaceful battle of intellects'.[48] For Kelsen this seems to be the (somewhat ironic) strength of a 'pure' conception of democracy, a conception without *any* substantive values; antidemocrats argued that a democracy must be overthrown in order to realize their antidemocratic goals, a pure democracy proves them

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[42] See 'Democratie. Ook jegens niet-democraten' ('Democracy. Towards non-democrats too'), *Vooruit*, 6 October 1936.

[43] In 1940 Kelsen, like Loewenstein, left Europe, and after a stay at Harvard, became a professor at the University of California, Berkeley, see Jabloner 2002, p. 68. As a representative of the idea of relativist democracy Eskes primarily mentions Gustav Radbruch, see Eskes 1988, p. 249, note 616. On Loewenstein and Kelsen, see: Greenberg 2014, p. 174–75.

[44] Greenberg 2014, p. 174–75.

[45] Kelsen 2002 (1929), p. 107–108. The same line of reasoning can be found in the first edition of 1920: Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen: Mohr 1920, p. 36–38. Kelsen connects democracy not only with relativism, but also with positivism and scientific thinking; see the observations in Schmitt 2005, p. 49. More problematic in Schmitt's view was the confusion of democracy (*not* equality of individuals) with liberalism (which is equality of individuals as individuals; an individualist-humanist ethics and worldview) in Kelsen's ideas; see Schmitt 1988, p. 13.

[46] Kelsen never joined a political party, but entertained a certain sympathy for the Austrian social democrats (see Jabloner 2002, p. 71–72).

[47] Van den Bergh 1936a, p. 8.

[48] See Van den Bergh 1936a, p. 8–9.

wrong.[49] Democracy's value-neutrality allows antidemocrats to realize their aims *within* the constitutional order. In his 'Foundations of Democracy' (1955), Kelsen further elaborates on this ultimate consequence of a value-neutral democracy:

> Democracy seems to have less power of resistance than autocracy, which without any consideration destroys every opponent, whereas democracy, with its principle of legality, freedom of opinion, protection of minorities, tolerance, directly favors its enemy. It is a paradoxical privilege of this form of government, a doubtful advantage which it has over autocracy that it may, by its own specific methods of forming the will of the state, abolish itself.[50]

And in an essay entitled *Verteidigung der Demokratie* (1932), Kelsen is even more explicit on the issue of democratic self-abolition:

> But with this situation in mind the question also arises of whether one should restrict oneself to defending democracy theoretically. Whether democracy should not defend itself, even against the people who no longer want it, even against a majority which is united in nothing other than its will to destroy democracy. To ask the question is to answer it in the negative. A democracy that seeks to act against the will of the majority*, that has even tried to act by force, has ceased to be a democracy*.[51]

So, in Kelsen's view, a democracy cannot act against the will of the majority, even when the majority wants to abolish democracy all together. A democracy that tries to resist such a decision ceases to be a democracy.[52]

In the pre-war European debate on democracy we can roughly find three categories. There are outspoken, sometimes plainly hostile critics, who believe that (parliamentary) democracy itself is the problem. A second category consists of supporters, *democrats*, who combine fundamentalist characteristics with passivity. They are 'fundamentalist' in the sense that they maintain an uncompromising focus on one single element of the democratic idea, its tolerance, to the end, even when the survival of democracy is at stake. They are passive in the sense that they view and accept the destruction of democracy with a stoical resignation. Kelsen belongs to this category. He closes *Verteidigung der Demokratie* with the following words:

> One must remain faithful to one's flag, even when the ship is sinking; when entering the abyss one can only take the hope that the ideal of freedom is indestructible and that the deeper it sinks the more passionately it will be revived.[53]

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[49] Urbinati and Acetti 2013, p. 7.

[50] Kelsen 1955, p. 31.

[51] Kelsen 2006 (1932), p. 237.

[52] See also Jabloner 2002, p. 74 and Greenberg 2014, p. 174. Jabloner stresses that Kelsen's attitude of 'non-opposition' to a democracy abolishing itself does not *necessarily* follow from legal positivism, since (as for instance H.L.A. Hart argues in his well-known article 'Positivism and the Separation of Law and Morals', see Hart 1958, p. 620), the legal status of a law is a different, and separate, question, next to the duty to obey that same law; this also holds for a law that would abolish a democracy (see Jabloner 2002, note 7 to p. 74).

[53] Kelsen 2006, p. 237. A similar sentiment can be found in the work of American political philosopher Lawrence Hatab, see Chou 2013, p. 54.

If democracy comes to an end, then so be it; all that remains to us is hope. As said, Van den Bergh, too, admits that he was 'tempted' by these ideas, but after 'much contemplation and long hesitation' he came to the conclusion that this position is untenable.[54] Van den Bergh and Loewenstein give rise to a third category of democrats who do not accept this supposed logic. Tolerance is good, but a democracy is not a 'suicide pact'.

### *7.3.3 A First Answer to Relativist Democracy: Principled Democracy*

What, then, has Van den Bergh to offer in response to the relativist or procedural conception of democracy? In his inaugural lecture Van den Bergh pays substantial attention to the question if it is possible to ban *non-violent* antidemocratic parties under the Dutch law of the time. Although Van den Bergh is very critical of the banning provision, which he deems too vague and thereby inadequate for such a far-reaching measure as the banning of a political party, he concludes that a ban is indeed possible.[55] But Van den Bergh is not satisfied with this legal answer alone. A theoretical justification of militant democracy is needed. This requires a different type of argumentation and, moreover, a theory of what democracy is. In short, we need an answer to Hans Kelsen.

Firstly, the aim of antidemocratic parties is built on contradictions. Van den Bergh brings this paradoxical character to the reader's attention several times.[56] The antidemocrats demand respect from democracy for their conviction while denying that same respect to others.

This attitude gives rise to contradictory statements, such as, 'In a democracy everyone is equal before the law, including those who want to abolish this equality,'[57] and 'Democracy is tolerant towards everyone, including the intolerant'[58] – a forerunner of Karl Popper's renowned 'paradox of tolerance' in *The Open Society and its Enemies*.[59] Or, in an early version of Popper's 'paradox of democracy': 'In a democracy the people make the final decision on government policy. The people can thus also decide that they will no longer decide on government policy.'[60]

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[54] Van den Bergh 1936a, p. 9.

[55] Van den Bergh 1936a, p. 19–20, 22.

[56] Van den Bergh 1936a, first on p. 6–7, and later in detail on p. 23–24.

[57] Van den Bergh 1936a, p. 23–24.

[58] Van den Bergh 1936a, p. 23.

[59] Popper 2013, p. 581–582 (note 4 in chapter 7 of part 1).

[60] Van den Bergh 1936a, p. 24; for Popper's variant, see Popper 2013, p. 581–582 (note 4 in chapter 7 of part 1). Popper's solution, however, is dissatisfying; see Rijpkema 2012, p. 93–96. See also Eric Weber's response, in which he suggests that John Dewey approached the problem in a manner comparable to Van den Bergh's; see Weber 2013, p. 177.

The paradoxical nature is clear, or at least feels that way, but what precisely is paradoxical about it? On closer inspection, it is possible to distinguish a formal and a substantive level. On the formal level beliefs are equal in their capacity as 'belief', for the simple reason that they are beliefs. On a substantive level those beliefs differ in *content*: from 'adjusting the retirement age' to 'abolishing democracy'. A democracy, defined as 'majority decision' or 'majority rule' only pays attention to the formal aspect: all beliefs are equal in its eyes (Kelsen's 'value relativism').

On a formal level, there is thus no obvious paradox; at most, one could say, the ambition to abolish democracy itself is unsettling. From an analytical perspective, it is only a paradox if the definition of democracy *merges* the formal and substantive levels, i.e. by not only looking at the formal status of beliefs as 'beliefs', but also assessing their content; the substantive level. For that, one would indeed need to interpret democracy differently. As 'majority rule' it *cannot* 'inspect' the content of decisions; it remains at the formal level.

Van den Bergh makes a first attempt at this by citing a French saying: 'Pour discuter il faut être d'accord.'[61] For an exchange of views it is necessary that: 1) one is in agreement on *wanting* an exchange of views, and 2) one does not differ in opinion on at least one fundamental principle.[62] More or less the same applies to democracy. If we assume that a democracy is intended to result in a 'peaceful coexistence', we see that the same principles apply: 1) one must first *want* that peaceful coexistence, and 2) there must be a fundamental principle against which ideals can be tested.[63]

For democracy, according to Van den Bergh, that fundamental principle is formed by a pair of 'inviolable principles': freedom of thought ('geestelijke vrijheid') (comprising freedom of religion and freedom of belief) and equality before the law. Van den Bergh sums it up as follows:

> With these principles as *touchstone* and *foundation* the peaceful battle of intellects is decided. Acceptance of this touchstone and foundation is a condition of admittance to the peaceful battle. Parties which attack these pillars of our state are its enemies. The state must do everything in its power to oppose them.[64]

Under this definition a democracy is no longer characterized by 'majority rule'; instead its essence lies in the fundamental principles of freedom of thought and equality before the law. These two principles form the gateway to the democratic arena. Parties which fail to recognize these principles are denied entry. This is now possible: democracy has been given substantive content and is thus equipped with a substantive criterion. This interpretation fits with Van den Bergh's remarks elsewhere in his inaugural lecture: 'In my view the deepest essence of democracy can

[61] Van den Bergh 1936a, p. 24.

[62] Van den Bergh 1936a, p. 24.

[63] Van den Bergh 1936a, p. 25

[64] Van den Bergh 1936a, p. 25.

be found in its tolerance, in its respect for the individuality of every human being, rather than in the majority principle.'[65]

The answer to Kelsen is that he has not properly understood the essence of democracy. If we assume that democracy is purely 'majority rule', that leads to the misplaced supposition that 'anything goes'.[66] If we understand democracy instead as being characterized by the principles of freedom of thought and equality before the law, it naturally follows that there are boundaries to the democratic arena, so it is *not* simply a case of 'anything goes'. This notion of democracy exhibits characteristics of natural law: democracy is founded on a number of absolute principles with 'the presumption of permanence'.[67] We might call it 'principled democracy'.

However, we can also imagine Kelsen's criticism of this answer. Does this not stretch the principle of democracy much too far? Is it not an 'overspecification', risking the open, non-absolute quality of democracy? Is it not based on a confusion of the concepts of democracy and rule of law, the latter being the proper place where fundamental rights are to be located? In fact, does this not, as it were, smuggle moral judgements into law via the back door, by elevating them to legally inviolable principles?

Without fully embracing this criticism, one could argue that this solution 'substantializes' the concept of democracy too much. If we assume that a democracy in any case should allow *as much freedom as possible* to different beliefs, we might wonder, is it really necessary to go so far in defending democracy as to formulate such a broad criterion, as Van den Bergh does?

### *7.3.4 A Second Answer to Relativist Democracy: Democracy as Self-Correction*

There is an alternative interpretation of Van den Bergh's notion of democracy. Elsewhere in his lecture, he creates an original and more fruitful conception of militant democracy. His other observations are valuable, but this may be his most important innovation in the defence of democracy against antidemocratic forces.

British philosopher James Mill centred his powerful and influential argument for representative democracy, the 'grand discovery of modern times', around the concept of an 'identity of interests' between governors and those governed.[68] Only if this identity of interests is in place the government is able to serve the greatest happiness for the greatest possible number of people.[69] Regular elections ensure that

[65] Van den Bergh 1936a, p. 8. In his interpretation of Van den Bergh, Gelijn Molier emphasizes this very aspect of the inaugural lecture, in particular Van den Bergh's insight that respect for the individuality of every human being can only exist by the grace of reciprocity. See Molier 2014, no. 22 (see under 4).

[66] To Chou an 'anything-goes' mentality is an example of 'too much democracy', which can subsequently lead to democratic suicide; see Chou 2013, p. 69.

[67] See Bellekom 1982, p. 117.

[68] Mill 1939, p. 871–873; Stephen 2006 (1900), p. 79; Ball 2014.

[69] See Mill 1939, p. 857–859 and 885; Stephen 2006, p. 75.

those interests do not diverge.[70] This idea of an 'identity of interests' can also be found in Van den Bergh's work:

> In democracy the circles of the stakeholders and those who make the decisions coincide in the final instance. The people make the decisions and feel the consequences directly.[71]

Van den Bergh however does not stop at the 'identity of interests'. Governors and those governed having the same interests means something else too: the people make their *own* decisions, albeit through their representatives. In democracy citizens are thus also responsible for the consequences of their decisions, a serious task, but one with great advantages: because they make their own decisions, the people can also revoke them *themselves*.[72]

More than any other system, Van den Bergh claims, democracy offers the safeguards which ensure that incorrect decisions can really be revised.[73] Van den Bergh puts the core of the matter as follows:

> [The people] know their responsibility, they correct their own mistakes. In principle every democratic decision is revocable, although it is not always possible to undo all the consequences.[74]

The essence of democracy in this interpretation no longer lies in the majority principle (Kelsen), or the protection of inviolable fundamental principles (the first interpretation), but in the *capacity for self-correction*: in government by means of self-correction by the people.

This has consequences for the problem of antidemocratic parties. Van den Bergh argues that, in the light of democracy's capacity for self-correction, there is something exceptional when it comes to the aspirations of antidemocratic parties. We can see this clearly if we try to imagine the spectrum of possible decisions in a democracy. There is one decision that differs radically from all other possible decisions, namely the decision to abolish democracy. It is the only decision that is not open to democratic self-correction[75] – and it is precisely this what antidemocratic parties

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[70] Mill 1939, p. 873: 'This is an old and approved method of identifying as nearly as possible the interests of those who rule with the interest of those who are ruled' (p. 873). See also Stephen 2006, p. 79–80.

[71] Van den Bergh 1936a, p. 9.

[72] This is what I argue in Rijpkema 2012. See also Cliteur and Rijpkema 2012, p. 243–244.

[73] Van den Bergh 1936a, p. 9

[74] Van den Bergh 1936a, p. 9.

[75] Van den Bergh 1936a, p. 9–10. Van Poelje and Hartmans also emphasize this aspect of the inaugural lecture; see Van Poelje 1960, p. 3, and Hartmans 2012, p. 185; see also Eskes 1988, p. 251, who sees this as a 'first justification'. Van den Bergh's idea was also noted in the first judicial comments; Kramer 1936a offered a positive comment (see p. 821–822), and on the critical side Langemeijer 1936a p. 883–884. The 'possibility of self-correction' is also mentioned in a master's thesis worth reading by H.C. Wichers Hoeth; see H.C. Wichers Hoeth 1980, p. 8–9 and 26. The Austrian judge and lawyer Rudolf Thienel also draws a distinction between possible changes in the law which fits closely with Van den Bergh's idea: 'There is an obvious difference between – for instance – a tax law, which is backed by the majority and can be changed by a future majority, and a constitutional change abolishing the democratic participation itself – without the possibility of

aspire to. Their ambitions therefore go directly against the essence of democracy, and *that* is the reason why a democracy may deny them entry to the democratic arena.

Now one might wonder whether this is really the only irrevocable decision in a democracy. Take, for example, the democratic decision to destroy a monument.[76] That seems a fairly definitive decision. Nevertheless, there is a subtle difference between the decision to demolish a monument and the decision to abolish democracy. To be clear, the actual consequences of the decision regarding the monument cannot be completely restored: if reconstructed, the predicate 'monument' would no longer naturally apply.[77] But that does not make the decision itself irrevocable. Within the framework of democracy, we *can* revoke the decision and attempt to alleviate the consequences *as far as possible*. The decision to abolish democracy, however, leads to the loss of the entire framework, making the decision not only irreparable, but also *irrevocable* (in its most literal sense). It is permissible for a democracy to oppose that one decision. We might call this second interpretation of Van den Bergh 'democracy as self-correction'.[78]

### *7.3.5 Markovitch and the Law of Reaction*

Van den Bergh ingeniously deployed the self-correction principle he developed to defend democracy. He was also the first to make it part of a rudimentary *theory* of militant democracy, for instance with attention to procedural safeguards, about which more below. Van den Bergh thus gave a political-philosophical answer to a current problem. In formulating the self-correction mechanism, however, he turned out not to be alone. On 6 October 1936, a week and a half after the inaugural lecture, his fellow SDAP party member and lawyer Marinus van der Goes van Naters

returning to democratic rule if a future majority so wishes. The consequence is quite clear: In order to secure democratic participation for future generations, it is justified and necessary to deny radical political movements the possibility of destroying the democratic system – even if they try to achieve their goal not by violence, but by means of a "march through the institutions".' See Thienel 2008, p. 64–65.

[76] I also use this example in Rijpkema 2012.

[77] To illustrate this point: the Dutch minister of education, culture and science Jet Bussemaker initially refused to place a burned down but restored windmill dating back to 1787 back on the list of monuments, arguing that it was a 'replica'. Bussemaker: 'The essence of a monument is its authenticity, and this is not authentic. What would we do if *The Night Watch* were burned? Surely we would not suddenly pronounce a replica to be the true *Night Watch*?' Eventually, after protest from the House of Representatives, the minister revised her decision on the basis that it was a 'unique case'. See 'Molen Burum geen rijksmonument' ('Burum Windmill not a national monument'), nos (online), 8 September 2014, and 'Molen Burum toch Rijksmonument' ('Burum Windmill a national monument after all'), nos (online), 6 October 2014.

[78] This term was introduced in Cliteur and Rijpkema 2012, p. 240 to describe this interpretation of Van den Bergh's inaugural lecture.

(1900–2005) sent Van den Bergh a letter.[79] He regretted that he had been unable to attend the ceremony, but he had nevertheless read the lecture 'with great interest'. As evidence of his interest, Van der Goes van Naters referred to *La doctrine sociale de Duguit* by Milan Markovitch, a Sorbonne doctoral dissertation written in 1933 which he had before him at that moment, probably while he worked on his *Socialistische Staatsvernieuwing* (Socialist state revival), which was to appear a year later, and in which Duguit is briefly discussed.[80] Why does he make this suggestion? According to Van der Goes van Naters, Markovitch has an idea comparable to Van den Bergh's.

*La doctrine sociale de Duguit: ses idées sur le syndicalisme et représentation professionnelle*, as the full title reads, is first and foremost an exposition of the ideas of the French jurist Léon Duguit (1859–1928).[81] Duguit's ideas do not square well with democracy,[82] and it is precisely that aspect which is sharply criticized by Markovitch in a remarkable concluding chapter.[83]

Duguit fails to understand the value of democracy and Markovitch seeks to counter his arguments by demonstrating that value. He therefore goes in search of what makes democracy unique, finding that special quality in the 'law of reaction'. New political systems are always a 'reaction' to existing forms of government: they are an adaptation or even rejection of those systems.[84] Such a reaction can only take place in two ways: with or without bloodshed.[85] The latter option is always preferable; in the former case society is, after all, thrown into chaos and tyranny, leaving

[79] Marinus Van der Goes van Naters, letter to George van den Bergh, with attachment, 6 October 1936, in the personal archive of George van den Bergh, owned by Van den Bergh's heirs.

[80] See Marinus van der Goes van Naters 1937, p. 118.

[81] Markovitch 1933.

[82] For an overview of Duguit's ideas, see Laborde 1996, p. 227–244 (in particular p. 235–236 and 239–240); Duguit placed the 'functional representation' of economic and social groups in opposition to the 'individualist basis' of the representative democracy. It would offer the French republic a more 'solid structure' than the 'democratic, individualist and parliamentarian framework'. Although Duguit saw himself as a democrat, and although part of the parliament would be elected by the regular democratic route, in his thinking citizens unmistakably fulfil a more passive role as 'those governed' without direct participation. Duguit's ideas also have technocratic characteristics, according to Laborde.

[83] For a summary of that criticism, see Markovitch 1933, p. 275–277, including 'La représentation professionnelle est. aux antipodes du parlementarisme rationalise qui est. le couronnement logique et nécessaire de toute démocratie individualiste et de la souveraineté populaire. Ainsi, uniquement le système démocratique d'organisation politique conditionné par la vie et adéquat à elle, .... Essayer de la remplacer par l'organisation de la représentation professionnelle est. après cela, vraiment impossible. Introduire le mauvais, étant donné tous les défauts, vices et inconvénients de la représentation professionnelle, pour remplacer le bon est. contraire à toute logique. Et la représentation professionnelle réalisée au Parlement le serait certainement. D'où et pour cette raison, la proposition de Duguit de donner aux professions organisées dans tous les syndicats les rênes pouvoirs est. sans aucun doute impossible et inacceptable'; see also p. 255–256.

[84] Markovitch 1933, p. 256–257.

[85] Markovitch 1933, p. 257.

no essential difference between humans and animals.[86] It is unworthy of man, the only self-aware and thinking being.[87] The possibility of accepting, approving and rejecting a political system must therefore be guaranteed 'whatever the price'.[88] That is what Markovitch calls the 'law of reaction'. 'The ability to change systems of political organization' is a 'fundamental law for all societies,' founded in *humanity*.[89] Democracy is the only system which does not deny this law of reaction, nor oppose it.[90] In fact it actively applies the law of reaction, via periodical elections.[91] Measured against the yardstick of the law of reaction, democracy is 'superior to all other forms of political organization'.[92] It is 'inviolable'.[93]

But Markovitch does not stop here, and that is where Van den Bergh comes into the picture. Markovitch anticipates critics who, in defence of Duguit, seek to relativize the inviolability of democracy. What happens if the reaction is, we want to replace democracy? On the basis of the law of reaction a democracy must surely allow that?[94] This would leave the way open to less democratic alternatives, such as that of Duguit. Markovitch's reply is, 'superficially yes, but in reality no'.[95] A democracy is not obliged to allow *all* reactions: the reaction which excludes a new reaction, whether intentionally or unintentionally, thus 'ignoring and practically destroying' the reaction, is one which a democracy need not tolerate.[96] Such a reaction against democracy 'justifies and codifies the revolution, the fire and the blood',

[86] Markovitch 1933, p. 257.

[87] Markovitch 1933, p. 257.

[88] Markovitch 1993, p. 256, and also p. 258, with the elections as the instrument.

[89] Markovitch 1933, p. 257–258: 'loi de réaction, c'est-à-dire la possibilité de changements de systèmes d'organisation politiques', p. 255: 'de la loi vitale de toute société qu'est. la loi de reaction,' and p. 256: 'Il est. juste aussi bien logique que celui qui subit le poids d'un système soit l'arbitre souverain de sa valeur. Sans cela, l'homme sera enchaîné, opprimé, terrorisé, ce qui est. tout à faire contraire a sa quaité (sic) d'homme, à son rôle social primordial, donc à toute la vie sociale.' On man, or humanity, as a point of departure, see also p. 256: 'L'homme, c'est. la vie. Chaque système, s'il veut être tel., est. nécessairement oblige de correspondre a cette vie, parce que l'homme est. tout et partout,' and p. 251: 'L'individu est. tout et partout. S'il n'est. pas seul en dernier ressort, c'est. toujours lui, l'individu. Donc, il est. partout.'

[90] Markovitch 1933, p. 258: 'Seule, la démocratie, système d'organisation politique où le peuple est. l'unique souverain, ne nie et ne s'oppose à la loi de réaction.'

[91] Markovitch 1933, p. 258.

[92] Markovitch 1933, p. 255: 'La démocratie présente, en tant que système d'organisation politique, une valeur incontestablement supérieure à tous les autres modes d'organisation de la puissance politique. Ses qualités propres sont innombrables. Elle seul assure nettement la pleine expression de la loi vitale de toute société qu'est. la loi de reaction.' See also p. 271.

[93] Markovitch 1933, p. 276: 'Le principe de la démocratie est. inattaquable,' see also p. 255 and 258.

[94] Markovitch 1933, p. 258.

[95] Markovitch 1933, p. 258: 'Apparemment oui, mais au fond, non.'

[96] Markovitch 1933, p. 258.

precisely that which does not befit the ambitions of man to be *more* than a 'common animal, without mind or consciousness,' in other words: his humanity.[97]

The common ground is unmistakable. Markovitch too feels that democracy could oppose the one decision that makes all other decisions impossible, namely the decision to abolish democracy.[98] What should be done with parties seeking to bring down democracy by legal means? By his own admission, Van den Bergh, after 'diligent searching in Dutch and foreign literature', had failed to find anything significant on the subject.[99] Even in a personal account of the writing of the inaugural lecture we find nothing on specific sources of inspiration,[100] to his own disappointment, in fact: 'I am aware of how dangerous it is not to be able to connect one's own ideas with those of others.'[101] Van den Bergh most likely missed this book, which is not surprising. A book about Duguit, after all, is not the first source one would consult when it comes to the defence of democracy, or democracy in general. Van den Bergh and Markovitch, as Van der Goes van Naters writes to Van den Bergh, probably formulated the same fundamental democratic mechanism of self-correction completely independently of one another.

That is a shame. It would have been interesting to know what Van den Bergh thought of Markovitch's theory, because besides common ground there are also differences. Firstly, there are conceptual differences: where Markovitch speaks more generally of the 'law of reaction' and 'reactions' to political systems, Van den Bergh thinks much more from *within* democracy; he talks about the 'self-correction of democracy' and 'decisions'. These conceptual differences, however, point to a subtle, but more fundamental contrast. Markovitch develops an *external* criterion, the law of reaction, which all political systems must fulfil. Democracy scores the highest on that criterion, giving it a *de facto* inviolable status. But it remains an *external* criterion; Markovitch acknowledges elsewhere that a democracy has to allow itself to be replaced, if the law of reaction is fully guaranteed in a *new* political system.[102] Markovitch admits that it is difficult to think of another such system and that a sys-

[97] Markovitch 1933, p. 258–259: 'Toute réaction légale est. possible, sauf une seule: la réaction qui veut consciemment ou non, peu importe, supprimer la possibilité d'une nouvelle réaction donc ignorer et pratiquement détruire la loi vitale de la société qu'est. la loi de réaction, en justifiant et en codifiant ainsi la révolution, le feu et le sang, ce qui évidemment, ne doit nullement cadrer avec l'homme et son ambition d'être autre chose qu'un animal ordinaire, sans esprit et conscience.'

[98] 'Here too the emphasis is on the legal reaction of those intending oppression, and here too every legal reaction is tolerated, except that which seeks to interrupt the possibility of a new reaction!' according to Van der Goes van Naters in his letter to Van den Bergh; see Marinus Van der Goes van Naters, letter to George van den Bergh, with attachment, 6 October 1936, in the personal archive of George van den Bergh, owned by Van den Bergh's heirs.

[99] Van den Bergh 1936a, p. 6.

[100] 'De democratische Staat. Tegenover niet-democratische partijen' ('The democratic State. Against non-democratic parties'), *De Residentiebode*, 23 December 1936.

[101] Van den Bergh 1936a, p. 6.

[102] Markovitch 1933, p. 259.

tem which respects the law of reaction will, *in essence*, be democratic.[103] An external criterion, or external justification has a clear advantage. In addition to acting against antidemocrats within a democracy, it also justifies opposition to an undemocratic system outside a democracy. To put it a different way, it legitimizes revolution in order to establish a democracy. This advantage, however, comes at a price: we must find support for the external criterion. Markovitch appears to seek such a basis for his law of reaction in what makes us human, our 'humanity', our capacity to distinguish ourselves from animals, without mind or consciousness. That gives such a justification the characteristics of natural law, raising the burden of proof; after all, someone might conceivably argue that no binding laws can be derived from our humanity at all, let alone one as concrete as Markovitch's law of reaction. It is the least convincing part of Markovitch's argument. The high burden of proof is not met; we only encounter unconvincing 'generalities' about the compelling force of 'humanity', and *thus* the compelling force of the law of reaction; the political system is there for man, and not the other way around; 'man, that is life'. Every political system must take into account that aspect of life, because 'man is everything and everywhere'.[104]

To Van den Bergh the point of departure is democracy as an *established* system. Is it inconsistent of a democracy, i.e. does it betray its own principles, if it bans a party? Van den Bergh's answer is no: a democracy does not have to take an antidemocratic threat lying down. That is a more modest claim. It is only argued that there is nothing inherently inconsistent about a democracy which opposes its own abolition. When Van den Bergh writes that all decisions except one are acceptable in a democracy, he engages in a polemic against a *formal* notion of democracy in the work of Kelsen and others; when Markovitch makes the same claim, he opposes a supposed consequence of his law of reaction in a democracy. Van den Bergh thus offers no justification for revolution in the name of democracy, but nor does he incorporate natural law into his argumentation. Of course, that is *one* interpretation, to be more precise, the second interpretation outlined above: democracy as self-correction. In the first interpretation, the principled democracy, on the other hand, there are starting points for a defense of democracy charged with values and thus also more in line with natural law. Van den Bergh, after all, *also* speaks of the 'individuality of every human being'. In order to clarify this very point it would be interesting to know what he thought of Markovitch's theory.

There are other differences too. Van den Bergh emphasizes the revocability of decisions and with it the unique opportunity a democracy offers to *learn* from mis-

[103] Which taken *literally* is a circular argument: democracy is the best system because it fulfils the law of reaction, which in turn means it is a democracy; see Markovitch 1933, p. 259 and note 1. See also, p. 258: 'La démocratie se présente comme le seul système politique compatible avec la vie, qu'elle doit rester dan tous les temps et chez tous les hommes.'

[104] Markovitch 1933, p. 256: 'L'homme, c'est. la vie. Chaque système, s'il veut être tel., est. nécessairement oblige de correspondre a cette vie, parce que l'homme est. tout et partout'; for comparable formulations see p. 251–252 and 273.

takes[105]; Markovitch thinks instead of preventing bloodshed, which is only guaranteed in a democracy in which a *judicial* 'reaction' to a political system is possible. Nonetheless the core of the self-corrective mechanism (all decisions are permitted except one) is brought into sharp focus by both Markovitch and Van den Bergh.[106]

### *7.3.6 The Interpretations Compared*

The second interpretation, democracy as self-correction, differs from the first on a number of points. Where the first interpretation might obscure the concept of democracy, by incorporating a large array of principles into its definition, the second interpretation leaves 'all-but-one-decision' open, and is thus, in a strict sense, the 'more democratic' democracy. One could also consider it in this order: 'majority rule' offers (and is) a decision mechanism, democracy as self-correction offers 'majority rule' plus a mechanism for facilitating *and* protecting 'self-correction', while principled democracy offers 'majority rule' plus a number of inviolable, fundamental rights. Democracy as self-correction thus leaves more freedom for public, democratic debate; principled democracy has less faith in the democratic debate and excludes a specific 'core' of principles from it.

The justification for party bans under democracy as self-correction is considerably smaller than in principled democracy. The grounds for prohibition are thus more restricted, with the important advantage that undesirable repression is less likely.[107] The only test is: does the party in question aim to overturn the democratic model of decision making: does it want to make democratic self-correction impossible? That leaves less room for interpretation. In principled democracy that is different: does this party aspire to erode freedom of conscience or equality before the law? It is a broader basis, with greater interpretative freedom.

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[105] Van den Bergh 1936a, p. 9: 'One of the strongest elements of democracy can be attributed to its "self-correction". Every democrat admits that democracy often leads to erroneous decisions. However, it offers more safeguards than any other system to ensure that these decisions, as soon as it becomes apparent that they are incorrect, are revised. In democracy the circles of the stakeholders and those who make the decisions in the final instance overlap. The people make the decisions and feel the consequences directly. They know their responsibility, they correct their own mistakes.' Markovitch comes closest to this when he writes, 'L'homme, créateur du système et objet de son application, va être le seul juge de son opportunité et de son utilité. Il est. juste aussi bien que logique que celui qui subit le poids d'un système soit l'arbitre souverain de sa valeur. Sans cela, l'homme sera enchaîné, opprimé, terrorisé, ce qui est. tout à faire contraire a sa quaité (sic) d'homme, à son rôle social primordial, donc à toute la vie sociale' (Markovitch 1933, p. 256).

[106] In Rijpkema 2015 other 'approximations' of Van den Bergh's 'democracy as self-correction', in particular Karl Popper's 'democracy as science analogy', are discussed at length, see p. 149–152 (see also Rijpkema 2018, p. 134–136). Interestingly enough, it could also be argued that the idea of 'self-correction' is approximated by Hans Kelsen, see Hong's interpretation of Kelsen called 'democracy as self-restraint', in Hong 2012, and the comparison in Molier 2018.

[107] Experiences in post-war Germany might serve as an illustration of these possibilities; see Müller 2013, p. 1258–1260.

In the first interpretation of Van den Bergh we find one of the first, perhaps even *the* first, theoretical formulation of a militant democracy concept. It is a notion of militant democracy that fits seamlessly with the Constitution of modern Germany.[108] There this inviolable core of principles can be found in its 'eternity clause' (Art. 79 para. 3 of the German Constitution): certain democratic principles *plus* the principle of 'human dignity' lie outside the legislator's reach, regardless of any majority.[109] The democratic route is thus shut off; a revolution is the only option, and for that there is, of course, criminal law.[110] We find variations on this theme in countries such as Israel, Spain and Italy.[111]

In the second interpretation of the inaugural lecture we find an original idea of what democracy is, a notion of democracy, furthermore, which is equipped for the battle with antidemocratic parties, but without leaving democracy too little space to function in the process.

### *7.3.7 Procedural Safeguards*

In his speech, Van den Bergh also covers the concrete execution and application of his ideas. First of all, 'One should be careful of allowing too much latitude in the interpretation of the, in the above mentioned sense, inviolable principles!'[112] For

[108] See Müller 2013, p. 1258, who speaks of the influence of Loewenstein's ideas on the German constitution. H.C. Wichers Hoeth also links Van den Bergh expressly with the German 'streitbare Demokratie'; to my knowledge, this is the first interpretation of Van den Bergh in these post-war terms; see Wichers Hoeth 1980, p. 25). In 1995 Van den Bergh surfaces, along with the term 'weerbare democratie' (militant or defensive democracy) in an article for the newspaper *Trouw* on the AIVD, the General Intelligence and Security Service of the Netherlands (then the BVD): Cornelisse 1995. In response to the judgement of the ECHR on the Refah case, Eskes mentions Van den Bergh's inaugural lecture in *Trouw* and draws a direct line to the German 'streitbare Demokratie'; see Eskes 2011. In his comments on the same Refah case, in the context of militant democracy, Alkema too mentions Van den Bergh; see ECHR 13 February 2003, 41,340/98, 41,342/98 and 41,344/98, nj 2005, 73, incl. Note E.A. Alkema (Refah Partisi/Turkey).

[109] See Thiel 2012, p. 292.

[110] See Thiel 2012, p. 293, and Klamt 2007, p. 137. The question, of course, is whether this means that the constitution can *never* be overturned. The answer is probably no, in the light of GG Article 146: if the people set up a new constitution and it comes into effect, the old one is deactivated. See Bovend'Eert and Burkens 2012, p. 69, and Preuss 2011, p. 443. It can be argued, on the other hand, that, given the structure of the constitution, GG Article 146 anticipates the establishment and adoption of a constitution after a civil war (or at least, after a lengthy disturbance to public order), rather than the hypothetical situation in which a new constitution is written and adopted in parallel with the current constitution. At the same time the wording of the article does not rule this out. It creates the remarkable situation in which revision of certain *parts* of the Grundgesetz is impossible, but complete replacement might be formally permitted. This explanation appears also to apply to the Federal Constitutional Court: the eternity clause can only be overruled by the 'directly expressed will' of the German people (see Preuss 2011, p. 443).

[111] See Müller 2013, p. 1262–1266, and Klamt 2007, p. 150–152.

[112] Van den Bergh 1936a, p. 26.

this problem democracy as self-correction, given its formulation, appears to offer the most guarantees: the grounds for prohibition are narrower. Secondly, have faith, as far as possible, in 'the moral conscience of the vast majority of our people'.[113] In other words, he proposes an 'opportunity principle'. The antidemocratic party need not always be directly banned. It is not a mechanical construct, a guillotine set to fall at the first antidemocratic expression. The democratic state itself can thus choose the appropriate moment to apply its most powerful means of defence.

In order to ensure careful application Van den Bergh also argues that decisions on party bans should be made exclusively by the Supreme Court, carried unanimously, on the basis of an independent 'Political Parties Act', containing carefully formulated grounds for prohibition.[114] In fact according to Van den Bergh such a law should also oblige parties to complete openness with respect to their finances; recently this last proposal was taken up, *mutatis mutandis*, in the Netherlands in the 2013 Political Parties Funding Act.[115]

## 7.4 The Reception of Van den Bergh's Inaugural Lecture

The reception of Van den Bergh's inaugural lecture was overwhelming. 'Much talked about' would be an understatement. A day after the ceremony more or less all the newspapers and journals of any note published summaries, from *De Tijd, Het Vaderland*, *De Telegraaf* and the *Algemeen Handelsblad* to *De Rotterdammer* and the *Provinciale Drentsche en Asser Courant*. There followed a deluge of comments and reviews in local papers as well as all the big publications, often in several articles.

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[113] Van den Bergh 1936a, p. 31.

[114] Van den Bergh 1936a, p. 28–29. For criticism of Van den Bergh's proposal only to allow the Supreme Court to ban a party on a unanimous vote, see Kramer 1936a, p. 824, who fears that this exacting requirement might 'endanger the intended protection of our democratic state institutions'; 'does this not put too much power in the hands of one single councillor?' That fear is not unfounded, as becomes apparent from experiences with the requirement for a *two-thirds majority* in Germany; see Rensmann 2003, p. 1134: 'The real victim of the decision (in the case of the extreme right NPD, BR), however, is the normative authority of Article 21 para. 2 of the Basic Law. At least as long as the minority judges remain in office and wield their veto power, the possibility of a successful application to ban a political party in Germany is for all intents and purposes excluded, save in exceptional cases of clear and present danger to the "free democratic basic order." Normativity is largely reduced to virtuality and symbolism. According to the minority a single informer in the party leadership is sufficient to thwart any attempt to dissolve a political party. On the other hand the minority opinion imposes a considerable burden on the applicants to substantiate the claim of unconstitutionality with sufficient evidence. Such evidence cannot, however, be obtained without the help of informers.'

[115] Donations of 4500 euros and more have to be made public, see Article 25 of the 2013 Political Parties Funding Act (Wet financiering politieke partijen). Donations were first made public by the minister of the interior Ronald Plasterk on 1 October 2014; see 'Giften politieke partijen openbaar' (Donations to political parties made public), NOS (online), 1 October 2014.

The liberal *Nieuwe Rotterdamsche Courant* was outspokenly critical. Van den Bergh was accused of having given a political, and hence unscientific, speech.[116] For convenience' sake it was assumed that Van den Bergh's lecture was targeted exclusively at a specific party, the National Socialist Movement (NSB), a suspect action for an SDAP member. What, then, are we supposed to make of the SDAP itself, with its doctrine of class war, its antimonarchical stance and its undermining of authority in the army? Moreover, according to some authors, socialism *also* demands a transition period of dictatorship on the way to the ideal socialist state.

The similarly liberal *De Avondpost* felt able to agree with Van den Bergh's notion of militant democracy, but exhibited dissatisfaction over the proposed legal implementation. It is not right to defend a party ban 'on a contrived interpretation of an existing article which was not written for a case such as this'. It would be better to produce legislation specifically for the purpose.[117] The newspaper also expresses the expectation that the new professor will be roundly criticized by his colleagues in law. Neither could his discussion of 'opportunity', i.e. what is the right moment to intervene, count on support; the newspaper declares it 'weak'.

The frontal assault from the socialist newspaper *Het Volk* was more painful still, expressing concern as to what Van den Bergh's theory would mean for the position of the social democrats themselves:

> We consider this a highly dubious stance (banning antidemocratic parties on the basis of 'public morality' [goede zeden], BR). In essence it is the foundation of every strict conservatism. With this proposition in hand a judge might for example succeed in banning the Neo-Malthusian League or the association of free thinkers 'De Dageraad'. It would only be a small stretch to ban the S.D.A.P., if a judge were permitted to assume that the right to private property belonged to the 'fundamental moral principles' of our people, an idea for which he could find support in decades of election results.[118]

Many commentaries also simply put forward the prevailing relativist notion of democracy. The *Algemeen Handelsblad* wrote that a state which protects freedom

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[116] 'Politieke wetenschap' ('Political science'), *Nieuwe Rotterdamsche Courant*, 14 October 1936. A day later this suggestion was repeated in a second piece on the lecture: 'Wet op de staatkundige partijen?' ('Political parties act?'), *Nieuwe Rotterdamsche Courant*, 15 October 1936.

[117] 'Een lastig probleem' ('An awkward problem'), *De Avondpost*, 6 October 1936.

[118] As cited in 'Gevaarlijke stelling' ('Dangerous proposition'), *De Amsterdammer: Christelijk Volksdagblad*, 7 October 1936. The example of *De Dageraad* (an organization now known as *De Vrije Gedachte*) turned out to be attractive. Had Thorbecke not named faith and religious piety 'the nation's most noble characteristic'? Would it not be possible, then, to ban the atheist *De Dageraad* by Van den Bergh's reasoning, *De Avondpost* asked a few weeks later? 'We are not arguing for that,' but 'not obstructing is not the same as encouraging,' see 'Twee gevaren' ('Two dangers'), *De Avondpost*, 20 October 1936. *De Vrijzinnig-democraat* came to the same conclusion as *Het Volk*; see 'Democratische Staatsbeleid: de houding tegenover dicatuur-stromingen' ('Democratic State Policy: the position on dictatorship trends'), *De Vrijzinnig-democraat*, 17 October 1936. In response to the review, the *Dagblad van Noord-Brabant* concluded, 'It is understandable that the social democrats prefer not to use this double-edged sword in defence of their democracy.' See 'Verbod van ondemocratische partijen?' ('Ban on undemocratic parties?'), *Dagblad van Noord-Brabant*, 16 October 1936.

of conscience should never adopt authoritarian methods, not even in its own self-defence: 'The democratic state would destroy itself by this method.'[119]

The *Haagsche Post,* which was not unsympathetic to the inaugural lecture,[120] concluded in an overview article, 'Now that a few weeks have passed, we must observe that the idea has not been received with approval.'[121] The *Dagblad van Noord-Brabant* writes, 'Much has now been written on these propositions by Professor Van den Bergh, in the mainstream literature as well as the anti-revolutionary papers, but neither side declares warm approval.'[122] That is unmistakably true. But other voices also made themselves heard, some of them positive.

In *De Groene Amsterdammer* the speech was favourably discussed by the chief editor, Delft professor of constitutional law C.A. Josephus Jitta.[123] He first addresses those who believe the topic of the speech shows that it is a political treatise: anyone who *really* familiarizes themselves with the speech will be fully reassured to find that it exhibits a 'purely scholarly character'. It is not the subject which is decisive, but rather the methodology. Josephus Jitta does, however, wonder how the judge's power of banning a party can be delimited. One must be willing to grant the judge almost unlimited power, or else provide a sharper formulation for the grounds for prohibition, which seems impossible to provide. He considers Van den Bergh's most important innovation to be the distinction between non-violent and violent parties, which sharpens the formulation of the problem compared with previous treatments. Josephus Jitta concludes:

> The speaker has exhibited the unusual merit, in a short timeframe, of shedding new and surprising light on a problem which has repeatedly been debated. What more could one ask of an inaugural lecture?[124]

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[119] See 'De zelfverdediging der democratie. Revolutionaire kiezers en revolutionaire Ambtsdragers' ('The self-defence of democracy. Revolutionary voters and revolutionary Officials'), *Algemeen Handelsblad*, 28 October 1936. To the same effect, see 'Niet aldus' ('Therefore no'), *De Standaard*, 8 October 1936, 'Democratie: ook jegens niet-democraten' ('Democracy. Towards non-democrats too'), *Vooruit*, 6 October 1936, and 'Democratie en Dictatuur' ('Democracy and Dictatorship'), *Het Christelijk Historisch Weeklbad*, 17 October 1936.

[120] 'We do not deceive ourselves that the execution of these propositions will provide wonderful possibilities; yet the writer's reasoning is fully deserving of attention.' See 'Hoe kan ik u weer kwijt?' ('How can I get rid of you again'), *Haagsche Post*, 3 October 1936.

[121] 'Het Probleem van deze Dagen' ('The Problem these Days'), *Haagsche Post*, 31 October 1936.

[122] 'Verbod van ondemocratische partijen?' ('Ban on undemocratic parties?'), *Dagblad van Noord-Brabant*, 16 October 1936.

[123] Josephus Jitta 1936.

[124] Josephus Jitta 1936. Previously Josephus Jitta expressed himself in similar words in a personal letter to Van den Bergh: 'I received your speech half an hour ago and read it through in one breath. Yesterday evening I was somewhat shocked by the title. I thought, good heavens, has he indeed lost sight of the vague boundaries between politics and science. But that fear has been swept away. ... An hour ago I still took the view that a democracy cannot [view?] a dictatorial party as a prohibited association, although I felt dissatisfied with that. Now I am completely converted. Your speech, which is also in all respects praiseworthy, has thrown an entirely new light on a problem which we thought had been inspected from all sides. Is any greater praise imaginable for an inaugural lecture?' (A.C. Josephus Jitta, letter to George van den Bergh, 29 September 1936, in the personal archive of George van den Bergh, owned by Van den Bergh's heirs).

A few days earlier, as main speaker at a free-thinking democratic conference, Josephus Jitta had recommended to his audience that they study Van den Bergh's lecture. The socialist *Het Volk* made much of this with the headline:

> Professor Josephus Jitta on democracy. Approval of the inaugural lecture of Professor van den Bergh.[125]

On the opening of the Liberal State Party's election campaign another colleague, professor of constitutional law, C.W. de Vries, looked at Van den Bergh's speech in detail.[126] He endorsed the condemnation of national socialism and communism as conflicting with 'the morals of our people', but felt unable to agree with what followed: 'We want to overrule political wrong with what is right and not by force and prohibition.' Nonetheless De Vries was sufficiently satisfied with the lecture to order 225 copies for his Rotterdam students.[127]

The communist and national socialist press also produced commentaries. In two articles seething with vile antisemitism, the national socialist mouthpiece *Volk en Vaderland* dismissed the inaugural lecture as a 'propaganda speech'.[128] A while later

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[125] 'Prof Josephus Jitta over democratie. Instemming met de inaugurale rede van mr. dr. v.d. Bergh.' ('Professor Josephus Jitta on democracy. Approval of the inaugural lecture of Professor van den Bergh'), *Het Volk*, 6 October 1936. See also 'Conferentie Vrijzinnig-Democr. Jongeren Organisatie' ('Conference of the Free-Thinking Democratic Youth Organization'), *Het Vaderland*, 6 October 1936.

[126] A summary appeared as 'Liberale Staatspartij de Vrijheidsbond: Opening van de verkiezingscampagne te Amsterdam' ('Liberal State Party: Opening of the election campaign in Amsterdam'), *Nieuwe Rotterdamsche Courant*, 13 October 1936.

[127] 'De democratische Staat. Tegenover niet-democratische partijen' ('The democratic State. Against non-democratic parties'), *Residentiebode*, 23 December 1936. A similar *conditional* approval was voiced by his fellow SDAP-member Willem Drees, and later Dutch Prime-Minister (1948–1958); in a letter to Van den Bergh he writes, 'The argument which formed the main content of your speech stirs one to reflection. I am not yet at the point of complete endorsement, although I acknowledge the moral right of democracy to oppose its enemies[,] even by methods different from those which have so far been considered normal.' (Willem Drees, letter to George van den Bergh, 2 October 1936, in the personal archive of George van den Bergh, owned by Van den Bergh's heirs.)

[128] See 'Duys over de S.D.A.P. Vernietigend bewijsmateriaal' ('Duys on the S.D.A.P. Damning evidence'), *Volk en Vaderland*, 4 December 1936. The same goes for the earlier article, 'Een dankbare professor: de "objectieve wetenschap gediend"' ('A grateful professor: "serving objective science"'), *Volk en Vaderland*, 2 October 1936. The article by Duys (former SDAP member, and later NSB member), on which the former article was based, in fact gathered an unpleasant following when it was published as a separate booklet, *Democraten op Fascistenjacht* (Democrats on the hunt for fascists), from which his views on the (lack of) scientific content in Van den Bergh's inaugural lecture were sometimes adopted in other journals. It must have been a particularly traumatic experience and Van den Bergh personally urged a number of editors to rectify the situation; he felt it was nothing less than slander (see 'Eer is teer' ('Honour is fragile'), *Deli Courant*, 12 March 1937). The editors generally reluctantly complied, the *Residentiebode* writing, 'Rereading the details, we must confess to having been swept along by Mr. Duys' boisterous writing. It turns out that Professor van den Bergh's scientific character is in good working order, and we would therefore now like to withdraw the conclusions previously reached from Duys' book.' (*Residentiebode*, 23 December 1936) Similarly, *De Tijd*: 'Professor van den Bergh is indignant at this term ('a stillborn child from a scientific perspective', BR) and on closer consideration we admit that these words would have been better omitted.' See 'Een verdediging. Prof. G. van den Bergh over zijn inaugurale rede' ('A defence. Professor G. Van den Bergh on his inaugural lecture'), *De Tijd*, 22 December 1936. *Het Vaderland* refuses to commit itself; see 'De inaugureele rede van prof. v.d. Bergh' ('The inaugural lecture of Professor van den Bergh'), *Het Vaderland*, 29 December 1936.

Henri Polak, a prominent Jewish SDAP member and union leader was sent a dozen copies of the national socialist newspaper uninvited, something which often happened, but in this case each copy had the article about the lecture marked out.[129] In the article it was suggested that Van den Bergh, who was Jewish, owed his appointment at the University of Amsterdam to a 'Jewish clique'. Some time later Polak settled the score with this antisemitism brilliantly in a column for the newspaper *Het Volk*:

> This clearly shows how great the power of this Jewish clique is. In the entire Faculty of Law there is only one Jewish professor to be found. Of the five members of the University Board of Governors not one is Jewish. In spite of all that, the Polaks and co succeeded in imposing their will on both boards.[130]

The communist press was more argumentative. In *De Tribune*, Van den Bergh was accused of lumping fascists together with communists, in true 'SDAP tradition'.[131] The picture he had painted of dictatorship lacked nuance, for it lacked any consideration of its nature or aim, which form would it take, or which classes would support it?[132] In this, *De Tribune* contended, the fascist and communist dictatorships, besides their names, have nothing in common. Van den Bergh's conclusion, could be endorsed, at least as far as it applies to fascists. *De Tribune* thought the precise legal argumentation for these measures could be thrown overboard; it would only of interest to jurists and their formal concepts.[133]

Let me add a few observations. Overall, the daily newspapers were manifestly critical or negative. Ideological colour certainly played no small role in that.[134] Van den Bergh had taken a scholarly view on political subject matter. It turned out to be a hornets' nest. Much of the press hurried to interpret the speech in exclusively political terms, leading to predictable criticism, with that of *Het Volk* standing out most of all. Some newspapers betrayed their political interpretation by explaining Van den Bergh's proposal without reservation as a plea for the prohibition of the National Socialist Movement and communist parties, when nowhere in Van den Bergh's speech does he mention concrete parties.[135] It was perhaps naive to think

[129] See Polak 1936.

[130] See Polak 1936.

[131] 'Kroniek van de week' ('Chronicle of the week'), *De Tribune*, 10 October 1936.

[132] 'Over democratie en dictatuur' ('On democracy and dictatorship'), *De Tribune*, 8 October 1936.

[133] 'Over democratie en dictatuur' ('On democracy and dictatorship'), *De Tribune*, 8 October 1936.

[134] Wichers Hoeth attributes the criticism of the daily newspapers entirely to party ideologies (Wichers Hoeth 1980, p. 22), which appears to me to be too strong a statement. We should not underestimate how widespread the relativist notion of democracy was at the time. The newspapers, as a rule, also go to great lengths to support their position with arguments.

[135] In my view Hartmans also sees the speech too emphatically as being at the heart of the battle against the NSB when he writes in *Vijandige Broeders?* (Enemy brothers?), 'For what was now a very legalistic party like the SDAP it was therefore a natural step to see whether there were a legal means of calling a halt on the national socialists. That was why the most important constitutional lawyer of the SDAP, George van den Bergh, in September 1936 devoted his inaugural speech for acceptance of his professorship at the University of Amsterdam to the question of whether it was possible to ban the NSB.' See Hartmans 2012, p. 185. It seems justified to think that Van den Bergh would have firmly denied that. Besides the fact that the NSB is not mentioned at all in the speech,

that in such politicized times such political interpretations would not be forthcoming, but it could also be explained as a sign of Van den Bergh's courage to discuss such a topical and controversial subject from a scholarly perspective at such a moment.

Moreover, good rebuttals were conceivable for the more serious points of criticism. Take, for example, the variants of 'What should be done with party or association X?' It would have been sufficient for Van den Bergh to reply that if party X's *aim* was in conflict with the essence of democracy (in the first or second interpretation), then party X could indeed be banned; that simply follows from the concept of militant democracy he was outlining. The fact that this would mean banning the NSB in no way reduces the consistency of that argument. It would then be up to his critics to show why an outcome such as the prohibition of the NSB would be undesirable. Simply referring to the concept of relativist democracy to show what democracy entails, is not sufficient here, as that is exactly the notion which Van den Bergh argues against. It would thus be necessary to come up with *arguments* to defend one's own concept of relativist democracy against Van den Bergh's militant democracy.

The condemnation of the legal argument as a 'contrived interpretation' is also dubious. From a technical legal perspective, Van den Bergh had indisputably set his sights on the right law: according to Dutch law a political party was (and still is) nothing other than an ordinary association. The fact that Van den Bergh then has to go to some lengths to properly delimit the concept of 'public morality' [goede zeden, BR] is true, but one can hardly blame him for that, as legal history offered almost no points of departure. The proposition that Van den Bergh would have been better off seeking salvation in new legislation is similarly easy to refute: in his speech Van den Bergh explicitly argues that new legislation of this kind would be highly desirable. And so it goes, with the odd exception, for many of the objections.

It is a pity that Van den Bergh neglected to discuss and counter these points of criticism explicitly.[136] Driven deep into the defence, in a personal account in *Het Vaderland*, he expressed his deep indignation regarding the treatment he received:

> I find it undeniably distasteful to have to write this now. Once again, all this really is of no concern to anyone, but I will not allow my scholarly reputation to be insulted without defending it.[137]

The scholarly reception was more positive.[138] The speech was discussed in the leading legal journal *Nederlands Juristenblad* by H.L.M. Kramer, who supports Van den Bergh's idea and 'warmly' recommends studying it; he has only a few 'modest

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this coincides with what he himself stated in a piece submitted to *Het Vaderland*, included in 'De democratische Staat. Tegenover niet-democratische partijen' ('The democratic State. Against non-democratic parties'), *De Residentiebode*, 23 December 1936.

[136] *De Tijd* came to the same conclusion: 'What good is it to the critics to be informed that Prof. C.W. de Vries has ordered 225 copies for his students?'; see 'Een verdediging. Prof. G. van den Bergh over zijn inaugurale rede' ('A defence. Prof. G. van den Bergh on his inaugural lecture'), *De Tijd*, 22 December 1936.

[137] Included in 'De democratische Staat. Tegenover niet-democratische partijen' ('The democratic State. Against non-democratic parties'), *De Residentiebode*, 23 December 1936.

[138] Eskes 1988, p. 254.

objections on some subordinate points'.[139] The eminent jurist and later Leiden professor Gerard Langemeijer also enters the debate at this point. His criticism: Van den Bergh's idea leads to the possible will of a *future* majority prevailing over 'the established will of the majority of today'.[140] Kramer writes a firm response: Langemeijer misunderstands the 'essence' of democracy. He mistakes the majority principle, merely a necessary method of decision making, for the key principle on which democracy rests – 'an overly simplistic proposal', according to Kramer.[141] At the end of 1936 the discussion among legal scholars even ended up in the daily press via a piece submitted to *De Tijd*: under the title 'legal polemic', 'Van den Bergh's bulldog' debated on, this time with jurist C.Ch.A. van Haren.[142] A modest compensation for Van den Bergh, just before the storm surrounding his inaugural lecture died down.

## 7.5 Conclusion: Democracy as an End, Not as a Means

In the 1930s three books on democracy appeared within a short period of time. All three were written at the University of Amsterdam, the authors were all SDAP members. In 1933 Bastiaan van den Tempel was granted his PhD on *Democratische vrijheid en socialistisch recht* (Democratic freedom and socialist justice). A year later the previously mentioned *Problemen der demokratie* (Problems of democracy) by professor Willem Bonger was published. The trio of books was completed the following year by Van den Bergh's *De democratische Staat en de niet-democratische partijen* (The democratic state and the non-democratic parties). The three books illustrate the divisions within the SDAP on a prominent question: what is the relationship between democracy and socialism? Which is the end; which the means?

Van den Tempel is explicitly named in Van den Bergh's inaugural lecture. The mention is anything but approving:

> I have forcefully contested Mr Van den Tempel's proposal: I reject it completely.[143]

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[139] Kramer 1936a, p. 824; see Eskes 1988, p. 252–253. Kramer's main objection is directed at Van den Bergh's choice to base the legal part of his argument on the second part of Article 3 of the 1855 Wet vereniging en vergadering (Association and assembly act). Kramer sees the third part (which Van den Bergh ignores) as more appropriate; see p. 822–823. He later hones this argument in Kramer 1936b, p. 994.

[140] Langemeijer 1936a, p. 884; see Eskes 1988, p. 254.

[141] Kramer 1936b, p. 991. In a postscript Langemeijer denies that he sees the majority principle as the essential characteristic of democracy, See Langemeijer 1936b, p. 995; for details on the debate between Kramer and Langemeijer, see Eskes 1988, p. 253–254.

[142] 'Het begrip: "goede zeden". Een juridische polemiek' ('The concept of "public morality" [goede zeden]. A legal polemic'), *De Tijd*, 8 December 1936. Thomas Henry Huxley (1825–1895), grandfather of author Aldous Huxley, called himself 'Darwin's Bulldog' and faithfully defended Darwin's ideas against 'the many attacks from ecclesiastical and other sides'; see Cliteur 2001, p. 11–12.

[143] Van den Bergh 1936a, p. 27. Van den Bergh had reviewed Van den Tempel's PhD dissertation in *De Socialistische Gids*; see Hartmans 2012, p. 206.

Van den Tempel's sharply rejected proposal was that under certain circumstances a dictatorship can be justified in order to realize socialism.[144] In Van den Tempel's view the order was clear: socialism is an end because it is *objectively* right; democracy was an interchangeable means.[145] That is not to say that they were equal, but if democracy did not lead to socialism, a transitional dictatorship could be an acceptable alternative.[146]

Bonger was of a very different opinion. In opposition to the trend of youthful revolutionary zeal, he clung to the social democratic tradition which in his view had always defended the attainments of democracy.[147] In Bonger's work democracy held a special position. With reference to associations and 'natural peoples', *Problemen der demokratie* argues that democracy is *the* form of government when humans start organising themselves.[148] To Bonger democracy might still be a means, but it is the *only* means; there are no alternatives.[149]

Van den Bergh takes the opposite view to Van den Tempel. For him democracy is always an end, socialism the means.[150] At the SDAP Easter conference in 1936 he

[144] Van den Bergh 1936a, p. 27.

[145] See Van den Tempel 1933, p. 54. For the objective principles, see p. 55–58. They are: 1) every human being must fight for the development of the entirety of humanity, and 2) the opportunity for participation in this development must be shared as equally as possible among the individuals (the equality requirement). For a detailed discussion of Van den Tempel's dissertation see Hartmans 2012, p. 203–207 (in particular 203).

[146] See Van den Tempel 1933, p. 168 (transitional dictatorship) and 219–220 (dictatorship as last resort, if democracy is not sufficient). See also p. 93: 'Freedom (here assumed to be *democratic* freedom, BR) can only be a means for the socialist movement.'

[147] See Tames 2006, p. 249; Van Heerikhuizen 1983, p. 118.

[148] See Bonger 1934, p. 80; Van Heerikhuizen 1983, p. 129–130. Bonger also defends democracy on technical grounds: only democracy is capable of enabling peaceful transfer of power, see Bonger 1934, p. 108; *and* by pointing to its capability of correcting mistakes, see Bonger 1934, p. 109.

[149] The question is whether this puts democracy on an equal footing with socialism, or even places it higher. Van Heerikhuizen appears to suggest an equal footing (see Van Heerikhuizen 1983, p. 125–126); Tames seems to give it higher priority (see Tames 2006, p. 250). In my view there is more truth in Hartman's interpretation that to Bonger, just as for Van den Tempel, democracy really was a means to an end, but that in Bonger's view, in contrast with Van den Tempel, any other means would be *inconceivable*; see Hartmans 2012, p. 205. What Bonger writes in his *Evolutie en Revolutie* (Evolution and revolution, 1919) fits in with this idea: 'The only means of achieving this great revolution which will be recognized in human history, is the gradual, peaceful way of democracy, springing from deep-rooted conviction. All other attempts, coups, dictatorships etc., since they are irreconcilable with the proper functioning of the economy, will necessarily fail, ending only in chaos and no higher order. May democracy thus conquer and be made complete and defended against attacks and never harmed,' cited in Van Heerikhuizen 1983, p. 128.

[150] See Pans 1985, p. 174.

had already explained this position and in his inaugural lecture he repeated it.[151] Van den Bergh resists the temptation to which so many other intellectuals of the time fell prey: enforcement of a utopian ideal by an elite who sidestep the indecisive democracy, working without the people but 'for the people', on the way to the 'true democracy' or another ideal. In his view socialism is the means to fully realize the democratic promise of respect for the individuality of every human being. Freedom of belief and religion, and equality before the law, can only fully realized through socialism, but that society will be *democratic* above all. Van den Bergh words this relationship as follows:

> He who does not accept socialism is free in his belief; but he who rejects freedom of belief will be the victim of his own doctrine![152]

This characterizes the place of socialism within the boundaries of a militant democracy: socialism is merely one of the options, and has Van den Bergh's strong preference, but it can never replace democracy.

These were remarks of no small significance. In *Vijandige Broeders?* (Enemy brothers?) Dutch historian Rob Hartmans shows that Van den Bergh and Bonger firmly set the SDAP on the tracks to democracy by breaking with the antidemocratic Marxist direction.[153] The SDAP was eventually a party which often struggled with a militant, revolutionary left wing.[154] This was particularly disadvantageous for a party which still needed to work on its democratic credibility after its former leader

[151] In the speech at the Easter conference Van den Bergh puts it as follows: 'If I had to see democracy and socialism in a means-end relationship, then in my personal view socialism would have to be seen as the means and democracy as the end,' and, 'We social democrats reject all tyranny, every dictatorship, even in order to achieve socialism.' (Van den Bergh 1936b, p. 4 and 7 respectively). Van den Bergh also speaks about a certain 'young fellow party member' with different views on these issues (Van den Bergh 1936b, p. 6). On the Easter conference, see also Pans 1985, p. 191–192. For the relevant section in the inaugural lecture see Van den Bergh 1936a, p. 20–21 and 26–28.

[152] Van den Bergh 1936a, p. 28.

[153] Hartmans 2012, p. 206–207. Other developments undoubtedly contributed (see Hartmans 2012, p. 207–211). For instance there was a fourth influential book, the report *Het staatkundig stelsel der sociaal-democratie* (The political system of democracy, 1935), co-authored by Van den Bergh, which firmly rejects 'any form of dictatorship' in favour of a 'plea for parliamentary democracy with strong state authority'; see Knegtmans 1994, p. 100. On the basis of this report a resolution (adopted during the SDAP conference, April 1936) expressly states that the party honours democracy, 'not only as a method in the battle for socialism, but also as a principle and as a goal'; the resolution is included in Van den Bergh 1936b; see p. 15. To Josephus Jitta the report and the following SDAP conference were reasons to conclude in *De Groene Amsterdammer* that the SDAP had once again taken a step in the direction of becoming a true democratic party (see Hartmans 2012, p. 211). He was confronted with prickly commentary on this by SDAP leader J.W. Alberda in *Het Volk*: in what sense was it a step in the direction of a democratic party? Alberda attempts to demonstrate in detail that the SDAP has always been loyal to democracy, referring to a number of resolutions and reports. He also distances himself expressly from a few party members' 'personal views', including those of Bastiaan van den Tempel. See Alberda 1936. The argument is not very convincing; one only need look to Alberda's predecessor Troelstra to see that the claim that they were '*always* purely democratic' requires some further qualification (on Troelstra in this connection, see Tames 2006, p. 249).

[154] See Knegtmans 1994, p. 63–117, especially p. 82–117.

Pieter Jelles Troelstra's failed attempt at revolution in 1918.[155] Within the SDAP's longstanding 'dual character', revolutionary in origin and reform-oriented in practice, the parliamentary democratic direction now definitively had the upper hand.[156]

At the same time, of the Bonger-Van den Bergh duo it was Van den Bergh who formulated the idea of democracy as an end *in itself*. Ultimately in his view we wanted to live a democratic life above all. Freedom of thought was central. Socialism could subsequently make a democracy flourish. This unique and heartfelt commitment to democracy probably explains the fact why it became George van den Bergh who would lay the foundation for the idea of militant democracy in the Netherlands.

Freedom of thought also played an important role in the lecture with which Van den Bergh bade farewell to the University of Amsterdam in 1960. The central idea of that speech is concentrated in the figure of a French army rabbi; on the battlefield he held up a crucifix for a dying Catholic soldier.[157] It was symbolic for Van den Bergh's interpretation of freedom of thought and his respect for the individuality of everyone.[158] The title of his 1960 farewell lecture was: *De demokratische staat en de demokratische partijen* (The democratic state and the democratic parties). His collected work begins with his inaugural lecture and ends with this farewell lecture, both on the defence of democracy. In the intervening period (1936–1960) Van den Bergh, who during the war had been incarcerated in Buchenwald, published nothing on the subject.[159] In his farewell lecture Van den Bergh explicitly reflects on the initial reception, as well as the later vindication, of his ideas. We therefore end this contribution with Van den Bergh himself, looking back on his inaugural lecture:

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[155] This famous 'mistake by Troelstra' was plainly percieved as an attack on democracy, see Tames 2006, p. 249.

[156] On this 'dual character', see Perry 1994, p. 61.

[157] Van den Bergh 1961, p. 86. The valedictory lecture is briefly mentioned in Schuijt 1995, p. 7–8.

[158] Based on a number of individual cases (including among others kosher food, the ban on processions, the prayer before municipal council meetings and subsidies for church building) Van den Bergh makes the broad reach of his interpretation clear (Van den Bergh 1961, p. 85–88). He does criticize the role played by confessional parties in the Dutch system of government (Van den Bergh 1961, p. 90). We read more on the subject in his 1958 book *Hoofdlijnen van het Nederlandse Staatsrecht* (Outlines of Dutch constitutional law). To Van den Bergh the fundamental opposition in politics is between progressives and conservatives, which of course leaves room for more than two parties; they are simply always different mixes of the same opposition. In Van den Bergh's view that opposition is *provided by nature*, because it follows from 'the nature of human personality'; it is also necessary for the proper functioning of democracy. Confessional parties, by contrast, are grouped around statements of faith, with members often holding diametrically opposed ideas on important political problems. They have effectively organized themselves around the wrong, politically irrelevant, principles. In Van den Bergh's words, 'From the perspective of constitutional law, that is highly regrettable, because it means that the foundation on which democracy is built is extremely shaky.' See Van den Bergh 1958, p. 57–58. His student A.A. De Jonge adopts this criticism in part, as shown by his critical discussion of the role of confessional parties in the democratic crisis of the interbellum; see De Jonge 1968, p. 19–20; on Van den Bergh as his teacher, see p. 3. For a recent evaluation of the future for Christian politics, see Klei and van Mulligen 2014.

[159] As also shown by the detailed bibliography, provided by N. Chr. E. van den Bergh-Marcus, in Van Poelje 1960; see p. 290–294.

> The reception of my lecture by the press was generally anything but friendly. ... Even circles of otherwise kindred spirits were far from enthusiastic. There the accusation was frequently, 'Undemocratic!' But everything turned out all right in the end. Eyes have been opened by the worst possible misery. In the spring of 1941 I gave a lecture with the same content to the law faculty of Buchenwald, a faculty with more public law professors than any Dutch university. There, where a large number of the victims of the antidemocratic Nazi practices were present, my thoughts were welcomed with willingness and enthusiasm. There they were pleased to hear their daily reflections on practice supported by a lucid theory.
>
> And now! I merely have to read you the closing article of the renowned Universal Declaration of Human Rights, unanimously accepted in 1948 by the General Assembly of the UN: (Art. 30) 'Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and the freedoms set forth herein.'
>
> And also from the European Convention on Human Rights (Rome 1950), which directly binds the undersigned, including our country. Article 17 states in almost the same words:
>
> '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 of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the convention.'
>
> That, in a nutshell, is what I meant to say in my inaugural lecture, so I am not dissatisfied.[160]

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[160] Van den Bergh 1961, p. 82–83.

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# Chapter 8
# L'amour de la démocratie *versus* the Dictatorship of the Constitutional State (Rechtsstaat). The Defense in Democracy Itself


**Afshin Ellian**

*Higher than actuality stands possibility.*

*Martin Heidegger (Martin Heidegger, Being and Time, translated by John Macquarrie and Edward Robinson, Oxford: Blackwell 1995, p. 63.)*

**Abstract** Current threats and developments raise the question whether democracy still functions. This chapter provides a philosophical analysis of democracy as a political regime and as a 'form' of society. The essence of democracy will be addressed by using the ideas of Lefort and Arendt; while the concept of a 'regime' is studied by analysing key texts of Plato and Aristotle, stating that this regime constitutes a society that is open to the possibility. The 'openness' of democracy is then compared to the ontological inversion of the Aristotelian ontology by Heidegger; democratic openness is an openness to the unexpected and the possible. This means that this 'possibility' *can* also be undemocratic. Therefore, the 'Weimarian' debate between Kelsen and Schmitt on a 'constitutional dictatorship' is discussed, that is a dictatorship in its *classical* sense (as a Roman legal concept), in order to defend the state and the legal order during a state of emergency. This chapter will, however, argue for deriving the militancy of democracy from within democracy *itself*, rather than from the constitutional state (rechtsstaat), by analyzing Derrida's concept of 'democracy to come' and Montesquieu's view on democracy. The chapter con-

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cludes by stating that democracy is indeed a fragile regime – it produces a conflictual form of society and is constantly exposed to internal and external threats – but remains a convincing regime.

**Keywords** Democracy · Constitutional dictatorship · Militant democracy · Plato · Aristotle · Arendt · Schmitt · Lefort

## 8.1 Introduction

The optimistic view that democracy would conquer the world in the wake of the fall of the Berlin Wall in 1989 has long since passed. The Soviet Union was dissolved precisely 25 years ago, becoming a historic testament to the final collapse of the last totalitarian regime in Europe. The end of history was heralded from the other side of the Atlantic: liberal democracy as the final bastion in history. This euphoria has now dissipated. The danger of succumbing to doubt in democracy is not limited to the East; this danger even looms in the West. Donald Trump's success in the United States and the rise of the Party for Freedom in the Netherlands has compromised some people's faith in democracy, which seems to reflect the idea that one may only appreciate democracy if the outcome of general elections aligns with the existing political situation. The increasing terrorist threat, the rise of 'populist' parties, the Ukraine referendum in the Netherlands (2016) and the Brexit raise the question whether democracy still *works*. It does: the mentioned democracies produced fair and peaceful elections and transitions of power, or the ratification of new treaties. Neither side of the Atlantic has witnessed the advent of a military regime.

It appears that democracy once more stands in need of being promoted. Jacques Derrida (1930–2004), in one of his last public conversations, discussed democracy and dialogue with an Algerian delegation. With respect to a peaceful dialogue with the Arab-Islamic world against the backdrop of Islamism, he proposed one has to accept a common principle:

> (…) the common acceptance of the democracy to come that I mentioned earlier, which presupposes deconstruction, the deconstructive question raised on the subject of the sovereignty of the nation-state, the authentic secularization of the political, that is, the separation between the theocratic and the political.[1]

The 'democracy to come'[2] is truly secularized, meaning that citizenship rather than a religious identity is decisive. Derrida rightly described democracy's strength in terms of a political system – 'a model without a model –, since democracy accepts its own historicity, i.e., its own becoming. This is self-criticism; it carries within itself, so to speak, its self-criticism and perfectibility.'[3] Since democracy is to come, it is a promise. In the name of this promise anything in a democracy may be criti-

[1] Chérif 2008, p. 53.

[2] Derrida 2005, pp. 108–114; Bennington 2004, pp. 599–613.

[3] Chérif 2008, p. 42.

cized and questioned. Democracy to come, *la démocratie à venir*, is a developing movement, which brings a self-correction mechanism with it. This is the true and perhaps sole concept of militant democracy. The aspect of militancy follows from democracy itself rather than from other phenomena or concepts.

Democracy is, to be sure, a fragile regime which, moreover, engenders a conflictual form of society. Totalitarian despotic movements can rise to power through the democratic process. All forms of government include a sort of defense mechanism for fear of being disbanded, but what about the *democratic* aspect? Democracy is irreconcilable with dictatorship in general, and especially with a *despotic* dictatorship. Democracy is also an independent regime, which is specified formalistically and in terms of procedure. The constitutional state (or, by its other denomination, the rule of law) is a basic legal form of a state, which is not necessarily democratic. Those who seek to act dictatorially in the name of the constitutional state in order to defend it may base their actions on just or unjust grounds. That is not, however, how militant democracy is to be understood. It would be more apt to qualify it in terms of a militant constitutional state,[4] which is in fact the dictatorship of the rule of law.

Why is the defense of a democratic regime, which is still a way of life, predominantly a theoretical rather than an empirical inquiry? Donald Loose rightly states: once democratic regimes 'cannot legitimize themselves otherwise than by their factual existence and ability to maintain themselves, they stand in need of being justified by the very nature of their regime.'[5] This is a theoretical discussion. Referring to Machiavelli, Loose subsequently indicates the militancy of a republic: 'The militancy of a republic is only apparent to those who already adhere to the principle of republicanism, or to a society which has already adopted the republican mindset.'[6] A fine formulation! This is precisely what Montesquieu calls *Amour de la démocratie*.

My objective is the following. I will first discuss democracy in the context of the end of history. Before discussing democracy as a regime, I will examine the concept of regime. I will discuss the essence and vulnerability of modern democracy by means of the ideas of Claude Lefort (1924–2010) and Hannah Arendt (1906–1975). I will then immerse myself in the concept of dictatorship, which is unwarrantedly confused with that of tyranny. Dictatorship depoliticizes and thus neutralizes the domain of the political, while democracy continues in the sense of a *société politique* (political society). I will end by deriving the militancy of democracy from democracy itself, rather than from the constitutional state or the state in general. Democracy appears, in spite of the many dangers and flaws it carries with it, a commendable regime as well as the political horizon. Plato warned us over two millennia ago for the birth of tyranny from democracy.

[4] Cf. Jasper Doomen, 'Mitigated Democracy.' *Archiv für Rechts- und Sozialphilosophie* vol. 102, no. 2, p. 293.

[5] Loose 1997, p. 170.

[6] Loose 1997, p. 170.

## 8.2 The End *in democracy* or the End *of democracy*

It is sometimes said that modern democracy is unthinkable without a secularized form of Christendom.[7] The Reformation[8] has undoubtedly been a decisive step forward in Western history, providing the foundation for a transition to a new political and cultural order. This transition was instrumental in realizing a synthesis between Antiquity and the Middle Ages, between text and interpretation, between the letter of the law and the spirit of the law, between polytheism and monotheism and between the openness of politics and its restrictiveness. This synthesis ultimately brought forth a new regime: modern democracy. Initially, modern democracy was not presented as a fully elaborated plan in political philosophy or in the various political theories; it has gradually taken shape throughout experiences of joy and tragedy. Modernity secularized political-theological terminologies and it was the same modern world that created the conditions for the development of democracy. Democracy has, then, in spite of the many wars and conflicts the 19th century has seen, developed into a form of society. We are indebted to Karl Marx for this concept and form of society. Modern democracy is, accordingly, not just a regime but a form of society as well: a democratic culture.

We do not live in the era of *medium tempus*, the time in-between, for the time preceding our era has been incorporated into our science and knowledge. We may end either in democracy or in the abyss of democracy. Does that mean that we are Nietzsche's last man? Most despicable of all is the last man, according to Nietzsche's Zarathustra:

> The time will come when man can no longer give birth to a star. Woe! The time will come of the most despicable man, who can no longer despise himself. Behold! I show you the last man. What is love? What is creation? What is longing? What is star?' – the last man asks this and blinks. (…) 'We have found happiness' – the last men say this and blink.[9]

Are we the despicable ones who have changed, in oblivion, into machines? By now, we should be dissolved in the happiness brought forth by modern democracy and the rationality associated with it. We are drowning in our own happiness! What an ambiguous expression!

The ambiguity of the last man, with his ultimate happiness, emerges pithily in Francis Fukuyama's *The End of History and the Last Man* (1992). There are no hordes at the gate anymore, since capitalist liberalism is the final destination of all conflicts of ideas. Everything is incorporated in it: Christianity (equality, i.e., the welfare state), Judaism (the law) and the Enlightenment (freedom and the institu-

[7] In a broader context, Carl Schmitt says: 'All significant concepts of the modern theory of the state are secularized theological concepts (...).' Schmitt 2005, p. 36.

[8] According to Adolf von Harnack, Martin Luther is in several respects an old-Catholic phenomenon. At the same time, he famously concludes, in his comprehensive study of Christian dogmas, that Luther inaugurated the modern era by hammering his theses to the church in Wittenberg. Von Harnack 1893, p. 541ff.

[9] Nietzsche 1893, p. 15.

tionalization of curiosity). The Wall had fallen. The final great enemy of Western liberal democracy had capitulated and disbanded itself. The universality of history is a Hegelian invention, but the dialectical process – in terms not of the ideal but of the actual end of history – is the achievement of Karl Marx. He superimposed the idea on political reality. A greater irony than this has never been witnessed, the end of history is heralded by disbanding a Marxist regime:

> At the end of history, there are no serious ideological competitors left to liberal democracy. In the past, people rejected liberal democracy because they believed that it was inferior to monarchy, aristocracy, theocracy, fascism, communist totalitarianism, or whatever ideology they happened to believe in. But now, outside the Islamic world, there appears to be a general consensus that accepts liberal democracy's claims to be the most rational form of government, that is, the state that realizes most fully either rational desire or rational recognition. If this is so, why then are all countries outside the Islamic world not democratic? Why does the transition to democracy remain so difficult for many nations whose people and leaderships have accepted democratic principles in the abstract?[10]

As early as 1992, Fukuyama isolates the Islamic world from the end of history in the sense of the struggle for recognition. He does not explain what might be the reason for such an exclusion from the democratic desire shared by peoples in general. Modern democracy has emerged from Europe's Ancient and Christian history, whereas Islam, by contrast, opposes this history by qualifying it as a period of *Jahiliyya* (which means ignorance, and in fact also refers to that which conflicts with the Islamic era of omniscience). Islam, isolated from the triumphant idea of the end of history, is banging on the door of Europe through terrible terrorist attacks. Islam is here, in Europe. Political Islam – meaning the legal and political manifestation of Islam – challenges Western liberal democracy from within the European cities themselves. The challenge of radical Islam, which was excluded to maintain in the end of history thesis, actually proves pivotal for the continuation of modern democracy as a peaceful form of society.

The development of universal history terminated in the West. Now, let us return to political reality.[11] The world was perplexed in the 1980s by two words: '*evil empire*'. President Ronald Reagan (1981–1989) brought the reigning doctrine, which had governed the relation between East (i.e., the Eastern Bloc) and the West, to an end in a speech on March 8, 1983. He launched a stern Soviet policy, using a teleological locution, to wit, the expression of 'evil', at a gathering of the 'National Association of Evangelicals':

> I urge you to beware the temptation of pride—the temptation of declaring yourselves above it all and label both sides equally at fault, to ignore the facts of history and the aggressive impulses of an evil empire, to simply call the arms race a giant misunderstanding and thereby remove yourself from the struggle between right and wrong and good and evil.[12]

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[10] Fukuyama 1992, pp. 211–212.

[11] The following reconstruction is based on the most recent study of this history: Plokhy 2014, pp. 319–406.

[12] Glass 2011.

This was a remarkable strike at the opponent in terms of ideology and politics. The unexpected had been set in motion by the American president. The effects of his stance became apparent a few years later, when the evil empire was disbanded. Twenty-five years ago, on December 7, 1991, the leaders of three Slavic peoples, constituting the Soviet Union's backbone, convened in the Białowieża Forest (officially in Minsk) to realize the Belavezha Accords, in order to consolidate the end of the Soviet Union: Russian president Boris Yeltsin (1931–2007), Belarusian leader Stanislav Shushkevich (1934-) and Ukrainian leader Leonid Kravchuk (1934-). Five Islamic nations in the Soviet Union had at that time already decided to leave the empire.

Those present realized a treaty containing fourteen articles. The first article starts with the following historical observation: 'We, the republic Belarus, the Russian Federation and Ukraine, the states that have jointly founded the Soviet Union in 1922 (…), establish that the Soviet Union ceases to exist as a subject of international law and a geopolitical reality.'[13] The Belarusian leader contacted Mikhail Gorbachev in order to convey the obituary of his empire. The Soviet Union, and with it the Bolshevik revolution, was buried forever. Various countries in different continents gained new neighboring countries. On December 25, 1991, Gorbachev formally abdicated his position, having become the last leader of the Soviet Union. It was a true liberation for the Baltic States. In other regions, however, such as Tajikistan, armed conflicts arose. The civil war that plagued Ukraine commenced two decennia later. Chaos and freedom were the most significant fruits of the end of a world empire. Not only did the Soviet Union come to an end, the same is true of Tsarist Russia. After all, Russia ceased to be a world power after December 25, 1991. There was no longer a need for anyone to take Russia into consideration any longer.

The Russian power did not meet its end at the battlefield. Not a single bullet was fired. Nor was there a use of nuclear weapons. It is precisely against this backdrop that president Vladimir Putin deems the disbanding of the Soviet Union the single greatest geopolitical catastrophe of the 20th century. He thereby refers to the beginning of the end, when the Slavic trinity sealed the fate of the Soviet Union and consequently that of Russia. From Putin's perspective, a worthy leader has at last emerged for the Slavic peoples: Russia, led by Putin. They have only one geopolitical enemy, an enemy coming from the south: Islam. What about the enemies from the West? The past enemies were Napoleon Bonaparte and Adolf Hitler. There was an overwhelming joy, and rightly so, when Europe's final totalitarian regime, the Soviet Union, was disbanded. All the same, even today the Russian people still do not live under a democratic regime, and the Russian Federation has not yet been able to evolve into a democratic society with democratic ethics and a democratic legal order.[14]

[13] Plokhy 2014, p.309.

[14] Garry Kasparov writes, in his chilling account of the rise and fall of democracy in Russia, that Putin disposes, just like many other modern autocrats, of means, 'an advantage the Soviet leadership could never have dreamed of: deep economic and political engagement with the free world.' Kasparov 2015, p. xiv.

The only Islamic country on the borders of Europe with a strong secular tradition and alliance with the West (NATO) has distanced itself from democracy. Turkey has metamorphized, under the leadership of Recep Tayyip Erdoğan, into a tyranny.[15] Free Europe is again in danger of being surrounded by hostile tyrannical regimes. This development has brought about severe afterpains in Europe. This prompts the following question: can democracy survive its enemies and perhaps, *and principally*, itself? In order to have the means at our disposal to answer this question, we need to inquire what might, from a legal-philosophical point of view, be the essence of a democratic regime.

## 8.3 Democracy: A Tale of Eventuality and Decay

A central tenet for the Ancient Greeks was that everything develops or moves cyclically. The political order has, accordingly, a cyclical nature of its own. It was Plato who, for the first time in history, more or less systematically reflected on different regimes (i.e., forms of political order). In his work *Politeia* Plato presents, in addition to a discourse about what he considers to be the ideal state, a dialogue about the rise and fall of regimes. This is presented as an analogy of natural processes: '(…) This is the dissolution: in plants that grow in the earth, as well as in animals that move on the earth's surface, fertility and sterility of soul and body occur when the circumstances of the circles of each are completed (…).'[16]

This is a proper translation, but some other translators unwarrantedly use the word 'revolution' to refer to the completion of the circles.[17] This is no mere translation matter or trifling contention, for a fundamental issue is at stake here, as becomes apparent once one realizes that the Greeks themselves had no word for 'revolution'. Nor did they know the political category of revolution. They used the word 'metabolè', which primarily denotes a cyclical rotation. This is what happens in nature. An alternative translation one sometimes finds in present-day translations in English for the word 'metabolè' is 'transformation'.[18] According to Plato, and, with him, the political culture of the time, there are five forms of government: aristocracy, timocracy, oligarchy, democracy and tyranny. In *Politeia*, Plato describes the regimes and the respective types of person that suit them. It appears that each constitution brings forth a specific type of person; a regime may contribute in forming or deforming the cultural and political DNA of individuals.

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[15] Leiden professor of Turkish studies Erik-Jan Zürcher was positive that Turkey was moving ever closer towards Europe. He denounced his own analysis with respect to Turkey and Erdoğan in 2016, and sent back the prestigious award he had received in 2005 to the Turkish government. 'Europa moet vooral kappen met Turkije', in: *De Volkskrant* of May 14, 2016.

[16] Plato 1888, 546a.

[17] Plato 2006a, p. 255. Allan Bloom also uses the word 'revolution' in his translation: Plato 1991, p. 224.

[18] Plato 2006b, p. 249.

In Plato's discourse, the very rise of democracy goes together with rumor and violence, since '(…) democracy comes into being after the poor have conquered their opponents, slaughtering some and banishing some, while to the remainder they give an equal share of freedom and power (…).'[19] Plato's response to the question why citizens are free in a democracy (and, significantly, have the freedom to express themselves with respect to state affairs) is almost modernist: 'I should think, then, that there would be a wider variety of types of people in this society than in any other.'[20] Plato points out that those who want to realize a state at random should inquire democracy, which looks like a marketplace for forms of government. May this not be seen as a warning for the rise of antidemocratic movements that seek to realize a state to their liking? That is why the question which occupies us is raised: '(…) Does not tyranny spring from democracy in the same manner as democracy from oligarchy.'[21]

It is intriguing to note how some threats and questions are forever associated with a concept: 'When a democracy which is thirsting for freedom has evil cupbearers presiding over the feast, and has drunk too deeply of the strong wine of freedom, then, unless her rulers are very amenable and give a plentiful draught, she calls them to account and punishes.'[22] An excess of freedom is fatal to democracy, so that, just as in any natural process, the opposite result[23] is accomplished: 'And so tyranny naturally arises out of democracy, and the most aggravated form of tyranny and slavery out of the most extreme form of liberty.'[24] The type of person that suits tyranny is someone who '(…) either under the influence of nature, or habit, or both, (…) becomes drunken, lustful, passionate.'[25] This eternal wisdom cannot be exceeded! Regime change was taken to be a cyclical change, just like any other cyclical movement and transformation in nature. Everything already existed; nothing could come from nothing. That is why Plato considered himself able to describe the nature of regimes and the causes of changes, or the transition to a new regime, in abstract rather than temporal terms.

Aristotle's *Politica* is the oldest and most comprehensive political-philosophical treatise, systematically analyzing and describing the realms of politics and praxis (i.e., action). In addition, it is a description of the existing political regimes. Aristotle commences his work by criticizing his mentor Plato, rejecting the practice of commonly sharing property and women. Aristotle studies, describes and analyzes the

[19] Plato 1888, 557a.

[20] Plato 1888, 557c.

[21] Plato 1888, 562a.

[22] Plato 1888, 562c, d.

[23] Plato 1888, 563e, 564a. Here too, where Plato speaks of plants, bodies and regimes, which, in their natural process, realize, through excess, the opposite result, the cyclical takes precedence ('metaballein'). See Plato 2006b, p. 312.

[24] Plato 1888, 564a.

[25] Plato 1888, 573c

diverse forms of political regimes, using, in contradistinction to his teacher, not just philosophical methodology but also those typical to the fields of sociology and legal philosophy as well. Book IV of Aristotle's work opens with his famous remark that it is the province of any craft (techné) and knowledge (epistèmè) which is not restricted to a part but rather concerned with the whole of the subject, to inquire everything which belongs to that subject.[26] Thus, a science which pertains to gymnastics considers which exercise is suitable, and for which type of body: '(…) the absolutely best must suit that [body] which is by nature best and best furnished with the means of life (…).'[27] We also need to answer the question, according to Aristotle, which exercise is suitable for the greatest number of people.

We note two important elements in this passage in Aristotle's work. First, he compares politics with the body and second, what we observe here is a realistic approach to politics. Not everything can be considered suitable for the greatest number of people. The corpus (body) will, once Christianity will have been institutionalized, serve in the description of politics in diverse of the profane and sacral. Aristotle's realism departs from the idealist approach to politics: which form of government is most suitable for a specific people? Aristotle says that we should not just study the best form of a political regime, but the specific form which may be realized and which is, in other words, attainable. What is needed, Aristotle writes, is this: 'Any change of government which has to be introduced should be one which men will be both willing and able to adopt (…).'[28] The existing constitutions display differentiations between different forms of democracy or oligarchy. There is, then, no single form of democracy. What is the constitution that is often translated 'as form of government'? The constitution (régime) is '(…) the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community.'[29] Three questions are, then, introduced here: (1) who may govern, and in which way? (2) who is the sovereign? and (3) what is the goal a community strives for within an established state? These three questions are indeed the most basic questions we can put forward to a regime. At the same time, they are decisive in determining whether a regime is legitimate.

Three constitutions, namely, monarchy, aristocracy and politeia, are described together with their degenerated counterparts, namely, tyranny in the case of monarchy, oligarchy in the case of aristocracy and democracy in the case of politeia. Yet the worst degeneration is the one which occurs in the case of the divine form of government, monarchy, while the least pervasive degeneration takes place in the case of democracy. This Ancient philosopher, one of whose notable feats is being the teacher of Alexander the Great, thought that '(…) barbarians, being more servile in character than Hellenes, and Asiatics than Europeans, do not rebel against a des-

[26] Aristotle 1916, 1288b. The original Greek text can be found in: *Aristotle Politics*, Loeb Classical Library, Cambridge/London: Harvard University Press 2005.

[27] Aristotle 1916, 1288b.

[28] Aristotle 1916, 1289a.

[29] Aristotle 1916, 1289a.

potic government.'[30] Their character is tyrannical. Aristotle marveled the Persians' inclination to tolerate a tyrannical regime. Aristotle took the fact that they did not change their regime as proof of their naturally servile disposition. Why is the word 'naturally' used here? Something which conflicts with a specific natural order will provoke its opposite; the fact that Persia's tyrannical regime did not provoke its opposite implies that it corresponded, at that time, with the development of that people (or those peoples). This is an almost empirical inquiry, similar to one we are to encounter later, in Montesquieu's approach.[31]

The regime of 'politeia', which has often been translated as a constitutional order, is a general concept which in fact at the same time refers to the concept of constitution in general, but Aristotle also uses it to point to a specific political order in which citizenship in connection to the laws is central. In that light, democracy is the constitution that exhibits the slightest degeneration (from 'politeia') compared to tyranny (from 'monarchy'), and compared to the greatest degeneration it is even the best constitution. The law is, to be sure, the essence of a political regime. After all, if the law is not supreme in a politeia, what remains can no longer truly be considered to be a politeia as a distinct constitution. 'Politeia' is an ambiguous word, referring to either a political regime or a form of government or a constitutional regime. Might this be based on the presumption that no political regime can exist without supremacy of the laws, at least to some extent? In my opinion, Aristotle's text provides sufficient evidence to think this is his position.[32] The causes of the respective variations of democracy and oligarchy lie in the composition of their populations. In my view, a drastic change of these compositions would, if it should corrupt a country's identity, neutralize the existing balance, possibly leading to tumult.

The next issue to discuss is decay. What is decay? A revolution? No, decay is nothing but the situation in which an existing regime is reborn, in the wake of its downfall, in a new, yet already existing, constitution. It is a sort of metabolism occurring in the body politic. There is a striking parallel, whether coincidental or not, since the Greek word for regime change is 'metabolè': a rotation, or a transforming metamorphosis. It is undoubtedly Hannah Arendt's merit to have made us aware of this difference, which appears at first sight to be a minute, linguistic one, between the concept of revolution in antiquity, unknown in antiquity, and the word 'metabolè': 'Changes did not interrupt the course of what the modern age

[30] Aristotle 1916, 1285a.

[31] Aristotle's spirit lived on in Montesquieu's work, the latter distinguishing three distinct regimes, namely, republic, monarchy and despotism. He discusses the relations between laws and forms of government as well as the decay of each constitution in particular. There is no mention of a revolution to realize a regime change beyond the purview of cyclical forms of government; he rather associates each regime form with a specific principle of its own. Once that principle is corrupted or neglected, the constitution decays. See Montesquieu 2000, pp. 10–11.

[32] In his chapter dealing with politeia, Aristotle discusses the reciprocity between the laws and the excellence of those who create them: '(…) it appears to be an impossible thing that the state which is governed by the best citizens should be ill-governed, and equally impossible that the state which is ill-governed should be governed by the best.' Aristotle 1916, 1294a.

has called history, which, far from starting with a new beginning, was seen as falling back into a different stage of its cycle, prescribing a course which was preordained by the very nature of human affairs and which therefore itself was unchangeable.'[33]

The decay, or relapse, resulted in 'stasis', uproar, civil strife or even revolt and, possibly, civil war.[34] Only two outcomes were conceivable. In the first case, one rebels against the regime in order to replace the existing regime by introducing another constitution (which was itself already existing). In the second case, one prefers to keep the existing regime in place, only dismissing the executors.[35] Civil strife was the consequence of inequality combined with the dominance of a certain group of people. This is an inconvenient truth for many regimes. Interethnic conflicts – the heterogeneous origin of the population – were also something Aristotle knew to be a cause of civil strife. The remainder of Aristotle's exposition on, inter alia, the preservation of a regime will remain undiscussed so as to create the necessary room to penetrate into the core of the problem regime change in modern times.

People in the Middle Ages were no strangers to revolts, either. Political theories were even developed in order to answer the question under what conditions a king may be deposed if he uses his power despotically.[36] That did not entail a regime change, though, for the regime itself (monarchy) remained in place. The Latin word 'revolutio' came into common use at the time of the Renaissance. This concept was initially mainly used to denote restauration, i.e., a reversal or reform to something original: reforms within the Catholic Church as well as a re-establishment of antiquity's artistic achievements. In the Italian city-states,[37] several concepts were used to refer to the changes occurring in the political struggle for the continuance of these miniature countries, such as 'mutatio rerum' and 'mutazioni del stato'. Arendt[38] ascertains that Machiavelli emphasizes the necessary role of violence in the political domain.[39] This is what revolutionaries of later generations will appeal to.

Modernity is characterized as a period in which revolutions are considered and experienced as the most common way of accomplishing a regime change. This raises the question: what is the origin of the word 'revolution'? Nicolaus Copernicus' *De revolutionibus orbium coelestium* (1543) has gained the epithet of the Copernican

[33] Arendt 1990, p. 20.

[34] Schmitt 2007, p. 28–29.

[35] Aristotle 1916, 1298a.

[36] Thomas Aquinas' *De Regimine Principum ad Regem Cypri* is an example of a reasoning of how a despot may be deposed. A modern translation is *Über die Herrschaft der Fürsten*, (On Kingship. To the king of Cyprus) Stuttgart: Reclam 1971.

[37] John Adams, one of the leader of the American Revolution and the second president of the United States, had, as becomes apparent from his essays, carefully studied the Italian city-states. *Vide* Adams 2004, pp. 291–335.

[38] Arendt 1990, p. 36.

[39] In his *Politik als Beruf* (1919), Max Weber continues along the lines of Machiavelli: 'It is the specific means of the *legitimate use of violence* as such, in the hand of human associations, which determines the peculiarity of all ethical problems of politics. He who always realizes contracts by this means, to whatever ends – and every politician acts thus –, is delivered to its specific consequences.' Weber 1919, p. 61, 62.

revolution for good reasons. Yet here, too, the focus lay on the mechanism that lies at the root of the rotating movement of celestial bodies. The word 'revolution' was later used in England in a markedly political context. Whose actions were characterized thus? Oliver Cromwell's? Even though Oliver Cromwell (1599–1658) was a revolutionary and had a king beheaded, he did not crown himself the new king, nor did he abolish the monarchy, assuming the title of 'Lord Protector'. The 'Glorious Revolution' of 1688, which ended the instability of James II's reign, was the merit of William III, who came to power together with his wife Mary. This was a restauration as a result of Dutch interference. The outcome is not hard to understand, for revolution is a recurring movement: it makes a reversion to a previous, original movement possible.

The word 'revolution' was later used by the founders of the United States of America. Sovereignty in the modern sense was established for the first time in the Netherlands, and brought forth a thriving and successful republic.[40] The Netherlands, and in particular the rational way in which it claimed sovereignty – by means of the Act of Abjuration (Plakkaat van Verlatinghe 1581) – became a source of inspiration for the founders of the United States.[41] What was the nature of the American Revolution? Is it justified to equate the American Revolution with all other revolutions of that time? Joseph Ellis rightly observes in his *American Creation*: 'If that is what the standard story of a revolution requires, then one of two conclusions about the American Revolution follows naturally: either it was not really a revolution at all but merely (or perhaps not so merely) a war for colonial independence, the first of its kind in the modern world, to be sure, but not a fundamental shift in the social order that left the world changed forever (…) The result is another contradiction, or perhaps a paradox: namely, an evolutionary revolution.'[42]

The revolution terminates the cyclical regime change; no cycle remains. A fictitious recurrence is available for the revolution, but this would not result in a regime in accordance with the existing constitutions. So, the revolution is a creative act on the basis of which a regime is created from nothing (creatio ex nihilo). Revolution in the sense of a modern political category is no metabolè. A revolution that opposes democracy, or a dictator, with the intent of establishing a democratic regime does not seldom end in the decay of democracy or the hopes of a democratic future. This was the fate of the Russian people, precisely 100 years ago: the October Revolution did not yield a democracy but a totalitarian regime. The same is true of the Iranian Islamic Revolution of 1979. The foregoing exposition shows that two moments are characteristic of all regimes in the world, to wit, a time of birth and a time of decay; this gives rise to the question whether a specific type of decay is characteristic of modern (post-totalitarian) democracy as well. This boils down to the question whether modern democracy could survive its own mode of existence.

[40] Israel 1996, p. 261–304.

[41] See, e.g., Federalist no. 20 (Madison to Hamilton). Hamilton et al. 2000, pp. 118–123.

[42] Ellis 2007, p. 21.

## 8.4 It Walks along the Edge of the Abyss and Lives in Crises

No decisive foundation (ground) is present for modern democracy, but it does have an abyss. This idea can be found in Martin Heidegger's philosophy on modernity and in Claude Lefort's political philosophy. Democracy's ultimate abyss is totalitarianism, which is not to be confused with the regular forms of tyranny. Totalitarianism is a *new* constitution (political régime). A totalitarian regime can only occur in modernity. What is it that characterizes modern democracy, the decay of which is said to result in a totalitarian regime? The definitive legal and political reception of modernity, and with it of modern democracy, was the fruit of the French Revolution, which heralded the rights of man and popular sovereignty; yet the Revolution transformed a short time thereafter into a totalitarian regime in the making, under the rule of Maximilien de Robespierre. The Revolution was, to paraphrase Alexis de Tocqueville, a cult of impossibility that became a new religion with martyrs of its own: '(…) This strange religion has, like Islam, overrun the whole world with its apostles, militants and martyrs.'[43]

These words by Tocqueville nowadays literally appeal to the imagination. The French Revolution became a paragon for all revolutionaries, transforming the state, with the revolution in mind, into a totalitarian state. Modern democracy has, in fact, been confronted from its very inception with its own specific abyss, which is a totalitarian regime. As Arendt observes, '(…) terror is the essence of totalitarian domination.'[44] According to Lefort, an insightful post-war French intellectual who inexorably criticizes the French Revolution in a number of essays, such as *La Terreur révolutionnaire* (The Revolutionary Terror) and *Penser la révolution dans la Révolution française* (Interpreting Revolution within the French Revolution), Robespierre hid, Lefort maintains, behind 'the mask of the Supreme Being in order to promote a dictatorship. (…) When the enemy of the people becomes the enemy of God, everything changes.'[45] Man promotes, from the very moment he is born, his own ending, his decay, his inevitable death. The same does not apply to a legal order or a regime, which are, after all, erected for eternity; in actuality, however, a regime is also born into an existence that carries with it the possibility of its own decay. Democracy does not, then, necessarily decay, but it does exist with the quality of its own possible ending, which is its fate.

It is characteristic of democracy, even in its present form, to be a state of division. Modern democracy is characterized by the principal distinction between power, knowledge and law. A totalitarian regime, by contrast, unites power, knowledge and law in a state which is organized and led by a carefully defined ideology and organization.[46] This distinction marks different influential domains within a democratic

[43] De Tocqueville 1983, p. 13; Lefort 1992, pp. 247–260.

[44] Arendt 1979, p. 464; cf. p. 466, where Arendt states that the essence of totalitarian government is total terror.

[45] Lefort 1988, p. 88; Lefort 1986a, pp. 118–119.

[46] Lefort 1988, pp. 12–13.

legal order, each with specific borders and border guards of its own. The law is guarded by independent and impartial judges, science is guarded by independent scientists and political power is guarded and checked by the people, being the foundation of democracy. The 'we', the necessary 'we', is identified in a totalitarian state with the representatives of the state, being adherents of the ruling ideology or party. In democracy, however, the 'we' is a problematic concept, for the question who 'we' is, is more difficult to answer here. To be sure, one may straightforwardly identify a 'we' in the sense of including some people in the legal order while excluding one or more others. One may also speak of a 'we' in terms of a specific faction, such as offenders versus law enforcers, scientists versus nonscientists, Christians versus non-Christians, etc. Such varieties of 'we' can never, however, transform into the 'we' as a more encompassing whole, i.e., the people, and that is the decisive issue: we, the people.

The divisiveness is in fact institutionalized in democracy through various distinctions and conflicting interests: '(…) There is no representation of a center and of the contours of society: unity cannot now efface social division', Lefort writes.[47] Is it to be inferred from this that a democratic people has no identity or self-determination of any kind? This is, if the answer were in the affirmative, a postmodernist perspective. With respect to this issue, Lefort writes: 'Democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent.'[48] Identity exists, but it is latent. In times of crisis, the latent becomes visible, touchable and present. Lefort emphasizes something often underestimated by politicians and intellectuals, namely, that the experience of an ungraspable society is not without problems. Society appears as an object, according to Lefort, because it is no longer engraved into a natural or supernatural order. Modern democracy seeks to somewhat shape the ungraspable society by means of diverse institutions such as the family, the state, authority, the fatherland or culture.[49] Should this process of shaping society fail or be in danger of failing, or appear to be incredible, the discontent will result in a crisis, so that the legitimacy of the institutions will be called into question. It is in this stage that Western democracy at present finds itself. That is why it is precisely now that a commonly shared language and history is immensely important in defining national identity.

The ungraspable society is also connected to the way in which power is conceived. The physical conception of power was beheaded by the time of the French Revolution. Catholic political theology could not persist without the concept of corpus. This does not apply to modern democracy. Indeed, modern democracy exists by the grace of the *absence* of a corpus. The power that is conceived from a symbolic level refers, in a democracy, primarily to an empty place: 'Power appears as an

[47] Lefort 1986b, p. 303.

[48] Lefort 1986b, pp. 303–304.

[49] Lefort 1986b, p. 304.

empty place and those who exercise it as mere mortals who occupy it only temporarily or who could install themselves in it only by force or cunning.'[50]

Claude Lefort reached the conclusion that modern democracy heralds the experience of an ungraspable and uncontrollable society, on account of which citizens experience a process of societal disintegration in reality, and sometimes even imagine such a process. The desire to cease the disintegration is present, be it latently or not, and is manifested in the desire for a heroic politician who ceases the disintegration. To paraphrase Hannah Arendt here: the philosophical mistrust vis-à-vis the world (in terms of the polis, or, more generally worded, politics) is increasing. Under certain circumstances, social cohesion is more easily threatened in a democracy than in other constitutions. The special condition pertaining to democracy is the presence of mass society. It is the task of politics to unite people and at the same time divide them up into certain categories (in groups, families and individuals).

What makes mass society so difficult to bear, according to Arendt, is '(…) the fact that the world between them has lost its power to gather them together, to relate and to separate them. The weirdness of this situation resembles a spiritualistic [séance] where a number of people gathered around a table might suddenly, through some magic trick, see the table vanish from their midst (…).'[51] What separates them and brings them back together has disappeared in this Arendtian example. As a result, '(…) two persons sitting opposite each other were no longer separated but also would be entirely unrelated to each other by anything tangible.'[52] The political order, a specific world of a specific people, resembles that table, bringing people together and separating them from one another. Social cohesion resembles that fictitious table as something which defines; because of its power to define, it brings people together. The more homogenous people are the easier it is to construct a common table, and, vice versa, the more heterogeneous people are the more difficult it is to construct one. Multicultural society and the far-reaching globalization of labor and capital have unmistakably led to a less of identity, and it is this loss that is already putting the political and societal relations in the West under pressure.

The ungraspable and uncontrollable democratic society is associated with the union of conflicting principles: '(…) on the one hand, power emanates from the people; on the other, it is the power of nobody (…).'[53] It is precisely here that one of the sources of the democratic crises is located: the people as the foundation of power, power which no one may permanently yield. This is the logic of democracy, a logic of conflicting principles which can only be considered paradoxical from the vantage point of a symbolic theory: the position of power is conceived as an empty place, which is, all the same, never really empty. Political elections bring forth the will of the people, and since this will is ever divided within itself, the outcome is that the – temporary – power is yielded by a majority. There is, then, no identification of – temporary – power and society. The real and the imaginary

[50] Lefort 1986b, p. 303.

[51] Arendt 1998, p. 52.

[52] Arendt 1998, p. 53.

[53] Lefort 1986b, p. 279.

legitimate the legislation and the procedures of decision-making. Lefort draws the most radical conclusion with respect to modern democracy: it is democracy in the form of a historical society that allows and preserves the indeterminacy. There is no eternal and immutable horizon. The indeterminacy of democracy is diametrically opposed to the absolute identity characteristic of totalitarian movements such as Nazism, Stalinism and political Islam. In democracy, history has neither a beginning, nor an end.

It is important to avoid a misunderstanding here. When Lefort speaks of indeterminacy, he does not denote a postmodernist (post-truth) society or democracy: 'The indeterminacy we were discussing does not pertain to the order of empirical facts, to the order of economic or social facts which, like the gradual extension of equality of condition, can be seen to be born of other facts.'[54] Anyone who – mistakenly – interprets Lefort in postmodernist terms, will end up in decisiveness or physical limitlessness in reality, which would spell the doom for a democratic regime. The symbolic order Lefort addresses should not be confused with concrete political discussions dividing a society up in terms of Left, Right, Globalist, Nationalist etc. All of these viewpoints have a claim to truth and a narrative of their own. It may not, accordingly, be inferred from this determinacy that they represent totalitarian movements. This may also be considered a warning to those relativists who study Lefort's work instrumentally and lightheartedly.

Democratic governments cannot and may not sell out their certainties to their citizens. All of their promises and decisions are only valid during the short period of their reign. The fate of Obamacare, which was introduced in 2010, and repealed in the wake of the presidential elections (2016), is a case in point. To be sure, several constitutional certainties are in place, but these may be revised in a democracy by a majority decision. Popular sovereignty, manifesting and realizing itself through periodic elections, is, in the end, the ultimate source of insecurity. Modern democracy and its economic manifestation, i.e., capitalism (in whatever appearance) will forever remain a source of crisis. Anyone who aspires to a society devoid of crises should start looking for a tyrant. Democracy is a successful yet simultaneously perilous form of society. In his essay 'Renaissance de la démocratie', published on July 10, 1989 in *Libération*, Lefort discusses two interconnected issues: the decay and decomposition of Soviet totalitarianism and the rebirth of democracy in the East. He raises the question whether we should limit ourselves to Isaiah Berlin's negative freedoms, or to the principle of constitutionalism, as if democracy may only be defined or understood in such terms. In his response, Lefort breaks free from the system of clichés about democracy with a strict relation to the constitution:

> In response to the aspirations now dawning in the East and to the kinds of resistance to which these aspirations are giving rise, are we doomed to fall back on a cramped position, limiting ourselves to Isaiah Berlin's notion of "negative liberties"? Isn't the task before us to conceive democracy as a form of political society, a regime in which we have an experience of our humanity, rid of the myths that conceal the complexity of History? This regime, like all others, is characterized by a constitution and a way of life. Still, one must

[54] Lefort 1988, p. 16.

> not take the term *constitution* in its purely legal meaning or treat its way of life as a simple fact. Democracy does not allow itself to be reduced to a set of institutions and rules of behavior for which one could provide a positive definition by means of a comparison with other known regimes. It requires people's adherence. And this adherence, or approval isn't necessarily formulated in strictly political terms.[55]

Democracy is characterized by a constitution, which may be written or not, and a way of life. We should not interpret the constitution in purely legal or legalistic terms, for democracy cannot be reduced to a constitution or institutions. As far back as 1989, Lefort realized that modern democracy cannot, in contradistinction to what Habermasian thought would have us believe, simply be reduced to institutions or even the constitution. Democracy is just a way of life. Demagogy, the elections, the majority decision, the desire for independence and the freedom of expression are all covered by 'democracy'. They are all signs of democracy. This is interesting for politicians who tend to qualify decisions or opinions expressed at the European and national level that do not suit them as undemocratic. Restraining actions and thoughts cannot just be projected onto reality as long as democracy remains. Democracy, including its constitution, brings fragmentation with it.[56] Lefort cautions the Soviet citizens for a lighthearted conception of democracy.

Liberalism is an important and perhaps, at some level, essential aspect of modern democracy. In a lecture in Latin-America, Lefort discusses the then prevailing Left-wing populism in that part of the world. Liberal ideology fails to structurally address and deal with the socio-economic populism issues. In addition, liberalism despises mass democracy, according to Lefort, while no other democracy may exist in our era than one which takes the needs and desires of the collective seriously. In the end, Lefort says, democracy must be able to distinguish itself from liberalism as well as from populism. This outcome requires that one be realistic in that there is a need to acknowledge socio-economic issues.[57]

It is fascinating to witness the debate on mass democracy culminating in a polemic with respect to the relation between democracy and liberalism and the question to what extent this relation may be said to be necessary for democracy. What Lefort in fact sets out to do, just as Hannah Arendt, is to emphasize the form of society that democracy has brought forth and without which modern democracy could not exist: the *société politique*. So, whoever abolishes the political essence of a democratic society by appealing to the idea of constitution or higher ethics, already finds himself at a serious distance from modern democracy. That is precisely what the despots in Eurasia (be it in Russia or in Turkey) do: abolishing the

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[55] Lefort 2000, p. 266.

[56] 'Someone who exercises some public responsibility is under no obligation to take an oath of faithfulness to the constitution. It is perfectly possible for this or that person to flaunt his contempt for elections, for the decisions of the majority, for the demagogy of parties, and at the same time to display a desire for independence, a freedom of thought and speech, a sensitivity to other, an investigation of the self, a curiosity for foreign or former cultures. All of these displays bear the mark of the democratic spirit.' Lefort 2000, p. 266.

[57] Lefort 2007, p. 624.

*société politique*. Should it be concluded, on this basis, that modern democracy is a suicide pact?[58]

## 8.5 Defenseless Militant Democracy

According to Hans Kelsen, the idea of democracy presupposes relativism. Relativism is presented as the decisive worldview ('Weltanschauung') of democracy. 'Democracy,' Kelsen wrote in 1929, 'values each person's political will equally, just as it respects equally any political belief, which is after all expressed by the political will.'[59] There is unlimited room for a free competition of ideas and the struggle for political power. This state of affairs results in a free society; freedom is the vital issue in democracy. Appealing to Rousseau, Kelsen thinks that unanimity is only required in realizing the basic contract – i.e., the social contract –, since it is this contract which constitutes the state as such, on a specific territory. The creation of the state requires, then, unanimity.[60] After all, freedom implies, in this case, that anyone is only bound to obey his own will. Within a free society, the principle of majority decision applies. The principle of freedom, too, has evolved, in a certain way, from simply being free from state interference (in other words, unbound) to individual participation in state affairs (amounting to procedures of co-decision). The latter situation, Kelsen argues, originates from liberalism.[61]

The misconceptions of democracy find their origin in a widespread confusion between ideology and reality. Democracy is a type of state in which the will of the community (i.e., the social order) is created by the people. Democracy thus interpreted is the identity of the rulers and the ruled. In addition, two conceptions of the people exist: the people as the co-legislator in the case of the Constitution ('the people' is a normative conception here, to be considered as an ideal conception) and the people as the actual people, i.e., those who are ruled or who constitute the electorate ('the people' is, accordingly a real conception here). It is here that the political rights and citizenship in a political sense originate, Kelsen argues. In the transformation from one conception of 'the people' to another, from the natural to the political, parliamentarism is indispensable. Kelsen draws the most radical consequence from the conception of democracy. Again, the people as a quasi-natural phenomenon and as the basis of the sovereign power may only through parliamentarism transform into the people as something comprised of groups and individuals endowed with specific political rights and concrete entitlements.

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[58] Habermas' 'Diskursbegriff der Demokratie' does not provide a solution for the democratic crises, either. He attempts to replace democracy by rationality, inventing, along the way, new concepts to formulate a rational utopia. See Habermas 2007, pp. 302–315.

[59] Kelsen 2000, p. 108.

[60] Kelsen 2000, p. 86.

[61] Kelsen 2000, p. 88.

In his 'Verteidigung der Demokratie' (Defense of democracy), a collection of essays, Kelsen raises the question whether democracy should defend itself against the people if it wants to abolish it. Is democracy entitled to defend itself against a majority that is 'united in nothing but its wish to destroy democracy'? To raise the question implies, according to Kelsen, that it be answered in the negative: 'A democracy that seeks to maintain itself contrary to the will of the majority, or has even attempted to maintain itself by violent means, has ceased to be a democracy.'[62] This gives rise to the question what 'democracy' is in the first place. The meaning of 'democracy' was intensely debated as early as the period of the Weimar republic. This is easy to understand, since democracy, and especially parliamentary democracy, had come under criticism in the wake of the success of the Bolsheviks in Russia, the rise of Fascism in Italy and, at a later stage, the rise of Nazism in Germany. World War I heralded the end of several empires, resulting in the introduction of some form of democracy in the countries involved, with the exception of Russia. Even though the February Revolution (1917) made plain the Russian ambition to realize a democratic regime, the October Revolution gradually killed off these Russian aspirations. The result was a civil war and, in its wake, a totalitarian regime. It wasn't democracy that violently oppressed the opponents in Russia. The budding Russian met its inglorious demise within a mere few months. The name of Alexander Kerensky (1881–1970), the Prime Minister of the government that aspired to introduce democracy in Russia, is not widely remembered nowadays.[63]

In the 1920s, serious debates were held on democracy and liberal democracy. The most striking contribution on this topic was made by Carl Schmitt, in his 'Die geistesgeschichtliche Lage des heutigen Parlamentarismus' (1923). Schmitt takes up a polemic with Rousseau. What is concerned here is the majority's legislative power. Rousseau ponders: 'How could a blind multitude, which oftentimes does not know what it wants, as it seldom knows what is good for it, realize of its own accord an undertaking as considerable and as difficult to realize as a system of legislation?'[64] This is in fact the essential question of modern democracy. Why *modern* democracy in particular? Since it is only modern democracy that acknowledges the principle of equality (as a political right), thus treating everyone equally. On that basis, modern democracy acknowledges that an individual is not just the master of his own will in the ethical sense but in the political sense as well; once his will has been formed, he is allowed to express in public his individual will and its formation. These individuals together constitute the people, consolidating, in the modern world, the basis of sovereignty. Rousseau surmounts his own doubts, stating: 'Of its own, the people always wants the good, but of its own, it does not always see it.'[65]

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[62] Kelsen 2006, p. 237 (translated from the German by the author, AE).

[63] John Keegan opens his book on World War I with the observation that it was an unnecessary and tragic conflict. The author does not, unfortunately, discuss the issue of democracy in this study and deals with the Russian February Revolution merely summarily. See Keegan 1998, pp. 358–369.

[64] Rousseau 1763 [1762], p. 50.

[65] Rousseau 1763, p. 50.

This claim is not hard to understand, for an alternative view would jeopardize the very idea of the social contract. The people are good and its will is not, in and of itself, bad; to deny this is tantamount to saying farewell to democracy. Another mysterious, almost mystical, will is present in Rousseau's theory: 'The general will (volonté générale) is always righteous, [but] the judgment that guides it is not always enlightened.'[66] How should people be enlightened? Rousseau has a special strategy for this, consisting in obligating individuals to 'conform their will to their reason.'[67] What we see here is a tendency toward violence, with the obligation of educating people rationally so as to guide their will in the right direction.

Schmitt rightly remarks that Rousseau's idea of general will presupposes unanimity and homogeneity.[68] The principle of equality in modern democracy presupposes the *equality* of all (i.e., homogeneity) and at the same time the *inequality* of *unequal* cases (i.e., heterogeneity).[69] Democracy shows its political strength by excluding that which it considers to be alien and which it is unwilling to treat equally; this is banned to the domain of heterogeneity, while only that which it considers to be distinctive is included, and is admitted to the domain of homogeneity.[70] At the time, the colonized countries were those that were located outside the domain of equal treatment characteristic of democracy. Parliamentarism, in the sense of an essential liberalist element of modern democracy, operates on the basis of equality, which is a political right. The equality of all people is, in Schmitt's analysis, not democratic without liberalism, nor is this a form of government (a regime) without the ethics of individualism-humanitarianism with its concomitant worldview.

In Antiquity, democracy did not grant equality as a political right to every individual.[71] In addition, it is precisely the liberalist Kantian or Neo-Kantian worldview, which is the foundation of modern liberal democracy and which is characterized by the acknowledgment of individuals as sovereign persons, that is frequently challenged by mass democracy. Mass democracy draws on the power of the individual person as a citizen, aspiring to express his volition without the mediation of representative democracy. The struggle within the essence of modern democracy becomes apparent here: the liberalist will of the individual *versus* the collective will of the individual in and as a part of the whole. So anyone aspiring to salvaging liberal democracy must be careful not to destroying democracy's twin brother or sister in the process; modern democracy is liberalist from the individual perspective, yet *also* individualistic-collective, namely insofar as the whole is considered. How may democracy, considering this special position in which it finds itself, be salvaged without maiming it? It was this concern that inspired Kelsen to present his somewhat

[66] Rousseau 1763, p. 50.

[67] The original text reads: '(…) 'conformer leurs volontés à leur raison.' Rousseau 1763, p. 51.

[68] Schmitt 1988, p. 13.

[69] An absolute equality of all human beings without the necessary correlate of inequality is, according to Schmitt, both conceptually and practically void. See Schmitt 1988, p. 12.

[70] Schmitt 1988, p. 9.

[71] Doomen 2014, pp. 35–43.

peculiar ideas on democracy, which in turn provoked Schmitt to express his disagreement.

The – political – debate and openness are what constitute the essence of liberal democracy. They are contrasted by mass democracy, represented by, according to Schmitt, Fascism as well as Bolshevism, as the 'consequences of direct democracy' ('Konsequenzen der unmittelbaren Demokratie').[72] Schmitt states that the openness, deliberation, compromise and the idea of being tolerant when other people's interests or opinions are concerned are values not bound to any specific era. They are not the inventions of the Modern Age. Freedom of expression and parliamentary immunity exist to secure the political debate and openness in liberal democracy. Deliberative democracy stands or falls by these principles, and they have been created for it to function properly. Accordingly, illiberal democracy[73] and the idea of anti-pluralism (which seeks to fortify homogeneity) are concepts of movements as old as modern democracy itself; modern democracy encompasses all of these elements. The liberal principles, by contrast, were, Schmitt holds, never included in the foundations of regime or a constitution. They are empty formalities and ceaseless conversations that Harold Laski, in 1921, dubbed 'government by discussion'.[74]

One may, not without some irony, note that 'populism' is nothing but one of the legitimate manifestations of modern democracy, with, at times, far-reaching consequences: 'A popular presentation (Vorstellung) sees parliamentarism in the middle today, threatened from both sides by Bolshevism and Fascism. That is a simple but superficial constellation. The crisis of the parliamentary system and of parliamentary institutions in fact springs from the circumstances of modern mass democracy.'[75] In the decisive year for Italian Fascism, 1922, Mussolini wrote that '(…) the democratic right of universal suffrage is the most unmistakable injustice; (…) a government by everyone (…) will in reality lead to a government by no-one.'[76] To many Italians, liberal democracy had perished on the battlefields of World War I. At the time when Lenin was focused on destroying what remained of parliamentary democracy in Russia, Fascism made its appearance on the political stage in Italy. On the page just quoted, Schmitt maintains that if one takes the democratic identity (i.e., parliamentary democracy, so governing by means of debating) seriously, no constitutional power may withstand the will of the people (in this case taken as a whole).

There are, then, times when the ruling, faltering power might not be willing to take the democratic identity seriously, which means that one would, in the name of liberalism, so still half of the essence of modern democracy, ignore and suppress the other half, so the direct will of the individuals (united in the whole). Even supposing this were legal, it is not legitimate, being in conflict with the will of the people, or

[72] Schmitt 1996, p. 7.

[73] The relation between what is liberal and what is democratic is problematic against the backdrop of the so-called neoliberal economic developments. See Dallmayr, pp. 169–179.

[74] Laski 1921, p. 36.

[75] Schmitt 1988, p. 15.

[76] Farrell 2003, p. 125.

of the majority of the people, or at least of a considerate segment of the people. Schmitt, while considering both Bolshevism and Fascism to be dictatorial as well as antiliberal, deems neither to be necessarily antidemocratic. In this respect, Schmitt is mistaken. It is precisely the totalitarian movements that use democracy to definitively bring democracy, in whatever form, to an end, for the strength of democracy, namely, its openness and equality, becomes its weakness, ultimately leading to its downfall.[77]

Schmitt contrasts liberal democracy with homogenous democracy. Is this an absolutely antagonistic situation or rather a contrast that can be bridged, its state of abrogation notwithstanding? Schmitt praises direct democracy, being endowed with 'dictatorial and Caesarist methods'. This is not a democracy, however, for it may merely resemble a regime such as that of Napoleon Bonaparte or Tsar Romanov of Russia.

What about the anti-homogenous character of liberal democracy? As a matter of fact, liberal democracy, too, introduces a number of exclusion mechanisms so as to make the access to homogeneity or the homogenous people possible only under certain conditions. The political debate concerning multicultural society and immigration is focused on, on the one hand, the ambit of the exclusion mechanism (specifying who may be considered an alien) and, on the other, the process of the integration and assimilation in the homogenous legal order. Finally, the question presents itself whether the two elements of the essence of democracy – the liberal forming of the will and the direct (i.e., unmediatable) general will of the people – are *conditiones sine quibus non* for the demise of democracy, which I do not think to be the case, for the following reasons:

1. An individual political will not expressed in a parliamentary democracy through chosen representatives is not internally conflictual. This unique, individual will cannot, with respect to the formation of political power, be divided in two manifestations: a parliamentary will and a direct will, expressed in freedom. The unity between the individual and his will would only be severed in the case of deceit, abuse of the circumstances or schizophrenia.
2. An individual's direct will is not under all circumstances a sign of an irreconcilable struggle with the parliamentary will; the referendum is a striking example. One need not look hard to find numerous examples, such as in Switzerland, where parliamentarism and some practices of the referendum go together.[78]
3. In both cases, the individual's will may be manipulated. National Socialism was not realized through the direct will of the people, but through the parliamentary system, and the Nazis did not rise to power through referenda.

[77] Schmitt 1988, p. 16.

[78] For clarity: I am not concerned here with the issue whether a referendum is a proper instrument.

4. The general will (volonté générale) may err. It may err such that it has no sacral imperviousness: error and man are in tandem, in the sense that whatever man touches or covers may be a sign of error. For that reason, democracy and tragedy are related concepts. In both cases, the will of an individual, including its direction, is involved. Countless factors may steer the individual or collective will in a wrong, or tragic, direction.

The contradictions and conflicts within the essence of democracy might appear at some point as an irreconcilable conflict. That is not, however, as has been shown above, the logical consequence of the unchangeable essence of democracy. There is a single reality, a single *political* reality, creating an irreconcilable conflict within the essence of democracy: the individual is alienated from authority, the establishment, the elite, the traditional representatives and, indeed, the whole of the *société politique*. It is the political, the polis, that is brought into discredit here. The decay increases. The correction mechanisms of democracy become paralyzed. The fate raises. The sworn enemies of democracy would do all that is in their power to let the day arrive on which they could steer the will of the people, or rather a segment of the people, in an antidemocratic direction. It was in this spirit that Joseph Goebbels wrote, in 1928, on parliamentary democracy: 'We enter the Reichstag to arm ourselves in democracy's weaponry with its arms (…). If democracy is foolish enough to provide us, in return for this disservice, free passes as well as allowances, that is its own business. We consider any legal means suitable to change the present situation into a revolution (…). We come as neither friends nor neutrals. We come as enemies! As the wolf attacks the flock of sheep, thus we come.'[79] This enemy of democracy has risen to power through regular elections.

The Weimar Republic's nightmare was caused threefold: the economic crisis, the constitutional crisis and the increase of personal violence.[80] The Nazi Party's first significant electoral success dates from 1930, when it rose from twelve seats, with only 2.6% of the votes cast in the general elections of 1928, to 107 seats, with 18.3% of the votes cast, almost 6.5 million people having for it.[81] This landslide was no cause for other political parties to reflect on what had happened, though. Violence and intimidation were quite common. In 1931, Hitler called on Ernst Röhm to resume his position of leader of the Sturmabteilung (SA), which was prompted by his plan to intensify the violence and intimidation; as Kershaw writes, taking January 1931 as the date of reference, the number of Sturmabteilung votes had increased from 88,000 to 260,000.

[79] Translated by Randall Bytwerk in the *German Propaganda* Archive, see: http://research.calvin.edu/german-propaganda-archive/angrif06.htm. The original text, from *Der Angriff* (April 30, 1928).

[80] 'In the beginning was the end: the sate crisis of 1933 was prefigured in the turbulence of the first years, and neither the practice of emergency government nor the interpretation of its constitutional foundation in Article 48 can be understood from the last year alone.' Ellen Kennedy 2004, p. 155.

[81] Kershaw 1998, p. 333.

In the presidential elections of 1932, Hindenburg gained 53% of the votes cast and Hitler 37.4%. The Summer of 1932 was characterized by political violence in all of Germany, culminating in a number of deaths. At that time, the Nazi Party had campaigned for 4 months, reaching its peak with the 37.3% just mentioned, amounting to 230 seats. New elections soon followed, since a stable government could not be formed, and in November 1932, the Nazi Party managed to gain 33.1% of the votes cast, amounting to 196 seats, thus losing 34 seats, while the Communist Party secured 100 seats with 16.9% of the votes cast, the Social Democrats securing 20.4%. It was not difficult, in terms of mere numbers, for Hitler's opponents to form a government, but they nevertheless did not succeed in doing so. I reiterate here what happened during the final democratic elections, those of November 1932: the Nazi Party lost almost two million votes in a period of 4 months.

The Nazis were unable to secure a majority vote through free elections; two-thirds of the German population did not vote for the Nazi Party. The massive increase of its relatively large following was not only due to the economic circumstances, for the Weimar Republic itself played a key role as well, pressure groups having a decisive part in bringing democracy to its end. Kershaw rightly concludes his masterful study by saying: 'Paradoxically, the party responsible for much of the mayhem, the NSDAP, could benefit by portraying itself - enhanced by the image of serried ranks of marching Stormtroopers - as the only party capable of ending the violence by imposing order in the national interest. The acceptance of a level of outright violence in public life, which had been there at the birth and in the early years of the Weimar Republic and again become pronounced in the Depression years, helped to pave the way for the readiness to accept Nazi terror in the aftermath of the 'seizure of power'.'[82]

Democracy was subsequently pronounced dead and buried in the debris of World War II. At least two basic conditions have to be met in order for a democracy to come into existence and persist: the state should have the effective monopoly on violence and there should be freedom of expression. The Weimar Republic had relinquished this monopoly, with intimidations and violent actions by paramilitaries as a result. Since the state was unable to maintain the monopoly on violence, it was incapable of securing freedom of expression and the safety necessary for it to exist. It is hard to avoid the conclusion that Hitler's regime did not primarily rise to power because of democracy but rather in spite of it. The Nazi regime was established from 1933 on by brute violence rather than by democratic means. Democracy can only survive in a nonviolent and free atmosphere. Was the constitutional state (rechtsstaat) capable of saving democracy and the republic? Why was no enlightened dictator forthcoming?

[82] Kershaw 1998, p. 409.

## 8.6 The Dictatorship of the Constitutional State (Rechtsstaat) *versus* the Romantic Fall

In 1932, a serious legal debate was current on the ban of paramilitary groups; in the end, an appeal was made to article 48 of the Weimar Constitution, which specifies the presidential capacity to decree that a state of exception is in place. The President was actually only competent to prohibit Communist and Nazi groupings. The next stage of the political drama was the Legislative power, manifesting itself in the case of *Prussia v. Reich*. It was a legal-philosophical struggle, featuring great names such as Hermann Heller, Gerhard Anschütz, Hans Kelsen and Carl Schmitt. Schmitt justified the disbanding of the SA and the Schutzstaffel (SS) by the President with an appeal to *ratione necessitatis*.[83] Schmitt concludes his work *Legalität und Legitimität* (1932) with a literally ominous premonition: 'Otherwise (namely, if the Weimar Constitution is not saved, AE), it will meet a quick end along with the fictions of neutral majority functionalism that is pitted against value and truth. Then the truth will have its revenge. (Dann rächt sich die Wahrheit).[84]

Schmitt speaks of truth here. Ellen Kennedy is right to point out that shortly afterward, no room was left in Germany for truth.[85] In 1933, Schmitt became a member of the Nazi Party, an organization that did not leave any room for truth, either. The position of Schmitt prior to this date is clearly a different one. The political and legal issue in 1932 was crystal-clear: is the President entitled to act as a dictator in order to safeguard the constitutional state, even, if necessary, from a segment of the people? What should a dictatorship be taken to mean in the first place? That is the topic of a detailed study Schmitt published in 1921. In *Die Diktatur*, Schmitt distinguishes between two sorts of dictatorships: the dictatorship 'at the behest of', i.e., a commissarial dictatorship, and the sovereign dictatorship. The commissarial dictatorship acts in the name of the sovereign.

The dictatorship 'at the behest of' originates from Roman law. It is a legal category, indicating that the dictator acts 'at the behest of', since it is based on the authority of the senate (*senatus auctoritas*). The Roman Republic allowed the appointment of a dictator for a limited period in crisis situations. For a long time, the *res publica*, and thus the Roman people, was the sovereign organ in Rome. In that case, the dictator literally dictates: *dictator est qui dictat*. The dictatorship was *de jure* a method of ruling during a state of exception, usually for a period of 6 months. In times of need, little room existed to confer or debate in the political arena.[86] Once order had been restored, or it was no longer considered necessary to continue the dictatorial reign, the dictator's mandate came to an end. The dictator represented, then, the sovereign, but was not himself the sovereign. A dictator who did not appropriate the power 'at the behest of', but on the basis of individual, personal motives

[83] Schmitt 2004, p. 94.

[84] Schmitt 1988, p. 76.

[85] Cf. Kennedy 2004.

[86] Rossiter 2002 (1948), pp. 3–48.

and arguments was called a tyrant. Tyranny was considered to be a reprehensible form of exercise of power in both Rome and Greece, and given the fact that tyranny conflicts with both the law and religious tradition, it was not prohibited, under certain circumstances, to kill a tyrant.

Dictatorship was not a constitution but a method for ruling during times of emergency. With the inception of the Modern Age, in the 16th century, French thinker and scholar Jean Bodin reintroduced the concept of 'dictatorship' in his best-known work *Les Six Livres de la République* (1576). Here, too, the concept referred to situations of emergency; no *sovereign* dictator was identified.[87] This situation changed, however, both in theory and in practice, at the time of the French Revolution (1789). Schmitt holds that the 'sovereign dictatorship' was introduced at that point as a model of the state or regime. The revolutionaries, Schmitt argues, could have already found the relevant ideas in the work of Jean Jacques Rousseau: the convergence of the sovereign, the people and the general will.[88] This amounts to direct democracy, expressing the will of the people without the mediation of other organs. It must be observed here that in Rousseau's view, not deviating in this regard from the rule in Roman law, a dictatorship cannot be established for a period longer than 6 months.[89]

Schmitt's criticism of Rousseau is mainly focused on the convergence of the sovereign, the people and the general will without a mediating form of *indirect* representation, so direct democracy acting on the presumption that the people is infallible. This unity, which can in no way be represented, produces 'pouvoir constituant' (constituent power) and sovereign dictatorship.[90] Despotism in the name of freedom and reason had thus a reality. Something novel occurs here, namely, the birth of a new political régime: the sovereign dictatorship does not suspend the constitution, but destroys the existing legal order so as to erect another one in its place. This amounts to a complete negation of the existing legal order: 'That is the meaning of pouvoir constituant.'[91] This development is not peculiar to what happened in the wake of the French Revolution, but can be witnessed in all totalitarian regimes of the 20th century. What is striking in the case of the French Revolution, though, is the transformation that soon occurred from the commissarial dictatorship into a sovereign dictatorship.

The revolutionary dictatorship ushered in a true reversal of values and political categories: sovereign power now emerges on the political stage in the name of *pouvoir constituant* (constituent power), whereas the temporary dictator acted on behalf of *pouvoir constitué* (constituted power). The possibility of a totalitarian state emerges here. The totalitarian state, Lefort writes, '(…) goes much further than Caesaro-Papism, for it encompasses the entire economy of the country as well.

[87] Bodin even reserves a chapter to provide an answer to the question under which circumstances it is permitted to terminate the life of a tyrant and to recall the laws he has created. See Bodin 1992, pp. 110–126.

[88] Schmitt 2014, pp. 105–111.

[89] Rousseau 1763, p. 135.

[90] Schmitt 2014, pp. 127–128.

[91] Schmitt 2014, p. 119.

Stalin might rightly, differing in this respect from the Sun King, say: "la société, c'est. moi" (society is what I am).'[92] As early as the 19th century, the idea of the dictatorship of the proletariat was introduced by Friedrich Engels, which was to be implemented as the model of the state later, by Lenin. In Schmitt's analysis of Karl Marx, the period of the class struggle would be viewed as a state of exception, in which the dictatorship of the proletariat should rule. Totalitarianism emerges as the despot of the everlasting state of exception.

This was Schmitt's position in 1922. What is presented here will at a later stage be realized through the totalitarian regimes of the 20th century. It is precisely for that reason that one wonders why Schmitt, 11 years later, joins a totalitarian political movement which would also imply a complete negation of the existing legal order. The people as *pouvoir constituant* receives an impossible task: being the source of a complete unity between law, knowledge and power. Schmitt warned, however, that the people would, once it came to live under the reign of sovereign dictatorship, have no rights and only duties. This is, in fact, a modern variety of the state of nature.[93] Total tyranny is no temporary dictatorship, but a consistently thought-out regime of terror: 'Dictatorship is nothing but a military-bureaucratic-police machine, born form the rationalist spirit. In contrast, the revolutionary use of force by the masses is an expression of immediate life, often wild and barbaric, but never systematically horrible and inhuman.'[94] It is the immediate relationship the mass of people establishes with itself, in the guise of a people, thus realizing absolute sovereignty that brings about the massive forms of violence. Immediate life appears to exist in a state closer to death than to life.

Democracy cannot be defended with the institution of sovereign dictatorship. It is there that democracy meets its end, in the best case for a short time and in the worst case indefinitely. The possibility of a temporary dictatorship defending public order, safety and vital interests of the state is the state of exception. That is what we find in article 103 (section 1) of the Dutch Constitution: 'The cases in which a state of emergency, as defined by Act of Parliament, may be declared by Royal Decree in order to maintain internal or external security shall be specified by Act of Parliament. The consequences of such a declaration shall be governed by Act of Parliament.'[95] What is presupposed in this clause, whose purpose is to defend democracy, is the presence of a controllable danger as well as an uncontrollable threat to the public and the state organs. This state of emergency is provided for in a democratic system; it does not terminate democracy. It is a temporary measure the implementation of which may in no way structurally affect periodical elections or parliamentary control. An attenuated variety has been in place in France since the jihadist assaults in Paris (2015). As readily becomes apparent from what has been said, the state's

[92] Lefort 1986b, p. 276.

[93] Schmitt 2014, pp. 123–124.

[94] Schmitt 1988, p. 72.

[95] I am not concerned here with the philosophical debate on the state of exception, which is discussed in: Ellian 2012, pp. 23–69.

attempt to effectuate its monopoly on violence (an important condition for democracy to persist) is prompted only under exceptionally violent circumstances.

The debate on dictatorship and democracy is focused, however, on precisely the situations in which a risk analysis is made with respect to a political movement that seeks to disband democracy *on the basis of the democratic procedure* itself. This issue is considerably more complex than the issue of combating terrorism. The Dutch constitutional thinker George van den Bergh believed that a peaceful democratic society can only function if two (meta)conditions are met, or, in other words, if two principles are recognized, namely, intellectual freedom and equality before the law. According to Van den Bergh, political parties that corrupt these principles and act inimically should be combated by any means the state has at its disposal: '(…) democracy may employ the powers of dictatorship for a single purpose, namely, to defend itself against dictatorship.'[96] The following balance is struck: sovereign dictatorship *versus* the dictatorship of democracy. This straightforward and perspicacious explanation is based, in turn, on the reasoning that in a democracy, the people can learn from its own mistakes, save for one, namely, the decision to disband democracy.[97]

A dictatorship realized to uphold democracy is no democracy. It is no existing state model or constitution. The inner conflict is so unbearably great that the democratic dictatorship is disbanded before it may be realized. That dictatorial actions take place at some time in order to maintain public order or safety, is mainly prompted by the intention to protect the state and, specifically, the constitutional state (rechtsstaat). Van den Bergh's ideas are worked out by Bastiaan Rijpkema's penetrating inquiry into this matter.

Rijpkema distinguishes between three ideas of democracy: formal democracy (ruling by majority decisions), material democracy (majority decisions as well as number of fundamental rights are decisive) and democracy as self-correction.[98] He is right to create, appealing to Van den Bergh, a new category: the category of democracy as self-correction. How is this self-correction to be understood? Is it part of the *essence* of democracy or rather a *consequence* of democracy? Democracy was not created to set up some sort of self-correction mechanism in the people, and we do not find the self-correction mechanism defined as part of the essence of democracy by the inventors of democracy, the Ancient Greeks. Nonetheless, Rijpkema is correct in saying that the self-correction mechanism is an important characteristic of democracy, and in particular of *modern* democracy.[99]

This does not mean that a material aspect is added to democracy; democracy is fundamentally and essentially a formalistic and procedural system. Self-correction as a characteristic of democracy is something akin to the formalist essence of democracy – the majority decision –, since self-correction refers to the eventuality,

[96] Van den Bergh's inaugural lecture 'De democratische Staat en de niet-democratische partijen (1936)', reprinted in Van den Bergh 2014, p. 143.

[97] Van den Bergh 2014, p. 129.

[98] Rijpkema 2015, p. 155.

[99] Rijpkema 2015, pp. 148ff.

the possibility, of continually changing majorities: there is no eternal majority in democracy. As a consequence, the majority decision is only temporarily valid; its temporary nature is what constitutes the essence of the majority decision. The alternative would be accepting the eternal majority, which is a dictatorship, and which would mean identifying, in Rousseau's words, the supposedly invariably unerring general will. The life of anyone living in a democracy is shaped by a horizon of possibly wrong decisions, made by temporary majorities.[100] At the same time, it is just *because* these majorities are temporary that the possibility presents itself to correct such decisions. This shows the importance of the openness and freedom as the atmosphere in which democracy may persist. The open society is a society that brings forth democracy as a form of society for it to exist in. It is democracy that protects itself by means of self-correction.

Militant democracy is primarily a manifestation of the force of democracy itself in all openness, indeterminateness and temporariness. Once militant democracy is in place, democracy defends itself, provided the two conditions just mentioned – the absence of illegitimate and illegal violence and the presence of freedom of expression – are not violated. These are *conditio sine qua non* for democracy's self-correction, whereby the – temporary – majority debates with itself and the minority transforms into a new majority. The regenerating force of democracy is powerful enough to preserve itself: the basic awareness that any majority is a temporary one. Kelsen reaches the most radical conclusion from the love for democracy in *Verteidigung der Demokratie*: 'One must remain true to one's colors, even when the ship is sinking, and may only keep the hope, having sunk to the depths, that the ideal of freedom is indestructible and that the deeper it has sunk, the more passionately it will resurge.'[101]

Democracy resembles a suicide pact: the demise. Democracy as a form of society should not be taken to be a suicide pact; no state or society desires its own ending. After World War II it has become common to speak of the democratic constitutional state. The concept of the constitutional state does not directly follow from the concept of democracy. The concept of the constitutional state is at present sufficiently broadly defined and encompassing for it to start resembling a religion. Even a despotic regime can somehow be related to a constitutional state. The modern concept of the constitutional state comprises three components: first, legality (not only the executive power is subject to the law; the same applies to the legislative and judicial power), second, an independent and impartial judicial power and, third, a collection of fundamental rights. The extent of the fundamental rights can never be specified eternally and immutably. It is in the nature of the fundamental rights that they are subject to an abstract as well as a concrete balancing of the interests involved.

[100] Rijpkema formulates three necessary conditions for a democratic self-correction to be realized: evaluation (through elections), political competition (realized by the participation to these elections of several political parties or individual candidates) and freedom of expression. See Rijpkema 2015, p. 177.

[101] Hans Kelsen 2006, p. 238.

There are at least two different ways in which the constitutional state may be conceived to be related to democracy: first, as a phenomenon opposed to democracy, bent on incorporating democracy in order to 'sublate' it in the constitutional state (uniting both elements by elevating them to the same level), and, second, as a concept complementary to democracy. In the latter case, it complements democracy. The concept of the constitutional state that is hostile to democracy absolutizes two elements of the constitutional state: the judiciary and fundamental rights. Jurisprudence and the authority of the judiciary are placed before democracy. The judiciary is presented here as the counterpart of temporality, and consequently of the possibility of changes to the law as well. Moreover, the judiciary is continually considered to be the law-forming and -creating organ. From this perspective, the judiciary is in fact placed before the legislator and, by extension, before democracy as a whole. Judicial interpretation in that case receives a legislative character. In this almost mystical approach to the constitutional state an almost absolute status is attributed to fundamental rights, too. The room to balance the interests in the abstract and in the concrete is thus limited. Here too, democracy stands in the way, as it continually sets the temporary limits with regard to the fundamental rights. This depoliticization leads to a serious corruption of the *société politique*.

The approach in which the constitutional state is complementary to modern democracy, by contrast, constantly takes the primacy of the political domain – i.e., democracy – into consideration. This conception of the constitutional state is based on legality, freedom and an impartial judiciary. Freedom encompasses the fundamental rights fortifying democracy. It is precisely the constitutional state that avoids a conflict with democracy by taking popular sovereignty seriously. The room for the judiciary to create law is limited here. A proactive court will, by contrast, present norms in its ruling that are not supported by a democratic majority. Should this occur on a regular basis, the court's authority will become corrupted, which is one of the most severe accidents to befall a democracy.

In the modern democratic state, the judicial judgment is positioned between the heteronomous and the autonomous processes of reaching a verdict. Montesquieu states that it could happen that the law, which is simultaneously clairvoyant and blind, might to be too rigorous in certain cases. Justice is realized in such a situation by a special court representing the legislator while also being entrusted with the task of passing judgment. This authority, and not the regular judges, should be considered to be the supreme authority: '(…) it is for its supreme authority to moderate the law in favor of the law itself, by pronouncing less rigorously than the law.'[102] Moderating the law in favor of the law itself attests to a deep respect for politics and the legislator: the law considered as the will of politics (the majority decision) is something good, but in a specific, unforeseen case it is experienced as unintentionally harsh. That is precisely the room that is left for a limited but at the same time complementary form of jurisprudence that is not in conflict with legality, but it does moderate the law in favor of the law.

[102] Montesquieu 2000, p. 112.

Equality too, being a vital component of political freedom, may lead to the demise of democracy. As Montesquieu points out, '(…) the principle of democracy is corrupted not only when the spirit of equality is lost but also when the spirit of extreme equality is taken up and each one wants to be the equal of those chosen to command.'[103] This may also happen to our democracy, namely if judges or those who execute the law interpret equality in the extreme. Social differentiation and equality are part of the essence of a free society. Equality before the law and the equal opportunity to express the political will together constitute the principle of equality as a condition for democracy to be realized. It is precisely because of this equality that Montesquieu considers virtue to be the most important principle or motivation for democracy: 'Love for the republic in a democracy is love of democracy; love of democracy is love of equality. Love of democracy is also love of frugality.'[104] Democracy is not to be upheld and preserved for an existential threat by brutal violence or even, in the end, by the rulings of judges, but rather by the love for the republic and democracy ('l'amour de la république, l'amour de la démocratie'). Citizens must love democracy lest it be doomed to founder. This recalls Lefort's remark that democracy cannot be reduced to a constitution. Does this mean that in an impending emergency no alternative is available to a Kelsenian heroic, romantic doom, so democracy as a romantic fall? No, for a legal form remains: dictatorship.

As was pointed out above, dictatorship is not to be confused with despotism or tyranny. The temporary establishment of dictatorship does not immediately save democracy but rather a state that seeks to be a constitutional state. It is necessary, at this point, to be specific and precise in presenting our concepts. Nothing may, after all, mask the temporary suspension of democracy. The totalitarian threat or the threat of chaos and possibly a civil war could imperil the existence of a state and its people. At the same time, we should realize that a grouping, party, faction or state organ trying to defend the state from the marching evil by installing a dictator if necessary disputes the very existence of a commonly shared general will or a general norm.

The constitutional state (rechtsstaat) is primarily an element of the state, so the bare state, not having adopted a political form in the sense of a regime. Once the well-being of the state as such is presented to be paramount when confronted with a menacing situation, the shared reasonableness and convictions have already expired. Dictatorship establishes itself in the name of the state, the constitution or general well-being. Should this naked, bitter truth prevent the suspension of democracy? The state exists, as does the people; they even exist without having yet adopted a form, since the state is ultimately never absorbed by democracy. The state, considered as an organization of a people, may be organized in many ways by (part of) the people. One of the possible outcomes is democracy. The indecisiveness of the Weimar Republic with respect to its own continuance led to a twofold demise: the

[103] Montesquieu 2000, p. 167.

[104] Montesquieu 2000, p. 43.

demise of the state of the Weimar Republic (it was replaced by the Nazi state) and the demise of democracy (a totalitarian regime rose to power).

Dictatorship as a temporary exercise of power is not without its risks. The most obvious risk is the change from dictatorship into tyranny. In addition, the dictator is responsible for the safety of all citizens; the danger of excesses is real. The dictatorship of the constitutional state cannot be legitimated by merely referring to the decision of a relative majority, for this amounts to a dictatorship of the majority, which is, by definition, something unfavorable. The dictatorship of the constitutional state is dictatorship exercised by the constitutional norms of the state imposed in conflict with the will of a majority, or as a result of its indecisiveness, in order to eliminate the danger of its downfall.

## 8.7 Conclusion: The Eventuality of Democracy

The social sciences reduce politics and, by the same token, democracy to data-analyses and considerations of rational choice, but they are unable to negate theoretical reflection on democracy.[105] In this paper, I have inquired the militancy of modern democracy insofar as it may be inferred from modern democracy itself. Having analyzed the concepts of regime and democracy as a constitution and having shown that democracy consists of more than just periodical elections, I have argued that it must at the same time be considered to be a form the state can adopt. The form then literally shapes the state in a specific way. Modern democracy is constantly exposed to threats. In the footsteps of Heidegger and Lefort, I venture to say that modern democracy has no ground but faces many chasms. That is something specific to Modernity.

I have not discussed the vicious threats. Islamism is a grave threat to democratic legal orders. Democracy can deal with this threat, though, by military means, police force, intelligence services or administrative law. The Islamist threat grows as debates on multicultural issues become increasingly heated. It is not necessary for a new reflection on democracy to combat Salafism and Jihadism, but what *is* needed is the political will of administrators. The same is true with respect to mass immigration, i.e., the great migration toward the West. The openness of democracy is not to be confused with the disappearance of countries' physical borders. These threats do not require one model of democracy or another, but rather an effective democratic state. The situation is different once Islamist political parties are founded with the purpose of hollowing out democracy from the inside. In that case, militant democracy becomes a reality.

In addition, populism, as it is called, must be considered. This is perceived as a serious internal threat to democracy and it is an uneasy idea. Politicians are often called populists. Dutch Prime Minister Mark Rutte remarked during the parliamentary elections of 2017 that we need to counter 'bad populism', thereby distinguishing

[105] See Dallmayr, pp. 10–11.

between 'good' and 'bad' populism. His frankness merits approval. The position of a politician who never says or does something populistic apparently does not depend on the votes cast by the voters (the citizens). Such a person is not a true politician but rather an appointed civil servant.

Characterizing 'populists' as right-wing representatives is not without its problems either, though. After all, the agenda of European populists is predominantly Leftist, considering the economic and social ideas they want to realize. Jan-Werner Müller is right to include a Marxist movement such as Syriza in Greece in the list of populist organizations. President Erdoğan addressed those criticizing him in a speech: 'We are the people; who are you?'[106] I think we are dealing with a despot here, albeit one who uses the populist vernacular. The same applies to the totalitarian leaders, however, considering themselves as representatives and the embodiment of the people.

The idea that European populism opposes liberal democracy is not unproblematic, either, for there is no single indication that the party of Geert Wilders or Marine Le Pen seeks to abolish democracy. They want to uphold democracy, but perhaps in an *illiberal* guise. Do they oppose the liberalist global policies (manifested in trade agreements) or liberal institutions? To be sure, so-called populists oppose a number of aspects of the constitutional state. With his statements, Müller invites us to reconsider democracy itself as well as its means. His message is that not everyone who criticizes the elite is a populist. He also rightly observes that the call for referenda, on the basis of which the will of the 'real people' would become apparent, is nothing other than the will as it has already been determined by the populists themselves. Müller's advice, in the end, is to initiate the dialogue with populists in order to defend liberal democracy, democratic values and the constitutional state. Apart from the political debate on who or what the populists are, and who or what has precipitated their emergence, a democratic state should effectively safeguard the conditions for a democracy to persist, these conditions being that citizens should be protected against violence and that one should be free, in particular to express oneself. As long as these two conditions are safeguarded, democracy is capable of providing a rebuttal to the populists and, if necessary – if real societal problems are addressed –, of incorporating what they have to say.

Present-day Western 'populism' is in fact an outcome of democracy. Supposing that democracy is to be likened to a game, one should not halfway through start demonizing some of the players and change the rules of the game, for such a strategy is probably the best recipe for killing off democracy. The losing team would do well to reflect on the situation. 'Populists' do not represent the entire people or speak on its behalf, but they do address a number of serious problems that plague Western societies: Islamism, immigration, citizenship in a multicultural society, global economic relations and the loss of identity. A recent example is the position of the Turkish Dutch vis-à-vis the Turkish and the Dutch state respectively, a majority supports Erdoğan.

[106] Müller 2016, p. 3.

This poses a problem. How to properly integrate minorities is a major issue in Western states. The attempts at Islamizing the public domain and re-Islamizing individual Muslims in the sense of radicalizing them are a cause for great concern for many Europeans. Anyone bent on combating populism should first and foremost combat the problems of society and the social discontentment the populists claim to represent. From this perspective, 'populism' may even be considered to be something safeguarding democracy as a constitution. The time to start worrying will have come once this form of populism will have failed without the *causes* of populism having dissipated, for the successors of present-day populists may prove to be a serious threat to democracy as a constitution.

The dictatorship of the constitutional state, as necessary as it may sometimes be, should not be confused with democracy. This dictatorship is a temporary suspension of democracy, too. The possible ranks higher than the actual, Heidegger suggested. This statement turns the Aristotelian hierarchy between the actual and the potential on its head. What is to come is not set. The indecisiveness of democracy is the radical openness toward the future. This openness cannot be regulated for all eternity by the law and the state, just as man's essence consists in particular in his endless possibilities. These considerations are liberating but also immensely frightening.

Democracy maintains the horizon of everything possible, the eventuality of what may come and become. It is here that freedom is created, the spontaneity of the occurrence history brings forth. It is a risky eventuality, for we do not at present know what is coming. That is precisely why the Romans took the possibility of a temporary dictatorship into account. Democracy is a risky operation; militant democracy as the outcome of democracy itself is the corollary of its corrective capability.

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