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## **Freedom and equality as necessary constituents of a liberal democratic state**

Doomen, J.

### **Citation**

Doomen, J. (2014, May 21). *Freedom and equality as necessary constituents of a liberal democratic state*. Retrieved from <https://hdl.handle.net/1887/25825>

Version: Corrected Publisher's Version

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**Author:** Doomen, Jasper

**Title:** Freedom and equality as necessary constituents of a liberal democratic state

**Issue Date:** 2014-05-21

## Chapter 16. The added value of ‘militant democracy’

**16.1** Since basic equality and freedom are necessary constituents of a liberal democratic state, as I have argued, the question arises to what extent changes that might undermine their foundational role in a liberal democratic state, and thus the liberal democratic state in question itself, should be prevented.

This question is most fruitfully brought to the fore through an examination of the concept that has come to be known as ‘militant democracy’, or – by its German denomination – as ‘streitbare Demokratie’.<sup>500</sup> Militant democracy consists in fending off any changes to a (liberal) democratic state that are so radical that the form of government is no longer recognizable as (liberal) democracy; significantly, this includes changes proposed through the proper democratic procedure, so that (liberal) democratic states are protected against being dissolved via the means that are characteristic of them.<sup>501</sup>

**16.2** The necessity of militant democracy seems evident. After all, the need for basic equality and (some) freedom in any liberal democratic state seems at odds with their possible negation, which may very well be the outcome of a democratic procedure. To such an observation I would, with regard to the first element, basic equality, respond that ‘basic equality’ may be specified in many ways, so that little is said if one seeks to defend basic equality. Still, this is a somewhat rhetorical response, and one may urge on the specification that has featured prominently in this study, namely, basic rationality, which cannot be denied once it has been acknowledged (cf. section 6.8). It must then be reminded that basic rationality is merely something rational beings should acknowledge, as prescriptive equality dictates, ‘should’ being no ‘moral’ imperative but rather an expression of an appeal to self-interest, in line with what was said in section 6.4, and there is no measure to force people to be rational, so that they need not acknowledge basic rationality, and thus not act upon that which prescriptive equality stipulates.

With regard to the second element, freedom, I have already indicated what criterion should be used to decide whether it may be curtailed: the ignore principle. Paradoxically, only in a totalitarian state can opinions that plead the cessation of a democratic form of government be suppressed. What complicates matters is the fact that such opinions might lead to precisely such a state. In the most straightforward scenario, the populace may be

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<sup>500</sup> The *locus classicus* is K. Loewenstein, “Militant Democracy and Fundamental Rights, I”, especially pp. 423, 430–432.

<sup>501</sup> To point to an actual example where this line of thought is practiced, the German Constitution stipulates (article 79), *inter alia*, that amendments to the Constitution that affect the principles laid down in articles 1 and 20 are inadmissible. (Article 20 states, *inter alia*, that Germany is a democratic and social federation (‘Bundesstaat’); article 1 is mentioned in note 149, *supra*.)

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convinced by a (charismatic) politician to vote for a party that will dismantle the democratic form of government.

I readily grant that there is nothing in my model to principally avert this state of affairs. Just as in the case of basic equality, people must on the basis of a rational assessment act in such a way that the most desirable result for them is most likely to follow, which may in certain circumstances lead to a radical change as the one just outlined (leaving the matter whether such a change can actually follow if the matter is indeed rationally assessed). It is obvious that it is quite unsatisfactory to reach this result, being able only to express the hope that one will have enough historical awareness to make balanced decisions in this respect, especially since militant democracy has not been inquired in detail, and a judgment regarding the desirability of militant democracy must be forestalled until this will have been done, although it has already become apparent that at least some elements seem difficult to reconcile with that position. Such an inquiry will now be undertaken.

**16.3** I would first approximate the matter of the tenability of militant democracy from a practical stance. If militant democracy is in place, and a political party has already gained so much support from the populace that it would rise to power if a ‘normal’ democratic state (observing the demands of ‘formal democracy’ (cf. section 1.3))<sup>502</sup> were in place, the changes such a party seeks to realize apparently find much approval. In the most extreme scenario, a coup would ensue, so that the party could, via alternative means, reach the same result. The law is not better able to subdue a revolt than any other collection of words. In addition, banning such a party may actually have the adverse effect of making it more committed.<sup>503</sup>

Legislation may be passed to preclude outcomes a *present* majority considers undesirable, but – again, unless a totalitarian state is in place to begin with, thus defeating the premise and purpose of the present account – it will not be ultimately effective. The effects that legislation can produce are not to be overestimated: legislation is a mere means to realize some goal decided upon external to the process of legislation itself. It is first decided by the majority, for example, that the minimum wage must be increased, which is subsequently formalized. (In representative democracy, the process is of course more circuitous.) The opposite result – a decrease of the minimum wage – can just as easily be realized.

The law itself does not exist as a (separate) authority to express its approval or disapproval but is a mere record of the legislator’s decision. To expect the law, or, in its place, unwritten, ‘natural law’, to provide definite answers to hitherto unsettled issues is to take a downright metaphysical stance, and, besides, such a position would evidence a category mistake, identifying the means (the law) as the goal. It is clear, moreover, that the law itself cannot enforce behavior: its effectuation depends on the existence of government officials.

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<sup>502</sup> What is said here applies to democracy in general and is not limited to *liberal* democracy.

<sup>503</sup> M. Minkenberg, “Repression and Reaction: Militant Democracy and the Radical Right in Germany and France”, pp. 40-44.

A continual performance on their part is not in every case necessary, as the mere threat that they will act may be sufficient.

**16.4** Even if the law can be enforced, it must (usually) be obeyed by a substantial number of people. If it should be generally disobeyed, it could (at least in practice) not be maintained.<sup>504</sup> (The number of people sufficient to make it a ‘substantial’ number cannot in general be delimited; this will depend on the circumstances.)

The foregoing observation is easily demonstrated by the ineffectiveness of the prohibition of alcohol in the U.S.A., which was imposed in 1920 and had to be terminated eventually (in 1933, when the Eighteenth Amendment to the Constitution was repealed by the Twenty-first). Hart points to the importance of a rule of recognition, which specifies “[...] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”<sup>505</sup> The rule of recognition provides criteria for identifying primary rules of obligation.<sup>506</sup> It is identified within a system of rules, no external criterion to assess its validity being available.<sup>507</sup>

The issue of ‘is-ought’ (*vide* section 6.4) is revisited here. Although Hart does not himself qualify the issue in these terms, he does say: “[...] the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”<sup>508</sup> This appears to provide a possibility to breach the chasm between the descriptive and prescriptive realms. It does mean that an independent norm, be it one stemming from ‘morals’ or not, is no factor of importance here.

Should one, alternatively, as Kelsen does, cling to a strict separation of ‘is’ and ‘ought’,<sup>509</sup> the crucial task will be to indicate which element, or elements, would feature at the ‘ought’ level, and thus take the normative role. Kelsen notoriously resorts to a basic norm (‘Grundnorm’),<sup>510</sup> the main problems of which consist in its being devoid of content<sup>511</sup> and the fact that it can only be upheld by resorting to a fiction.<sup>512</sup> The latter issue is not

<sup>504</sup> Cf. H. L. A. Hart, *The Concept of Law*, pp. 90, 112, 113, 116, 118.

<sup>505</sup> H. L. A. Hart, *The Concept of Law*, p. 94.

<sup>506</sup> H. L. A. Hart, *The Concept of Law*, p. 100.

<sup>507</sup> H. L. A. Hart, *The Concept of Law*, p. 109.

<sup>508</sup> H. L. A. Hart, *The Concept of Law*, p. 110.

<sup>509</sup> E.g., H. Kelsen, *Reine Rechtslehre*, pp. 4, 10.

<sup>510</sup> H. Kelsen, *Reine Rechtslehre*, p. 197.

<sup>511</sup> H. Kelsen, *Reine Rechtslehre*, pp. 199, 200: “Die Grundnorm liefert nur den Geltungsgrund, nicht aber auch den Inhalt der dieses System [des dynamischen Typus von Normensystemen] bildenden Normen.” (“The basic norm only provides the basis of validity, and not also the content of the norms that shape this system [i.e., the dynamic type of systems of norms].”); cf. pp. 201-208.

<sup>512</sup> H. Kelsen, *Allgemeine Theorie der Normen*, p. 206: “Die Grundnorm einer positiven Moral- oder Rechtsordnung ist [...] keine positive, sondern eine bloß gedachte, und das heißt eine fingierte Norm, der Sinn

necessarily problematic (and I appealed to fictions myself, in chapters 6, 12 and 13), but if the basis of the legal system is concerned, one should operate with caution in this regard. Whether a stance such as Kelsen's is downright impossible I do not know, but absent any convincing candidate to provide the necessary contents, I venture to say that the most promising way to confront this issue is to locate the descriptive and prescriptive elements at the same level of analysis.

**16.5** I hasten to add to these observations that legal reforms are in many cases no trifling measures. To claim the contrary would make much of what is argued here and in many other works moot. This observation is, however, not sufficient to satisfy the reader who suspects this *argumentum ad consequentiam* to be guiding in warding off this result, so that I would add that there is a difference between driving on an uneven road and a paved one; while the outcome – measured by distance – may be the same, legislation makes a significant difference here, realizing the objective as carefully as possible, and thus taking care of any foreseeable obstacles while leaving those that present themselves along the way to the courts' judgment.

**16.6** I have tried to show that it would be in vain to produce legislation in order to enforce behavior if a significant part of the populace would disobey such legislation. One would combat a political problem by legal means, which is no more effective than to stop the rain from falling by shouting at it. Applied to the topic at hand, this means that restricting the actions of those that seek to undermine the democratic procedure would be in vain. If they have acquired the support of a sufficient number of people (i.e., a majority, and in some cases a qualified majority) to carry through the changes by means of the democratic procedure, it would be unrealistic to expect government officials to be able to suppress such a mob, especially if it is well-organized. As I said above, even a coup could be expected.

However, the foregoing merely indicates why clinging to a more substantive concept of democracy than that of 'formal democracy' will not yield much. It may be welcome not to limit the analysis to such a pragmatic stance and to approach the subject matter in a more principled way, stating what the problems with the concept of 'militant democracy' might be, thus judging the matter even regardless of the question of whether the implementation of militant democracy would result in a viable polity. This is my task for the remainder of the chapter.

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nicht eines realen, sondern eines bloß fingierten Willensaktes. Als solche ist sie eine echte oder "eigentliche" Fiktion im Sinne der *Vaihingerschen* Philosophie des Als-Ob, die dadurch gekennzeichnet ist, daß sie nicht nur der Wirklichkeit widerspricht, sondern auch in sich selbst widerspruchsvoll ist." ("The basic norm of a positive moral or legal order is no positive norm but a purely thought and thus a fictitious norm, and the meaning is not of a real act of will but of a purely fictitious one. As such it is a genuine or a "real" fiction in the sense of *Vaihinger's* philosophy of as-if, which is characterized by the fact that it not only contradicts reality but is self-contradictory.")

**16.7** A first reason to defend the existence of militant democracy is that a majority will make decisions that have far-reaching effects for a minority (*viz.*, the minority that wants to continue the democratic state). This is no compelling argument, as *every* democratic decision that is not supported by every citizen is of this nature, so that, if this line of reasoning were followed, practically no democratic decision could be made. To be sure, what is at stake here is important, but the weight of the matter must not be an essential factor, since, as I indicated, a principled rather than a pragmatic view is the objective here.

One may argue that those who seek to end democracy act paradoxically, using the very procedure they would ultimately terminate.<sup>513</sup> Such an objection, however, confuses the means (i.e., the democratic procedure) with the end (i.e., the goal(s) a political party wants to realize) (cf. what was said in section 16.3). The antagonists of democracy want to replace it by another form of government because they apparently have some goal(s) they wish to achieve (absent such goals, they would have no stake in reforming the procedure; reforming it can only be of value in any sense if the new procedure may be *used* for something), and they apparently consider it impossible or at least difficult to achieve their goal(s) within the confines of democracy, for which they seek, for that reason, to substitute another form of government. Should one incorporate some end into what one considers to be characteristic of ‘democracy’, one would, contra such antagonists, implicitly claim that the democratic procedure is an amalgam of the procedure – the means – and some special (allegedly positive) content – the end – that other forms of government supposedly lack, thus acting under the guise of some apparent ‘moral high ground’. (I will return to this point below.)

**16.8** This is the proper place to make the transition to a discussion of the *concept* of ‘democracy’. It does not follow from this concept that it should be safeguarded against its own annihilation. Rather, if the legislator impedes the destruction of democracy by means of a democratic procedure, this is prompted by *external* considerations, primarily the fear that some minorities will be confronted with negative effects, which may in time have negative effects on society as a whole.<sup>514</sup> Such concerns may be legitimate but have nothing to do with the concept of ‘democracy’. I agree, then, with Kelsen when he soberly observes: “Democracy judges the political will of each person to be *equal*, just as it regards equally every political opinion, whose expression is indeed merely the political will. That is why it affords each political conviction the same opportunity to express itself and to assert itself in

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<sup>513</sup> Cf. J. Rawls, *A Theory of Justice*, § 35 (p. 190): “[...] it seems that an intolerant sect has no title to complain when it is denied an equal liberty.”

<sup>514</sup> In addition (if the phrase ‘society as a whole’ is too vague), I would remind the reader about what I said in sections 3.3 and 6.7: one may at some time in the future oneself become a member of a relevant minority. This is sufficient reason for those belonging to a majority to steer clear from parties that are intent on abolishing the democratic decision procedure.

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the free *competition* for people's dispositions."<sup>515</sup> If this is correct, 'democracy' is devoid of content,<sup>516</sup> just as liberalism (cf. sections 12.7 and 12.8).

The fact that (basic) equality is a necessary constituent of a democratic state takes away nothing from the observation just made. Still, it must be clear how this equality is to be understood. 'Basic equality' can receive virtually any content, my contention that basic rationality is the most desirable concretization notwithstanding. This position may be contrasted with, e.g., Schmitt's, who speaks of 'the *substance of equality*' ('die *Substanz der Gleichheit*') to characterize democracy.<sup>517</sup> While Schmitt states that this substance may be qualified in diverse ways, he seems to resort to a static state model, being unwilling to agree with a procedure as the decisive criterion,<sup>518</sup> focusing instead on the will of the people,<sup>519</sup> which may be present in a minority rather than a majority.<sup>520</sup> In his own way, Schmitt defends militant democracy, pleading a dictatorship ('Diktatur') if the true will of the people is not acknowledged, dictatorship being identified with ('true') democracy.<sup>521</sup> This leads to the conclusion that "democracy can exist without that which is called modern parliamentarianism and parliamentarianism without democracy; and dictatorship is just as little the decisive opposite to democracy as democracy is the one to dictatorship."<sup>522</sup> Such a conception of 'democracy', albeit perhaps idiosyncratic,<sup>523</sup> is possible, but that does not mean that each position is equally tenable. I will return to this issue in section 16.9.

One may still claim that it is characteristic of democracy that it cannot dissolve itself. This raises the question why such a consideration should apply especially to *democracy*, and not also, e.g., to monarchy. Should a monarch decide to resign, leaving the political room to be filled by democracy, this is just as 'self-destructive' as the converse situation. If those defending militant democracy refer to the 'self-destructive' element, then, they must either also speak of 'militant monarchy' and 'militant aristocracy', or make it clear why democracy

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<sup>515</sup> "Demokratie schätzt den politischen Willen jedermanns *gleich* ein, wie sie auch jeden politischen Glauben, jede politische Meinung, deren Ausdruck ja nur der politische Wille ist, gleichermaßen achtet. Darum gibt sie jeder politischen Ueberzeugung die gleiche Möglichkeit, sich zu äußern und im freien *Wettbewerb* um die Gemüter der Menschen sich geltend zu machen." H. Kelsen, *Vom Wesen und Wert der Demokratie*, § 10 (p. 101).

<sup>516</sup> Kelsen explicitly characterizes it as a mere form or method (*Vom Wesen und Wert der Demokratie*, § 10 (p. 99)).

<sup>517</sup> C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 14; cf. *Verfassungslehre*, pp. 227-234.

<sup>518</sup> C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, pp. 14-16.

<sup>519</sup> In *Verfassungslehre*, p. 234, 'democracy' is defined as the "identity of ruler and ruled, governing and governed, commander and obeyer." ("[...] Demokratie [...] ist Identität von Herrscher und Beherrschten, Regierenden und Regierten, Befehlenden und Gehorchenden.")

<sup>520</sup> C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, pp. 35, 36.

<sup>521</sup> C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 37.

<sup>522</sup> "Es kann eine Demokratie geben ohne das, was man modernen Parlamentarismus nennt und einen Parlamentarismus ohne Demokratie; und Diktatur ist ebensowenig der entscheidende Gegensatz zu Demokratie wie Demokratie der zu Diktatur." C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 41.

<sup>523</sup> I will forgo here the complication that the meaning of 'dictator' has shifted considerably throughout history, and depends on the context in which the term is used.



stands out as a special instance. The first option would mean that forms of government can never change into others, except through another sort of change than the one presently under discussion, such as revolutions, while the latter boils down to a defense of ‘substantive democracy’. As Dworkin describes it, “[...] the partnership conception does not make democracy independent of the rest of political morality; on that conception we need a theory of equal partnership to decide what is or is not a democratic decision, and we need to consult ideas about justice, equality, and liberty in order to construct such a theory. So on the partnership conception, democracy is a substantive, not a merely procedural, ideal.”<sup>524</sup> Such a substantive conception is not tenable, though. Judging whether a decision is democratic by such a standard is like judging whether a substance is whisky not by using the production process as a standard but one’s palate, confusing whisky with nice whisky, the latter being a special instance of the former.

**16.9** If those upholding militant democracy take ‘democracy’ to mean more than a form of government in which the majority of the population is in power,<sup>525</sup> they may be accused of making the category mistake similar to those to which I referred in the introduction and in section 8.1, namely, to include in the concept of ‘democracy’ (apart from the given that it cannot dissolve itself) elements such as the requirement that the rights of minorities be respected and that citizens enjoy freedom. While the latter results may ensue from a democratic decision process, they do not necessarily follow from the mere existence of such a process. Included in a conception of ‘substantive democracy’ are elements that need a support of their own; including them in one’s own conception of ‘democracy’ is as unproductive as it is unsatisfactory. That such elements may be deemed desirable I will not deny, but that anything meritorious is accomplished by smuggling them in under the guise of ‘democracy’ is hard to uphold.

A position such as Schmitt’s is faced with such difficulties. He finds fault in considering the outcome of a procedure, with a majority vote being the criterion, decisive. Instead, the people constitutes a democratic state. Schmitt avers “that every democracy rests on the presupposition of the indivisibly alike, entire, unified people,”<sup>526</sup> speaking of “a substantive likeness” (“eine substanzielle Gleichartigkeit”).<sup>527</sup> Such an likeness differs

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<sup>524</sup> R. Dworkin, *Is Democracy Possible Here?*, p. 134; cf. note 42, *supra*.

<sup>525</sup> Forgoing here the practical details (such as the difficulties involved in the formation of governments in a multi-party system (i.e., a system in which more than two political parties can participate in elections), where it is in general necessary to form coalitions).

<sup>526</sup> “[...] daß jede Demokratie auf der Voraussetzung des unteilbar gleichartigen, ganzen, einheitlichen Volkes beruht [...]” C. Schmitt, *Legalität und Legitimität*, p. 31. Cf. p. 43: “Grundsätzlich beruht jede Demokratie, auch die parlamentarische, auf der vorausgesetzten durchgehenden, unteilbaren Homogenität.” (“At the core, every democracy, including parliamentary democracy, rests on the presupposed continuous, indivisible homogeneity.”)

<sup>527</sup> C. Schmitt, *Legalität und Legitimität*, p. 31.

significantly from basic rationality as defended by me, which, first, is not necessarily acknowledged as the decisive criterion to specify basic equality (as I have argued, it would be rational to do so – using the very means to specify basic equality as the decisive criterion –, but that is another matter), and, second, may be universally applied, being a possible criterion for any state (and any people) on account of the fact that my approach has been an *a priori* one, as far as possible.

Decisive for Schmitt is the following: “according to the democratic presupposition, the people that is in itself homogenous has all the characteristics that contain a guarantee of the justice and reasonableness of the will uttered by it. No democracy exists without the presupposition that the people is good, and its will suffices accordingly.”<sup>528</sup> More concretely, “one presupposes that, by virtue of the equal membership to the same people, everyone essentially wants the same, in the same way.”<sup>529</sup> Such a position is, with respect to the relevant aspects, hard to uphold. I deliberately say ‘the relevant aspects’: it may be argued that some peoples exhibit, to some extent, a unity, but as far as the issues discussed in the present inquiry are concerned (i.e., the rights granted on the basis of formal equality), a common view on what one wants would, even if this is taken broadly, be illusory, let alone when those not discussed here (e.g., the extent of a system of social security) are concerned.

Apart from that, the criteria Schmitt proposes – that justice be served, that one be reasonable and good – are vague, and it may be questioned whether his view is tenable once it is confronted with the issues addressed in the present inquiry. Suppose a people should be of one mind that citizens of some race or religious denomination should not have the same rights as others, or that such a difference should exist on the basis of one’s gender, meaning that some persons should no longer be considered full-fledged citizens.<sup>530</sup> Would such a stance conform to Schmitt’s standard? If so, the room for the people to manoeuvre is apparently significantly reduced; if not, the standard of ‘justice, reasonableness and goodness’ seems arbitrarily set,<sup>531</sup> making the fact that it cannot be revised on the basis of a procedure all the more troubling.

For the reasons addressed in this section, ‘substantive democracy’ is hard to maintain. It is understandable that one might want to prevent some of the consequences that may

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<sup>528</sup> “[...] nach demokratischer Voraussetzung hat das in sich homogene Volk alle Eigenschaften, die eine Garantie der Gerechtigkeit und Vernünftigkeit des von ihm geäußerten Willens enthalten. Keine Demokratie besteht ohne die Voraussetzung, daß das Volk gut ist, und sein Wille in folgedessen genügt.” C. Schmitt, *Legalität und Legitimität*, pp. 27, 28.

<sup>529</sup> “[...] man setzt voraus, daß kraft der gleichen Zugehörigkeit zum gleichen Volk alle in gleicher Weise im Wesentlichen das Gleiche wollen.” C. Schmitt, *Legalität und Legitimität*, p. 31.

<sup>530</sup> Schmitt’s position may seem to be paradoxical (those opposed to the change, among whom presumably at least those concerned, seemingly being no part of the people (which is in the case of gender hard to imagine without resorting to outlandish instances, such as the society of the Amazons) even *before* it is effectuated), but that is not the issue here. After all, as mentioned before (*vide* chapters 1 and 6), a liberal democratic state, and, therefore, a democratic state as such, may exist without acknowledging every reasonable person as a citizen.

<sup>531</sup> Leaving the matter here whether such words have a meaning at all.

result from a purely procedural model, but if this comes at a price that cannot philosophically be justified, while it is difficult, if not also impossible to do so politically, such a position must be relinquished.

**16.10** A final issue to be considered is the international level. Article 17 of the European Convention on Human Rights reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Whether or not a party should aspire to change the form of government so radically that no democratic procedure remains, it would still be obligated to steer clear from the destruction of the rights and freedoms<sup>532</sup> just mentioned.

First of all, a general problem international legislation faces is that it cannot properly be enforced,<sup>533</sup> so that what was said in section 16.3 applies here on a larger scale: should a state relinquish some of the principles it has agreed to uphold, and fail to respect some of the rights it has agreed to protect, no international officials could force it to do so. Apart from that issue, it is unclear when actions that would contravene these rights would take place: “Article 17 [of the ECHR] suggests that a state might be entitled to act in a militant manner toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description. The international legality of militant democracy – in all of its manifestations – will remain uncertain until the field is able to provide legal standards for defining those associations, organizations, or actions against which a state is entitled to act in a militant manner.”<sup>534</sup>

Shifting the focus to the judicial level does not appear beneficial: “[...] the framework the [ECtHR] offers for determining the legality of militant democracy requires greater specificity on issues relating to timing, standard of proof, and probability of harm. In the absence of relatively specific rules and presumptions addressing these issues, this framework invites an entirely ad hoc exercise of interest balancing.”<sup>535</sup>

In general, *any* proposition stemming from a government or parliament seeks to limit rights. This is clear, e.g., in the case of realizing a system of social security, which needs to be paid through taxation, thus limiting taxpayers’ rights to freely use their means. To point to another example, this time regarding the present issue, freedom of expression may be limited in order to protect individuals or groups of people, but, regardless of the question of

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<sup>532</sup> It is actually strange to speak of ‘rights *and freedoms*’ as if the latter were something else than rights. Only in the case of one sort of freedom, which is irrelevant here, would this be correct, namely, freedom of movement insofar as this concerns physical processes; cf. section 7.2.

<sup>533</sup> J. Doomen, “The Meaning of ‘International Law’,” pp. 884-889.

<sup>534</sup> P. Macklem, “Militant Democracy, Legal Pluralism, and the Paradox of Self-determination”, p. 495.

<sup>535</sup> P. Macklem, “Militant Democracy, Legal Pluralism, and the Paradox of Self-determination”, pp. 513, 514.

whether this is justified or not (on the basis of the ignore principle, or a similar principle), the protection comes at the expense of curtailing this right.

There is of course an article in the ECHR that deals specifically with the issue of balancing the various interests at stake, namely, article 10, but, as was pointed out in section 10.4, it is difficult to reach a consistent and acceptable result in the absence of the ignore principle (or a similar principle). Indeed, section 2 of this article reads: “The exercise of [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Most of these restrictions can easily be defended on the basis of the ignore principle. ‘The rights of others’ is admittedly a very general category.<sup>536</sup> Similarly, it would be difficult to see what ‘the protection of morals’ might encompass. ‘Morals’ may be of various sorts,<sup>537</sup> stemming from as varied (world)views as, e.g., Christianity, Islam, Hinduism, Confucianism and Humanism, and to this difficulty is added that their adherents may differ in significant respects as to what these views require. Conceding to every position would effectively result in nothing other than a stalemate. A choice must be made by means of a criterion, and I have proposed the ignore principle to fulfill such a role.

It must be clear, however, how ‘harm’, which is what the ignore principle seeks to eliminate, must be understood here. Harm is in each instance ascertained *within* the confines of the liberal democratic state, so as long as it is extant. It would be misleading, then, to use the ‘clear and present danger’ test (cf. section 11.6) in the case of calls for the cessation of the liberal democratic state, as such a test is to be used to ward off harm from an *external* source, such as a terrorist attack,<sup>538</sup> while the harm is *internal* here in such a way that ‘harm’ may even be a misnomer, since in *this* case the only proper judge to decide whether harm occurs is the majority.<sup>539</sup>

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<sup>536</sup> Incidentally, the ‘reputation of others’ is an arguably justifiable criterion. It is admittedly a rather vague term, but may be defended on the basis of the fact that libel can be identified as harm (cf. sections 10.2 and 11.3).

<sup>537</sup> Forgoing here the meta-ethical question of whether this has a meaning at all.

<sup>538</sup> Both states that adhere to militant democracy and those which observe the standards of non-militant (formal) democracy can undertake actions against such threats.

<sup>539</sup> This state of affairs may be compared with the difference between murder and suicide. In the case of murder, the harm stems from an external source, while an internal source is the cause of suicide. I readily grant the potentially controversial nature of this example: it may be argued, *inter alia*, that suicide must be caused by an external source, like a malady, or, more radically, that it is difficult or even impossible to distinguish between external and internal factors. The former argument requires more than those defending it in the present context – in order to buttress a theory of militant democracy – can proffer without an appeal to nonpolitical elements. The latter argument may be plausible, for reasons I shall not explore here, but those defending it – for the same

**16.11** The foregoing considerations do not derogate from the fact that installing certain thresholds to impede the change of some rights considered very important<sup>540</sup> is justifiable (although, admittedly, on a pragmatic basis) as a middle ground between the ‘normal’ procedure (where something is accepted if more than 50% of the representatives agree with it) and some unchangeable principles, the latter testifying to a presumptuous attitude of the – contingent – legislator (however understandable their introduction may be with some historical events in mind).

**16.12** The concept of ‘militant democracy’ and its ramifications have been critically examined. It appears that it cannot consistently be maintained, and consequently that (liberal) democracy is not necessarily the final form of government that can be realized. This need not be a negative outcome. What is decisive for democracy is merely a certain procedure, and the possibility cannot be excluded that a superior form of government exists. It would be difficult to see who should judge the merits of such a form of government (the populace being ruled out as a candidate since it would be democracy itself for which its presumable successor would be substituted), but it does not follow from that given that (liberal) democracy must be the ultimate form of government. Any other outcome would constitute an *argumentum ad ignorantiam*, as one would conclude from one’s inability to imagine a superior alternative to (liberal) democracy that it *must* be the ultimate form of government.

In the introduction I indicated that basic rationality is the crucial element for a liberal democratic state to remain in existence. The foregoing in no way impugns that observation. It merely means that the proposition must be read as a *modus ponens*: *if* one wants to continue a liberal democratic state once it is in place, basic rationality is an indispensable element. This is formulated purely hypothetically: whether ‘one’ (i.e., the majority of the citizens of a particular (liberal) democratic state) indeed wants to do so remains to be seen in individual states. A liberal democratic state will remain in existence as long as a (qualified) majority wants it to.

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reason – would undermine their own premise as an appeal to it would strip the notion of ‘liberal democracy’ of any substance, and reduce it to a procedural framework (as I have argued on an alternative basis). As for the additional argument that in the case of a state, it is not just a single individual who is involved, and each citizen is affected by a majority decision, this may be rebutted by pointing to the fact that any democratic decision is of this nature (cf. section 16.7).

<sup>540</sup> For instance, the Dutch Constitution (article 137) stipulates that any change to it must first be approved by both the House of Representatives and the Senate (the two Houses of Parliament) on the basis of a (simple) majority. After the House of Representatives has been dissolved and a new House of Representatives has been installed in pursuance of the new election result, the proposed change(s) must again be approved, this time by a qualified majority (specifically, a two-thirds majority) in both Houses.

**16.13** It is not difficult to see that basic rationality and the continuance of a liberal democratic state spring from the same source. It is arguably in an individual's interest that he has certain rights and that such rights are optimally protected against intrusions from both other individuals and the state itself, the former being realized by penal legislation and the latter mainly by the separation of powers and the existence of general elections. Acting on his interest, and thus rationally, would mean that he should both uphold basic equality (in the guise of basic rationality) and withhold his support from parties that seek to undermine the liberal democratic state of which he is a citizen.

That does not necessarily mean, of course, that one will in fact act rationally. In that case, there are two possibilities. Anyone who considers himself better able to judge what is in individuals' interest than they themselves are will have to put forward a compelling reason for his claim. If he *observes* the standards of liberal democracy, no other means is at his disposal than rational persuasion, which entails that he may try to convince those opposed to liberal democracy of the presumable error of their position, but must refrain from using any alternative. If he, by contrast, *fails* to observe such standards, he will have used means that conflict with the very premise of his position, thus refuting himself by acting tyrannically.

Some individuals may consider a certain state and form of government more important than these rights. Should they constitute a (qualified) majority and withhold them from citizens (and thereby from themselves), they would act arguably irrationally,<sup>541</sup> but in a liberal democratic state the (qualified) majority is right, its sheer quantity being the decisive criterion. This does not mean that what it decides is therefore correct or 'true', for in order to reach such a result, it is in most cases less advisable to appeal to the majority than to experts. The majority's rightness has, then, merely a *political* meaning.

### 16.14 Summary

Apart from the problem of the practicability of militant democracy, the very concept of 'militant democracy' is difficult to uphold. This does not mean that every viewpoint is equally desirable, but whether it *is* indeed desirable cannot be decided in a liberal democratic state by any other instance than the majority of its citizens. There are no guarantees that a liberal democratic state will continue to exist once it has come into existence. It is, depending on one's criteria, arguably the least unappealing form of government at present, but a dogmatic stance is to be avoided in legal and political philosophy no less than

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<sup>541</sup> Whether they would indeed act irrationally is in fact difficult to say. Suppose, e.g., that they act from religious convictions that cannot be rationally refuted. Saying that this is too meager a basis to cling to such convictions (as this constitutes an *argumentum ad ignorantiam*) fails to take into consideration that interests are at stake that may for some people be (far) more important than the rights under discussion, to which may be added that, depending on one's philosophical outlook, reason may be too limited a faculty to claim anything with regard to religious matters.

## CHAPTER SIXTEEN

elsewhere, which means, applied to the case at hand, that it cannot be ruled out that the liberal democratic form of government will be succeeded by a superior one.

