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A Short Guide to Militant Democracy: Some Remarks on the Strasbourg Jurisprudence

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Keywords

Militant democracy, ECtHR, democratic society, freedom of expression, hate speech, freedom of assembly, the right to stand for election, dissolution of political parties, terrorism, secularism

A Introduction

The revelations at the end of 2011 about ten racially motivated murders stunned Germans who believed that that crisis over euro possessed the greatest risk to Germany and Europe's well-being. To recall, the killings of the nine men from immigrant backgrounds (ethnic Turks, an ethic Greek) and a police officer, committed between 2000 and 2007, were back in the public eye when last November the German investigative authorities connected them with the neo-Nazi group - NSU whose name echoes the name of Adolf Hitler's NSDAP.[1]

After the details about a brutal series of murders were disclosed, the ruling CDU began to reconsider its long lasting opposition to a ban of the NDP, which

1 See Nicolas Kulish, Neo-Nazis Suspected in Long Wave of Crimes, Including Murders, in Germany, New York Times, 13 November 2011, http://www.nytimes.com/2011/11/14/world/europe/neo-nazis-suspected-in-wave-of-crimes-in-germany.html?pagewanted=all; also see Heather Horn, In Germany, Neo-Nazi Murders Surface a Contradiction, in the Atlantic, 14 November 2011, http://www.theatlantic.com/international/archive/2011/11/in-germany-neo-nazi-murders-surface-a-contradiction/248414.

is said to have links to more extreme groups.[2] Generally, Germany is known as a country ready to defend its democracy from the extreme right or left. The ban of the right extremist Socialist Reich Party in 1952, the Communist Party of Germany in 1956 and the last year ban of the biggest neo-Nazi association, the HNG, well illustrate the point.[3]

Let me expand the scene. In another part of Europe in 2011, the ECtHR did not allow the Lithuanian Government to get rid of its domestic political opponents under the guise of defending democracy. The Court was unimpressed with the argument that democracy in Lithuania was endangered to the point which necessitated banning its former president from standing in parliamentary or presidential elections after having been impeached, finding that the his permanent and irreversible disqualification from standing for election constituted a disproportionate response to the requirements of preserving the democratic order.[4]

These two examples of real-life situations fit well in a political and legal concept of "militant democracy" illustrating its old dilemma refreshed by Dyzenhaus: "How far can a democracy go in protecting itself without compromising its democratic nature?"[5] Namely, many European democracies have a long tradition in legislating different defensive measures to be used against their enemies who mostly pick freedom of speech, freedom of association, freedom of assembly and electoral rights to destroy democracy. On the presumption of being endangered, state responses include the restrictions of these freedoms, disqualifications from electoral lists or even political parties' dissolution. The issue of whether such responses can still be democratic makes debate on militant democracy go on. The responses to this question given by the ECtHR lie at the heart of this article.

In order to delineate the context of the discussion, this article starts with some reflections on the notion of militant democracy. It then traces the Court's conception of democracy and the justification for making it "militant". The central part of the article discuses some examples from the Court's jurisprudence so as to establish the permissible legal obstacles aimed at enabling constitutional democracies to confront their internal enemies without loosing their democratic credentials.

B Militant Democracy: Then and Now

As Pfersmann has noted, it was first Plato and then Montesquieu who dealt with an issue of stabilizing a moderate government.[6] Yet, not until 1937, when the German émigré scholar Karl Loewenstein used the term "militant democracy" (Streitbare Demokratie) to argue that some democratic regimes in post-World

2 See A horror from the past. Angst over a ten-year killing spree by a neo-Nazi group, in The Economist, 19 November 2011, at http://www.economist.com/node/21538773. One of the suspects currently being held had previously held positions within the NPD. See Germany seeks public help in neo-Nazi murder hunt, in NEWS Europe, 1 December 2011, http://www.bbc.co.uk/news/world-europe-15982826.

3 For more see Markus Thiel, Germany, in Markus Thiel (ed.), The Militant Democracy Principle in Modern Democracies, Farnham and Burlington 2009, 109-145.

4 Paksas v. Lithuania, Judgment of 6 January 2011.

5 David Dyzenhaus, Constituting the Enemy: A Response to Carl Schmitt, in András Sajó (ed.), Militant Democracy, Utrecht 2004, 15.

6 Otto Pfersmann, Shaping Militant Democracy: Legal Limits to Democratic Stability, in Sajó (ed.) (2004), 47.

War I Europe, including the Weimer Republic, either lacked or failed to use defensive measures against extremism, the problem of defending democracy did not occupy a prominent position within constitutional theory itself.[7] After World War II, the idea of militant democracy was reflected in the 1949 German Basic Law and subsequently developed by the German Federal Constitutional Court. Today, constitutional systems of many European countries address the problem of democratic self-defense, but they differ in a degree of "militancy".[8]

While in 1937 and later during the Cold War, it was mostly known who could be labeled an enemy of democracy and which measures fall within the concept, both issues became blurred when in modern times, first after a collapse of communism and then in the aftermath of 9/11 terrorist attacks, the concept reigned in significance. Faced particularly with a trendy dilemma "freedom or security", many authors turned to militant democracy to justify the extreme measures or even cruelty undertaken in "war on terrorism".[9] Others refer to this concept to address the issue of religious freedom, particularly in today's Europe.[10]

In my opinion, these are wrong tracks. I would agree with those who adhere to Loewenstein's original idea and argue that militant democracy predominately deals with internal threats. According to S. Holmes, the concept "refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their continued existence".[11] Although under certain circumstances, the fight against internal anti-democratic forces and international terrorism can require the implementation of similar measures (e.g. surveillance) and produce a similar dilemma connected to suicidal potential of democracy, the idea of "counter-terror" state is not congruent with the idea of militant democracy.[12] The latter was developed to fight against secular totalitarian movements, not against religious fundamentalist movements. Even if in the meantime the circumstances have been changed, there is hardly a country engaged in "war on terrorism" in which a political wing or association of Al-Qaida or another religious fundamental movement are active to the extent that they could be labeled an internal enemy. Additionally, militant democracy measures are subject to strict judicial review, while "war on terrorism", as we have seen in the US and UK, has shown little respect for the constitutional system of checks and balances.[13] Admittedly, the developments in some countries can blur the differences. For example, radical anti-secular movements represent a major danger to

7 Karl Loewenstein, Militant Democracy and Fundamental Rights I, II, American Political Science Review 31 (1937) 417, 638.

8 For a detailed discussion see Thiel (ed.) (2009).

9 Clive Walker examines this trend in Militant Speech about Terrorism in a Smart Militant Democracy, Mississippi Law Journal 80 (2011) 1395. For a detailed discussion on the relationship between "war on terrorism" and militant democracy see Kent Roach, Anti-Terrorism and Militant Democracy, in Sajó (2004), 171-207.

10 Ruti Teitel, Militating Democracy: Comparative Constitutional Perspectives, Michigan Journal of International Law 29 (2007) 49; Patrick Macklem, Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe, (2010), unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660649.

11 Stephen Holmes, Militant Democracy, ed. by András Sajó (book review), International Journal of Constitutional Law, 4 (2006) 3, 586.

12 For more see András Sajó, From Militant Democracy to the Preventive State? Cardozo Law Review, 27 (2006) 2255.

13 Holmes argues similarly with regard to US. See Holmes (2006), 590.

democracy in Turkey. It is also proven that some non-religious political movements, for example in Spain, are linked to organization that rely on terrorist intimidation, just like totalitarian movements that used democratic means did in Nazi Germany.[14] However, not only that militant democracy and "war against terrorism" refer to different sort of treats (internal and external), but more importantly, both require different approaches to neutralize them. Thus, the criminal and administrative law approach can confront international terrorism better then controversial idea of militant democracy that advocates denying freedom to the enemies of democracy.[15]

I find equally unacceptable the claim that the concept of militant democracy can be used to confront the challenges in the relationship between a state and religion in today's Europe. The issue of whether a particular religious practice falls within the scope of freedom of religion entails the scrutiny on justifiable interferences with the public manifestation of one's religion and not scrutiny on a threat to democracy. For this reason, although the ECtHR itself has echoed different approach,[16] I will argue against the Court's vision of Islam as "a treat to democracy" within a discussion on the freedom of association rather than on the freedom of religion.

The discussion that follows will adhere to the original idea of militant democracy and revolve around the Court's cases involving freedom of speech, the banning and dissolution of a political party and the right to stand for election.[17]

C Why Militant Democracy? Messages from Strasbourg

Unlike certain other universal human rights treaties in which the term "democracy" was carefully avoided, the alliance between democracy and human rights was recognized in the Convention from the moment of its adoption. First, the Preamble states that "fundamental freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend". Second, "a democratic society" is an underlying principle of the Convention – any restrictions on the rights guaranteed in Articles 8 to 11 must be "necessary in a democratic society". Third, not only representative democracy is expressly ensured in Article 3 Protocol No. 1 to the Convention but also participatory democracy seems to emerge as a protected value under the Convention.[18] Finally, apart from electoral rights, the Convention covers other rights that derive from democracy itself: freedom of speech, freedom of association and related right to party formation are the most familiar illustrations. The ECtHR has pointed out several times that the Convention was designed to maintain and promote the ideals and

14 Sajó (2006), 2265.
15 Roach (2004), 171.
16 See e.g. Leyla Şahin v. Turkey, Judgment of 10 November 2005.
17 The arsenal of militant democracy includes also the duty of alliance for public servants, but limited space prevented me to discuss it here. To discern the Court's position se e.g. Vogt v. Germany, Judgment of 26 September 1995.
18 For more see Rory O'Connell, Towards a Stronger Concept of Democracy in the Strasbourg Convention, European Human Rights Law Review, 3 (2006) 281-293.

values of a democratic society.[19]

Nevertheless, it seems that the pact between democracy and human rights at the European level was sealed when the ECtHR's explicitly acknowledged democracy as the only legitimate form of governance in the European public order: "democracy [...] appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".[20] From that point the Court has become the frontrunner in promoting a particular political system through judicial practice and departed from its earlier practice when it understood democracy only in the sense of anti-fascism and non-totalitarianism.

Although it has never offered a precise definition of democracy, one can assert that the Court places pluralism in the heart of it: "there can be no democracy without pluralism", it stressed in Communist Party v. Turkey.[21] The ECtHR defines pluralism as one "built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious belief, artistic, literary and socio-economic ideas and concepts".[22] Put differently, "democracy does not simply mean that the views of majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of dominant position".[23]

Now, I can argue with some confidence that the Convention was born as a militant democracy instrument. Since World War II, Europe's worst-case scenario has been a Nazi country. The Convection was aimed at preventing such scenario: "Democracies do not become Nazi countries in one day [...]. One by one, freedoms are suppressed, in one sphere into another. Public opinion and the entire national conscience are asphyxiated [...]. It is necessary to intervene before it is too late".[24]

For its part, the ECtHR has not ignored the fact that inherent tension between democracy and human rights, no matter how compatible they are, cannot be avoided: "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".[25] Moreover, the Court has upheld contracting states' right to take specific measures to protect themselves and acknowledged the legitimacy of the concept of a "democracy capable of defending itself".[26] Thus, even the former Commission, and after the Court itself, has not excluded the possibility that a person or a group of persons would rely on the rights enshrined in the Convention in order to put an end to democracy.[27] Moreover, this concern led the drafters to introduce a provision

19 See e.g. Soering v. United Kingdom, Judgment of 7 July 1989, at 87 and Kjeldsen, Busk Madsen and Pedersen v. Denmark, Judgment of 7 December 1976, at 53.

20 United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, at 45.

21 Ibid., at 43.

22 Gorzelik and Others v. Poland, Judgment of 17 February 2004, at 92.

23 Ibid., at 91.

24 The remark comes from one of the drafters. See in Jure Vidmar, Multiparty Democracy: International and European Human Rights Law Perspectives, Leiden Journal of International Law, 23 (2010) 1, 228, note 126.

25 Klass v Germany, Judgment of 22 September 1993, at 59.

26 Vogt v. Germany (1995), at 51, 59; Ždanoka v. Latvia, Judgment of 16 March 2006, at 100.

27 Communist Party (KPD) v. Germany, No. 250/57, Commission decision of 20 July 1957, Yearbook 1, at 222.

into the Convention against the abuse of rights.[28] Therefore, no one should be authorized to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society.[29]

According to the Court, both a state and individuals must contribute in maintaining democracy. On one hand, individuals must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole.[30] On the other hand, every time a state intends to rely on the principle of "a democracy capable of defending itself" in order to justify interference with individual rights, it must carefully evaluate the scope and consequences of the measure under consideration, to ensure that the balance is achieved.[31] Accordingly, the problem in maintaining democracy is that of achieving a compromise between the requirements of defending democratic society on the one hand and protecting individual rights on the other.[32]

Under the Convention system, it falls to the Court that having regard to the circumstances of each case determines whether a fair balance has been struck between the individuals' fundamental rights and the legitimate interests of a democratic state, which in the context of this discussion amounts to the interest to preserve democratic order. The rest of this article provides some further insights into the Court's jurisprudence, which shed light on how the Court navigates between the Convention rights and militant democracy principles.

D Militant Democracy in Action: Some Examples from the Court's Jurisprudence

1 Interferences with Freedom of Expression

I shall start with the right to freedom of expression since it does not only derive from democracy - it has been the darling of democracy ever since the first constitutional democracies abolished censorship. Yet, what amounts to "protected speech" is a central issue in courtrooms across the globe, particularly when it comes to the speech's most alarming form – hate speech. Although European democracies handle hate speech differently, basically it enjoys no freedom in Europe. Moreover, the hate speech prohibition seems to be the most "militant" and the most consistently applied of all defensive measures from the ECtHR's militant democracy arsenal. Consider the following.

At the beginning, a link that the Court established in Handyside between democracy and freedom of speech resembled a bit the First Amendment privileged position in the US constitutional jurisprudence: stressing that freedom of expression constituted one of the essential foundations of democratic society, the basic

28 Article 17 reads: "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."

29 Refah Partisi (The Welfare Party) and Others v. Turkey, Judgment of 13 February 2003, at 99.

30 Ibid.

31 Ždanoka v. Latvia (2006), at 100.

32 United Communist Party of Turkey and Others v. Turkey (1998), at 32.

conditions for its progress and for an individual's self-fulfillment, the Court particularly underlined that the Convention protected freedom of expression even if it could be seen as offensive, shocking or disturbing for the state or any group of population.[33] In the Court's view, a particular effect of speech was not a reason to sacrifice pluralism, tolerance and broad-mindedness, because without them there was no "democratic society" itself.[34] The restrictions are, however, permissible as long as they are "prescribed by law", pursue a legitimate public objective and are "necessary in a democratic society". The restrictions must be proportional, meaning that for the interference in question there must be a "pressing social need" proportionate to the aim being pursued. Under these principles that permeate the Strasbourg jurisprudence, the Court has developed a very broad area of "protected speech", including political speech, commercial speech, artistic expression and press and journalistic freedom.

However, from the very beginning, the Convention organs have made clear that not all kinds of offensive, shocking or disturbing speech enjoy the protection under Article 10. This is particularly the case with Holocaust denial, and more recently, with other forms of racist speech. When it comes to Holocaust denial, the former European Commission of Human Rights in a series of its decisions on admissibility, after having established that that national measures constituted an interference with the applicants' freedom of expression, found that the interference was "necessary in a democratic society".[35] The Court' approach is openly uncompromising: in view of Article 17 of the Convention, Holocaust deniers cannot even rely on Article 10 since their views run counter to the fundamental values of the Convention. A speech that contradicts "clearly established historical facts", such as the Holocaust, is not protected under freedom of expression and consequently "revisionist historians", found guilty of Holocaust denial by national courts, cannot invoke Article 10 before the Court because this type of "speech" constitutes an abuse of rights.[36] Moreover, not only denial of "clearly established historical facts", but also minimizing their degree and seriousness, fall outside the protection of Article 10. However, the Court's position towards 'revisionist speech' targeting other historical events is yet to be seen because the doctrine on when exactly historical facts become "clearly established" is missing and because the Court has generally refused to arbitrate the underlying historical issues.[37]

Now, the Court's militant approach towards hate speech also stems from the emerging case law that supports restrictions on the freedom of political discussion even in the absence of a concrete act of violence or other criminal act. Until recently, the Court has repeatedly emphasized that it is essential in a democratic society to defend the freedom of political debate and that one can not restrict political speech without compelling reasons.[38] Although offensive racist state-

33 Handyside v. UK, Judgment of 7 December 1976, at 49.

34 Ibid.

35 See e.g. X v. Germany, No. 9235/81, Commission decision of 16 July 1982, DR 29; T. v. Belgium, No. 9777/82, Commission decision of 14 July 1983.

36 Lehideux and Isorni v. France, Judgment of 23 September 1998, Garaudy v. France, Decision of 7 July 2003; Pavel Ivanov v. Russsia, Decision of 20 February 2007.

37 For critics see Laurent Pech, The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition, http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf.

38 See Scharsach and News Verlagsgesellschaft v. Austria, Judgment of 13 November 2003, at 30; Castells v. Spain, Judgment of 23 April 1992, at 42.

ments given in the political arena never enjoyed protection under Article 10,[39] in Féret the Court went a step further when in relation to "dangerous speech" (Sajó) it announced: "in principle, it may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, encourage, promote or justify hatred based on intolerance".[40] The restrictions are justified even if the hate does not necessarily require the use of a particular act of violence or other criminal act: the Court stressed that the language with clear incentives to discrimination and racial hatred cannot be camouflaged by the electoral process, since it is threatening social peace and political stability in democratic states.[41] Accordingly, a "pressing social need" has become a need to protect "a peaceful social climate" and "confidence in democratic institutions" rather than the rights of others or public order.[42] The Court's approach towards "dangerous speech" reassembles the abandoned American 'bad tendency' doctrine and lowers significantly the threshold of permissible speech in political arena.[43] Thus, it appears that in the presence of latent discrimination toward immigrants in Europe, political speech – once perceived as the cornerstone of freedom of expression – will receive a lower level of protection if it includes a discriminatory policy proposal that has tendency to generate public reactions incompatible with democratic goals.[44] In his powerful dissenting opinion, Judge Sajó found unreasonable the lowering of the threshold of permissible political speech in the context which did not include a call for violence against a particular section of the population. He also warned that the majority approach towards political speech stood contrary to the experience of contemporary constitutional democracies, which testified that the participation of political movements with dubious political discourse in the election process, reduced the risk of extremism and did not undermine democracies based on openness and tolerance.[45]

The Féret judgment well symbolizes the long-standing controversy over militant democracy. The controversy is based on two opposing approaches a constitutional democracy may take in fighting against its enemies. Thus, the majority invoked so-called "toe-in-the door" approach implying that even allowing anti-democratic forces to compete in the election process would be too dangerous for democracy, while dissenters argued that the best way to tame anti-democrats was to invite them into the democratic process in which they would show that

39 See Jersild v. Denmark, Judgment of 23 September 1994, at 35.

40 Féret v. Belgium, Judgment of 16 July 2009, at 64.

41 Ibid., at 73, 78.

42 Ibid., at 73, 77.

43 The "bad tendency" test, used earlier in the American constitutional jurisprudence, permitted restrictions of freedom of speech if the speech had a sole tendency to incite or cause illegal activity. It was overturned several times, finally in Brandenburg v. Ohio and replaced by the "clear and present danger" test that included the requirement for lawless action to be imminent. See Brandenburg v. Ohio, 395 US 444 (1969).

44 Féret v. Belgium (2009), at 69, 77. In this respect, the Court's approach well fits in the proclaimed European policy of a firm and continued action to fight against racism, xenophobia, anti-Semitism and intolerance endorsed in the Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe and the work of ECRI.

45 Féret v. Belgium (2009), dissenting opinion of Judge Sajó, joined by judges Zagrebelsky and Tsotsoria.

they were not capable to rule ("safety valve" approach).[46] Undoubtedly, aware of anti-immigrant feeling in Europe, the ECtHR did not want to take a risk with the policy of "emotionalism" and allow the Europe's worst fear of going again to the extreme to come true. Therefore, although with a tight majority (4:3) the Court in Féret endorsed the policy of repression against those who employ "bad tendency speech" to destroy democracy.

The Féret case may have changed the Court's approach towards hate speech but it does not reflect the Court's general stance towards interventions with freedom of expression based on militant democracy grounds. There is more to it than this. For the purpose of this discussion, particularly illustrative is the Court's position towards the claims coming from new democracies that the restrictions on the freedom of expression serve to defend their emerging democracy usually under fire from the former forces of the totalitarian regime. Although acknowledging that history plays an important role in this context, the Court has not always accepted that a speculative threat to emerging democracy can amount to a "pressing social need" and justify preventive measures intended to restrict the freedom of expression. For example, in Vajnai the Court did not support Hungary's claim that the criminal conviction of a politician who worn a red star at a political demonstration was permissible under Article 10.[47] The Court found that a conviction for simply having worn a red star could not be considered to have responded to a "pressing social need" since there was no evidence to suggest that there was any real danger of a political movement or party restoring communism in Hungary.[48] Additionally, the context in which a leader of a registered political party with unknown totalitarian ambitions displayed the symbol that may have several meanings cannot be equated with dangerous propaganda.[49] Moreover, although the Court accepted the fact that the well-known mass violations of human rights committed under communism had discredited the red star and that the display of such a symbol might create uneasiness among past victims and their relatives, it considered that such sentiments, however understandable, couldn't alone set the limits of freedom of expression.[50]

In contrast, the Court found that the need to maintain democracy in transitional countries might be a particular reason to restrict the right of members of the police to participate in a political debate.[51] Thus, having in mind that the police was a supporter of the former totalitarian regime in Hungary, the Court found the obligation imposed on police officers to refrain from political debate was intended to contribute to the consolidation and maintenance of pluralistic democracy in the country and could be seen as a "pressing social need" and not excessive with regard to the applicant's freedom of expression.[52]

46 For more about these strategies and their efficiency see Holmes (2006), 591.
47 Vajnai v. Hungary, Judgment of 8 July 2008.
48 Ibid., at 49-58.
49 Ibid., at 56.
50 Ibid., at 56-58.
51 Rekvényi v. Hungary, Judgment of 20 May 1999.
52 Ibid., at 47-50.

2 The Banning and Dissolution of Political Parties

More than anything, the banning of political parties clearly tests the limits of militant democracy: the ban restricts the freedom of political organization and communication exercised through the freedom of association and freedom of speech, and as a rule leads to dissolution of parties, confiscation of their assets, prohibition of their programs and propaganda and finally the prohibition on establishing ersatz-organization.[53] Despite announcing in a number of cases the primordial role political parties play in a democratic regime,[54] in the presence of certain conditions the Court raises no principal objection against the mentioned interferences with the political rights. On the contrary, the case law suggests that the Court is not ready to take any risks with parties which are openly extremists or which want to replace democratic rules with a system based on irreversible religious rules.

During the period of Cold War, the former Commission did not allow fascist and communist parties to invoke the Convention rights against the restrictions of their activities, applying either Article 17 or Article 11 (2) of the Convention. The decisions were colored by a legitimate aim to protect democracy and its institutions.[55]

In more recent times, the Court has contributed in developing the European standards for dissolution of political parties.[56] On one hand, the case law reflects the preferred position political parties enjoin in today's Europe, and on the other the Court's focus on saving democracy. Thus, mostly in cases concerning Turkey and Spain, the Court has repeatedly confirmed that political parties are a form of association essential to the proper functioning of democracy, entitled to seek the protection of Articles 10 and 11 of the Convention.[57] Yet, a political party may talk politics and initiate changes in the legal and political structure of a 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".[58] Put briefly, political parties are not allowed to work against democracy: "a political party 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 recognized in a democracy cannot lay claim to the Convention's protection […]".[59]

On the premise that it is of the essence of democracy to allow diverse political projects to be proposed and debated, including even those that call into question

53 See Günter Frankenberg, The Learning Sovereign, in Sajó (ed.) (2004), 119.

54 See e.g. Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 87.

55 Communist Party (KPD) v. Germany (1957); X v. Italy, App. No. 6741, Commission decision of 1 January 1976.

56 See in Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), 9-11.

57 See e.g. Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 87 and Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, at 74.

58 Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 98.

59 Ibid. See also Yazar and Others v. Turkey, Judgment of 9 April 2002, at 49; Stankov and the United Macedonian Organization Ilinden v. Bulgaria, Judgment of 2 October, 2001, at 97 and Socialist Party and Others v. Turkey, Judgment of 25 May 1998, 46-47.

the territorial constitutional order of a contracting state,[60] the Court in a number of cases has confronted national authorities, finding that dissolution of the political parties did not meet a "pressing social need" based on account of harming democracy itself. For example, unless they are followed by calls for the use of violence, neither a particular political party's approach to minority issues, self-determination nor secessionist claims, no matter how much significantly opposed to existing constitutional structure, represent a threat to democracy requiring the dissolution of a party.[61] On the contrary, political parties advocating alternative constitutional policy are essential to the effective functioning of democracy and cannot be subject of the stringent militant democracy measures, including dissolution, provided that there is nothing like propagating or taking recourse to violence in their programs or in speeches of their leading figures.[62] Therefore, it is clear that the Court has not allowed States to settle longstanding local problems with their political rivals (particularly with minorities) under the guise of militant democracy doctrine. This is not, however, the end of the matter.

Firstly, the Court has not denied the possibility that totalitarian movements organized in the form of political parties, in pleading the rights enshrined in the Convention, might attempt to destroy democracy. In fact, the Court has reminded that such attempts are recorded in modern European history.[63] Secondly, up to now, the Court has decided that "pressing social need" to ban and dissolve a political party may be justified on the militant democracy principle grounds if the party rests its program and activities on the religious order incompatible with fundamental principles of democracy[64] or if it is clearly linked to a terrorist organization.[65] Thirdly, even if the party dissolution is grounded solely on the failure to condemn violent acts connected to terrorism, this would not necessarily stand contrary to the Convention, since the conduct of politicians extends not only to their actions or speeches but also, in certain cases to their omissions or silence, which could be seen as taking a position and be just as telling.[66] Next, the Court has recognized that, faced with treats of the above-mentioned sort, a State cannot afford to be indifferent and wait until a political party has seized power to intervene: "where the presence of such a danger has been established by the national courts, a State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and

60 United Communist Party of Turkey and Others v. Turkey (1998), at 57.

61 See e.g. Freedom and Democracy Party (ÖZDEP) v. Turkey, Judgment of 8 December 1992; United Communist Party of Turkey and Others (1998); Socialist Party and Others (1998); Yazar and Others v. Turkey (2002); Dicle for the Democratic Party of Turkey v. Turkey, Judgment of 10 December 2002; Democracy and Change Party v. Turkey, Judgment of 26 April 2005; Emek Partisi v. Turkey, Judgment of 31 May 2005 and United Macedonian Organization Ilinden-PIRIN v. Bulgaria, Judgment of 20 October 2005.

62 Ibid. For more see Olgun Akbulut, Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties, Fordham International Law Journal 34 (2010) 46.

63 Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 99.

64 Ibid., at 119, 123.

65 Herri Batasuna and Batasuna v. Spain (2009), at 89, 92-94.

66 Ibid., at 82.

the country's democratic regime".[67] To support this policy, the historical context in which the dissolution of the party concerned took place should be taken into account.[68] The authorization for preventive intervention is only conditioned by a rigorous Court's supervision. Finally, the Court has upheld a right of the state to deny the members of established ersatz-parties the right to stand for elections.[69]

While the Court should be praised for its tendency to limit the possibilities for states to adhere to a party ban whenever they want to remove their opponents from political arena, one has to admit that the Court has not succeeded in making coherent guiding principles, particularly when the reason for dissolution is based on the relationship between the state and religion and the notion of secularism. In its highly criticized Refah decision, the Court upheld the decision of Turkish Constitutional Court to ban one of the parties in then ruling coalition - the Refah Party - on the grounds that its advocacy for a plurality of legal regimes in Turkish society that would include one based on Sharia, was incompatible with the fundamental principles of democracy embodied in the Convention.[70] If the Court had stopped here, much of the criticism directed at the Court for failing to respect the principle of pluralism "in an age of multiculturalism" (Akbulut) would have been avoided, since a plurality of legal systems, including one which is religiously based, undeniably infringes the principle of non-discrimination and denies individuals a state protection against violations of their rights and freedoms firmly guaranteed in constitutional democracies.[71] Whether, however, there was a "pressing social need" to ban the Refah Party because risk existed of introducing the regime of Sharia in Turkey and therewith a threat to democracy, was a different issue subject to the proportionality test. Unfortunately, the Court went further and, as Boyle noted, lumped together secularism, human rights and democracy in order to argue that Sharia itself was also incompatible with democracy.[72] Thus, the Court departed from its own ruling in Communist Party v. Turkey where it held that seeking change in a democracy was legitimate provided such change did not harm democracy itself. Justifying such a departure by the speculative danger of statements made by Refah leaders a years before Refah came to power appears unpersuasive.[73] Moreover, the Courts reasoning in Refah is sharply contrasted with the Court willingness to afford contracting states a broad margin of appreciation when it comes to questions concerning the beginning and the end of life, particularly having in mind that in some states, including Ireland and Poland, state policy in these areas is highly influenced by Catholic religion. If one adds to this the fact that many European parties originated from an affiliation to Christian religion, it is hard to resist the conclusion that the

67 Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 102.
68 Ibid., at 105.
69 See Etxeberría and Others v. Spain, Judgment of 30 June 2009; Herritarren Zerrenda v. Spain, Judgment of 30 June 2009 and Eusko Abertzale Ekintza - Acción Nacionalista Vasca (EAE-ANV) v. Spain, Judgment of 7 December 2010.
70 Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 117-128.
71 For critics see e.g. Teitel (2007), 67; Kevin Boyle (ed.), Human Rights, Religion and Democracy: The Refah Party Case, 1 Essex Human Rights Review, 1 (2004) 13-14; Akbulut (2010), 55-66. Patrick Macklem, Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination, International Journal of Constitutional Law, 4 (2006) 488, 507-516.
72 Boyle (2004), 14.
73 Refah Partisi (The Welfare Party) and Others v. Turkey (2003), at 129-131.

Court's vision of "democratic society" is hardly compatible with society which does not origin from "Christian principles and values". Therefore, it seems fair to conclude that the big loser in Refah was democracy itself.

3 Interferences with Election Rights

The Court's willingness to legitimize militant democracy in a limited manner can be also traced with regard to its case law concerning Article 3 of Protocol No. 1 to the Convention. Unlike other provisions in the Convention, the article speaks primarily about positive obligations of contracting states to hold democratic elections.[74] Yet, the Court took the position that this article protects individual rights. It has recognized that the right to vote and the right to stand for election, together with freedom of association and freedom of expression, make irreparable contribution to the political debate, which itself features the very core of the concept of democratic society.[75] Although the provision mentions no grounds for restrictions, limitations are to be implied, but less stringent than those applied under Articles 8 to 11 of the Convention. The Court's task is limited to reviewing whether there has been arbitrariness or disproportionality and whether the restriction has interfered with the free expression of the opinion of the people.[76] Because there is no unique system of organizing and running elections within Europe, national "legislation must be assessed in the light of political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another".[77]

The Court has confirmed the last mentioned criteria especially in cases involving the post-communist countries of Central and Eastern Europe. On one hand, it has affirmed that the principle of "democracy capable of defending itself" is compatible with the Convention for the purpose of limiting electoral rights. On the other hand, it has not always sustained that previous corrupt behavior justifies disqualifications from the elections in emerging democracies. Consider the following.

Admittedly, there is an obvious interference with the right to stand for election whenever an individual is disqualified from standing due to their political or other related activity in the totalitarian regime. However, the critical issue is whether the restriction has been disproportionate, arbitrary and discriminatory. In Ždanoka, the Latvian legislation which prevented those who had "actively participated" in the CPL after 1991 to stand for election, passed the Court's scrutiny. The Latvian Government justified the restriction on the militant democracy grounds:

> *"[...] The bar from standing for election applied to those who had been active within organizations which, following the declaration of Latvia's independence, had openly turned against the new democratic order and had actively sought to restore the former totalitarian communist regime [...] Having failed to respect democratic principles in the past, there was no*

74 Article 3 reads: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

75 Yumak and Sadak v. Turkey, Judgment of 8 July 2008, at 106-107.

76 Ždanoka v. Latvia (2006), at 115.

77 Ibid.

guarantee that they would now comply with such principles [...] the disputed disqualification was preventative in nature and did not require proof of actual dangerous or undemocratic actions on the part of those persons."[78]

Confirming, the Court found that barring the politicians of the former regime from standing as parliamentary candidates "could be considered a legitimate and balanced measure" especially in circumstances where the individuals had not dissociated themselves from the CPL anti-democratic stance.[79] It, however, made clear that in balancing process the need to defend an emerging democracy in Latvia justified its special treatment and openly said that such a of restriction of electoral rights could have hardly been acceptable if adopted in a country of established democracy.[80] In other words, as long as there is "a threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime", the Court is ready to go 'militant' and approve restrictions of democratic rights.[81] Nevertheless, the Court warned that its readiness to support "militant" measures in new democracies was not absolute either in time or in scope. Accepting that the national authorities were better placed to assess the difficulties faced in establishing and safeguarding the democratic order, it nonetheless stressed that measures based on militant democracy grounds were permissible only if time-limited, proportionate and not arbitrary.[82]

Put differently, with a stronger democracy comes less "militancy": on a different and more advanced level of democracy, the Court may find restrictions of electoral rights based on past behavior in a totalitarian regime no longer necessary.[83] Only two years later the Court came to such conclusion in another Latvian case concerning the removal of the former KGB officer from the electoral list and his disqualification from standing in elections. Unlike in Ždanoka, in Adamsons the Court argued in favor of 'individualization' for the right to stand for election under Article 3 of Protocol No. 1 and stressed that with the passing of time, a particular socio-historical background could not alone justify restrictions of electoral rights.[84] The authorities have to provide the most compelling reasons for the restrictions and a mere general suspicion regarding a group of persons no longer suffices. Instead, imposing the bar with regard to elections for the protection of democratic order can only be justified if assessed on a case-by-case approach, which would allow the actual conduct of the person concerned to be taken into account.[85] As a result, in the Lithuanian case mentioned at the beginning of this article, the Court ruled that previous behavior, including that of the impeached president, cannot be justification for one's permanent disqualification from standing in election no matter it was aimed at preserving democratic order.[86]

78 Ibid., at 86.
79 Ibid., at 74, 128.
80 Ibid., at 132-133.
81 Ibid., at 133.
82 Ibid., at 135.
83 Interestingly, basically all four dissenters in Ždanoka found that at the time the case was considered (2006), Latvia had passed the difficult time and that the considered restrictions were no longer necessary to defend democracy in the country.
84 Adamsons v. Latvia, Judgment of 24 June 2008, at 131-132.
85 Ibid., at 121-132.
86 Paksas v. Lithuania (2011), at 110, 112.

E Conclusions

For any study of militant democracy in Europe the Strasbourg jurisprudence is an obvious choice for analysis. The ECtHR has contributed to a great extent in developing what is called today a “Europe of rights” (Keller and Stone-Sweet). The controversial idea of militant democracy advocating the denial of freedom to those who reject democracy, appears as a significant threat to a “Europe of rights” and at the same time as its basic tenet. My aim here was to explore whether the Court has succeeded in installing the principles of militant democracy in Europe in a way which did not compromise democratic values.

If one starts from the premise that militant democracy is mainly aimed at preventing radical movements from destroying democracy, it appears that the Court has developed a robust legal strategy to block such scenario. By totally closing its door to revisionists who deny “the clearly established historical facts”, by outlawing “dangerous speech” in the absence of accompanying violence or criminal activity, and by declaring that advocacy for legal regimes based on religious rules and terrorism are “threats to democracy”, the Court has built a strong preventive shield against those who use democratic means to kill democracy itself. The fact that the Court has taken such a strong defending position may imply that it has learned the lesson from the Europe’s troubled past. At the same time, to paraphrase O.W. Holmes, the Court has not allowed militant democracy principles to grow out of revenge and has discouraged the states’ attempt to remove their rivals from political arena under the guise of protecting democracy.

However, everybody who explores the Strasbourg jurisprudence on militant democracy hoping to find coherent guidelines as how to restrain democracy in a permissible manner may be somewhat disappointed. Not only are coherent guiding principles missing, but some of the Court’s decisions are text-book examples of an incorrect understanding of democratic ideals (the Refah) or open a wide possibility for a speculative decision-making when assessing whether democracy is at risk (Féret), legitimizing thus whatever comes from the majority and endangering the very value to be protected, democracy itself. However, one cannot deny that the Strasbourg jurisprudence helped promote the underlying thesis that authorizing a certain level of militancy is in principle unobjectionable in democratic society. The images of acceptable militant versions of democracy still remain the subject of interpretation.