

The 'Militant Democracy' Principle in Modern Democracies

Edited by Markus Thiel

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MARKUS THIEL

Heinrich-Heine-Universität Düsseldorf, Germany

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THE 'MILITANT DEMOCRACY' PRINCIPLE
IN MODERN DEMOCRACIES

In 1937 Karl Loewenstein under the impact of the Weimar Republic's demise developed a principle of militant democracy which was subsequently implemented by the German Grundgesetz. His controversial concept has been widely discussed in various national contexts but rarely from a comparative perspective. This unique collection of essays proves that the German example is no isolated precedent and that many democracies have developed means for defending themselves.

Wolfgang Durner, University of Bonn, Germany

With surprising regularity, all democracies turn 'militant' and proclaim the right to exclude from the political process those who would undermine democracy itself. How they do it, why they do it, and which groups are likely to feel the wrath of the state vary significantly. This edited volume is a major contribution to the emerging literature on how democracies maintain their integrity in the face of internal opposition, a topic of great contemporary relevance in the age of national security and the war on terror. Placing the national examples under a comparative light illuminates the risks and indispensable protections for democratic viability. Each chapter provides rich insights for the study of democratic politics.

Samuel Issacharoff, New York University, USA

Manifestations of the pre-emptive defence of democracy – whether termed 'militant' or simply 'muscular' – have become commonplace during this decade, with the terrorism of our neighbours becoming the prime contingency. This impressive survey of comparative constitutional settings and detailed responses provides the reader with knowledge and insight within a rich discourse.

Clive Walker, University of Leeds, UK

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Preface

It has been quite a long journey from an idea for a scholarly piece to a printed and bound book, especially because it is an anthology on a controversial matter, touching different sciences, for example, jurisprudence; constitutional and democratic theory; and political sciences. The idea for this book emerged in 2004, and now, the gentle reader holds it in their hand.

An editor on such a journey is in need of reliable companions – I count myself lucky to have them. I would like to thank Ashgate Publishing for including this book in their publishing programme, and the publisher's staff – especially Alison Kirk and Emily Jarvis – for their very friendly and helpful support, and for their thankworthy patience with an editor who – literally spoken – dawdled and strayed on his journey and significantly exceeded the agreed closing date.

I have to express my acknowledgements for the authors of the reports on the other countries. I am fortunate to have recruited international experts of such a high reputation to write chapters for this book. Although involved in the duties of their occupation in research, teaching and administration, they all participated in the project and contributed valuable and interesting articles, each with a slightly different, intriguing focus.

This book is dedicated to my beloved parents for their unconditional help and support.

Markus Thiel

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Chapter 1

Introduction

Markus Thiel

A Weak Flank of Democracy – Vital Questions of Democratic Self-Defence

Democratic systems frequently come under fire. Their very existence is threatened by acts of terrorism committed by separatists; political extremists from the extreme right or left; ‘enemies’ of the democracy pulling the strings behind the scenes; agitating in the underground; partaking in the political process in disguise; or even openly fighting the present political system. In addition to these menaces ‘from within’,¹ democratic states (and the so-called ‘Western’ model of democracy in general) are endangered by terrorist attacks ‘from the outside’, for example, by fundamentalist followers of a radical persuasion of Islam.

Some democracies declare themselves under siege or at war,² taking steps to defend against such threats. Defensive measures promoting homeland security often have negative effects on the rights and freedoms of the people: immigration control; intensified security checks at airports; video surveillance of public places and public transport vehicles; automatic vehicle monitoring; biometric control devices; individual observation; or sneaking access to electronic data processing systems and personal computers. This list could be continued almost endlessly, and it is understandable that individuals feel controlled, hassled or threatened by such measures. Regarding internal security aspects (which cannot be separated accurately from questions of external security anymore), these issues culminate in the old question of the balancing of freedom and security. The traditional dilemma of a state who is expected to guarantee security, on the one hand, and who, on the other hand, may face legal action from individuals by trying to enforce security.

But, according to the most recent development in democratic theory, freedom and security cannot be understood as mere antipodes. The freedoms people have become so fond of require the perpetuation of the democratic system, including fundamental rights and freedoms and, for example, the endurance of the rule of law. ‘Constitutional comfort’ is dependent on a certain level of security. Many critics of

1 We will not deal with other ‘endurance tests’ and dangers to democratic systems, like a ‘functional depletion’, problems of social exclusion and marginalization or ‘globalization’, in this book. See Müller 2001 (on the German situation) and, with a wider scope, Faulkner and Shell 2009.

2 For example, the US; see the books of Bobbitt 2008; Stone 2005: 550 et seq.; Tushnet 2005.

security measures ignore the fact that the aim of, for example, Islamist terrorists³ is not only to abolish states and their institutions, but to defeat the democratic legal order altogether and to replace it with a theocratic regime (including the *Sharia* law) contradictory to the free democratic order or at least characterized by a restrictive attitude towards certain fundamental rights and freedoms. Human rights and the rule of law are challenged by the *Sharia* law, although its legitimate status in Islam is highly controversial. Offences by fundamentalists are directed not only against the abstract democratic idea of the state, but against real democratic states with real legal systems and real guarantees of personal freedoms. As Karl Loewenstein has pointed out, the authoritarian enemies of the constitution try to substitute 'emotionalism' for the rule of law, which must lead to the decline of basic rights and liberties. On the other hand, security is not only a function of the state using its 'monopoly of coercion' and penal power, but is regarded – for example, in Germany – as a task and a duty the state cannot completely neglect, delegate, privatize or give up.⁴

Hence, a democratic state may have to defend at least its very existence on behalf of its citizen. The legitimacy and range of self-defence is, therefore, a vital question of every democratic system. It can be 'traced back to the very beginning of democratic theory itself' (Pfersmann 2004: 47).

As a matter of course, this applies to *any* state with *any* form of governance. However, only in a democracy the balancing of freedom and security, and the question of whether enemies of the democracy are allowed to use democratic structures and rights to destroy it (the 'weak flank' of every liberal democracy) culminate in the dilemma and debate around the idea of a 'militant democracy'. The essential problem here is the choice between the 'open democracy' or a democracy constituting (at least) a 'minimal stability' (Pfersmann 2004: 53 et seq.), which leads to the question as to whether the democracy should actively fight efforts using the 'democratic framework' to abolish the democratic system or not.⁵ This democratic dilemma has not been satisfactorily solved yet (and it is to be feared that a generally accepted solution cannot be found in a pluralistic, liberal and 'majoritarian' democratic system at all).

The Birth of a Project – A Sort of 'Constitutional Curiosity'

In 2003, I edited and published a book about the 'militant democracy' principle in German constitutional and sub-constitutional law; a book entitled '*Wehrhafte Demokratie. Beiträge über die Regelungen zum Schutze der freiheitlichen*

3 In the context of this book, the term 'Islamist' is understood as an orthodox follower of Islam. The term 'Islamist terrorist' means a person who adheres to a fundamentalist persuasion and who violently aims for the spread of this faith.

4 See Möstl 2002 (in German).

5 See Klamt 2007: 134 et seq.

demokratischen Grundordnung'.⁶ It contains several papers dealing with a wide range of topics closely connected to the protection of Germany's constitutional order from threats. Topics covered include, for example, the treatment of 'enemies' of the constitution in public services; the provisions for a 'state of emergency'; regulations to protect the constitutional order in criminal law; the administrative protective measures of the intelligence services; the deployment abroad of the *Bundeswehr* (military forces); irrevocable elements of the German *Grundgesetz* (Basic Law); the forfeiture of fundamental rights (Article 18 of the German Basic Law); and the banning of extremist political parties (Article 21 Section 2 of the Basic Law). What seemed to be a 'spotty', loose synopsis of heterogeneous legal requirements and provisions turned out to be manifestations of an overarching constitutional 'militant democracy' principle, derived from these regulations especially by the *Bundesverfassungsgericht* (Federal Constitutional Court) in a number of eminent, yet controversial judgments.

From the insights of these studies dealing with the instruments and measures in which the 'militant democracy' principle becomes apparent, the question emerges as to whether Germany is an 'isolated case' or if other democracies could be qualified as 'militant' as well. Is there an affinity with or disapproval of such a principle in modern democracies' constitutions and legal systems? And, if a constitutional militancy principle is not acknowledged in a country, are there at least legal and political provisions to defend the democratic structure against attacks? Even if a democratic system does not agree with the general idea of a 'militant democracy' as an argument and criterion in weighing up legal positions (for example, in Germany – the fundamental rights of an extremist public servant against the interests of the state to maintain its function), they may have some kind of regulations to cope with dangers that threaten the fundamental democratic order 'from within'. Where such regulations do not exist, it would be interesting to learn about how and why alternative ways are expected to secure a sufficient level of prevention – for example, why a society trusts more in the self-regulative powers of election than in judicial proceedings to prohibit or dissolve right- or left-extremist political parties.

After analysing the status quo of 'militancy' in diverse countries, the final step is an examination of whether the idea of a 'militant democracy' is (or should be) a ubiquitous principle, valid in every democratic country, as a kind of 'constitutional common feature' or a consensus in democratic theory, or if at least some 'core elements' of militancy could be identified in the different legal systems. For this purpose, I initiated this project and invited scholars of constitutional law, democratic theory and political sciences from a number of countries around the world to contribute.

6 'Militant Democracy. Essays on the regulations aiming at the protection of the free democratic basic order'.

A Closer Look – The State of Research

'Militant democracy' has been dealt with in several monographs and articles.⁷ But publications using a wider, comparative or international approach are rare.⁸ Most essays and books cover the 'militancy' problem only in respect of a single country, considering 'transboundary' aspects in historical retrospection at best, and – in that case – predominantly by mentioning the scholarly activities of emigrants Karl Loewenstein and Karl Mannheim (as the originators of the term, if not the idea, of the 'militant democracy') or the Weimar experiences and spectres of the German Nazi past.

In recent years, the topic of militancy has become a broad-front matter of interest among scholars of jurisprudence and political science.⁹ This interest was boosted by the fact that the democratic world became aware of the novel threats posed by religious fundamentalists of a new generation.¹⁰ Issues of internal and external security, converging in a so-called new 'paradigm of security', were intensively debated. The question of democratic self-defence is only a sub-area of this overarching topic. As a scholarly opus containing a rich diversity of papers concerning the 'militant democracy', the book of the same title, edited by András Sajó in 2004, should be mentioned (Sajó 2004a). It is, according to the back cover, a 'collection of contributions by leading scholars on theoretical and contemporary problems of militant democracy', and provides – besides the essays by Karl Loewenstein that could be called the 'cradle' of the term – a bundle of articles illuminating various aspects (political parties, anti-terrorism, 'militancy' in 'transitional democracies'),¹¹ theoretical groundwork¹² and the question of 'militancy' in selected countries (for example, Israel and Spain).¹³

It can be concluded that several aspects of the 'militant democracy' have been examined thoroughly, but – as far as can be seen – a more comprehensive study, attempting to develop a rudimental basis for a theory of the 'militant

7 Especially in German literature; see, for example, Jaschke 1991; Jesse 1980; Lameyer 1978; Sattler 1982; Wu 1998; in general: Fox and Nolte 1995.

8 See Capoccia 2001: 435, the concept of militant democracy is 'largely understudied in a comparative perspective'; Klamt 2007: 135.

9 From the comprehensive literature, see from Germany: Boës and Schwegel 2005; Papier and Durner 2003; Thiel 2003; from Spain: Revenga Sánchez 2005; from the US: Crosston 2006; Viotti et al. 2008; Weinberg 2008; in general: Brysk and Shafir 2007; Issacharoff 2007; Macklem 2006. For further reading, see the references sections of the chapters in this book.

10 On the 'war on terror' and its facets, see, for example, Bobbitt 2008; Stone 2005.

11 See Ferreres Comella 2004; Roach 2004; Sajó 2004b; Tardi 2004.

12 For example, Dyzenhaus 2004, on the Schmittian way of identifying the 'enemy'; Pfersmann 2004, on the origin of the 'militant democracy' idea, especially p. 49 et seq.

13 See Ferreres Comella 2004; Krennitzer 2004.

democracy' and with a comparative approach based on status reports of a selection of countries, is still missing.¹⁴

The Pitfall of Comparison – Methodical Remarks

Comparison is one of the legal scholar's few digging fields for new discoveries. In recent years, an increasing interest in comparative law, especially in the field of constitutional law, can be observed.¹⁵ This is based to some extent on the need for more comprehensive inquiries regarding the advance of supranational and international institutions and regulations, which revert to the national systems (Möllers 2008: 116). In addition to that, a general discomfort with a 'nationalist' approach to constitutional law, history and theory is spreading.¹⁶

Although the term of 'comparative law' is not absolutely clear and understood uniformly,¹⁷ it can be accepted as a basic principle that only such institutions, regulations and other legal phenomena can be compared that fulfill similar tasks and functions. From this principle, other cornerstones of comparative jurisprudence emanate: the selection of the legal systems to compare; the scope of the analysis; and the systematization (Zweigert and Kötz 1996: 33). As 'form follows function', a comparative study in constitutional law and democratic theory is based on the definition of a problem (or a complex of problems).

This may cause some difficulty here because comparative studies run the risk of being biased by the authors' perception, which is necessarily rooted in their national legal systems.¹⁸ In particular, the term 'militant democracy', coined by a German émigré, can only be conceived against the background of the historical experiences with fascist movements. Therefore, the 'militant democracy' issue is intimately connected with the particular country's history, its coming to terms with a (totalitarian) past and the formation of constitutional law, legal and political theory. This fact complicates the comparative analysis.

In addition, comparative legal studies are often confronted with further methodological barriers. First of all, such an approach inevitably has to be highly selective. As Zweigert and Kötz have stated, the selection of countries to be compared must not be arbitrary (Zweigert and Kötz 1996: 40). This book contains country reports on a dozen democratic countries and leaves aside many more,

14 Anyhow, the article by Martin Klamt on militant democracy in different European countries (Klamt 2007) offers an insightful overview, and his forthcoming doctoral thesis (Klamt 2009), will close a gap here.

15 See, for example, von Bogdandy et al. 2007; Reimann and Zimmermann 2006. Namely in the field of civil law, the comparative method has a much more established tradition.

16 See, for example, Scheppele 2004: 391 et seq.

17 See, for example, Jaluzot 2005.

18 See Zweigert and Kötz 1996: 34 et seq.

unfortunately, even those where an analysis of the democratic systems would have been intriguing. But since it is impossible to include a contribution from every democratic country, there had to be a selection, and so this book focuses mainly on European and North American countries, with the addition of Chile, Israel and Japan.¹⁹

The countries chosen for this study are representative for various reasons. They have an assured democratic tradition, although many of them have encountered several threats to their very existence and their fundamental constitutional order over the last decades. Most of the countries have developed quite different ways of coping with these threats: the empowerment of measures against individuals and groups threatening the democratic system, the state as a whole or single institutions of the state. And every chosen country provides a stable legal order (including an elaborate constitutional jurisdiction) able to confine the said measures – by restricting legislative powers or ‘dyking’ the executive’s competences – to prevent the state and its institutions from becoming too authoritarian and from neglecting or excessively curtailing individual rights and freedoms guaranteed by constitutional law.

Some may feel that the approach of this book is too ‘eurocentric’, and that African, Asian and Latin American countries should have been awarded more space and attention. It can be conceded that a focus on Europe shortens the quantum of possible insights, and that country reports especially from ‘younger’ democracies, democracies ‘in transition’ or emerging democracies would be of great interest. However, with all due respect, some of these countries may not provide a level of ‘stabilized’ constitutional theory necessary for a project like this. In addition, not all of those requested to contribute to this study were able to do so, which leaves a small number of gaps that unfortunately could not be filled.

Another objection may be that one compares – to say it with a proverb – apples and oranges. The initial enthusiasm may be dampened when the scholar undertaking comparative studies becomes aware that even such superficially clear terms as ‘the state’, ‘fundamental rights’ and ‘society’ dramatically differ in comprehension, depending on layers of preconceptions of, for example, historical; philosophical; political; jurisprudential; or sociological provenance. The idea of the ‘state’ is, for instance, recognized in a quite different way in Germany than in the United States because the federal tradition, connexions of the juridical terminology and the comprehension of ‘democracy’ and ‘freedoms’ are (somewhat) different (Möllers 2008: 9). As Christoph Möllers has remarked, it is not that the German term ‘*Staat*’ is, for example, untranslatable in other languages, but the juristic conception behind (Möllers 2008: 90). The same applies to the perception of ‘constitution’ and ‘constitutional law’, and to the (presumably) equivalent terms in other languages. Therefore, a comparative study like this book must not cling to

19 Israel and Chile have been included because of the obvious influence of the German concept of a ‘militant democracy’, Japan because of its decided refusal of this idea. For a short summary on Greece and Portugal, see Klamt 2007: 147 et seq.

nomenclature and the exact meaning of terms, but has to examine (and compare) the different *practical* manifestations of militancy. This challenge is aggravated by the fact that scholars in comparative studies might tend to act on the assumption that the political and legal system and situation of their home country are the ‘normal case’, so that they become the ‘pivotal point’ of the comparison in a partial or even biased way – a problem especially for a German scholar because of the country’s specific choice of a ‘militant democracy’.

A last objection is that, by comparison of different legal cultures, one often arrives at the quite poor single conclusion that the (legal) world is ‘colourful’. Of course, it is to be expected that a comparison between democratic states will result in the conclusion that there is a wide scope of different legal, political and sociological approaches to a single topic. Such a study may be confined to merely providing a descriptive overview, lacking a profound analysis of the substantive characteristics of the countries’ response to the said topic. However, the promise to identify similarities in the various democratic systems justifies comparative efforts; basically, it would be a significant achievement to clarify terms and concepts, and trace mutual influences between several democratic systems, in a historic retrospective in particular.

Another circumstance that makes a comparative study on the ‘militant democracy’ difficult is that the topic is quite a ‘touchy’ one. Although most democratic states had or have to deal with enemies – extremist political parties and fundamental religious groups; violent secessionists; extreme left or right-wingers in public service; hate speech agitators; and many more, and although many countries have provided legal measures to defend the status quo, to the point that it seems now to be common opinion that a democracy has the vital right to defend itself against attacks and to prevent such attacks, these measures are broadly considered to be in friction with liberal democratic theory. *Benyamin Neuberger* (Israel) has called it a ‘slippery slope’ of democracy. The democracy fights against persons or groups who make use of their democratic rights, and thus the tolerant state form of democracy suddenly turns intolerant. But this ‘democratic dilemma’ and the quest for its solution make this study even more fascinating.

The Colourful World of Constitutions – A Spectrum of ‘Militancy’

The book starts with a chapter by *Helen Irving* on *Australia*. As in other countries with a common law tradition, the concept of ‘militant democracy’ is unknown as a constitutional, legal or political overarching principle in Australia. The country has been untroubled to a large extent by political extremism and violence and by terrorist attacks on its territory. Nevertheless, as Helen Irving points out in a historical retrospect, there have been legislative measures to fight ‘subversion, sedition and the erosion of democracy’ (especially, as in many other countries, against communists) and currently there are several (controversial) laws governing, for example, threats by terrorists. These include allowing bans of organizations