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MILITANT DEMOCRACY AND HUMAN RIGHTS: THEORETICAL FRAMEWORK AND PRACTICAL IMPLICATIONS

This article examines the concept of militant democracy, a particular form of democratic order that actively defends itself against political actors and ideologies aiming to destroy democracy by using democratic institutions. The study focuses on the complex interrelationship between militant democracy and fundamental human rights and freedoms in the context of safeguarding the democratic order. Since militant democracy inherently involves the possibility of restricting certain rights to prevent antidemocratic actions, this article examines the normative justifiability of such limitations. The theoretical analysis traces the evolution of the concept of militant democracy through the works of key political and legal theorists, with special emphasis on Karl Loewenstein and Hans Kelsen. Alongside a conceptual approach, the authors analyse the application and acceptability of the instruments of militant democracy through the practice of competent judicial bodies. The findings reveal that there is no single position on the acceptability of militant democracy in legal theory whereas certain measures of militant democracy, especially the ban on political parties that advocate undemocratic goals, are recognized and accepted in legal practice as legitimate means for preserving democratic institutions.

Keywords: militant democracy, human rights, limitation of human rights, legal theory, legal practice.

1. INTRODUCTION

New forms of threats have once again revived the debate on the concept and mechanisms of a democracy capable of defending itself. Such a system is most commonly referred to as militant democracy. Although various instruments of militant democracy can be identified in ancient states, the modern concept was developed by Karl Loewenstein as a means of defending democracy against the growing threat of Nazism.

Although militant democracy emerged as a reaction against the totalitarian ideologies of fascism and communism, this concept remains relevant today for the protection of democracy

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against contemporary threats such as populist movements and religious fundamentalism, and it is sometimes also used as a means of protecting the state against terrorism.

The paper is thematically divided into two parts. The first part presents the theoretical framework of militant democracy, with particular reference to the views of Karl Loewenstein and Hans Kelsen as two different theoretical approaches. The second part of the paper analyses the practical application of militant democracy in Germany and Turkey, and in the case law of the European Court of Human Rights, in order to examine the acceptability of militant democracy measures in the practice of relevant judicial bodies. The analysis is conducted through doctrinal legal research using normative and casuistic methods.

2. MILITANT DEMOCRACY—THEORETICAL FRAMEWORK

Democracy as a form of political organisation has traditionally been defined by the principles of popular sovereignty and equality of citizens. These two fundamental principles are often interpreted in absolute terms so that any limitations imposed upon them are viewed as a contrary to the very essence of democracy. Accordingly, democracy has long been understood as requiring equal opportunities for all political ideas, regardless of their content. However, the tragic experiences of totalitarian regimes have led to a re-evaluation of the concept. Is democracy merely a procedural framework or does it also embody certain immutable values? Should all citizens enjoy equal rights to political participation regardless of the substance of their actions? Is democracy entitled to defend itself against those who seek to undermine or destroy democracy? Finally, is a value-neutral, relativistic conception of democracy “one of the gravest threats to democracy”? (Sajó, 2019, p. 187) The theory of militant democracy provides a clear response to these dilemmas. It holds that democracy is based on certain absolute values, the protection of which it must ensure by acting against those who aim to destroy them, since they seek thereby to destroy democracy itself.

The concept of militant democracy is far from unambiguous. The ambiguity largely stems from different views on the scope of militant democracy. While the classic definition of militant democracy envisaged a democratic order that actively defends itself against the enemies of democracy within the state, the new threats facing modern democracies have contributed to a broader understanding of the concept, extending its scope so as to include external threats. This primarily refers to the increasing danger terrorism poses to the democratic order although in literature there is no consensus as to whether counter terrorism measures are part of militant democracy (Beširević, 2023, p. 662). Militant democracy measures are generally directed against actions aimed at destroying democracy rather than against individual subjects. However, Müller (2019, p. 25) believes that such measures may also be directed at individuals when their conduct over time demonstrates a clear intention to destroy democracy.

Militant democracy is sometimes narrowly understood as the prohibition of radical political movements seeking to dismantle the democratic institutions. However, the banning of political parties is only one measure in the arsenal of militant democracy. Additional mechanisms include a wide range of other measures, such as entrenched constitutional provisions (the so-called “eternity clause”), restrictions on access to public office for citizens who seek to destroy the democratic order, measures aimed at countering religious fundamentalists or even populist political movements.

In addition to the lack of consensus regarding the content and scope of militant democracy, as Beširević (2013a, p. 15) states, there is also notable terminological heterogeneity, with the concept being described using terms such as defensive democracy, democracy capable of self-defence, vigilant democracy and value-based democracy.

Militant democracy can be defined as “democratic regime which is willing to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime” (Müller, 2012, p. 1253). According to Tyulkina (2015, p. 14) there are three characteristics which make democracy militant: pre-emption, specific enemy and abuse of rights and privileges which democracy gives to its enemies. Several problems arise from the very definition of the concept. The fundamental problem facing militant democracy in its theoretical justification relates to the principle of equality as a core element of the democratic political system (Dimitrijević, 2013, p. 32). If democracy is based on the will of the majority, why would it be justified to prevent the realization of that will through measures of militant democracy, even if it meant replacing democracy with another form of political system. Another problem arises from the nature and timing of militant democracy measures. Such measures may appear undemocratic *a priori*, as they involve restricting political freedoms such as the freedom of political action, expression and representation of different ideas for the sake of preserving the democratic order, most often by excluding certain political actors from the political arena and by limiting fundamental human rights and freedoms.

Apart from the fact that such measures seem *prima facie* undemocratic, they are taken preventively before any concrete act of democratic subversion occurs. This preventive logic raises concerns about potential misuse, particularly given that the authority to invoke such measures is often within the competence of the currently ruling political elites. As Müller (2016, p. 260) states, “if left entirely to executives or parliaments, militant democracy might turn into a convenient means for parties to outlaw their competitors or to score cheap points with the electorate against unpopular minorities.” Invernizzi Accetti & Zuckerman (2016, p. 195) warn that the application of militant democracy measures is inherently arbitrary and may have dangerous consequences insofar as it risks expanding to a broad and indeterminate set of alleged enemies of democracy in the absence of principled criteria. Instead, they advocate, “democratic regimes ought to insure themselves against the so-called paradox of democracy by relying exclusively on the means of constitutional and criminal law, without entering into the terrain of militant democracy.”

Most scholars who address militant democracy focus on both its theoretical justification and the potential risk associated with the application of militant democracy measures. Even proponents of militant democracy urge caution in using these measures, justifying their application as a last resort where there is a clear and present threat. For instance, when considering the potential application of militant democracy measures against populist movements, Kaltwasser (2019, p. 89) warns of their possible counterproductive effects—such measures may be perceived as illegitimate by part of the electorate, thereby strengthening electoral support for such movements. By contrast, Schupman (2024, p. 70) cautions against an overly restrictive approach. He argues, “limiting them solely to immediate existential threats, there is an increased risk that, by the time militant measures can be deployed legitimately, they will no longer be capable of halting an antidemocratic party’s rise to power.” In an effort to strike a balance between militant democracy and fundamental human rights, some scholars

advocate a graduated approach: “to give much leeway to extremist actors at the periphery of the system but to also impose increasingly severe restrictions as they approach the centre of decision-making” (Rummens, 2019, p. 131).

It seems the essence of the problem is perhaps best captured in the enduring question *Quis custodiet ipsos custodes?* Two influential theorists, Karl Loewenstein and Hans Kelsen, have sought to answer this question. They offered different answers considering their understanding of the essence of democracy.

2.1. Karl Loewenstein

Although the historical roots of militant democracy can be indirectly traced back to ancient times (Podunavac, 2013), the term itself is most closely associated with political scientist and legal scholar Karl Loewenstein who is often considered the father of militant democracy. During the rise of Nazism, Loewenstein served as a professor of constitutional law at the University of Munich. After Hitler came to power, Loewenstein lost his professorship, because “constitutional theory and law cannot be taught by a Non Aryan in the National Socialist State” (Rensmann, 2011, p. 980). After emigrating to the United States, Loewenstein published two articles in the renowned *American Political Science Review* in which he outlined the fundamental threats facing democracies (Rijkema, 2018, p. 26).

Analysing the rise of fascism in Europe, Loewenstein (1937a, p. 423) argues, “its success is based on its perfect adjustment to democracy. Democracy and democratic tolerance have been used for their own destruction.” Drawing lessons from the collapse of the Weimar Republic, Loewenstein (1937a, p. 424) warns: “Until very recently, democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city.” While the principle of legality is fundamental to democracy, Loewenstein (1937a, p. 424) criticised “the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules.”

Loewenstein advocated the adoption of legislative measures to combat fascism. Although he was aware that no ideology can be suppressed by legislative measures alone, Loewenstein (1937a, p. 432) tried to address this normative gap in his theory by claiming that fascism is not an ideology “but only a political technique under ideological pretences. There is no historical evidence that a political technique is irresistible if recognized and fought as such.” Loewenstein was aware of the tension between democracy as a political order and measures of militant democracy. However, he believed that democracy must “live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles” (Loewenstein, 1937a, p. 424).

Loewenstein did not directly address the distinction between procedural and substantive democracy. However, it is clear that he was an advocate of the idea of substantive democracy “as a procedure that serves certain fundamental values that cannot be called into question under any circumstances, even if it is the will of the majority” (Jovanović, 2013, p. 193). Loewenstein refers to the absolute values of democracy in the fight against fascism. Such a position is in direct contradiction to the theory of procedural democracy, according to which no position possesses absolute value *a priori*, but all are equally valuable and enjoy equal protection. In this sense, no one could refer to certain substantive values that constitute the core of democracy in order to exclude from the political arena those who seek to destroy them. Loewenstein argued

that democracy could not be blind to its enemies in the name of respecting the rights of every citizen, regardless of their intention to destroy democracy. Democracy must become militant when the very core of democracy is attacked. Therefore, democracy must be redefined so that, at least during a transitional period, it implies “the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom” (Loewenstein, 1937b, p. 658).

Loewenstein’s concept of militant democracy has been criticized as an outdated concept, given that Loewenstein’s primary concern was the suppression of fascism as a special emotional technique that threatened to dominate the masses and destroy democracy through legal means. Loewenstein was aware of the dangers of abuse of the measures of militant democracy, which are reflected in restrictions of the fundamental rights of citizens. However, guided by tragic experiences, Loewenstein (1937b, p. 658) concludes that “to neglect the experience of democracies deceased would be tantamount to surrender for democracies living.” This conclusion remains highly relevant today, perhaps even more than ever.

2.2. Hans Kelsen

Kelsen is often overlooked or mentioned only sporadically in discussions of militant democracy. Scholars who have researched his contribution to this issue often cite Kelsen’s following statement as a starting point: “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” (Kelsen, 2006, p. 237).

Kelsen made a significant contribution to the development of legal theory, but also to the theory of democracy. A unifying feature of both fields lies in Kelsen’s effort to construct pure models—a pure theory of law and correspondingly a pure theory of democracy. In this context, his often-cited position on loyalty to one flag, the flag of democracy, can also be better understood. Kelsen firmly rejects the idea that democracy can become militant when threatened by its enemies: “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” (Kelsen, 2006, p. 237).

Therefore, Kelsen equated the use of measures of militant democracy with the cessation of democracy. This position is consistent with his commitment to a procedural democracy. For Kelsen, democracy does not rest on the existence of absolute truths or absolute political values. Democracy implies relativism in the sense that every political idea, every political opinion, even those aimed at destroying democracy, deserve an equal chance “to be articulated and to compete freely for people’s minds and hearts” (Kelsen, 2000, p. 108). Consequently, Kelsen is often characterized as a democratic fundamentalist for maintaining “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” (Rijkema, 2018, p. 34). As Schupmann (2024, p. 77) states, a fundamental weakness of this approach is equating legality and legitimacy, resulting in “any political goal at all is legitimate if pursued through formal democratic legal procedures, whatever its substantive implication.”

3. THE PRACTICAL IMPLEMENTATION OF MILITANT DEMOCRACY MEASURES

While there are differing theoretical views on the justification, scope and usefulness of militant democracy, the practice of modern states and relevant judicial bodies leads to the conclusion that militant democracy is, directly or indirectly, incorporated into most constitutional systems and supported in judicial practice. According to Tyulkina (2015, p. 41), it is “hard to find a modern constitution completely lacking militant democracy provisions, even where there is no precise reference to the militant character of a state.” In the remainder of this article, the authors focus on some of the most important cases involving the application of militant democracy in the practice of national and international judicial bodies in order to test the initial hypothesis that militant democracy measures are accepted in practice despite different theoretical views on the legitimacy of such measures.

3.1. Militant democracy in the practice of the Federal Constitutional Court of Germany

Germany is commonly viewed as the cradle of militant democracy. The first practical application of militant democracy measures, in the form of the banning of political parties, took place in this country. Shortly after the adoption of the Basic Law, the Federal Constitutional Court was called upon to apply Article 21, which provides the possibility of declaring political parties unconstitutional if they “seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany” (*Grundgesetz für die Bundesrepublik Deutschland*, 1949). The application of this provision resulted in declaration of the unconstitutionality of the Socialist Reich Party and the Communist Party of Germany.

The SRP was a party that openly expressed its neo-Nazi character through various forms of public action. In this case,¹ the Federal Constitutional Court focused its analysis on the role of political parties in democracy as well as on the party’s leadership and internal organization, programme and activities of its leaders. Having regard to the special significance of political parties as agents of the expression of the popular will, their exclusion from political life is justified only when they seek to undermine the supreme fundamental values of the free democratic constitutional state. The Court also considered the party’s internal organization, which closely resembled that of Hitler’s Nazi party, as well as the fact that many SRP leaders had been members of organizations closely associated with Hitler’s regime. Ultimately, the Court concluded that both the party programme and the activities of its leadership demonstrated opposition to the existing constitutional system with the aim of reviving the Nazi-type state. The Court therefore held that the SRP unconstitutional. In addition, it prohibited the establishment of replacement organizations, revoked the mandates of SRP representatives and ordered the confiscation of party assets.

Unlike the SRP case, in which the Federal Constitutional Court did not hesitate nor did the decision provoke significant public opposition, primarily “due to the fact that the memories of the Nazi regime were still fresh in people’s minds” (Tyulkina, 2015, p. 75), the Court acted much more cautiously in the Communist Party case. It took several years to deliver a decision in this case, which remains the longest decision in the Court’s history, at 308 pages (Tyulkina, 2015, p. 75). As in the SRP case, the Court examined the historical development

¹ SRP-Verbot, 1952.

of communism, the conduct of the party leaders and the party's organizational structure, ultimately concluding that the activities of the Communist Party were directed at undermining and abolishing the constitutional order (Communist Party of Germany Case, BVerfG, 17.8.1956. - 1 BvB 2/51). Tyulkina (2015, pp. 76-77) highlights several additional elements that underscore the importance of this decision. First, based on the Court's reasoning, it can be argued that a party ban does not require proof of the existence of an immediate or concrete danger, rather, it is sufficient to demonstrate a probability that the party will pursue unconstitutional goals in the foreseeable future. Second, considering the relationship of Article 21 of the Constitution to other provisions, the Court effectively elevated militant democracy to the status of a fundamental constitutional value. This jurisprudence demonstrates that the Federal Constitutional Court has resolutely stood in defence of substantive democracy, rejecting a purely procedural understanding that excludes the existence of fundamental constitutional values in a democratic political order.

Although it might have been expected that the Communist Party case would serve as a precedent for further bans of extremist political parties, this did not happen. When ruling on the constitutionality of the National Democratic Party, which had been linked to a series of racially motivated attacks and hate crimes, the Federal Constitutional Court discontinued the proceedings on procedural grounds (Tyulkina, 2015, p. 80). Stanić (2019, p. 50) argues that the Court's reluctance to ban political parties stems from the fact that "the mentioned bans were not of great and lasting benefit." Germany is once again facing the challenge of political extremism, particularly in relation to the AfD, a political party that enjoys considerable public support. At present, domestic courts have prohibited the intelligence service from referring to the party as an extremist group. It remains to be seen what the final legal outcome will be.

Beyond measures targeting political parties, militant democracy in Germany has also been applied to individual citizens through the adoption of the Radicals Decree. As Pantelić & Radojević (2021, p. 465) note, this act "required candidates for public service to demonstrate loyalty to the free democratic order." The decree provided a legal basis for screening citizens' loyalty prior to entering public service with the aim of preventing the infiltration of individuals deemed hostile to the constitutional order. Its implementation affected millions of citizens with more than 1,000 individuals being denied access to public service. These measures were applied to a wide spectrum of citizens, from schoolteachers and train drivers to postal employees, primarily based on their membership or activities related to the Communist Party.

3.2. Militant democracy in Turkey

The banning of political parties as a measure of militant democracy has been used only rarely in most jurisdictions. However, this general conclusion does not hold in the case of Turkey. The Constitutional Court of Turkey has banned 24 political parties. Most of these bans were imposed for violating territorial integrity or for breaching the principle of secularism, which has constitutional rank in Turkey. The application of this principle in practice extended beyond political parties advocating introduction of religious elements into the state structure and encompassed issues such as the wearing of headscarves in public institutions (Tyulkina, 2015, p. 169).

The prohibition of political parties in Turkey has not been limited to marginal actors but has also affected parties enjoying significant public support. One of the most prominent is the *Refah* case. The Refah Party won more than one fifth of the votes in the national elections and

subsequently formed a coalition government. After assuming power, this political party sought to introduce elements of Islamic law both as ordinary law and as law applicable to the Muslim community. Such initiatives were considered to violate the principle of secularism, a position upheld by the Constitutional Court of Turkey. The Court emphasized that “secularism is one of the indispensable conditions of democracy [...] The rules of sharia were incompatible with the democratic regime. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between citizens before the law” (*Refah Partisi and Others v Turkey*, 2001, para. 25). Tyulkina (2015, p. 175) criticizes this decision, highlighting its problematic nature, particularly given that it relied primarily on statements and activities of party leaders rather than on the party’s programme. Marinković (2013, p. 163) interprets this approach as a methodological shift, whereby the Court undertook an empirical analysis of party leaders’ statements in order to assess comprehensively whether a pressing social need for the ban existed.

Unlike in the *Refah* case, the Constitutional Court did not ban the AK political party despite allegations that it had violated the principle of secularism by attempting to lift the headscarf ban (Decision of the Constitutional Court of Turkey E.2008/1 (SPK), K.2008/2). The party ultimately avoided dissolution, although it is noteworthy that an absolute majority of judges voted in favour of banning it (Tyulkina, 2015, p. 176).

Beyond political parties, the militant protection of secularism in Turkey has also extended to individuals. In the well-known case of Leyla Sahin, a student was denied access to lectures and examinations for wearing a headscarf and was subjected to disciplinary measures. The Constitutional Court has previously addressed similar issues, adopting the position that “students had to be permitted to work and pursue their education together in a calm, tolerant and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation. [...] irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that State education must be neutral” (*Leyla Şahin v Turkey*, para. 39).

3.3. Militant democracy in the case law of the European Court of Human Rights

In its case law, the European Court of Human Rights has repeatedly examined the compatibility of various measures of militant democracy with the rights and freedoms guaranteed by the Convention. Beširević (2013b) distinguishes between four groups of cases: those concerning freedom of expression and the prohibition of hate speech, the prohibition of political parties, the restriction of electoral rights and a group of religious cases related to the alleged violation of the principle of secularism.

In *Vogt v Germany*, the applicant, a teacher, had been dismissed because of her political activities and membership in the German Communist Party. The Court accepted that the measure pursued a legitimate aim and found that “a democratic State has the right to require civil servants to be loyal to the constitutional principles on which that State is founded” (*Vogt v. Germany*, para. 50). It nevertheless found a violation of the Convention because the dismissal did not constitute a measure that was necessary in a democratic society. The Court attached particular importance to the fact that the Federal Constitutional Court had not banned the party in question and that the applicant’s activities had been lawful.

With regard to cases concerning the dissolution of political parties, the Court's case law may be divided into two groups. In the first group, the Court relied directly on Article 17 of the Convention, which prohibits the abuse of rights, to declare the application inadmissible. For example, in the case concerning the German Communist Party, the Commission found the application inadmissible by referring to Article 17 of the Convention, considering that the party's organization and activities constituted an abuse of Convention rights (*German Communist Party and Others v. Germany*, Application no. 250/57, Commission Decision, 20 July 1957).

The second group includes cases in which the Court examined the prohibition of political parties on the merits, primarily under Articles 10 and 11 of the Convention. The first case in this group is the *United Communist Party of Turkey and Others v. Turkey*. The domestic courts had dissolved the party because of its very name and the promotion of separatism and the division of the Turkish nation. However, after analysing the party's programme, the Court held that "there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population" (*United Communist Party of Turkey and Others v. Turkey*, para. 57). The Court concluded that "a measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society" (*United Communist Party of Turkey and Others v. Turkey*, para. 61).

In the aforementioned *Refah* case, the Court further clarified that it is not only the official party programme that must be examined, but also the statements and conduct of its leaders. This approach was confirmed in the *Batasuna* case, which concerned the banning of a political party for supporting a terrorist organisation. The Court held that the dissolution of a party for failing to condemn terrorism is not incompatible with the Convention. The Court emphasized "politician's conduct usually includes not only his or her actions or speeches but also, in some circumstances, omissions or a lack of response, *which can constitute acts indicating that politician's stance and be just as telling as any overtly supportive action*" (emphasis added) (*Herri Batasuna and Batasuna v. Spain*, para. 88).

The strongest judicial endorsement of the preventive dimension of militant democracy appears in the *Refah* case where the Court stated that "a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent" (*Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 102). In this judgment, the Court for the first time articulated three criteria for assessing the necessity of the prohibition of a political party: whether there was plausible evidence that the risk to democracy was sufficiently imminent; whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a democratic society (*Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 104).

Examining whether the ban on the Refah Party was justified, the Court supported the Chamber's position that "sharia is incompatible with the fundamental principles of democracy" (*Refah Partisi (The Welfare Party) and Others v. Turkey*, para. 123). Beširević (2012, p.

255) strongly criticizes this Court's decision, arguing that it follows from the judgment that "the Court's vision of democratic society is hardly compatible with society which does not originate from Christian principles and values. Therefore, it may fairly be concluded that the big loser in Refah was democracy itself."

Case law demonstrates that the Court has been ready to uphold restrictions on the human rights of individuals in the name of defending democracy. For example, in the *Ždanoka* case, the Court upheld measures adopted by domestic authorities barring individuals who had actively participated in the Communist Party from standing for election (*Ždanoka v. Latvia*, Application no. 58278/00, Judgment ECHR, 16 March 2006). However, such a restriction must be individualized, whereby the legitimacy of applying measures to defend democracy decreases over time (*Adamsons v. Latvia*, Application no. 3669/03, Judgment ECHR, 24 June 2008). The Court attaches particular importance to the existence of a time limit and the possibility of reviewing such a measure (*Paksas v. Lithuania*, Application no. 34932/04, Judgment ECHR, 6 January 2011).

Ultimately, the Court has also upheld the application of measures of militant democracy through restrictions of individual rights in order to protect the principles of secularism. In the *Leyla Şahin* case, the Court concluded that respect for the principles of secularism "may be considered necessary to protect the democratic system in Turkey" (*Leyla Şahin v Turkey*, 2005, para. 114). The Court went further by linking the wearing of headscarves to "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts" (*Leyla Şahin v Turkey*, para. 115). This reasoning has been widely criticized in the literature. The crux of the criticism boils down to the conclusion that the application of militant democracy in order to preserve the principle of secularism "affects only one religious group: Muslims" (Tyulkina, 2015, p. 198).

4. CONCLUSION

The concept of militant democracy was developed in the first half of the twentieth century as an immediate response to the collapse of democratic states. Totalitarian movements exploited emotionalism as a particular political technique in order to mobilize broad public support for the legal dismantling of the democratic order. However, the idea of militant democracy remains relevant today, as democratic states face new challenges which, although often less openly than in the past, aim to undermine democratic institutions.

An analysis of the theoretical framework of militant democracy demonstrates that there is no single position regarding the justification of this concept. Even today, there are those who, like Karl Loewenstein, argue that democracy should not be blinded by legalistic formalism, but should adopt active measures against those who seek to undermine democracy, even at the cost of temporarily restricting fundamental rights and freedoms. On the other hand, significant and well-founded criticisms of this concept have also been advanced. Since democracy may employ *prima facie* undemocratic means to protect itself, the question raised by Hans Kelsen remains relevant: does a political system cease to be democratic if it resorts to such measures?

In contrast to theoretical debates, the judicial practice indicates considerable support for the application of militant democracy as a fundamental constitutional value. In practice, militant democracy is most frequently used to justify the banning of political parties, and such measures have not been limited solely to marginal groups but have in certain cases affected

even governing political parties. Furthermore, militant democracy has been invoked as a basis for justifying restrictions on electoral rights, as well as on certain manifestations of religious belief. The latter appears particularly problematic and, according to the views of a significant number of scholars, extends beyond the traditional framework of militant democracy.

Although certain controversial cases exist in judicial practice, it appears that the concept of militant democracy has no viable alternative. Democratic systems must be resilient against attempts at their destruction, whether such attempts originate from within or from outside, and whether they are collective or individual in nature. The question of the limits and criteria for the application of militant democracy, as well as the potential for its abuse, therefore, remains open. However, this is a distinct issue from the question of whether a democracy remains democratic if it adopts a militant character.

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