

Transnational militant democracy

ULRICH WAGRAN DL

Department of Legal Philosophy, University of Vienna, Schenkenstraße 8-10, 1010 Wien, Austria

Email: ulrich.wagrandl@univie.ac.at

Abstract: Ordinarily, militant democracy is about restricting the rights of those who threaten to overthrow the very democracy that guarantees these rights. Hence, militant democracy permits the defence of democracy by disarming its opponents. Turkey's recent constitutional reform, which arguably is a move away from liberal democracy, forces militant democracy to face up to its transnational application. Can we use militant democracy's tools to defend not our own, but another democracy? Maybe we can and even should. This article examines the two transnational manifestations of militant democracy. The first is 'transnational democracy gone militant', epitomised by the European Union (EU)'s power to enforce liberal democratic standards in its Member States. The second is 'militant democracy gone transnational'. This manifestation permits treating people rallying in the EU to attack democracy abroad in the same manner in which we are permitted to treat opponents of 'our own' democracy. As long as we are dealing with members of the Council of Europe (CoE), the European Convention of Human Rights (ECHR) gives us the instruments we need. Generally, militant democracy is a militant liberal democracy, which is not neutral towards itself, but is also an opponent of every system that is antithetical to it.

Keywords: democracy; liberalism; militant democracy; paradox of democracy; transnational democracy

I. Introduction

Recent events in Turkey, Hungary and Poland have sparked an intriguing debate. Can we prevent foreign liberal democracies from harming or even abolishing themselves? Or do we have to stand idly by as these democracies take the wrong turn? The question is therefore whether militant democracy can become, or whether it already is, transnational. Can we use the instruments of militant democracy (party bans, restrictions on speech, association and assembly) against those who do not seek to undermine 'our own' democracy, but democracy abroad?

Turkey's constitutional referendum and the campaign preceding it are a recent and disturbing case in point, as is the ongoing crackdown following

the failed coup attempt. During the referendum campaign, several Turkish politicians in favour of Erdogan's reforms wanted to give speeches in Germany, Austria and The Netherlands, three countries with significant Turkish populations and strong Justice and Development Party (AKP) electoral bases. German local administrations were first to think of banning these speeches altogether, reasoning that those who are in the middle of abolishing democracy at home should not be granted the benefits of democracy abroad.¹ Of course, opinions were divided and the debate was fierce. In Austria, the Assembly Act was swiftly amended to give the police the power to forbid assemblies 'that serve the political activity of third-country nationals' when they run counter to 'international principles or customs, Austria's international responsibilities, fundamental democratic values or foreign policy interests' (section 6(2) Assembly Act 1953). Furthermore, in The Netherlands, a Turkish minister on her way to a rally was dragged off by police and escorted back to the border.² Unknowingly, these three countries engaged in transnational militant democracy. They contemplated and eventually carried out the restriction of rights in defence of democracy; however, the democracy they so defended was not theirs, but Turkey's. In this article, I will examine this new form of militant democracy and assess its preconditions and implications. This inquiry will assume that Turkey, Hungary and Poland are indeed moving away from liberal democracy, but even though that is contested, I will make this assumption for the sake of the argument.

I will begin with a few remarks on the theory of 'traditional' militant democracy. It is often alleged that democracy cannot escape the paradox that it could theoretically be abolished by its own means and that it has to be open to its enemies. I attempt to show that this paradox does not exist, if we have a political understanding of democracy. The paradox is defused when we realise that democracy has to respect every human being, but not every political belief those human beings might entertain. For when it comes to democratic militancy, it is not democracy pure and simple that is at stake, but *liberal* democracy. Liberal democracy, in turn, is not just a formal attribute of our government, but part of its identity. Liberal democracy itself is thus an opponent of every system that is antithetical to it, which means that defending liberal democracy is not and cannot be unjustified, because it is inevitable.

¹ See *New York Times* (6 March 2017) <<https://www.nytimes.com/2017/03/06/world/europe/turkey-referendum-germany-free-speech.html>>.

² See *New York Times* (12 March 2017) <<https://www.nytimes.com/2017/03/12/world/europe/netherlands-recep-tayyip-erdogan-turkey.html>>.

Then, I will turn from theory to positive law and give an explanation to distinguish the two transnational manifestations of militant democracy, which seem to complement each other. The first is *transnational democracy gone militant*, which deals with the EU's power to enforce democratic standards in its Member States, especially via Article 7 of the Treaty on European Union (TEU). For adherents to both transnational and militant democracy, this combined form of militant transnational democracy will be quite unproblematic – it is simply applying the traditional notion of militant democracy to the transnational level. As Article 7 is usually called the 'nuclear option', it is worthwhile also examining the more flexible approach: *militant democracy gone transnational*. This second manifestation seems to be more problematic than the first, and this is where the situation regarding Turkey is relevant. I am not talking about defending some common, transnational democracy that is shared with Turkey, rather the fact that a number of states applied their own arsenal of militant democracy not to protect themselves but to hinder anti-democratic activities which, while taking place within their territory, nevertheless were aimed at foreign democracies. In the absence of a shared democracy, this second transnational manifestation must seem odd, to say the least. Why bother with the fate of democracies that are not your own? Is that not just an inappropriate intervention in domestic affairs? Do we have a right, or even a duty, to prevent fellow democracies from downfall, and to handle threats to their democratic character just as we would handle threats to our own? I will formulate some possible answers to these questions.

II. A few remarks on militant democracy

Militant democracy involves restricting the fundamental rights of those who exercise these rights in order to harm or abolish democracy. Its best-known instrument is the party ban.³ If someone founds a party whose aim is to abandon democracy for dictatorship, this party is not allowed to take part in the very democratic process it seeks to abolish – the party gets banned; its right to associate is restricted. It works the same way with regard to political propaganda, which may be excluded from freedom of speech or freedom of the press. Militant democracy is thus the answer to what has been termed a 'democratic paradox': that one can use democratic means to do away with those very means. Take these means out of their

³ For a survey of European party bans, see AK Bourne and F Casal Bértoa, 'Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945–2015)' (2017) 13 *European Constitutional Law Review* 221.

hands, and democracy's opponents cannot operate any more. Militant democracy thus cuts to the heart of political participation. It is a one-sided answer, for sure, and it does not solve the paradox so much as it illustrates it. For is it not equally paradoxical to confine democracy in order to save it? Many would argue that the insecurity that comes with democracy is the price we have to pay for freedom – a thought often aired by scholars, especially regarding the related topic of hate speech legislation. It was Ronald Dworkin who memorably argued that 'the majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken'.⁴ Granted, at first glance, militant democracy seems to be precisely about forbidding to raise one's voice. And even supporters of militant democracy are not quite sure if its paradoxes can be resolved or should simply be acknowledged, soberly and a bit fatalistically. Karl Loewenstein, militant democracy's visionary, is quite honest when he urges that democracy should adopt authoritarian methods for its self-defence, that 'constitutional scruples' should be cast off and that its rescue should reckon with breaching the very principles it is rescuing.⁵ But if the paradoxes sticking both to democracy's self-abolition and to its self-defence really are equally insurmountable, to opt for militant democracy or against it reverts to a cold-blooded decisionism. We might then claim, as does Mark Chou: 'if this is indeed the case, if militant democracy is merely the other side of democracy's coin, then we may want to say whatever its paradoxes, they must certainly be preferable to those of a democracy which is permitted to tear itself apart'.⁶

In this brief introduction to the concept of militant democracy, my aim is to show that it is not condemned to be haplessly tossed from one paradox to the other. On the contrary, if these paradoxes are closely examined, they could well dissolve. I will therefore start with some clarification, which will lead us to yet another problem, the question of how militant democracy draws the boundary of political participation.

The alleged paradox of democracy

The first paradox, abolishing a political system by its own means, seems not to be a real democratic problem, as Jan-Werner Müller observes.

⁴ R Dworkin, 'Foreword' in J Weinstein and I Hare (eds), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009) v, vii. In a similar vein, R Dworkin, *Freedom's Law* (Harvard University Press, Cambridge, MA, 1996) 226.

⁵ K Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31 *American Political Science Review* 417, 432.

⁶ M Chou, *Democracy Against Itself: Sustaining an Unsustainable Idea* (Edinburgh University Press, Edinburgh, 2014) 72.

It could also happen in an autocracy, where the ruler's unlimited power includes changing the regime at will. The real democratic paradox is that one expects democracy to be 'open to its enemies' who enjoy the same rights as its adherents (other than they would in a dictatorship).⁷ While a dictatorship need not show any concern for those who oppose it, democracy, with its commitment to freedom and equality for all, indeed has to. In my view, the concept that democracy must be 'open to its enemies' actually has two meanings, or rather two modes of actualisation. First, there is *institutional* openness, meaning that the system of government is ready for even the most fundamental changes. Democracy could potentially include every other conceivable political model and be a starting point from which to go anywhere the people desired. Second, there is the sense of equal recognition: within a democracy, its opponents enjoy the same rights and freedoms as its adherents, they benefit from equal protection of the law, just like everyone else, and they partake of the goods society provides for each and for all. They are not 'enemies' in the Schmittian sense.⁸ Of course, militant democracy restricts these rights if they are used dangerously. But this is an exception, and that is why we are in the process of explaining and justifying it on the basis of democratic principles. If the opponents of democracy really were 'the existential other', we would not be obliged to explain our position. But as they are not, we do. Democracy's opponents are not aliens in our polity, but full citizens with the same rights. It is only when they use these rights to abolish the very system they are living in that militant democracy intervenes. This point marks the crucial distinction: openness in the sense of equal recognition does not necessarily entail openness in the sense of institution. Democracy may be closed institutionally, meaning that it has no reason to provide its citizens with the means of its destruction, but it remains open in the sense that it recognises everyone as free and equal. Put otherwise, democracy's opponents deserve the *recognition respect* we owe every human being, but not the *appraisal respect* we bestow because of certain characteristics.⁹ A democracy grants equal recognition as a human being to everyone (with all the rights that entails), but as an institution it can be closed: recognition as a free and equal citizen does not extend to every *political belief* a citizen might have.¹⁰ Some of these beliefs

⁷ J-W Müller, 'Protecting Popular Government from the People? New Normative Perspectives on Militant Democracy' (2016) 19 *Annual Review of Political Science* 249, 251.

⁸ C Schmitt, *The Concept of the Political* (University of Chicago Press, Chicago, IL, 1995) 26.

⁹ S Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36.

¹⁰ TM Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press, Cambridge, 2003) 197.

can be rightfully excluded from being implemented. Democracy's *appraisal respect* does not cover its enemies, whereas its *recognition respect* certainly does. Indeed, securing equal recognition for everyone as fellow citizen might even necessitate this kind of institutional closure, for only that would guarantee that citizenship remains equal.

Democracy's paradox should therefore be seen in the light of democracy's 'institutional closure', which in my opinion is a feature of every *political system* (not necessarily of every constitution): it cannot remain what it is if it has to include its opposite. In order to explain this, I will briefly examine Karl Popper's 'paradox of tolerance'.¹¹ He famously claimed that we need not extend tolerance to the intolerant, which is a frequently mentioned rationale for militant democracy. But it is not a real paradox, because it rests on a conception of tolerance that is so sweeping that it loses any meaning. It is a paradox only if one supposes that tolerance means tolerating absolutely everything, even the abnegation of tolerance. Thus understood, tolerance would be nothing more than indifference; it would not be a political stance at all, because acquiescence would always be the result. But tolerance means much more: it means fighting for something (tolerance) and fighting against something (intolerance). If you claim to be tolerant in the face of intolerance, you are not showing liberal broadmindedness, you are simply being indifferent. This is not what tolerance is supposed to be. In particular, tolerance seems to depend on reciprocity.¹² Can someone really be expected to tolerate the fact that they are not being tolerated? Therefore, the paradox of tolerance is nothing of the kind; on the contrary, fighting against intolerance – and thus not tolerating it – is what tolerance, *understood politically*, expects.¹³

With this in mind, we should reassess militant democracy's paradoxical nature. Maybe there will be clarification if militant democracy is located within the broader paradigm of defending democracy. This encompasses all measures 'to protect the democratic system from the threat of its internal opponents',¹⁴ these measures being short- or long-term, repressive or incorporating (militant democracy would be short-term and repressive, political education long-term and incorporating). It could be that just as defending tolerance means taking action against the intolerant, defending

¹¹ K Popper, *The Open Society and its Enemies, Volume I: The Spell of Plato* (George Routledge & Sons Ltd, London, 1945) 109, n 4.

¹² R Forst, *Toleranz im Konflikt* (Suhrkamp, Frankfurt am Main, 2003) 37–40, 594–6.

¹³ I am sure many thinkers have already made this point – see *inter alia* W Becker, *Die Freiheit die wir meinen. Entscheidung für die liberale Demokratie* (Piper, Munich/Zurich, 1982) 192.

¹⁴ G Capocchia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins University Press, Baltimore, MD, 2005) 47–50.

democracy means proceeding against anti-democrats. But why defend democracy altogether? I think this question answers itself. It would be odd to claim that democracy is the only justified form of government and at the same time maintain that its defence is illegitimate. If this were so, what value is there left in being the only justified form of government? And for those to whom democracy is dear, what shall they do in the face of destruction? The defence of democracy now has implications. It necessarily fights against someone, namely its opponents, for who else is attacking it? To defend something means taking action against its attackers by repelling or preventing their attack. This in turn inevitably means that democracy's opponents suffer specific consequences that adherents of democracy do not. The defence of democracy necessarily has this unattractive feature, otherwise it would not be a defence at all. There simply is no defence if no action is taken *against* someone or something. To reject this conclusion amounts to demanding that democracy stand defenceless, which is analogous to claiming tolerance for the intolerant. Just as tolerance does not include its own abnegation, but obliges us to defend it against intolerance, democracy, *politically understood*, really cannot condemn us to passivity, but likewise enables us to actively defend it. When described in terms of defending democracy, militant democracy (as a specific 'defence technique') no longer seems so paradoxical. Democracy does not latently include every form of government the people might fancy; on the contrary, a political commitment to democracy is a commitment *against* every non-democratic government. This result should not embolden us too much, though, because militant democracy (recall: party and propaganda bans) is not the only way to defend democracy and indeed comes with some dangers. Loewenstein's candour about militant democracy's inherent vices has a certain appeal: he does not bother to 'explain away' the temptations of democratic authoritarianism but looks them straight in the eye. Would not political education and social equality do the same job but better? Is not militant democracy the real attack on democracy we are talking about? Hans Kelsen famously made this point when he stated that a democracy that tries to maintain itself against a non-democratic majority has ceased to be a democracy.¹⁵ This is true: democracy is only of worth if founded on approval; there can be no democracy if the majority simply does not want it. But this frequently heard objection misses the mark. Just as democracy lives only within a democratic majority, militant democracy, too,

¹⁵ H Kelsen, 'Verteidigung der Demokratie' (1932) 2 *Blätter der Staatspartei* 90. Reprinted in M Jestaedt and O Lepsius (eds), *Hans Kelsen – Verteidigung der Demokratie. Abhandlungen zur Demokratietheorie* (Mohr Siebeck, Tübingen, 2006) 229.

only works as long as the majority is democratic. It therefore does not concern itself with upholding a regime against the will of the people, but with preventing the people from ever wanting to leave democracy. Hence, party bans suppress anti-democratic minorities to stop their ascent; they are not of much value when public opinion has shifted, when a government has already been captured. One might call this the majority's pre-emptive right to resistance.¹⁶ If you acknowledge the right to fight a tyrant, why not repel prospective tyrants before they rise?¹⁷ This makes clear that militant democracy only works as long as there is a functioning liberal democracy in place and therefore does not lend itself to legitimise a kind of enlightened despotism.

Boundary issues

There seems to be a more problematic issue than the paradoxes that do or do not beset democracy and its militant self-defence, and this is the question of membership, the question of who participates in the polity. Who decides against whom militant democracy is to deploy its forces? The decision on who can participate and who cannot (because they are an opponent of democracy) in a certain sense draws the boundary of the demos and thus creates it. As such, this decision cannot be taken democratically, because democratic decisions presuppose the very demos that is in the making. Carlo Invernizzi Accetti and Ian Zuckerman therefore argue that militant democracy – the decision over who is to participate, and who is not – always reverts to arbitrary and possibly authoritarian decisionism.¹⁸ This danger certainly exists, but two objections still remain. The first is more of a clarification: militant democracy generally is not disenfranchisement. Parties can be banned, but successor parties can be established, and, most importantly, these parties' voters retain their right to vote. They may not be able to voice their concerns in the exact way they would like to, because their favourite party is no more, but they remain full members of the polity: as we have seen, militant democracy knows no 'enemies' that it could arbitrarily disenfranchise. That would effectively treat some people as hopelessly unteachable, as Jan-Werner Müller points out.¹⁹ Even anti-democrats have

¹⁶ G Fox and G Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1, 68.

¹⁷ See also J Locke, *Second Treatise of Government*, section 220 (quoted from J Locke, *Two Treatises of Government and A Letter Concerning Toleration* [Digireads.com Publishing, 2005] 138).

¹⁸ C Invernizzi Accetti and I Zuckerman, 'What's Wrong with Militant Democracy?' (2017) 65 *Political Studies* 182.

¹⁹ See (n 7) 257–8.

legitimate interests worthy of being discussed, which a complete disenfranchisement would close off forever.²⁰ What are you supposed to do if you are a farmer and the only party representing farmers' interests happens to be fascist? Taking away the right to vote therefore is not a legitimate option. Of course, it could be argued that you are being disenfranchised the moment you cannot assert your political views in the way you prefer; why should you adjust and not everyone else, just because they think you are dangerous? This argument would fail to recognise that participation in a democracy inevitably means to yield to some set of common principles, hence everyone, democrats and anti-democrats alike, have to adjust their political views (Rawlsian: their comprehensive doctrines of the good) to accommodate them. This necessarily follows from participating in a form of government that is accountable to everyone, not only to oneself. The second objection needs some elaboration.

Putting Liberalism into the picture

I will begin by exploring what it is that militant democracy actually protects. Militant democracy is *always* militant *liberal* democracy. One cannot sufficiently emphasise this point. It defends democracy against dictatorship as well as liberalism against totalitarianism, and it may well defend liberalism against democracy, when a 'tyranny of the majority' lurks.²¹ Hitherto, I presupposed a form of democracy that is about the equal participation in making the laws that govern us. It is a formal or procedural approach that conceives of democracy as a method of creating laws, a method that makes the laws' subjects its authors. But liberal democracy is more, and it has some quite substantial tenets. What is the liberal part in liberal democracy? Basically, fundamental rights, the rule of law, and all that they entail. That means: a constitution that safeguards these rights against a majority in parliament, separation of powers, an independent judiciary, a free and diverse press, freedom of speech and to assemble, a right to a fair trial, and so on. Real democracy only works within this framework, as this framework alone can ensure that self-government remains free and equal. All these elements can moreover work against the democratic will of the people, and that is what limited government is all about. Militant democracy thus protects these features as well as it protects popular self-government. Democracy and liberalism

²⁰ A Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press, New Haven, CT, 2014) 40–1.

²¹ A de Tocqueville, *Democracy in America, Volume I* (3rd American edn, George Adlard, New York, NY, 1839) 267–8; A Hamilton or J Madison, *Federalist No. 51*, available at <http://avalon.law.yale.edu/18th_century/fed51.asp>.

are simply not separable: only under the conditions of liberalism are we prepared to yield to the majority's will, because we know that its rule will not be total, opposition will be possible, and a change in government peaceful. A definition of democracy that does not contain this liberal design would not make much sense for militant democracy, as it would not have much practical effect. Most opponents of democracy today do not fight against the idea that the law should emanate from the people subject to it. It is safe to say that the real target of most of democracy's opponents today is not democracy itself, but its liberal part,²² and militant democracy has to realise that.²³ Turkey, Hungary and Poland all seem to be drifting towards a form of 'illiberal democracy', as Hungary's Prime Minister Victor Orban has coined it:²⁴ a democracy where there are still free elections, but where all the liberal elements named above are in danger. The judiciary is being politicised, journalists are harassed, the constitution has become a partisan document, the government promotes some sort of national unity, which of course is highly discriminatory, and foreign organisations are delegitimised. To proceed like this in the name of 'democracy', however, is not a suitable excuse. Democracy and liberalism belong together, so an attack on one is an attack on the other. Militant democracy therefore protects liberal democracy as a whole, and when democracy is used as a pretext to encroach upon liberalism, it protects liberalism against democracy. You could call this a shift in paradigm: militant democracy nowadays protects much more than 'just' democracy:²⁵ it might well take the form of 'militant liberalism'.²⁶

Putting liberalism into the picture clarifies the boundary issue of who has a right to participate in the liberal democratic process, and who can be rightfully excluded, given we are not talking about disenfranchisement or outright expatriation. At stake are only party bans and speech restrictions. Even if deciding democratically on the extent of the demos seems problematic, the liberal part of liberal democracy provides us with guidelines on how to do so. The decision is therefore neither arbitrary, nor

²² M Thiel, 'Comparative Aspects' in M Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate, Farnham, 2009) 379, 413–16.

²³ J Doomen, 'Mitigated Democracy' (2016) 102 *Archiv für Rechts- und Sozialphilosophie* 278.

²⁴ Or was it F Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22?

²⁵ See G Bligh, 'Defending Democracy: A New Understanding of the Party-Banning Phenomenon' (2013) 46 *Vanderbilt Journal of Transnational Law* 1321, who distinguishes the older 'Weimar' paradigm from the newer 'legitimacy' paradigm, which focuses more on safeguarding equal citizenship, human rights and non-discrimination.

²⁶ P Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe' (2012) 19 *Constellations* 575, 576.

authoritarian, but based on certain liberal principles. There is of course much disagreement on precisely what liberalism is and what it entails. Nonetheless, in my view, the aforementioned elements of human rights and the rule of law represent some common ground. This is not to say that every human rights violation amounts to a systemic problem of liberal democracy – as long as there is a functioning judiciary – but it becomes highly problematic if human rights violations no longer see any redress. Apart from that, for the present purposes, it might be enough to know what liberalism decidedly is *not*. Whoever advocates racial segregation, disenfranchisement on religious or ethnic grounds, the expulsion of everyone not conforming to some national ideal, the criminalisation of legitimate opposition, the coercion in matters of faith, the intrinsic inequality of certain human beings, finds themselves in contradiction to liberal values, even if they are supported by a majority. They are advocating that equal participation should not be equal anymore, that freedom for all must become a selective freedom. But is not militant democracy advocating the very same thing when excluding them? This objection fails to take into account the liberal part of liberal democracy. While one could argue for the participation of even the fiercest anti-democrats and anti-liberals, based upon a procedural conception of democracy, it should be clear by now that liberal democracy is not exclusively procedural, but has some substantial principles that limit this very democracy.²⁷ Whereas it is a reasonable claim that democracy must be neutral as to the content negotiated within itself, liberalism must not, at least not when liberalism itself is at stake. Liberalism's frequently mentioned principle of state neutrality in questions of the good does not apply here, because neutrality is not a question of the good, but of right.²⁸ So, in response to the objection that militant democracy excludes arbitrarily, you could turn the argument around: he who simply cannot support a liberal democracy, but because of his deeply and sincerely held convictions feels compelled to fight for an illiberal state, could just as well be said to have excluded himself. This reveals that it is not exclusion per se that is problematic, but that it all depends on the reasons available to justify such a course of action. To disenfranchise someone on the grounds of their race is illiberal and anti-democratic as it uses a person's colour of skin as an argument. To ban parties that advocate such policies, however, is hardly comparable, since

²⁷ Even the great democratic formalist Hans Kelsen came to recognise this in his late work, see H Kelsen, 'Foundations of Democracy' (1955) 66 *Ethics* 1, 27.

²⁸ See J Rawls, *Political Liberalism* (Columbia University Press, New York, NY, 1993) 174–6.

the reasons for doing so are different.²⁹ To ban a party of died-in-the-wool racists does not presuppose that they are naturally inferior human beings and thus have no claim to being equal members of our polity. On the contrary, the only reason available to us is to say that they are misusing liberal democratic rights in order to deprive some of their fellow citizens of these rights.³⁰ Moreover, it is worthy of consideration that banning a party does not disenfranchise the party's supporters – they remain free to found another party straight away.

Who excludes whom?

I shall dwell a little longer on the subject of who excludes whom. What about people who, based on their beliefs and world view, cannot but reject this common liberal democratic culture? Those whose identity, according to their perception, does not allow such a political system?³¹ This is especially relevant since political beliefs as well as personal and collective identities are often defined by what people uphold and what they oppose.³² Being anti-democratic or anti-liberal is therefore often the corollary of how these people think they should lead their lives. They have, as Jasper Doomen observes, a political goal (say, apartheid, theocracy, or a *Führerstaat*) that simply cannot be attained within the framework of liberal democracy, because it is only possible outside it, thus necessitating its destruction.³³ For example, there can be no Nazi State that complies with human rights, and indeed Nazis have never claimed that. So is it really liberal democracy that excludes Nazis, or is it the other way round?³⁴ Isaiah Berlin once noted: 'The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me not merely unobtainable – that is a truism – but conceptually incoherent. [...] Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may

²⁹ The need to take into account the specific reasons is emphasised by Y Nehushtan, 'Offensive Expression: The Limits of Neutral Balancing Tests and the Need to Take Sides' (2016) 16 *Human Rights Law Review* 1.

³⁰ J Quong, 'The Rights of Unreasonable Citizens' (2004) 12 *The Journal of Political Philosophy* 314, 333.

³¹ This happens to be multiculturalism's perennial question, see for example W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995) 152–172.

³² KA Appiah, *The Ethics of Identity* (Princeton University Press, Princeton, NJ and Oxford 2005) 138–141.

³³ See (n 23) 280.

³⁴ For a kind of 'who-started-it-approach', see Y Nehushtan, 'The Limits of Tolerance: A Substantive-Liberal Perspective' (2007) 20 *Ratio Juris* 230, 253.

entail an irreparable loss.³⁵ The choice between liberal democracy and its opposite is a fateful one. Liberal democracy (sadly perhaps, but inevitably) cannot accommodate its opposite,³⁶ and this is why some people fight it in the first place. If National Socialism or radical Islamic fundamentalism were compatible with liberal democracy, there would be no need to talk about how to prevent them from rising. The idea of militant democracy only exists and makes sense because some beliefs simply are irreconcilable with liberal democracy. Is this a form of othering?³⁷ Yes. But it might well be an inevitable othering.³⁸ Every identity defines itself at least partially by what it is not, and there is no all-inclusive identity. Taking democracy's opponents' interests seriously, as Alexander Kirshner demands,³⁹ may well lead to this admittedly resigned conclusion.⁴⁰ To a National Socialist, a radical Islamist or a white supremacist we must say, mindful of the despair it causes:⁴¹ we cannot give you what you want. Democracy's *recognition respect* acknowledges such people's wishes and longings, but they get no *appraisal respect* for the resolve to implement them. This a liberal democracy cannot allow. In making this distinction, militant democracy avoids being entirely disrespectful of certain people. Some political contents are excluded from the democratic arena, not because of their moral wickedness, but because of a fundamental, irresolvable and thus tragic incompatibility with liberal democratic values.⁴²

Likewise, liberal democracy is partially constituted through the rejection of certain beliefs so that people who happen to cherish these very beliefs are in a difficult situation. Just as tolerance is pitted against intolerance and democracy against dictatorship, many European liberal democracies are defined by the political system they have successfully vanquished. Accordingly, and anticipating the next sections of this article, these liberal democracies have established a number of international safeguards in order

³⁵ I Berlin, 'The Pursuit of the Ideal' in I Berlin, *The Crooked Timber of Humanity. Chapters in the History of Ideas* (edited by H Hardy, 2nd edn, Princeton University Press, Princeton, NJ and Oxford, 2013) 1, 14. Berlin's thoughts are further expanded in *The Decline of Utopian Ideas in the West*, in the same volume, at 21–50.

³⁶ See Rawls (n 28) 196–7, referring to Berlin.

³⁷ See L Brons, 'Othering, an Analysis' (2015) 6 *Transcience* 69.

³⁸ V Morozov and B Rumelili, 'The External Constitution of European Identity: Russia and Turkey as Europe-makers' (2012) 47 *Cooperation and Conflict* 28.

³⁹ See (n 20) 34–42.

⁴⁰ Note the saddened tone in (n 28) 196–7.

⁴¹ See (n 20) 135–9.

⁴² Chantal Mouffe stresses that we should avoid moral condemnation and rather acknowledge this incompatibility; see C Mouffe, *On the Political* (Routledge, London and New York, NY, 2005) 120–1.

to preserve their specific character. Considering the historical dimension of militant democracy, Peter Niesen has advanced his concept of ‘negative republicanism’,⁴³ exemplified in the slogan of ‘never again’ that is a fundamental feature of many post-war democracies which suffered under National Socialism and the Holocaust. These societies not only draw their identity from a clear break with the past, they may even have a duty to prevent its resurrection – their sovereign can *learn* from past experiences and choose to never undergo them again.⁴⁴ Expressed explicitly, militant democracy could well be considered a ‘multiculturalism of the majority’: a liberal and democratic majority that seeks to protect this identity against minorities who threaten this very character,⁴⁵ thus renouncing any form of legal pluralism when it comes to democracy and human rights.⁴⁶

The paradox defused

The paradox that we expect liberal democracy to be open to its opponents therefore rests on two questionable assumptions: first, a somewhat too formal conception of liberalism and democracy, as if they were all-encompassing and ahistorical systems that cannot take their own side, their side being everywhere and thus nowhere.⁴⁷ Take the revolutionaries of the American and French Revolutions as a counter-example: they had a clear vision of what they wanted – and especially what they did *not* want – and thus fought. In respect of liberal democracy’s opponents, it must therefore always be borne in mind that *liberal democracy itself is an opponent* of every system that is antithetical to it. Second, in my opinion, this openness can refer only to recognition, not institution. Taking part in equal citizenship is not the same as abolishing it. Liberal democracy has to be open in the first respect, but not in the second – on the contrary, safeguarding equal citizenship for everyone necessarily means

⁴³ P Niesen, ‘Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties – Part I’ (2002) 3 *German Law Journal* available at <<https://www.germanlawjournal.com/volume-03-no-07>>; P Niesen, ‘Banning the Former Ruling Party’ (2012) 19 *Constellations* 540.

⁴⁴ G Frankenberg, ‘The Learning Sovereign’ in A Sajó (ed), *Militant Democracy* (Eleven International Publishing, Utrecht, 2004) 113.

⁴⁵ For the context of immigration, this argument has been put forth by L Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press, Oxford, 2015).

⁴⁶ See P Macklem, ‘Militant Democracy, Legal Pluralism and the Paradox of Self-Determination’ (2006) 4 *International Journal of Constitutional Law* 488.

⁴⁷ Carl Schmitt claimed it only to refute it. See C Schmitt, *Legality and Legitimacy* (Duke University Press, Durham, NC, 2004) 47–58.

to defend it against those who seek to turn it into *unequal* citizenship. Hence militant democracy, *politically understood*, is not paradoxical, but perfectly normal. This does not at all mean that every liberal democracy is militant in and by itself – this is a question for positive law.⁴⁸ Nor am I saying that every democracy *must become* militant. It is likewise not a claim that militant democracy is preferable to any other possible measure to defend democracy, and it is an even lesser claim that militant democracy is effective, for that would be an empirical assertion. I am content to say that militant democracy is not unjustified.

III. Militant transnational democracy

After this attempt to defuse the paradox of militant democracy, this article proceeds to briefly examine the first of its two transnational manifestations. As indicated, militant democracy is transnational democracy augmented by militancy. The main focus will be on the EU and its power to uphold liberal democratic standards in its Member States, especially via the suspension of treaty rights, and especially the right to vote in Council, pursuant to Article 7 TEU, as it is currently being debated concerning Hungary and Poland. Note that the specific risk this kind of militant democracy seeks to counter is not the same as its domestic variant. It is not individuals, who, in using their right of free speech and to assemble, endanger this country's liberal democratic character; rather, at the transnational level, it is the EU's Member States which, by amending their constitutions, become less liberal and less democratic and thus threaten transnational democracy as a whole. To counter a different risk is to protect a different object. Militant democracy at the transnational level thus undergoes a considerable transformation: it does not primarily protect national democracies, but the transnational democracy the countries of Europe have established.

The adjective 'transnational' means 'not only international', which in turn denotes that states and non-state actors (that is, citizens) are both interwoven in the European democratic project: European citizens today are not only governed by themselves, but, via European institutions, also by other states and their citizens, whom they and their state govern, in turn. Having conceived transnationality in these terms, we need not delve deeper into the

⁴⁸ Otto Pfersmann points out that as a matter of law, militancy is a question of degree and that every democracy is more or less militant; see O Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' in A Sajó (ed), *Militant Democracy* (Eleven International Publishing, Utrecht, 2004) 47, 53.

experts' debate on whether the EU 'really' is a transnational democracy. Wherever there is democracy, or, short of that, a quasi-constitutional framework, the question of its preservation arises, regardless of whether one is operating at the national or the transnational level. The problem discussed in this section is therefore quite evident: if there is militant democracy and transnational democracy, what about militant transnational democracy? No treatment of this matter can bypass Jan-Werner Müller's pioneering and exhaustive work in this respect, and on which I have relied extensively.⁴⁹

The principal instrument of militant transnational democracy is not the party ban, which in the preceding section was the standard example of militancy given. Rather, taking into account that European democracy's primary actors are the EU's Member States, it is their right to participation, and, accordingly, their people's right to self-determination, that is at stake and possibly becomes restricted. Whereas domestic militant democracy is basically a limitation of individual rights, militancy at the transnational level concerns collective rights. This is not some kind of militant democracy gone rogue, but the transnational extension of its principles: militant democracy eventually restricts the rights of its constituents, so if its constituents are collectives, the rights restricted are collective rights. When the EU uses its Article 7 TEU procedure to suspend a Member State's vote in Council because of a serious breach of European Union values, it effectively restricts this state's right to participate in Europe's transnational democracy. This inevitably means a restriction on the right of the people of that Member State to self-rule. For it continues to be governed by the EU, its other members and their peoples, but without having a say in it any more. As a distinct national people, the Member State stops being the author of many of its own laws. Militant democracy at this level thus does not ban political parties, which makes sense as Member States normally do not establish them. It effectively disenfranchises a state and its people at the transnational level.

It is interesting to note that while a Member State can lose its vote in Council, its people and their representatives cannot lose their vote for and

⁴⁹ See (n 7); J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141; J-W Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?' (2014) 165 *Revista de Estudios Políticos (nueva época)* 141; J-W Müller, 'Europe's Other Democracy Problem: The Challenge of Protecting Democracy and the Rule of Law within EU Member States' (2014) 21 *Juncture* 151; J-W Müller, *Wo Europa endet: Ungarn, Brüssel und das Schicksal der liberalen Demokratie* (Suhrkamp, Frankfurt am Main, 2013) 36–64; J-W Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 39; J-W Müller, *Constitutional Patriotism* (Princeton University Press, Princeton, NJ, 2007) 112–19.

in the European Parliament.⁵⁰ Bearing in mind Jürgen Habermas's theory of doubled sovereignty,⁵¹ this would make perfect sense as the vote in Council flows from the sovereign people according to a traditional national understanding. And it is only at the national level that liberal democracy has been distorted, presumably backed by the will of a state's people. Parliament, however, represents the sovereign in its European capacity; it represents EU citizens as a whole, not an accumulation of Member State nationals. European citizens have not tampered with liberal democracy though, and they possibly could not as Parliament's limited powers prevent it. Hence, the EU's militant transnational democracy can disenfranchise the people only in their national capacity, as they are represented in and by their Member State. Such a system leaves intact the composition of the European citizens' sovereign, excluding no one.

Disenfranchising a whole people must surely provoke the fiercest democratic refutation. With this in mind, reflection on the historical origins of the EU's transnational democracy, crucial to understanding militant democracy in terms of constitutional identity, is required. Indeed, securing liberalism and democracy has always been a rationale of European integration, especially when considering EU enlargement.⁵² But one must be careful here to distinguish between the national and the transnational levels. The EU today is no 'outsourced militant democracy' that exists only for the self-protection of its members. On the contrary, Europe's liberal democratic promise is fulfilled by gradually building a new political space. It is true that the new-born democracies after World War II, distrustful of too much popular sovereignty,⁵³ sought to 'lock-in' their liberal democratic

⁵⁰ M Ruffert, 'Artikel 7' in C Calliess and M Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, CH Beck, Munich, 2016) Rn 24; F Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV* (Duncker & Humblot, Berlin, 2000) 180. This issue remains quite obscure – technically, to be allocated seats in Parliament is a right of the Member State, just as voting in Council, and could therefore be suspended (I thank Michael Potacs for having brought this to my attention). Art 354 TFEU, however, which governs the voting modalities with respect to art 7 TEU, certainly excludes the Member State concerned from being a judge in its own cause, but not this country's representatives in Parliament. One could therefore argue that art 7 does not allow the suspension of Parliament membership, because otherwise one would expect a provision barring MEPs from voting on their own exclusion, in analogy to the procedure in Council.

⁵¹ J Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible' (2015) 21 *European Law Journal* 546.

⁵² J-W Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?' (2014) 165 *Revista de Estudios Políticos (nueva época)* 141, 145.

⁵³ J-W Müller, *Contesting Democracy* (Yale University Press, New Haven, CT, 2011) 110–13.

character by submitting to a form of supra- or transnational oversight.⁵⁴ Ideally, a European *peer-review*⁵⁵ (primarily via the courts) is supposed to bring worrisome developments onto the international stage before they get out of hand. By accepting an international court to monitor human rights standards, the new-born democracies effectively tried to anchor their democracy in a greater whole in order to prevent backsliding. But we should not conclude from this that the EU today is nothing but a tool in securing liberal democracy at home.⁵⁶ Such a conception could not satisfactorily justify the suspension of voting rights in Council. The right to vote in Council is not withheld because a given Member State is harming itself, as this would not stop the harming at all, much less repair it. Voting is suspended because becoming illiberal endangers the whole European project, and especially, the citizens of other Member States who do not wish to be partially governed by despots.⁵⁷ The suspension of voting rights thus makes sense only if the EU is perceived to be a common democratic sphere, which is militant in its own right. The EU secures liberal democracy not by bluntly forcing countries to remain as they are, but by integrating them into a newly built transnational democracy, whose militancy protects itself and therefore the liberal democracies of its members.

The operation of militant transnational democracy is thus intertwined with national militant democracy in the fashion of a fail-safe mechanism. It is a two-step system where the foremost responsibility to uphold liberal democracy lies with the Member States and where militant transnational democracy only intervenes when this duty has not been met. This is practically a principle of subsidiarity in the best European spirit. As every EU Member State has committed itself to liberal democratic values, as Article 2 TEU demonstrates, each one has an obligation not to relinquish them.⁵⁸ As a result, transnational militant democracy starts ‘at home’: every Member State is first and foremost responsible for safeguarding its own liberal democratic character. However, this does not entail an obligation to become militant in the traditional sense, involving party bans

⁵⁴ A Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization* 217.

⁵⁵ A Somek, *The Cosmopolitan Constitution* (Oxford University Press, Oxford, 2014) 176–8.

⁵⁶ As Jan-Werner Müller seems to presume, see J-W Müller, ‘Beyond Militant Democracy?’ (2012) 73 Jan/Feb *New Left Review* 39, 45.

⁵⁷ On this last point, see J-W Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21 *European Law Journal* 141, 145.

⁵⁸ Fox and Nolte even argued that for the contracting parties of the ICCPR, see (n 16) 59–65.

and speech restrictions.⁵⁹ If it works without militancy, so much the better. As long as this decentralised system operates smoothly, transnational democracy is not in danger, at least not from ‘below’, and therefore has no need to become militant itself. However, national militant democracy becomes transnationalised, too. For upholding democracy is not a purely a matter national of self-interest any more, but is undertaken with regard to the common democracy to which Member States have committed themselves. If, however, militant democracy fails or is absent at the national level, and a Member State takes the wrong turn, militant transnational democracy gets active – not to protect the country’s democracy, though, but to secure the transnational democracy it shares. Transnational democracy rests on everyone being democratic. Hence the EU fulfils its liberal democratic promise in a way that is neither top-down nor bottom-up: it sustains national democracies by integrating them within a transnational democracy. In turn, this transnational democracy is primarily safeguarded through its members remaining democratic. If this fails, their participation can be lifted in order to contain their negative impact, but only regarding their national form. Participation due to the common European citizens’ sovereignty continues. This way, transnational democracy persists.

It is clear, therefore, that militant transnational democracy is not about meddling in a state’s domestic affairs. On the one hand, by virtue of EU citizenship, there are no real domestic affairs anymore. Every EU citizen is governed (partly, at any rate) by other Member States and their peoples. Applying democratic fundamentals to this situation must mean that citizens have a right (a duty, even) to know what is going on across the border, to voice their opinion and to take measures to get this country back on track, especially because it will not be in their interest to be co-governed by an illiberal democracy.⁶⁰ On the other hand, militant transnational democracy protects the common democracy that all EU Member States and their peoples share. Seen in this light, taking away a state’s voting rights in Council clearly is not an intervention in domestic affairs, but a European measure at the European level. It works as a kind of democratic isolationism, a moral quarantine, as Jan-Werner Müller has aptly put it.⁶¹ No one talks about dismissing this country’s government or dissolving its legislature. It is simply a move to contain an illiberal

⁵⁹ See also M Klamt, *Die Europäische Union als Streitbare Demokratie: Rechtsvergleichende und europarechtliche Dimensionen einer Idee* (Utz, Munich, 2011) 339–51.

⁶⁰ See (n 52) 145, 151, 157.

⁶¹ See (n 57) 144.

Member State before it can affect common policy.⁶² Article 7 TEU so essentially says: stay as you are, but do not mess with us – which is actually a rather mild form of militancy. Moreover, turning away from liberal democracy might itself be an inappropriate interference, for being liberal and democratic are the very terms under which this transnational democracy was agreed upon in the first place. One could say as well that a Member State turned illiberal is, simply by taking part in European decisions, unduly meddling in the internal affairs of all other members: this state's participation in governing all others is only legitimate as long as it shares the values that undergird the whole enterprise. The distinction between *recognition* and *appraisal respect* resurfaces here. Appraisal respect – and thus participation in the EU's government – is only bestowed on countries that share the basic precepts of liberal democracy. Recognition respect, however, is not withdrawn since expulsion from the EU is unthinkable, as is the perspective of actual (military?) intervention.

Within the EU framework, is there room for individual Member States to take action unilaterally if they do not wish to wait until Article 7 is finally triggered? Iris Canor has suggested a kind of 'horizontal Solange':⁶³ As long as human rights are not endangered by a given Member State, other Member States cooperate on the basis of mutual trust. The moment a Member State stops being a reliable guarantor of human rights, mutual trust is lifted and its fellow Member States reserve the right to review in depth every action of this State for which they would otherwise have to give 'full faith and credit'.⁶⁴ This approach fits well, within the concept of militant transnational democracy. Likewise, we are not intervening in domestic affairs but rather containing the negative externalities an illiberal democracy has on its neighbours and the system as a whole.

IV. Transnational militant democracy

I now proceed to the second manifestation of transnational militant democracy, which is the more problematic one, and which will be examined in greater detail. This section deals with militant democracy,

⁶² H Schmitt von Sydow, 'Liberté, démocratie, droits fondamentaux et Etat de droit: analyse de l'article 7 du Traité UE' (2001) *Revue du droit de l'Union européenne* 285, 288.

⁶³ See I Canor, 'Solange horizontal – Der Schutz der EU-Grundrechte zwischen den Mitgliedstaaten' (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 249, which is a translation of I Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"' (2013) 50 *Common Market Law Review* 383.

⁶⁴ An expression taken from art IV, section 1 of the United States Constitution.

transnationally expanded. It could also be called *transnational militant democracy stricto sensu*, as opposed to *militant transnational democracy*, to which the preceding section was dedicated. It is about using the traditional instruments of militant democracy, party bans and speech restrictions to counteract the activities of people who agitate against a *foreign* liberal democracy – hence its transnational or cross-border character. It differs from the EU's militant transnational democracy in two respects: it restricts individual rights, not those of peoples or states, and it protects a national liberal democracy, not a shared transnational one. The absence of a shared democracy is the *prima facie* defining feature. This leads to multiple questions: is the protected democracy really the neighbouring one or rather the state's own? Protecting one's own democracy raises no more issues than militant democracy does. However, protecting a foreign democracy is in need of justification. If there is really no connection between the state that is getting militant and the democracy that is being attacked, why bother? But is there really no connection with Turkey, whose constitutional reform and the Europe-wide campaign preceding it serves as our prime example? An answer could lie in the European Convention on Human Rights (ECHR), the Council of Europe's most prominent instrument. Turkey, but also Germany, Austria and The Netherlands, are part of it, and it is within this framework that transnational militant democracy must be conceptualised – especially since we are considering the restriction of fundamental rights, a matter that is likely to end up before the European Court of Human Rights anyway.

Again, some observations on the term 'transnational' are in order. Whereas in the preceding section, it denoted the character of the democracy protected, it now indicates the scope of the instruments of militant democracy. It is not democracy that is transnational, for the purposes of this argument, but militancy.⁶⁵ This shift in terminology has been made, because the Convention, transnational as it may be, is no democracy. It only obliges its *members* to be democracies, liberal democracies of course, which in turn is the only political system compatible with the Convention (and with the Council of Europe's Statute, for that matter). It is worth quoting the Court in full:

Democracy is without doubt a fundamental feature of the European public order (...). That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further

⁶⁵ This distinction was not clear when I first made the point in *Verfassungsblog* (10 March 2017) <<https://verfassungsblog.de/die-transnationale-wehrhafte-demokratie/>>; DOI: <<https://dx.doi.org/10.17176/20170310-175223>>.

realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights (...). The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention (...); it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society (...). In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.⁶⁶

Whereas democracy, by way of the Convention, is 'European public order',⁶⁷ it is also true that the states and peoples of the CoE are not governed by each other, as is the case within the EU. The EU is unprecedented in both the breadth of its agendas and in the democratisation of its supranational governance (notwithstanding that still much needs to be done in this respect). This simply does not apply to the CoE, which therefore is not a transnational democracy, since it is not democratic.⁶⁸

However, this should not discourage us. I intend to show that transnational militant democracy is legitimate even without reference to a common democracy. Rather, a joint commitment to certain values is enough to warrant cross-border militancy. One could consider calling it transnational militant liberalism, but this would not be enough. The Convention arguably contains more than that, it contains a *commitment to liberal democracy, without itself being a democracy*. CoE members have entered a mutual obligation to uphold liberal democracy, but without thus creating a common democracy. Militant transnational democracy, as in the case of the EU, hence does not work. Certainly, the CoE knows a procedure similar to Article 7 TEU in its Statute (Article 8) that suspends the member state's rights of voting and representation in the CoE's organs. It even provides the possibility of exclusion. But as neither the member

⁶⁶ *United Communist Party of Turkey and others v Turkey*, App No 19392/92 ECtHR (30 January 1998) at section 45.

⁶⁷ An expression taken from *Loizidou v Turkey (preliminary objections)*, App No 15318/89 ECtHR (23 March 1995) at section 75.

⁶⁸ See (n 57) 157.

state nor its people are properly governed by the CoE, this procedure is not quite what militant democracy is about. Suspending the member state's vote would not protect a common CoE democracy because such a thing does not exist. What remains, then, is cross-border militancy, exerted by states against individuals. Its transnational character is threefold. First, it protects neither one's own democracy, nor a common one, but a foreign one. Second, its mode of enforcement is transnational too, as it targets individuals, not states, and probably more foreigners than nationals. Third, it enforces a joint commitment to liberal democracy.

The European Convention of Human Rights is the prime example of how countries are 'locking in' their liberal democratic character.⁶⁹ Certainly, the EU has achieved more in this respect, especially by virtue of adopting itself democratic forms of governance over time. But the ECHR arguably came first and, in the immediate aftermath of World War II, probably was the more important one. While the EU nowadays guarantees its members' democracy by integrating them into a common democracy, the CoE still performs this task by way of mutual obligation and mutual enforcement. This becomes clear when we consider a rather dusty Convention provision that nonetheless is very important conceptually. This is the state-to-state petition (or inter-state application) in Article 33. Not only individuals can petition the European Court of Human Rights (ECtHR) for redress, the states too can bring a human rights issue within a fellow Member State before the Court, and thus to Europe's attention. CoE members are therefore effectively acting as mutual prosecutors. They can address systemic failures, detached from single human rights violations, by having an *actio popularis*, which enables them to review political developments and legislation in general.⁷⁰ They can even act on behalf of someone who has the nationality of the perpetrator, thus also covering mere internal cases.⁷¹ With regard to human rights, there are no longer any domestic affairs that would be exempt from intervention. Every CoE member hence is, alongside the Court, the guarantor of liberal democracy across Europe.⁷² The mutual obligation to uphold liberal democracy in such a way perfectly matches the power to mutually enforce this commitment when necessary. Besides, CoE members are of course bound to guarantee

⁶⁹ See (n 54).

⁷⁰ See *Greece v United Kingdom (I)*, App No 176/56 European Commission of Human Rights (7 May 1956); *Denmark, Norway, Sweden and the Netherlands v Greece (I)*, App Nos 3321/67, 3322/67, 3323/67 and 3344/67 European Commission of Human Rights (24 January 1968).

⁷¹ See *Austria v Italy*, App No 788/60 European Commission of Human Rights (11 January 1961).

⁷² See also (n 59) 413–14.

the Convention's rights and freedoms to every person under their jurisdiction (Article 1). One could therefore venture that to uphold liberal democracy itself is something due not only to fellow CoE members, but also to individuals as a matter of their human rights.⁷³

The power to meddle with a fellow CoE member's democracy, in my opinion, entails the right to transnational militancy. He who advocates illiberal democracy for a neighbouring state actually agitates for the gravest possible Convention breach. As mutual guarantors of the Convention, it is highly questionable why a state faced with this kind of behaviour should be condemned to inertia. Pursuing illiberal democracy means demanding that a given state not honour its obligations any more. If other states are entitled to enforce this obligation, it is hard to see why they should wait until the harm is done. Put another way, CoE members need not become complicit in their fellow members' misbehaviour, and they need not even make room to morally support it. Every CoE member has therefore a right to deploy its militancy against this project's supporters. The state might even have a duty to do it if we conceive of his obligation to uphold liberal democracy in terms of individual rights. Note that all of this is not about actual (military) interventions, of the like that happened in The Gambia in January 2017. I am just arguing we should not offer any audience to those opponents of democracy who happen to propagate their ideas not at home, but abroad. For in matters of liberal democracy, it is this distinction that has become porous. The fate of liberal democracy in CoE countries is no longer a domestic affair. Thus, it is legitimate to treat opponents of foreign democracies just as a state would treat opponents of its own. Upholding liberal democracy at home is thus a *duty* of the state concerned; upholding liberal democracy abroad is a *right* for every other country.

To explain how all of this works 'on the ground', I will switch the perspective and leave the level of states dealing with other states for the classical human rights plane, where there is an individual facing state action. Suppose a person wants to hold a rally concerning a constitutional referendum in a neighbouring state. It is widely understood that the constitutional change intended would turn this country away from liberal democracy and put it into severe conflict with CoE values. The referendum also includes expat voters, and politicians from abroad have made clear their intent to come and visit their local supporters. What is the state on whose territory the rally is to happen to do, when it deems the referendum, and thus the rallies, to be a slap in the face of liberal democracy? As the rally is publicly renouncing liberal democracy while at the same enjoying

⁷³ See (n 59) 414–17.

two of its most salient features, freedom of speech and of assembly, the so-called ‘paradox’ of tolerance comes to mind. It seems dishonest to claim the protection of a system that one is in the middle of dismantling.

It is therefore worthwhile inquiring how the Convention would deal with such behaviour and whether it has a legal answer to this ‘paradox’, which of course does not exist. It has been explained that states have a right not to be complicit in another state’s illiberal project. Is there an instrument at the level of individual rights that could justify militant democratic action? The Convention does indeed have a special provision for cases like this – in Article 17, which concerns the prohibition to abuse the rights and freedoms guaranteed in the Convention. The Convention must not be interpreted as encompassing any behaviour that aims to destroy the very rights and freedoms set forth in it. It does not actually ensure a specific constitutional order within a Member State – it is not militant democracy plain and simple. Rather, it makes clear that the rights enshrined in the Convention must not be turned against themselves and that the Convention does not allow itself to be abused for aims counter to it. Article 17 thus protects the Convention, including the member state’s mutual commitment to it.

The Court expounded the rationale of Article 17 (though without referring to it) quite eloquently in its famous *Refah Partisi* case, which has been debated ever since.⁷⁴ It concerned a political party that was banned because of its allegedly illiberal stance. *Refah Partisi*, or the Welfare Party, advocated the introduction of Sharia Law for Muslims in Turkey. It thus not only endorsed several practices that were incompatible with the Convention, but also favoured a legal system that, because it inevitably made several important differences between Muslims and non-Muslims, just as between men and women, was highly discriminatory. This would effectively have led to the Convention’s safeguards no longer being *equally applied*. To ban this party was thus legitimate:

The Court 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. It necessarily follows that 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 recognised in

⁷⁴ See for example K Cavanaugh and E Hughes, ‘Rethinking What Is Necessary in a Democratic Society: Militant Democracy and the Turkish State’ (2016) 38 *Human Rights Quarterly* 623.

a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.⁷⁵

Note that in the eyes of the Court, not only must the means used by a party be acceptable in a liberal democracy, which essentially means no violence, but also its programme and aims must themselves remain within the framework of liberal democracy. The Convention's right to found a party (enshrined within the right to associate and assemble in Article 11) hence does not cover illiberal or anti-democratic activities. Likewise, hate speech,⁷⁶ Nazi propaganda,⁷⁷ holocaust denial⁷⁸ and radical Islamist propaganda⁷⁹ have been removed from the protection of freedom of speech and of association (Articles 10 and 11) because they run counter to the values that undergird the Convention – a standard that may indeed be too sweeping.⁸⁰ As the Court nowadays tends to lend Article 17 a 'guillotine effect',⁸¹ abusive behaviour is cut out of the scope of Convention rights so that any interference need not be justified by a legitimate aim and the principle of proportionality. Of course, this approach knows outliers of every kind and case law is far from consistent.⁸² There is no need to delve deeper into the jurisprudence concerning Article 17; the point is that the Convention contains an instrument of self-defence as a matter of positive law.

Article 17 has been used to justify classical militant democracy issues. This was confined to a national level, and the protected democracies have always been national ones. It is therefore interesting to note that just as the Convention contains a mutual obligation to and enforcement

⁷⁵ *Refah Partisi (The Welfare Party) and others v Turkey*, App Nos 41340/98, 41342/98, 41343/98 and 41344/98 ECtHR (13 February 2003) at section 98. The same passage was later used to justify the application of art 17, see *Kasymakhunov and Saybatalov v Russia*, App Nos 26261/05 and 26377/06 ECtHR (14 March 2013) at section 102.

⁷⁶ See *inter alia*, *J. Glimmerveen and J. Hagenbeek v The Netherlands*, App Nos 8348/78 and 8406/78 European Commission of Human Rights (11 October 1979).

⁷⁷ See *inter alia*, *Michael Kühnen v Germany*, App No 12194/86 European Commission of Human Rights (12 May 1988).

⁷⁸ See *inter alia*, *Roger Garaudy v France*, App No 65831/01 ECtHR (23 October 2000).

⁷⁹ See *inter alia*, *Hizb ut-Tahrir and others v Germany*, App No 31098/08 ECtHR (12 June 2012).

⁸⁰ H Cannie and D Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Convention of Human Rights: An Added Value for Democracy and Human Rights Protection?' (2011) 29 *Netherlands Quarterly of Human Rights* 54.

⁸¹ JF Flauss, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme' (1992) 4 *Revue universelle des droits de l'homme* 461, 464.

⁸² A survey is offered by S van Drooghenbroeck, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?' (2001) 46 *Revue trimestrielle des droits de l'homme* 541.

of liberal democracy, the abuse clause can also easily be construed in a transnational sense. For, as stated above, its aim is to close off threats to the rights enshrined therein, not to protect specific member states. Remember that to agitate for an illiberal democracy, which is defined by the lack of human rights protection, is to advocate a large-scale and continual Convention breach. An attack on liberal democracy, wherever in Europe it happens and whichever country it targets, must always be deemed an attack on the Convention as whole. Imagine the defunct *Refah Partisi* holding a rally not in Turkey, but in Germany. Would this make any difference? Their target – liberal democracy as enshrined in the Convention – would have been the same, wherever they acted. Member states, which are committed to the Convention's mutual enforcement, can therefore rightly use Article 17 against those who promote the end of liberal democracy, because this inevitably means the destruction of the rights and freedoms set forth in the Convention. It is important to stress that it makes no difference if the persons in scope are nationals or foreigners, because the Convention and the duty to uphold it also do not take notice of borders. But the measures of transnational militant democracy can perfectly well be directed against the state's own nationals. Their advocating that another state should abandon liberal democracy is just as much an incitement to Convention breach as when foreigners do it. In light of the common commitment to liberal democracy, attacks on it can be countered. If attacks come from states, the state-to-state petition is the way to go; if they come from individuals, the abuse clause does the work. First, it enables militant democracy at home, which is undisputed. Second, and because it actually protects the Convention, not a single state, it also allows for militancy wherever the Convention applies. Banning political agitations that take place internally but aim at democracies abroad is therefore justified under the Convention's abuse clause. This in turn exemplifies the mutual commitment to liberal democracy and its mutual enforcement CoE members have undertaken. Under the Convention, militant democracy truly is transnational.

V. Conclusion and perspectives

Militant democracy has become transnational. Nowadays, it protects not only a single, national democracy. The instruments of militant democracy today are equally applicable to transnational democracies and foreign democracies. To make this point, I have first explained why militant democracy, in my opinion, is *not unjustified*: When understood politically, democracy's alleged paradox – the paradox that we expect democracy to be open to its own enemies – dissolves. If we acknowledge that liberal

democracy is not only the form of government, but also part of our history and constitutional identity, its defence seems almost self-evident. In dealing with democracy's opponents, democracy itself is an opponent of those political beliefs incompatible with it. For democracy to be all-encompassing and to grant political fulfilment to every political creed whatsoever is unattainable – one simply cannot be a National Socialist and a liberal democrat at the same time. To claim that liberal democracy must embrace its own abnegation is to strip it of any meaning. I have therefore suggested a twofold understanding of democracy's being open to its enemies. Democracy is open in the sense that even its opponents enjoy equal citizenship. They are no Schmittian enemies, they are no aliens in our midst, and they are not disenfranchised. But democracy's openness does not extend to its institution. Equal citizenship does not bind democracy to provide the means of its destruction. Having the same rights as everyone else does not mean that the state must adopt whatever one thinks is politically apposite. Not to be able to implement one's preferred system of government is no disenfranchisement.

These thoughts, developed with traditional, national militant democracy in mind, can easily be transferred onto the transnational stage. As is often the case, political developments are ahead of theory. The EU is thinking about what to do with Hungary and Poland. Several states have banned Turkish referendum rallies and will continue to deny entry to Turkish government officials wishing to talk to their constituents abroad. In both cases, liberal democracy is at stake and in both cases, its defence does not come from within – it could not possibly, as it is from within that democracy is under attack! Its defence comes from the outside. The EU, being a transnational democracy in its own right, has a specific transnational tool to insulate itself against Member States who take the wrong turn. By suspending voting in Council (and, if need be, a host of other rights), the EU can contain an undemocratic Member State's negative impact on the common democracy they share. That is transnational democracy gone militant. The CoE is no democracy but arguably contains a commitment to liberal democracy that obliges its members to remain so and to enforce this obligation when necessary. This rests on two Convention provisions: first, Article 33, the state-to-state petition, reveals that CoE members have a right to get involved in their fellow members' internal affairs. Second, Article 17, the prohibition of abusing the Convention rights for aims counter to the Convention itself, protects the Convention as a whole. To abandon liberal democracy is the largest Convention breach. As Article 17 targets precisely such behaviour, it really cannot be significant whether someone is advocating the destruction of democracy at home or abroad. In both cases, the Convention would suffer; therefore, a state has the right to treat

an opponent of a neighbouring state's democracy just as it would treat an opponent of its own. That is militant democracy gone transnational.

Both manifestations of transnational militant democracy are complementary, in a spatial as well as material way. Spatially, the CoE, of course, is wider than the EU in that some countries are covered by one, but not the other. In the material sense, the two forms of transnational militant democracy protect different objects: one is concerned with the unimpeded functioning of transnational democracy, the other with the survival of a national democracy that is on the brink of not honouring its commitment to remain liberal and democratic, as the Convention requires. What they have in common is their cross-border entanglement. However, this is the logical consequence of democracies being transnationally bound together: the moment democracy becomes transnational, or at least the commitment thereto, the issue of defending this democracy, or the commitment respectively, arises. Both ways of transnationally defending democracy are bound together by a logic of escalation. Article 7 TEU is rightly called the 'nuclear option'. Its use is heavy-handed and long-winded. It is highly centralised and requires European unanimity. Cross-border militancy, backed by Article 17 ECHR, is decentralised and functions within the normal framework of militant democracy a country might have, and is therefore the first option to think about.

Questions remain. The theory of militant democracy itself is only in the making. One problem of course looms large: what if there is no connection whatsoever with the democracy in need of defence? This article has exclusively been concerned with Europe, where countries' ties are indeed very tight. Are we equally entitled to ban an assembly of, say, US citizens and members of the 'alt-right' promoting a white supremacist autocracy in the United States? (We probably could, based on hate speech legislation rather than on militant democracy grounds, although they share a common rationale.) Who counts as a 'fellow democracy' and is this even the right question? And what about the threshold above which militancy is justified? It is one thing to assess whether a party has become so dangerous that its ban is justified; at the transnational level, one doubts there could ever be such a standard. For it is clear that one single constitutional referendum, as hostile to liberal democracy as it may be, never could endanger the EU or the CoE in the same way it would endanger national democracy, even less so if we are talking about banning a rally in favour of such a referendum. So either dangerousness is no criterion or transnational militant democracy is never justified, because the danger it seeks to counter would never be great enough. I tend to favour the first variant, despite knowing that a transparent and clear-cut threshold is vital in preventing the kind of authoritarian democracy Karl Loewenstein apparently had no problem with.

It is also important to forestall the kind of mission creep epitomised by the saying ‘when you have a hammer, everything looks like nail’. Militant democracy’s instruments should not be used for a kind of militant culture.⁸³ In a liberal democratic state, help in obviating excesses of this sort is usually expected from the courts. So what about judicial oversight? With respect to Article 7 TEU, there is none (regarding the merits). Concerning Article 33 of the Convention, to initiate Court proceedings is the whole point. Article 17, however, whose aim is to bar people from invoking Convention rights, sits in the middle as a state’s revocation of fundamental rights protection is itself a matter for the Court. There is still much research to be done, and I hope to have made small contribution to it.

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⁸³ On this point see J-W Müller, ‘Militant Democracy’ in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 1253, 1266.