Weerbare democratie: de grenzen van democratische tolerantie
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Summary

Militant Democracy: the Limits of Democratic Tolerance
Weerbare democratie: de grenzen van democratische tolerantie

If you were to ask a random passer-by, "Why are you in favour of democracy?" the answer could very well be, "Well, we have nothing better"—or something to that effect. Such an answer goes back to the perpetually repeated "wisdom" of Winston Churchill (1874–1965) that democracy "is the worst form of government, except all those others that have been tried."[1065] This is, however, a rather weak justification for democracy that not only empowers technocrats, but also complicates a strong defence of democratic values. Of course this is remarkable for a statesman who, in many other respects, has done so much for democracy—but if *this* is its intellectual defence, a democracy can never be truly resilient. How can a democracy be effectively defended if we believe that we are merely supporting the "the least bad system" out there? More is needed.

Therefore we are probably better off concentrating on a pronounced *enemy* of democracy: the German jurist and political philosopher Carl Schmitt (1888–1985). He indignantly attacked parliamentary democracy. In his critique he challenged democrats to explicate the intellectual foundations of their political theory and raised the question:

> "Certainly no one would be so undemanding that he regarded an intellectual foundation or a moral truth as proven by the question, What else?"[1066]

"What else?" Churchill's quotation, does exactly this: we support democracy, but *only* because everything else seems less desirable. "There is no alternative"—quite a poor intellectual foundation. Schmitt is right and we should provide him with an answer. *Why* is it that we value democracy so much? This book picks up the gauntlet and tries to present what could be called a *positive* defence of democracy: what is so special about democracy that we want to defend it, above all other

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[1065] Roland Quinault, 'Winston Churchill and Democracy', p. 27-46 (44), in: David Cannadine en Roland Quinault (red.), *Winston Churchill in the Twenty First Century*, Cambridge: Cambridge University Press 2004.
[1066] Carl Schmitt, *The Crisis of Parliamentary Democracy (Die geistesgeschichtliche Lage des heutigen Parlamentarismus)*, Cambridge (M.A.): MIT Press 1988, p. 3.

political systems? The search for a justification to ban political parties—i.e. militant democracy—is therefore also a search for the essence of democracy.

This is exactly the way the Dutch constitutional thinker George van den Bergh (1890–1966) approached this question. In his 1936 inaugural lecture as professor of constitutional law he formulated the first political-philosophical foundation for militant democracy.[1067] Should a democracy be allowed to ban anti-democratic parties? Van den Bergh's answer: yes, a democracy *may*, and under certain circumstances *must*, ban anti-democratic parties. Van den Bergh's most original and compelling argument rests on a principle that I will call "democracy as self-correction"—an idea that, *before* him, we can see only in the French jurist Milan Markovitch, and *after* Van den Bergh in a somewhat underdeveloped version in the work of Karl Popper (in the *Open Society and Its Enemies*, for instance). In a democracy, decisions are revocable. The people govern themselves through a process of continuous self-correction. They make their own decisions, are confronted with the consequences of their choices and amend previous decisions, if they deem this necessary. But there is one choice that escapes this process: the decision to abolish democracy. This one decision destroys the very framework that makes self-correction possible in the first place—it is a decision that the people can never (peacefully) repair. And this is why a democracy should be allowed to oppose that one decision. This principle is the basis for the theory of militant democracy developed in this dissertation.

The *first chapter* discusses George van den Bergh's theory and the intellectual context in which he formulated it: the outspoken anti-democratic atmosphere of the thirties of the twentieth century. The intellectual building blocks for Van den Bergh's idea of militant democracy can be traced back to the British political philosopher James Mill and the French Enlightenment thinker Voltaire. That is not to say they had a *direct* influence on his thinking, but both developed crucial parts of what would later become Van den Bergh's argument.

James Mill formulated the idea of the "identity of interests" between rulers and the ruled. When the people rule themselves, the interests of the rulers are the same as those of the ruled—something that Mill thought only possible in a democracy. Voltaire hinted at the principle of self-correction: not only do people

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[1067] George van den Bergh, *De democratische Staat en de niet-democratische partijen* (*The Democratic State and the Non-Democratic Parties*), Amsterdam: De Arbeiderspers 1936.

rule themselves in a democracy, and are thus affected by their own decisions, but a democracy also seems uniquely capable of correcting its own mistakes.

Van den Bergh's contemporary Karl Loewenstein was the first to call for a militant democracy and is widely seen as the "father" of militant democracy. His theory is compared to Van den Bergh. The recent Loewenstein interpretation by the *European Court of Human Rights* (ECtHR) judge and constitutional lawyer András Sajó is also discussed, as well as the fierce criticism of historian Udi Greenberg. It is concluded that Van den Bergh's formulation of militant democracy offers a more viable *and* more philosophically sophisticated theory than Loewenstein.

Van den Bergh's thesis is then contrasted with the work of Austrian legal positivist Hans Kelsen—a prominent opponent of militant or substantive democracy. This results in two possible interpretations of Van den Bergh's theory, or, one could say, "two answers to Kelsen": "principled democracy" and "democracy as self-correction." The first interpretation sees democracy as founded upon certain fundamental principles, such as the freedom of conscience, equality before the law and freedom of religion. Parties have to endorse these values before being allowed to "enter the democratic arena." The second—"democracy as self-correction"—defines democracy as a system that is characterized by the unique ability to correct its own mistakes. Parties who threaten this mechanism can be banned. It is argued that the *second* interpretation of Van den Bergh is preferable: its justification for banning parties is narrower and therefore carries less risk of abuse. This interpretation serves as the basis for a more general militant democracy theory—democracy as self-correction—and will be fleshed out in the subsequent chapters. The chapter ends with a preliminary explanation of this comprehensive militant democracy theory.

In *chapter two* the alternatives and critiques are addressed. For lack of a general theory, the literature on militant democracy usually refers to a rather diverse group of lawyers and political philosophers. Karl Popper is typically mentioned— the philosopher of the "intolerance of the intolerant," but Carl Schmitt, John Stuart Mill and John Rawls are also referred to regularly. This chapter examines whether those references are sensible and fruitful. In other words: can a theory of militant democracy be distilled from their respective works? In addition, the work of two contemporary theorists of militant democracy is discussed: political scientist Alexander Kirshner and legal scholar Svetlana Tyulkina.

Subsequently the critique of militant democracy *as such* is discussed. This criticism falls into two categories: pragmatic criticism ("it does not work"), which is dealt with in this chapter, and more principled criticism ("the concept of militant democracy is flawed"), which is discussed in chapter three. The discussion of pragmatic criticism focuses on two questions posed by the British political scientist Tim Bale. First, why would a banned party not simply start over again (i.e. party bans are *ineffective*)? And secondly, is it not likely that anti-democrats will go underground and become a (more violent) threat (i.e. party bans are *counterproductive*)?

Empirical research done by Bale, among others, shows that these traditional objections to party bans do not hold—at least, they do not hold unconditionally. And there are clear success stories. As Bale shows, the successor parties to *Refah* (Turkey) and *Vlaams Blok* (Belgium) are less anti-democratic, and after the ban on *Batasuna* in Spain the party leader initiated a process towards peace. In addition, research into extreme or radical political parties emphasizes that providing a *real* second chance for former party members can increase the effectiveness of party bans. The stigma of being part of *far-right* groups hinders former party members' exit from the party environment and their reintegration into society, particularly in the Netherlands. An inclusive approach, as defended by Capoccia, should therefore focus on banning the party, but embracing its former members. The same goes for, as Buijs en Fennema explain, the political *themes* the banned party addressed: the party should be banned, but the issues must not. Such an approach not only reduces the "democratic costs" (in Kirshner's vocabulary), but it also reduces the desire to re-establish the banned party.

In the *third chapter* democracy as self-correction is further developed into a full-fledged theory of militant democracy. First by bringing Van den Bergh's ideas closer to those of Popper and further exploring their interconnectedness, then by probing the work of other authors for ideas that support the concept of democracy as self-correction. The legal scholars Günter Frankenberg, Samuel Issacharoff and Rudolf Thienel all bring a *specific* aspect of democracy as self-correction to the fore: democracy's unique ability to *learn*, the *revocability* of its decisions and the *temporary* nature of each majority.

Subsequently we look at militant democracy from the judge's perspective. After all, it is the judge who has to decide on party bans and who has to work with the legal provisions on party bans he is confronted with. The question therefore is,

how can the justification for banning a party be transformed into a legally *workable* ban? Firstly, this means that the legal grounds for banning a party should be as concrete as possible. How should a judge decide if a party is anti-democratic? Of course this is the case when the principle of self-correction is threatened, but *when* is this case? When is a democracy damaged *so* severely that that the mechanism of self-correction ceases to function and is *de facto* abolished?

To answer this question we draw inspiration from two highly regarded European judicial institutions. First, from the court with perhaps the most elaborate theory of militant democracy: the German High Court, the *Bundesverfassungsgericht* (BVerfG), and then from the justices with a European helicopter view, as they decide on party ban cases from all over Europe: the ECtHR. What elements do they distinguish within the concept of "democracy"? And which of these elements are important to our theory of democracy as self-correction?

It is argued that the self-correcting mechanism of democracy is supported by three principles: the principles of *evaluation*, *political competition* and *free speech*—of which the latter two principles are distilled from BVerfG and ECtHR case law. Without these three principles, self-governance through self-correction ceases to exist. The *principle of evaluation* is guaranteed by the right to vote and by free, secret and periodic elections (in the Dutch Constitution: Articles 4, 50, 52 and 53). It ensures that policies are regularly evaluated. It thus functions as a "penalty" for unresponsive governments—if they do not align their policies with new priorities and knowledge, they can be voted out. This ensures that *ultimately* the process of self-correction will always continue—even in the case of an unwilling government. *Political competition* is made possible by electoral rights and freedom of association (Articles 4 and 8). The principle of evaluation is obviously a sham if there are no realistic alternatives to current governments and their policies. Political competition thus gives substance to the principle of evaluation: healthy political competition ensures that—for competitive reasons—a multitude of policy alternatives are devised. *Free speech* completes this trio of principles and is protected as an independent fundamental right in many constitutions (Article 7). Alternative policies and the critique of government policy should not only be thought through but also expressed and debated. Freedom of speech enables a democracy to draw from an incredible reservoir of ideas, which is unthinkable in any other system.

Every citizen is seen as a potential source of viable alternatives and criticism—as, for instance, Bhikhu Parekh writes in his Popper interpretation.

Democratic self-correction therefore rests on three principles: evaluation, political competition and free speech. When these principles are threatened, self-correction is in danger, and a party becomes a legitimate target for a ban. These principles constitute narrow and strict legal grounds for banning a party, thereby reducing the chances of misuse. This is the basis of democracy as self-correction.

A party ban is undeniably a serious measure in a democracy. A second question therefore is, when can it be used? Popper, Rawls and Kirshner fairly agree on this issue. Banning parties brings, in Kirshner's view, "democratic costs," even when banning a splinter group. We should therefore, in line with Van den Bergh, formulate a kind of "principle of opportunity"—as in Dutch penal law: intervening is allowed, but it is not mandatory. Within the theoretical framework of democracy as self-correction, the *right* to intervene arises as soon as an anti-democratic threat manifests itself; in principle, however, restraint is required. As a rule of thumb one should wait until the danger an anti-democratic party poses is greater than the democratic costs of a ban. That moment is certainly not when votes are being counted and an anti-democratic party or anti-democratic coalition, is likely to grow into a majority (roughly the scenario of *Islamic Salvation Front* in Algeria). It is also not the time of the creation of an anti-democratic party (as in ECtHR *United Communist Party of Turkey*). In the first case, it is too late—a ban is unlikely to still be effective at that time. In the second case, the ban comes too early—the democratic costs of the ban are probably higher than the risk of allowing the party to function; the party must be confronted in the democratic debate. Ultimately, it is up to the government to choose an *acceptable* moment between these extremes, after which it is up to the court to make the final decision. Together they have a responsibility to protect democracy, but also to minimize the costs of doing so. Democracy as self-correction aims to protect democracy without unduly restricting what it is defending.

Notwithstanding the strict justification and the "principle of opportunity," additional safeguards are needed—the banning of a party is a strong measure in a democracy. That brings us to another issue a militant democracy theory should pay attention to: procedural safeguards. Van den Bergh already mentioned this in his inaugural lecture: how do you ensure a fair and careful application of party bans?

There are at least *three* possible procedural safeguards: judicial checks, supranational supervision and an apolitical authority to request party bans.

Above all, fair use will come down to the reasoned and non-political judgment of an independent court—aided by a legally workable banning provision. A procedure in a multi-tiered system is preferable to the German model, where only one, albeit important, court decides on party bans. The case law on party bans is (fortunately) relatively small, but it does show a great diversity of opinions on the concrete application of bans. It would therefore be helpful for a supreme court to profit from arguments developed in earlier proceedings.

A second safeguard is "supranational democratic oversight." Developments on the European supranational level, i.e. the ECtHR and the European Union (EU), show that the *future* of militant democracy largely lies at this pan-European level. The ECtHR serves as a court of last resort for banned political parties in all forty-seven member states of the Council of Europe. In this it plays a complex role. The court must first develop a conception of democracy that spans the democratic traditions of all member states—of which the treaty is, of course, the starting point. Then they have to verify that their conception of democracy also sufficiently takes into account the particularities of each member state. For example, can the ECtHR assess the extent to which an Islamist party poses a threat to secularism in Turkey and *thus* poses a threat to democracy? Or to what degree the exclusion of a politician in Latvia is justified by the ongoing transition from communism to democracy? In the cases examined in this chapter, the ECtHR performs quite an impressive balancing act, taking on a modest but critical role. If the facts are clear, it does not hesitate to draw a line (like in ECtHR *United Communist Party of Turkey*); at the same time, the court also takes into account local circumstances and does not completely substitute its own assessment for that of local authorities (such as ECtHR *Refah*, *Herri Batasuna* and *Zdanoka*). Although democracy as self-correction in principle provides a self-sufficient system, abuse-sensitive, fragile democracies can surely benefit from additional controls on abuse that are provided by supranational bodies such as the ECtHR.

If the role of the ECtHR is complex, that of the European Union can best be described as paradoxical. On the one hand we see a steady increase in democratic supervision. This ranges from *ad hoc* sanctions in the Haider affair to the current "nuclear option": if a country rejects democracy, its membership rights can be suspended under Article 7 of the *Treaty on European Union* (TEU). These are

not party bans (like the ones judges impose) and also not judgements on the legitimacy of specific party bans (as with the ECtHR)—the (current) EU supervision is more remote. Jan-Werner Müller, however, argues that this supervision should be strengthened and intensified. He argues that the EU, at least in part, must be seen as a post-war instrument to curb the powers of majorities and parliaments—as a reaction to the "lessons of Weimar." *If* this is part of the EU's rationale, it is not surprising that the EU is also concerned about its national democracies. But Müller also gives a more fundamental reason why more supervision is needed: via the European Council, each Member State, including non-democratic ones, decides on the lives of *all* European citizens.

While this trend is undeniable, we also see an evolution in the opposite direction: national judges who, in the name of militant democracy, feel obliged to oppose further European integration due to its democracy-debilitating effects. The German Constitutional Court is a front-runner in this development, armed with a constitution in which German democracy is enshrined "forever." In a series of judgments, on for instance the Treaties of Maastricht and Lisbon, and more recently the Outright Monetary Transactions program of the European Central Bank, the BVerfG has clearly shown its muscle. Its statements are criticized, but the court is not pulling back as yet. However, a withdrawal could still follow in response to the confrontation with the European Court of Justice on the Euro crisis, but then there are still twenty-seven *other* national courts in countries with more or less militant constitutions.

It still remains to be seen which development will prevail within the EU. Undoubtedly though, with the ECtHR and the EU, militant democracy will increasingly attain a *European* dimension.

Then the final safeguard: the distance between politics and the authority that can request a party ban. In the Netherlands, the (to some degree) independent Public Prosecutor submits such a request. Of course, this distance is partly imaginary. *Ultimately*, politics—parliament and government—can always submit a request for a party ban, since the Public Prosecutor is accountable to the Minister of Justice and Security. But an authority placed at some distance at least has the opportunity to reach its own judgment first. This creates a contravening force that can mitigate the potential *political* nature of the banning procedure. The German model, which allows government and parliament to submit a request, is therefore undesirable since it adds a political dimension to the procedure right from the start.

Banned parties have the tendency to carry out a sort of Houdini trick. Perhaps the best example is the Czech Workers' Party—its successor party, as research by Miroslav Mares shows, was already waiting in the wings; members just had to get on board. These and other circumstances can severely frustrate the effectiveness of a ban. A militant democracy theory therefore also has to work towards optimizing the effectiveness of its instruments.

To avoid ineffective bans we can formulate three general rules regarding the legal and institutional design of party bans: 1) a ban should be a *real* ban, 2) "successor parties" should be illegal, and 3) "banned parliamentarians" should lose their seat, or they should at least lose their seat if they try to re-establish the banned party. Regarding the first rule: participation in elections as a party must be impossible and the prolongation of the banned party should be punishable by law. These are the minimal required legal effects that are necessary to speak of a meaningful, i.e. real, ban. The second rule means that the parties that arise as new parties, but that are *in fact* just a continuation of the old, banned party, should fall under the former ban. Re-establishing the former party should also be a penal offence. Regarding the third rule: two perspectives compete when it comes to "banned parliamentarians". There is the "let them finish their term" point of view and the "let us be consistent" perspective. In democracies that rely heavily (at least in principle) on the free mandate of elected parliamentarians (such as the Dutch system), losing a seat due to a party ban is a fundamental change. In Germany, where the parties have a constitutionally acknowledged function as "co-creator" of the popular will, and also in Turkey, losing your seat is seen as a logical consequence of a party ban. Otherwise parliamentarians can still abuse the parliamentary platform for their anti-democratic goals. There is much to be said for the full-blown German and Turkish approach. However, at a *minimum*, contributing to the re-establishment of a banned party as a parliamentarian should lead to seat loss. It demarcates a border to the past; respecting that border is a prerequisite for a second chance as a parliamentarian. With regard to small splinter groups, the question of "banned parliamentarians" may sound like a marginal issue without real or major practical consequences; this is radically different, however, when we think of the Turkish Constitutional Court, which had to decide what was to happen to the seats of the *largest* party in parliament: the 158 (out of 450) seats held by *Refah*.

These are the central features of the militant democracy theory developed here: democracy as self-correction. The theory rests on four pillars that every

militant democracy theory should pay attention to: 1) a justification for banning anti-democratic parties, 2) a legally workable banning provision, 3) procedural safeguards, and 4) attention to legal and institutional design, in other words: the consequences of party bans.

Ultimately every democracy—either procedural or substantive in theory—has *some* kind of mechanism to protect itself.[1068] This applies to the very substantive German democracy as well as to the prototypical procedural democracy of the United States—where the two party system renders political outsiders chanceless. In other words, the exclusion of anti-democrats, though perhaps not achieved by legal means, is a reality in many democracies—anti-democratic parties are banned or excluded in other, more subtle ways. A militant democracy has the clear advantage that this exclusion takes place in *public* and is, if done properly, explicitly *justified*. The question is, how? To this question, democracy as self-correction gives an answer.

[1068] See Gur Bligh, 'Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism', *Brigham Young University Law Review* 2008, p. 1367-1440, (1440): "Ultimately, the lesson may be that every democracy, whatever its free speech ethos, has to develop defense mechanisms that protect it from forces of anti-liberalism and intolerance. These mechanisms may be explicit and direct or implicit and unacknowledged. Whatever the case, the existence of these barriers should be recognized and their justifications and effects should be examined." See also Samuel Issacharoff, 'Fragile democracies', *Harvard Law Review* 2007, vol. 120, p. 1405-1467 (1467).