

CHAPTER 4 LOCAL MILITANT DEMOCRACY: EXPLORING THE RELEVANCE OF SUBNATIONAL DEMOCRACY FOR NORMATIVE MILITANT DEMOCRACY THEORY

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1 INTRODUCTION

In 2019, at a meeting discussing extremism, social stability and municipalities Dutch Minister Koolmees (of Social Affairs and Employment) declared: ‘Municipalities play a key role. There they know the neighbourhoods, and they have the local insight that is indispensable to preventative and bridge-building policy.’¹ This was in line with long-standing Dutch policy – municipalities were central to the *Actieplan polarisering en radicalisering 2007-2011* (‘Polarisation and Radicalisation Action Plan 2007-2011’) and the long-time strategy of the National Coordinator for Security and Counterterrorism (NCTV): they are given a ‘managing role’ in preventing, detecting and combating radicalization.² The *Actieplan 2007-2011* even argues that ‘combating polarisation and radicalisation is *primarily a task* for local government, at the local level’.³ And in its 2019 *Rapportage integrale aanpak terrorisme* (‘Report on the Integrated Approach to

* This contribution uses parts of, and builds on, an independent study (in Dutch) by the author commissioned by the Dutch Ministry of the Interior and Kingdom Relations: Bastiaan Rijpkema, *Lokale weerbare democratie: een normatieve verkenning* (‘Local Militant Democracy: A Normative Exploration’), August 2020. These parts were translated by Sarah Strous, reworked and expanded by the author.

1 ‘Samen voor sociale stabiliteit’, report on a national meeting on ‘Sociale Stabiliteit’ (‘Social Stability’), published on behalf of the Ministry of Social Affairs and Employment (online), 6 February 2019.

2 Sara Grunenberg and Rita Schriemer, ‘Respons op extremisme in de regio Rotterdam’, pp. 141-166 (142-143), in: Jaap van Donselaar and Peter Rodrigues (eds.), *Monitor Racisme en Extremisme: achtste rapportage*, Amsterdam: Amsterdam University Press 2008; *Actieplan polarisatie en radicalisering 2007-2011*, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2007, p. 11. When it comes to the local detection of radicalization, see also the critical study from a human rights perspective of the Dutch practice by Annemarie van de Weert and Quirine A. M. Eijkman, ‘Early Detection of Extremism? The Local Security Professional on Assessment of Potential Threats Posed by Youth’, *Crime, Law and Social Change* 2020, vol. 73, p. 491-507.

3 *Actieplan polarisatie en radicalisering 2007-2011*, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2007, p. 11 (emphasis added, BR).

Jihadism’) the NCTV sticks to this approach and explicitly mentions the ‘further development of the local approach’ and ‘leading role’ of municipalities.⁴

The Netherlands is not alone in this approach; international policy and research on defending democracy and counterterrorism increasingly emphasizes the local level.⁵ Yet, in normative militant democracy theory – the field devoted to the study of questions such as when, and how, democracies may defend themselves⁶ – little to no attention is paid to subnational levels of democracy as specific arenas in the defence of democracy.⁷ This contribution argues that this dimension of democracy deserves more attention in normative militant democracy theory than it is currently given.

To that end, this chapter will first track how theorizing on militant democracy has, from its conception in the 1930s until its modern incarnations, primarily meant *national* militant democracy (§2). It then discusses the reasons for why the ‘local’ might deserve more attention in militant democracy (§3). Subsequently, it explores one of the implications for theory-making such increased attention to ‘the local’ could have: tailoring the militant democracy instrument *par excellence*, the party ban, to the local level (§4). The contribution concludes with a summary of its main arguments (§5).

Preliminary Remarks on Militant Democracy and Counterterrorism

In the present contribution ‘militant democracy’ is understood as a defence against *non-violent* anti-democratic parties. Nevertheless, in addition to non-violent anti-democrats, *violent* anti-democrats too will feature in the discussion that follows – since, obviously, they also pose a challenge to local democracy.⁸ The difference, however, is that, by virtue of their violent character, they are targets not only of militant democracy, but also of ‘counterterrorism’ (and criminal law in general).⁹

This natural affinity leads to at least three reasons why the present undertaking – examining *local* militant democracy – is relevant to counterterrorism. First, there is

4 *Rapportage integrale aanpak terrorisme* (December 2017-April 2019), NCTV, p. 7.

5 Julia Berczyk and Floris Vermeulen, ‘Prevent Abroad: Militant Democracy, Right-wing Extremism and the Prevention of Islamic Extremism in Berlin’, pp. 88-105 (88-89), in Christopher Baker-Beall, Charlotte Heath-Kelly and Lee Jarvis (eds.), *Counter-Radicalisation: Critical Perspectives*, Abingdon: Routledge 2015.

6 For an overview of recent developments in the field, normative and empirical: Afshin Ellian and Bastiaan Rijpkema, ‘Introduction’, pp. 1-20 (1-7), in: Afshin Ellian and Bastiaan Rijpkema (eds.), *Militant Democracy – Political Science, Law and Philosophy*, Cham: Springer 2018, see also Jan-Werner Müller, ‘Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy’, *Annual Review of Political Science* 2016, vol. 19, pp. 249-265.

7 In this chapter, ‘the local’, ‘the local level’ and ‘local democracy’ will be taken to mean *all* subnational levels of democracy in a given country, primarily the municipal level, but also provincial or state level.

8 See Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance*, London/New York: Routledge 2018, pp. 5-6 (earlier Dutch edition: Bastiaan Rijpkema, *Weerbare democratie: the grenzen van democratische tolerantie*, Amsterdam: Nieuw Amsterdam 2015).

9 See Rijpkema 2018, p. 9.

the question of evidence in judicial proceedings: in the case of violent parties, it is often difficult to link the violence to the party itself.¹⁰ An example is the German extreme-right *Nationaldemokratische Partei Deutschlands* (NPD), whose various members and local politicians were involved in violent acts. In 2017, however, the German Bundesverfassungsgericht (German Federal Constitutional Court, BVerfG) still felt unable to classify the NPD as an organization that has the use of force or committing criminal acts as part of its political strategy.¹¹

Second, being *anti-democratic* but *non-violent* may constitute just a preliminary stage in the radicalization of an organization towards violent opposition against democracy. The non-violent stage, the primary area of focus in militant democracy theory, is therefore also at least of *some* interest to counterterrorism efforts, mainly in the area of prevention, which, as we will see later, is an area of counterterrorism in which much is expected of the local level.

Third, there are those who argue that counterterrorism should focus on a much broader conception of terrorism, *regardless* of any progression to violence: one that also includes the non-violent contesting of democracy in the specific challenge non-violent Islamism poses¹² – such counterterrorism efforts enter the area natural to militant democracy and could benefit from (and might be restrained by) normative militant democracy theories regarding what kind of interventions against *non-violent* anti-democrats may be considered legitimate.¹³

2 NORMATIVE MILITANT DEMOCRACY THEORY AND THE RELATIVE LACK OF ATTENTION TO ‘THE LOCAL’

With his inaugural lecture at the University of Amsterdam, the Dutch constitutional scholar George van den Bergh is one of the founding fathers of the concept of militant democracy: the idea that, under certain circumstances, a democracy must shed its

10 See also Rijpkema 2018, p. 5.

11 BVerfG 17 January 2017, 2 BvB 1/13, *National Democratic Party II* (NPD II), §955, see extensively: Angela Bourne, *Democratic Dilemmas: Why Democracies Ban Political Parties*, London/New York: Routledge 2018, pp. 131-137 and Uwe Backes, ‘Banning Political Parties in a Democratic Constitutional State: The Second NPD Ban Proceedings in a Comparative Perspective’, *Patterns of Prejudice* 2019, vol. 53 no. 2, pp. 136-151 (144 and 147-148), also in earlier proceedings sufficient, *direct* evidence for links to violence was lacking, see Gur Bligh, ‘Defending Democracy: A New Understanding of Party-Banning Phenomenon’, *Vanderbilt Journal of Transnational Law* 2013, vol. 46 no. 5, pp. 1321-1379 (1348-149 and note 163).

12 See, for instance, the contributions by Bassam Tibi and Bart Collard in this volume; see, on the shared ideology of violent and non-violent Islamism (as opposed to *Islam*), Bassam Tibi, *Islamism and Islam*, New Haven/London: Yale University Press 2012.

13 Svetlana Tyulkina argues for applying militant democracy to counterterrorism *in general* (violent and non-violent alike); see Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond*, London/New York: Routledge 2015, see the third part devoted to this specific application; for a critique of this position, see Rijpkema 2018, pp. 87-93.

characteristic neutrality in the war of ideas.¹⁴ Within militant democracy theory, the political scientist and jurist Karl Loewenstein is commonly viewed as the father of this idea, in reference to his oft-quoted appeal from 1937: ‘democracy must become militant.’¹⁵ And, of course, it is possible to point to other thinkers who offered similar ideas of militant democracy around that time or earlier. An example is French thinker Milan Markovitch, who defended a doctoral thesis at the Sorbonne in 1933 about the French jurist Léon Duguit that contained a justification of democratic self-defence that is much like Van den Bergh’s.¹⁶ Another is the Dutch social democrat and jurist Marinus van der Goes van Naters, who used the term ‘weerbare democratie’ (‘militant democracy’) as early as 1935 in his book *Worsteling der Vrijheid* (‘The Struggle of Freedom’).¹⁷

Van der Goes van Naters views fascism as a driver of innovative new ideas about democracy that were popping up everywhere in the 1930s – so much so, that it is almost possible to speak of ‘an entirely new concept’: a ‘militant democracy’, ‘being forged in all the smithies’.¹⁸ Van der Goes van Naters even ends his small book with a Loewenstein-like call to action: ‘On to a militant democracy!’¹⁹ Democracy has become keenly aware of its own ‘meaning and value’; it is a ‘cultural calling’, and democracy will refuse to ‘commit suicide’.²⁰ Similar thoughts are noted in German-British sociologist Karl Mannheim’s book, *Diagnosis of Our Time: Wartime Essays*, published in 1943.²¹ He too speaks of the need for a militant democracy: ‘Our democracy has to become militant if it is to survive.’²² And just like Van der Goes van Naters, Mannheim believes democrats’ eyes were opened by fascism:

14 See extensively Rijpkema 2018.

15 Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, *The American Political Science Review* 1937, vol. 31, no. 3, pp. 417-432 (Loewenstein 1937a), p. 423, see also Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, II’, in *The American Political Science Review* 1937, vol. 31 no. 4, pp. 638-658 (Loewenstein 1937b).

16 Milan P. Markovitch, *La doctrine sociale de Duguit: ses idées sur le syndicalisme et représentation professionnelle*, Paris: Éditions Pierre Bossuet 1933, see, compared with Van den Bergh: Rijpkema 2018, pp. 38-41.

17 Marinus van der Goes van Naters, *Worsteling der Vrijheid*, Amsterdam: Uitgave Arbeiders-Jeugd-Centrale 1935; identified by Mreijen in: Anne-Marie Mreijen, *De Rode Jonker: de eeuw van Marinus van der Goes van Naters (1900-2005)*, Amsterdam: Boom 2018, p. 112, see, for even earlier occurrences of the term, going back to 1905, Werner Sollors, *The Temptation of Despair: Tales of the 1940s*, Cambridge (MA)/London: Harvard University Press 2014, p. 348, note 63 to chapter 4.

18 Van der Goes van Naters 1935, p. 9, see also Mreijen 2018, p. 112.

19 Van der Goes van Naters 1935, p. 15.

20 Ibid.

21 Markus Thiel, ‘Militant Democracy and the State of Emergency in Germany’, pp. 273-327 (275), in: Afshin Ellian and Gelijn Molier (red.), *The State of Exception and Militant Democracy in a Time of Terror*, Dordrecht: Republic of Letters Publishing 2012; Karl Mannheim, *Diagnosis of Our Time: Wartime Essays of a Sociologist*, London: Kegan Paul 1945 (first edition: 1943).

22 Mannheim 1943, p. 7.

What we have learned from the bitter experiences of the last decades is that the meaning of democratic tolerance is not to tolerate the intolerant, (...). Unlike the brutal wholesale regimentation of dictatorships who allow only one cast of thought and action, equally unlike the passive abstention of laissez-faire Liberalism from taking any side at all, this militant democracy will have the courage to come out into the open for certain basic values common to all; yet it will, on the other side, leave the more complicated values to free individual choice and decision.²³

Mannheim's search for 'certain basic values common to all' bears a similarity to what Van den Bergh calls 'fundamental principles' that all democrats have to accept before entering the democratic arena,²⁴ and the careful reader has already spotted a predecessor of Karl Popper's paradox of intolerance in the first lines of the quotation.²⁵ Other connections can probably also be made, to speak with Van der Goes van Naters, between the 'smiths in their smithies', each on their own forging a concept of democracy that no longer accepts its own abolishment as a possible outcome of the democratic process.²⁶

These examples show the extent of the normative discussion on militant democracy.²⁷ Within this broad, tumultuous international debate, however, Van den Bergh and Loewenstein take up the most prominent positions, providing the most extensive examinations of militant democracy.²⁸

23 Ibid., p. 49, Mannheim discusses what these values to be defended are on p. 7, examples being 'decency, social justice, freedom'; on this page Mannheim also adds that the 'agreed right procedure of social change' deserves a militant defence, a suggestion that approximates Van den Bergh's more elaborate idea of self-correction and Markovitch's 'law of reaction'; see the brief discussion of those positions in note 27 (for an extensive analysis, see Rijpkema 2018, pp. 22-49).

24 This view of Van den Bergh is what I have called the 'principled democracy' interpretation of his 1936 inaugural lecture; see Rijpkema 2018, pp. 35-37, the other, and the one I argue gives his inaugural lecture its distinct value, is 'democracy as self-correction'; see pp. 37-38.

25 Karl Popper, *The Open Society and Its Enemies*, Princeton (NJ)/New York: Princeton University Press 2013, pp. 581-582 (note 4 to chapter 7). Popper does mention Mannheim a few times, although not in this context and only by referring to *other* works by Mannheim such as *Ideology and Utopia* (see p. 716, note 1 to chapter 23).

26 The brief start Van der Goes van Naters makes in offering a justification for democratic self-defence is the following: 'The democrat is not allowed to oppose any instrument that safeguards criticism, control, and *the possibility of change*; he must resist dictatorship (...) to the utmost.' (Van der Goes van Naters 1935, p. 9, italics in the original), this is reminiscent, for instance, of Markovitch's 'law of reaction' (in short, a political system must always allow a peaceful response to itself; see Markovitch 1933), studied and recommended to Van den Bergh a year later (in 1936) by Van der Goes van Naters; see Rijpkema 2018, pp. 38-39, and, of course, it also shows some resemblance to Van den Bergh's emphasis in his 1936 inaugural lecture on the correction of errors in his idea of democratic self-correction; for a comparison of Van den Bergh and Markovitch, see Rijpkema 2018, pp. 40-41.

27 For a detailed study of the broader Dutch interwar debate (in particular, in politics and society) on defending democracy, with proponents and opponents of such a defence; see Joris Gijsenbergh, 'Democratie en gezag: extremisbestrijding in Nederland 1917-1940', PhD dissertation Nijmegen 2017.

28 See on the relationship between Van den Bergh and Loewenstein (the latter does refer to the former once) and a comparison: Rijpkema 2018, pp. 25-49, and, in particular, pp. 30-31.

In the end, Van den Bergh would only write about the subject of militant democracy twice: at his inaugural lecture and at his farewell lecture, in 1960, in which, among other things, he looks back on the turbulent reception of his inaugural lecture. However, Van den Bergh's true subject, his primary scientific interest, was *local government law* or *municipal law*. Van den Bergh's interest in municipal law is evident in his *Verzamelde Opstellen (Collected Essays)*, which he compiled himself. It contains the 1936 inaugural lecture and the 1960 farewell lecture on militant democracy, but much of the other material it contains is about municipal law and local democracy.²⁹ Van den Bergh does not, however, explicitly link his ideas on militant democracy to local democracy.³⁰

This true not only of Van den Bergh, who thus might be expected to have a natural affinity with local government, but also of Loewenstein. His classic 1937 article containing his call to militancy, 'Militant Democracy and Fundamental Rights', does not explicitly address the local level.³¹ Loewenstein does mention measures in some of the Swiss cantons, in which communist parties were banned, as well as the Canadian province of Quebec, in which anti-communist legislation was passed.³² However, Loewenstein does not discuss them because of their local character, but as examples of violations of the fundamental democratic principle of political equality, owing to their focus on a single type of party.

In a 1938 follow-up article in which Loewenstein provides an overview of the legislation European countries have passed against extremism, the local character of militant democracy stands out more clearly.³³ In a footnote, he revisits how the Swiss cantons implemented their own militant democracy measures when there was not enough federal support.³⁴ The article also mentions a number of South German *Länder* in Weimar Germany, like Bavaria. These *Länder*, in which the pro-democratic *Zentrumspartei* was still strongly represented,³⁵ moved to ban political uniforms on their own, only to be overruled by the federal government.³⁶ Owing to the complex

29 In three parts and a supplement: George van den Bergh, *Verzamelde Staatsrechtelijke Opstellen*, Alphen aan de Rijn: Samson 1955, 1957, 1958 and 1961.

30 Of some relevance is a 1948 essay in which Van den Bergh stresses that 'local citizenship' is where 'national citizenship' is learned. It is in the municipalities where interest in the public good is sparked – because local politics is where people are confronted with concrete public issues. In addition, Van den Bergh also notes, in the same essay, that too far-reaching municipal interventions can lead to 'anti-democratic tendencies' in citizens at times. See George van den Bergh, 'De Gemeenten' (1948, 'The Municipalities'), pp. 145-156 (respectively pp. 147-148 and 154-155), in George van den Bergh 1955.

31 Loewenstein 1937a,b.

32 Loewenstein 1937b, p. 646.

33 Karl Loewenstein, 'Legislative Control of Political Extremism in European Democracies I', *Columbia Law Review* 1938, vol. 38 no. 4, pp. 591-622 (Loewenstein 1938a); Karl Loewenstein, 'Legislative Control of Political Extremism in European Democracies II', *Columbia Law Review* 1938, vol. 38 no. 5, pp. 725-774 (Loewenstein 1938b).

34 Loewenstein 1938b, p. 733, note 33.

35 See more extensively on the role of the *Zentrumspartei*: Ivan Ermakoff, 'Frail Democracy', pp. 47-60, in: Ellian and Rijpkema 2018.

36 Loewenstein 1938b, p. 736.

federal nature of the state, Weimar Germany's politics were characterized by 'an almost constant campaigning', with many elections going on throughout the country.³⁷ Loewenstein posits that, within that constellation, local elections were a particularly useful and easily accessible launch pad:

Where separate elections of the local Diets at different periods were available, as was the case in Germany before 1933, the powerful machine of the National Socialist party could concentrate on limited political objectives and thus demonstrate, by impressive local victories, the relentless progress of the movement.³⁸

It is the most analytical level at which 'the local' in militant democracy is discussed in Loewenstein. In short, local democracy does incidentally feature in Loewenstein's thinking on militant democracy, but it is not discussed as a separate arena of democratic self-defence *in and of itself* – far from it. The same is true of more recent studies that follow in his footsteps, like the mostly legal-comparative work by Svetlana Tyulkina, as well as various more normative legal contributions about militant democracy by András Sajó.³⁹

Modern normative theories about militant democracy present the same picture. Modern, 'neo-militant' theories are characterized by the combination of support for the notion of militant democracy and a particularly critical position with regard to the scope of the idea, the use of certain instruments and the chances of abuse.⁴⁰ This is what distinguishes them from Loewenstein and recent heirs as Tyulkina and Sajó.⁴¹ Nevertheless, in these 'neo-militant' theories, this more differentiated and nuanced approach to the concept does not lead to an explicit conceptualization of the local level and/or the possible interplay with the national level. This is true of the arguably first full-

37 Dietrich Orlow, *Weimar Prussia 1925-1933: The Illusion of Strength*, Pittsburgh: University of Pittsburgh Press 1991, p. 30.

38 Loewenstein 1938b, p. 742.

39 Tyulkina 2015, for Sajó see: András Sajó, 'From Militant Democracy to the Preventive State', *Cardozo Law Review* 2006, vol. 27 no. 5, pp. 2255-2294; András Sajó, 'Militant Democracy and Emotional Politics', *Constellations* 2012, vol. 19 no. 4, pp. 562-574 (however, the question of local religious communities trying to get certain exemptions by democratic means is mentioned; see p. 567).

40 Anthoula Malkopoulou, 'Introduction: Militant Democracy and Its Critics', pp. 1-12 (2), in: Anthoula Malkopoulou and Alexander Kirshner (eds.), *Militant Democracy and Its Critics: Populism, Parties and Extremism*, Edinburgh: Edinburgh University Press 2019. An important distinction, moreover, because, for instance, Tom Ginsburg and Aziz Huq in their extensive constitutional study *How to Save a Constitutional Democracy* (Chicago University Press 2018, in particular pp. 171-172) criticize the concept of militant democracy *only* on the basis of Loewenstein's work, while paying no attention to the modern literature on the subject, which causes them to overlook that modern studies in particular (and one could add to this recent court cases, such as the *Bundesverfassungsgericht* in *BVerfG NPD II*) are focused precisely on the weak points that Ginsburg and Huq identify, such as the risk of 'overreaction'.

41 Malkopoulou 2019, p. 2.

fledged ‘neo-militant’ theory of militant democracy, by Alexander Kirshner,⁴² and also of my own work.⁴³

3 WHY ‘THE LOCAL’ MATTERS TO MILITANT DEMOCRACY

This lack of attention to the local level is understandable. Militant democracy or democratic self-defence as a separate field of study, after decades of being a rather underdeveloped subject in the international scholarly debate, has gone through a tumultuous period of development in the past years.⁴⁴ New, more substantial justifications are proposed,⁴⁵ expansions of the concept to related terrains are explored⁴⁶ and new instruments are analysed.⁴⁷ As such, it is not surprising that the local level has so far not received specific attention in theory building.

Nevertheless, this lack of attention is not fully defensible. First, local governments and politicians come into contact with political extremism early, sometimes first. Take the situation in Germany. In the first 9 months of 2016 alone, it saw eight hundred attacks on politicians – threats, arson but also eighteen direct physical attacks. A significant portion of these came from extreme right circles and happened during the refugee crisis. And, more importantly, local politicians seem to be the most common victims of this type of violence.⁴⁸

In this right-wing extremism, the NPD, active mainly in eastern Germany,⁴⁹ seems to function as a kind of a catalyst.⁵⁰ In 2015, the anti-refugee protests of this relatively small party (roughly 4500 members in 2018)⁵¹ contributed to the resignation of a mayor in

42 Alexander Kirshner, *A Theory of Militant Democracy: the Ethics of Combatting Political Extremism*, New Haven & London: Yale University Press 2014.

43 Both Rijkema and Kirshner are seen as ‘neo-militant’ by Malkopoulou 2019, p. 2; Rijkema 2018; in the other recent normative theories discussed by Müller in his recent Annual Review (see Müller 2016, p. 249-265) there is also no specific attention to the local level.

44 For an analysis, see Ellian and Rijkema 2018; recent years have seen full-length monographies by Kirshner 2014, Tyulkina 2015, Rijkema 2018/2015, and the edited volumes by Ellian and Rijkema 2018 and Malkopoulou 2019.

45 See, among others, the mentioned Kirshner 2014 and Rijkema 2018.

46 See, for instance, Tyulkina 2015, especially on counterterrorism.

47 Such as cutting off party financing, which is a new addition to German militant democracy; see Geliijn Molier and Bastiaan Rijkema, ‘Germany’s New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court’s “Potentiality” Criterion for Party Bans’, *European Constitutional Law Review* 2018, vol. 14 no. 2, pp. 394-409.

48 Wolfgang Dick, ‘Gewalt gegen Politiker’, *Deutsche Welle* (online), 27 September 2016.

49 Antonis Ellinas, *Organizing Against Democracy: The Local Organizational Development of Far Right Parties in Greece and Europe*, Cambridge: Cambridge University Press 2020, p. 200.

50 See, on the nature of the party, Molier and Rijkema 2018, and extensively (with a treatment of the NPD’s links to violence): Bourne 2018, pp. 128-137; see also Backes 2019, pp. 147-148.

51 Ellinas 2020, p. 200.

Tröglitz.⁵² The mayor saw it as the only way to protect his family when the NPD announced that it would start protesting in front of his house and those demonstrations were approved by the authorities.⁵³ Also, an NPD politician was eventually sentenced to a 9-year prison term for an attack on a planned refugee centre in 2015.⁵⁴ Earlier, there were at least *some* links to the Nationalist Socialist Underground (NSU) terrorist network that was discovered in 2011, such as the arrest of a regional NPD deputy chairman for ‘supplying firearms’ to the NSU.⁵⁵ In addition, a study concluded that in the eastern German state of Saxony almost a quarter of extreme-right violence between 2003 and 2006 could be linked to the NPD.⁵⁶

It is understandable in that light that, after a party-ban procedure failed on formal grounds in 2003,⁵⁷ the federal states, the level most affected (at least in eastern Germany), in particular, kept insisting on a new party ban application with regard to the NPD, regardless of the party’s dwindling strength at the time.⁵⁸ This new procedure failed in 2017, on substantial grounds. The BVerfG decided that, while the party could be classified as anti-constitutional (*verfassungsfeindlich*) and would therefore, in principle, be eligible for a ban, it did not have enough ‘potential’ to actually threaten the German ‘free democratic basic order’ (Article 21 (2) *Grundgesetz*) so it could not be banned (introducing a new criterion in the German militant democracy regime) – breaking with the Court’s earlier jurisprudence.⁵⁹

This issue is present elsewhere too in Europe. In a survey by the Dutch Perikles Institute, 26% of Dutch local council members reported that they have had to deal with, for instance, threats and aggression.⁶⁰ In the Dutch Government’s *Monitor Integrity and Safety 2020* of local politicians (local councils, provinces and regional water authorities) 35% said they had experienced violence or aggression.⁶¹ In the

52 Louise Osborne, ‘German village’s mayor quits over neo-Nazi protest permitted outside his home’, *The Guardian* (online), 9 March 2015.

53 Osborne 2015.

54 ‘Neun Jahre Gefängnis wegen Brandstiftung’, *Der Tagesspiegel* (online), 2 October 2019.

55 Bourne 2018, p. 131; Backes 2019, p. 147.

56 Uwe Backes, Matthias Mletzko and Jan Stoye, *NPD-Wahlmobilisierung und politisch motivierte Gewalt*, Köln: Luchterhand 2010, p. 139: ‘Gleiches gilt auch für die Kernfrage der Untersuchung – das Verhältnis NPD zu rechter Gewalt. Immerhin konnten in Sachsen bei fast einem Viertel der Fälle schwerer Gewalt mehr oder weniger starke Bezüge zur NPD hergestellt werden’; Backes 2019, pp. 147-148.

57 *BVerfG* 18 March 2003, 2 BVB 1/01 National Democratic Party I, para. 52; see also Thilo Rensmann, ‘Procedural Fairness in a Militant Democracy: The “Uprising of the Decent” Fails Before the Federal Constitutional Court’, *German Law Journal* 2003, vol. 4 no. 11, p. 1117.

58 Backes 2019, pp. 146-148.

59 *BVerfG NPD II*, §585-586; see on the turn in the BVerfG’s jurisprudence extensively Molier and Rijkema 2018.

60 Niet zonder last Onderzoek naar de meld- en aangiftebereidheid onder raadsleden in Nederland bij agressie, bedreiging en geweld, Periklesinstituut Onderzoek, February 2016.

61 *Monitor Integriteit en Veiligheid 2020*, I&O Research/Bureau BING, commissioned by the Ministry of the Interior and Kingdom Relations, June 2020, p. 3-4; see also the survey by *Omroep Gelderland* in 2019 in which 32% of local council members in the province of Gelderland reported experiences with threats or aggression: ‘Een op de drie Gelderse raadsleden bedreigd’, *Binnenlands Bestuur* (online), 10 June 2019.

refugee debate of 2015, in particular, tensions ran high in discussions about possible locations for refugee centres. In Geldermalsen, the riots resulted in a council meeting being stormed.⁶² Research into these heated protests, as well as into resistance in Bernheze and Steenberg, shows that political violence at least has the potential to disrupt local democratic processes. In addition to the direct influencing of voting behaviour (which seems to occur only very rarely), almost half of the local council members that the study surveyed see the intimidation contributing to a general deterioration of the democratic decision-making process, hindering the ‘exchange of information’ and ‘sound and independent judgment’.⁶³

We find other types of examples of local challenges to democracy in Belgium, where, for instance, the local party *Islam* held two seats in Brussels municipalities (one in Anderlecht and one in Molenbeek) until 2018, its goal being a ‘one hundred percent Islamic state’, and they also sought to separate men and women on local public transport, claiming it was for safety reasons.⁶⁴ But we can also look to the Czech Republic and Slovakia, where some parties have paramilitary features, such as the *Dělnická Strana* parties in the Czech Republic⁶⁵ and the, initially mostly regionally active, *Kotleba – L’udová strana nase Slovensko* (L’SNS, Kotleba – People’s Party Our Slovakia) in Slovakia.⁶⁶ Yet another type of local challenge is posed by the parties that explicitly resist the *nationally organized* character of democracy, such as the left-wing nationalist separatist movement Batasuna in Spain’s Basque Country.⁶⁷

The local level is thus often the first line of defence to absorb extremism’s blow. Extremist parties leave their mark at the local level, before launching themselves onto the national stage.⁶⁸ And one could even argue that the local aspects of political

62 See the retrospection of the then mayor, municipal clerk and registrar: Miranda de Vries, Jan Steurrijs and Max Vermeulen, ‘Besturen na de storm’, pp. 320-334, in: Sarah L. de Lange and Jasper Zuure (red.), *#Woest: de kracht van verontwaardiging*, Amsterdam: Amsterdam University Press 2018.

63 Niels Karsten and Jurre van der Velden, ‘Gewelddadig protest loont!? Over het effect van geweld, bedreiging en intimidatie rondom azc’s op de lokale democratische besluitvorming’, *Bestuurswetenschappen* 2018, vol. 72, pp. 79-89 (88; see also p. 80 for an idea of the various other studies on influencing through violence, which present a mixed picture).

64 Karen van Eyken, ‘Islam-partij wil islamitische staat in België’, *Algemeen Dagblad* (online), 6 April 2018.

65 Miroslav Mareš, ‘Czech Militant Democracy in Action. Dissolution of the Workers’ Party and the Wider Context of this Act’, *East European Politics and Societies* 2012, vol. 26 no. 1, pp. 33-55 (Mareš 2012a); Miroslav Mareš, ‘Right-Wing Extremism in the Czech Republic’, *Friedrich Ebert Stiftung*, September 2012, p. 3 (Mareš 2012b).

66 Miroslav Mareš, ‘How Does Militant Democracy Function in Combating Right-Wing Extremism? A Case Study of Slovakian Militant Democracy and the Rise of Kotleba – People’s Party our Slovakia’, pp. 61-76, in: Ellian and Rijpkema 2018.

67 See ECtHR *Herri Batasuna and Batasuna v. Spain* 20 June 2009, Case Nos. 25803/04 and 25817/04.

68 See Ellinas 2020, p. 236, based on an analysis of the local structures of the Greek Golden Dawn-party, and the already mentioned NPD and L’SNS.

extremism are inescapable, as extremism simply always has a 'location' in city X or village Y: extremist demonstrations take place somewhere, 'hate preachers' give sermons someplace,⁶⁹ a Salafist school (usually) has a school building,⁷⁰ and even an extremist that dwells solely on the Internet lives *somewhere* and accesses the Internet from somewhere.

Secondly, at the same time, a lot is expected of the level first impacted by extremism. This expectation is part of a trend in policy and research, a conclusion reached by political scientists Julia Berczyk and Floris Vermeulen in 2015:

Recently, anti-extremism and counter-terrorism policies have come to focus on the community level and, within it, on the concepts of community cohesion, stakeholder security and policy transferability. The local level is considered vital; it is where contact between diverse individuals and groups takes place on a daily basis and where integration, democracy and notions of community come to the fore. Moreover, the community frequently serves as the level of implementation. National authorities increasingly stress localized responsibility; being well acquainted with circumstances on the ground enables the development of targeted interventions. (...) In sum, according to current policies and scientific research, a community – be it understood in terms of ethnic group, neighbourhood or district – is considered an important resource for tackling extremism, radicalization and terrorism.⁷¹

And we do see this in the actual policies of, for instance, the Netherlands, as described in the Introduction (§1 above). We also find this perspective with the British Local Government Association⁷² and in the Congress of Local and Regional Authorities of the Council of Europe,⁷³ stressing that prevention is also functionally the natural

69 The Islamic preacher Fawad Jneid from The Hague was banned from two neighbourhoods in the city for 'inciting radicalization', see Ingrid de Groot, 'Woede om "provocatie" omstreden Imam Fawaz', *Algemeen Dagblad/Haagsche Courant*, 16 June 2018.

70 Research by the TV programme *Nieuwsuur* and the newspaper *NRC Handelsblad* in 2019 showed that ten of the fifty Dutch Salafist schools used teaching materials that taught pupils, among other things, that non-Muslims deserve the death penalty and that the pupils ought to turn away from Dutch society; see Lex de Jonge, 'Haagse politiek geschokt door extreme lessen op salafistische koranscholen', *Algemeen Dagblad* (online), 11 September 2019.

71 Berczyk and Vermeulen 2015, pp. 88-89.

72 *Council's role in preventing extremism*, Local Government Association, December 2015, p. 2; see also, from the same year, by the Vereniging van Nederlandse Gemeenten: *De rol van gemeenten in de aanpak van radicalisering*, 2 June 2015.

73 *Towards an alliance of European cities against violent extremism. Conference reference texts*, Congress of Local and Regional Authorities of the Council of Europe, 18 November 2015.

domain of local governments: after all, legislation is generally reserved for national governments, while prevention is usually a local matter.⁷⁴

Extremism's local impact and the expectations of what the local level can achieve are also explicitly put forth *mutatis mutandis* by University of St. Andrews' extremism researcher Diego Muro as justifications for a more local approach to extremism.⁷⁵ Muro sees the local impact as the 'key motivation', focusing on the direct impact, in terms of victims, of political violence and terrorist attacks, and not so much on the more subtle disruption of *local* democratic processes by violence and intimidation.⁷⁶ Muro primarily connects the great(er) expectation of local responses to extremism to the 'intelligence of the streets' that local authorities possess⁷⁷ – just as Bercyk and Vermeulen detect as a driver of the 'local' trend in policy and research.

Muro also adds two other reasons: greater confidence in local government and subsidiarity. While the former might strengthen the case for a local approach,⁷⁸ the latter is less convincing. Despite the undeniable local impact of, for instance, a terrorist attack (as the culmination of a process of radicalization) in terms of victims and other damage, such an attack, by definition, surpasses the local level in its effects. Something that, for instance, is very clearly expressed in the Dutch Criminal Code's definition of terrorism.⁷⁹ Only by failing to appreciate this distinctly *extra*-local dimension can Muro conclude that, on the basis of subsidiarity, terrorism should *primarily* be combated at the lower, local level.

Extremism leaves its mark on local democracy. In a way, local democracy is on the front line twice. The cases, policy choices and studies discussed above show two main reasons why normative militant democracy should consider paying more attention to the local level: municipalities often have to deal with the first impact of extremism, and they are also looked to as the first bastion of defence against extremism.

74 *Towards an alliance of European cities against violent extremism*, p. 14. See on this also the comparison between prevention policy in four European cities in: Anja van Heelsum and Floris Vermeulen, 'Cities' Policies: The Work of European Cities to Counter Muslim Radicalisation', *International Migration & Integration* 2018, vol. 19, pp. 161-179 (169-176).

75 Diego Muro, 'Introduction', pp. 13-17 (15-17), in: Diego Muro (red.), *Resilient Cities: Countering Violent Extremism at Local Level*, Barcelona Centre for International Affairs & University of St. Andrews, CIDOB Edicions 2017.

76 Muro 2017, p. 16.

77 *Ibid.*, p. 17.

78 But the greater confidence can also be called into question, in terms of effectiveness: the flipside of greater confidence in local professionals can, because of their proximity, lead to a reduced willingness to report on part of these professionals (Grunenberg and Schriemer 2008, p. 151), and also in terms of confidence itself: see the studies of van Van de Weert and Eijkman into the subjectivity of judgements and legal protection in the local approach to, among other things, radicalisation, in Van de Weert and Eijkman 2020, see also the project page 'Rechtsbescherming bij lokale veiligheidsinterventies' at <https://www.hu.nl/onderzoek/projecten/rechtsbescherming-bij-lokale-veiligheidsinterventies>.

79 See Art. 83a of the Dutch Criminal Code, stressing that having a 'terrorist intent' is, among other things, the intention to frighten (a part of) the population of a country and/or 'seriously disrupt or destroy the constitutional, economic or social structures of a country or an international organization'.

4 ASSESSING POSSIBLE IMPLICATIONS OF INCORPORATING THE LOCAL: A LOCAL PARTY BAN

The preceding paragraphs argued that local democracy received little attention in the normative studies of militant democracy (§2), while, at the same time, this lack of attention is not fully defensible given extremism's local impact and the high expectations of local remedies (§3). A crucial follow-up question, then, is, what implications might an increase in attention to the local level have for normative militant democracy theory? This section will tentatively explore one of those possible implications for militant democracy theory by focusing on the most important and normatively controversial instrument in its arsenal: the party ban.

4.1 *The Concept of a Local Party Ban*

Let us return to the situation concerning the NPD in Germany. As discussed, the BVerfG considered the NPD a party that aimed to strive against the 'free democratic basic order' but declined to ban the party because of its lack of potential. The NPD was deemed incapable of actually threatening German democracy. At the same time, the NPD, as shown in §3, is an example of an extremist party that does exert influence *locally*, primarily in Eastern Germany, at the municipal level. Even more so, such a 'local first' strategy could be part of an effort by parties to launch themselves on a national stage, in a move Loewenstein already analysed, making use of easily accessible local electoral platforms (see §3 above).⁸⁰

Let us alter the case of the NPD a bit. What if we were talking not about the NPD, but about a more successful local or regional anti-democratic party, an NPD*? This could be one claiming a substantial number of seats in regional elections, not in a position to govern regionally, but exerting influence and disrupting debates, for instance, and governing in a substantial number of municipal councils,⁸¹ without any violence, or *proven* links to violence – and all this in a specific part (or scattered parts) of a country.

80 See also Ellinas 2020, p. 236.

81 These were things the NPD at the time of the verdict was not capable of; see BVerfG *NPD II*, §896.

Again, from §3, we know these subnational strongholds of different types of extremism exist in, for instance, Germany, Spain and the Czech Republic, and so such a scenario is not unrealistic.

Nevertheless, and that is the point here, such a more successful party does not automatically qualify for a ban under the new ‘potentiality’ criterion developed by the BVerfG in *NPD II*, although it should not be fully ruled out.⁸² And we know that the European Court of Human Rights (ECtHR), in any case, adheres to an even stricter risk assessment test, which is quite likely to rule out a ban of the NPD⁺,⁸³ leaving German democracy, and, by extension, the local level, with no substantial instruments with which to directly confront the new NPD⁺ we conceived of.

How could this seeming mismatch between the *local impact* and the (implicit) requirement of *national significance* be overcome?⁸⁴ A possibility could be a local party ban. The idea is not new, as Länder in the Weimer Republic had a comparable instrument

82 The BVerfG seems to give considerable weight to the possibility of participating in the ‘political will-formation’ and discusses the possibilities of the NPD in this respect on the national, regional and municipal level (see BVerfG *NPD II*, §896 and §897-909 in detail) – and our hypothetical NPD⁺ does participate in municipal government. In addition, the BVerfG does provide *some* extra leeway for regional parties to be met with a (traditional, nationwide) ban: first, by adhering to a broader view of what counts regarding ‘potentiality’, not solely focusing on electoral success, but also taking into account ‘membership numbers’, the societal impact of its ‘alliances’ and ‘publications’, and such (see BVerfG *NPD II*, §588; Molier and Rijpkema 2018, pp. 397-398); second, when it comes to parties engaging in political violence (however, not relevant for our non-violent NPD⁺): the threshold is high (as seen in §1), but *if* party violence can be proven it is ‘game over’, *also* if it is concentrated only in specific regions [‘regional begrenzten Räumen’] (BVerfG *NPD II*, §588).

83 In any case (much) stricter than the BVerfG’s ‘potentiality’ criterion, although the BVerfG itself thinks otherwise. To this end, among other things, the BVerfG (see *NPD II*, §620) refers to ECtHR *Batasuna*, being a smaller (and, more importantly for us, regional) party that Spain was allowed to ban, but this is not fully convincing, since in the *Batasuna* case (as the BVerfG also notes in §620) the links to ETA terrorism played a very dominant role (see ECtHR *Batasuna*, §89-91).

84 See on this mismatch, regarding the actual NPD (not our NPD⁺) in the early 2000s: Michael Henkel and Oliver Lembcke, ‘Die Dilemmata Des Parteiverbotes. Probleme Der Wehrhaften Demokratie Im Umgang Mit Dem Rechtsextremismus’, *Zeitschrift Für Parlamentsfragen* 2001, vol. 32 no. 3, pp. 572-587 (581).

at their disposal,⁸⁵ and such a local party ban has been proposed in the German debate concerning the first NPD proceedings in the early 2000s.⁸⁶

A local party ban would mean that an anti-democratic party is banned *only* in the different municipalities where it exerts its extremist influence at the moment of the ban; not outside of it. Such a local party ban would hit the *then existing* party ranks and organization that *have a proven track record* of extremist impact on local democracy. At the same time, it would leave open the rest of the country, sparing *non-extremist* branches of the party in other regions. And it creates the possibility for non-extremist ‘restarts’ of the party elsewhere, where no branches yet existed, most likely by people sharing some of the party’s political goals, but *possibly* without the anti-democratic ones – which would be a gain for democracy, pulling the party as a whole out of anti-democratic spheres. After a set period the situation could be reassessed, possibly lifting the ban in the regions where the party was originally outlawed, if it is likely that the party has left its anti-democratic past behind.⁸⁷ Given the less far-reaching rights restriction it poses, it thus inserts an amount of proportionality into the ban.⁸⁸ In doing so, the local party ban adds to recent discussions in normative militant democracy theory on (other) less far-reaching ‘soft militant democracy’ instruments.⁸⁹

85 See also, on the defects of the use of party bans in the specific situation of Weimar Germany, Carl Christian Voscherau, *Parteiverbote in der Bundesrepublik Deutschland und im Königreich Spanien: ein rechtsvergleichender Beitrag zu Entstehung und Weiterentwicklung der verfassungsrechtlichen und gesetzlichen Grundlagen des Verbots von Parteien*, Frankfurt am Main: Peter Lang 2009, pp. 48-57 and Gereon Flümman, *Streitbare Demokratie in Deutschland Und Den Vereinigten Staaten: Der Staatliche Umgang Mit Nichtgewalttätigem Politischem Extremismus Im Vergleich*, Wiesbaden: Springer 2015, pp. 93-94; a general overview in Mathias Grütthaler, *Parteiverboten in der Weimarer Republik*, Frankfurt am Main: Peter Lang 1995. Müller 2016 (p. 252, note 2) points out – referring to Flümman 2015, p. 94 – that the number of party bans (28 in total) in Weimar Germany constitutes a ‘rather inconvenient fact for proponents of militant democracy’. While that is certainly important to note, one also has to consider the actual practice of the bans, which shows them to be a rather ‘stumpfe Waffe, da die Verbote nicht effektiv durchgesetzt und meist bald wieder aufgehoben wurden’ (Flümman 2015, p. 94).

86 Henkel and Lembcke 2001, p. 586: ‘(...) [that the BVerfG, BR] (...) vor dem Hintergrund der besonderen Situation des Rechtsextremismus in einigen Bundesländern sowie der jeweils korrespondierenden Situation in den NPD-Landesverbänden partielle Verbote etwa eines oder mehrerer Landesverbände ausspricht’; see on this also Flümman 2015, pp. 209-210.

87 The new German instrument of ending party subsidies, for instance, has a fixed 6-year period, after which the exclusion of state funding can be renewed; see Molier and Rijpkema 2018, p. 407.

88 In addition, the study by Ellinas 2020 (see pp. 219-220, 224 and 240) suggests that such a local party ban could be successful in halting further expansion of the party (and thereby the spread of the party to other regions or to the national level), as happened with the Golden Dawn, NPD and L’SNS after state intervention – in particular by starting *judicial* proceedings, regardless of the success of the proceedings, as, for instance, in the failed 2017 NPD banning procedure. This would be an argument in favour of a more tailored, *local* party ban (if such a ban would have a greater chance of being successful in judicial proceedings), as simply *commencing* judicial proceedings as an instrument as such (although its ‘judicial’ success is very unlikely) to counter extremism could not be a strategy of a government acting *in good faith*.

89 Müller 2016, pp. 259-260.

4.2 *Assessing the Compatibility of a Local Party Ban with the ECtHR Jurisprudence*

As it stands now, such an instrument is not available in Germany, and not, for instance, in the Netherlands.⁹⁰ But what if they (or other countries) wanted to introduce it to combat anti-democratic parties that disrupt democracy locally? The key question then is: would it survive scrutiny by the ECtHR?

The ECtHR decides human rights cases that reach the court on the basis of the European Convention of Human Rights (ECHR) to which 47 European countries are signatories. Several of these countries are militant democracies in the sense that they allow for parties to be banned; examples are Germany (the NPD banning proceedings were already touched upon in §1 and 3), the Netherlands, France, Austria, Romania, Bulgaria and the UK (Northern Ireland).⁹¹

Ultimately, party ban proceedings in these countries can reach the ECtHR when the banned political party claims its convention rights are violated, in particular Article 11 (1) ECHR, protecting the right to freedom of association. The ECtHR then scrutinizes such a ban by assessing whether the exceptions to this right under Article 11(2) ECHR justify the ban. There are, however, *also* cases that do not get the same level of scrutiny but that are dealt with primarily under 17 ECHR, the ‘abuse clause’: convention rights cannot be used against the Convention itself, and in such cases the applicant party loses the protection

90 Although it should be noted that in 1998 the small and primarily locally active right-wing extremist CP’86 was banned in the Netherlands, by way of a *general* ban, while having *prima facie* even less potential than, for instance the German NPD (see Court of Amsterdam CP’86, 18 November 1998, ECLI:NL:RBAMS:1998:AD2961), the question is, of course, whether the ban would have been allowed by the ECtHR (the party, however, did not go in appeal after the verdict at the lower court). If not so, which seems likely, especially in the case of our stylized *non-violent* NPD+, also the Netherlands lacks an instrument to combat such locally concentrated smaller parties. Also, Henkel and Lembcke argued that in Germany on the basis of Art. 46(2) of the *Bundesverfassungsgerichtsgesetz* (‘Die Feststellung [of a party ban pursuant to Art. 21(2), BR] kann auf einen rechtlich oder organisatorisch selbständigen Teil einer Partei beschränkt werden.’), a local party ban would already have been an option in the first NPD proceedings (see Henkel and Lembcke 2001, p. 586). However, in *NPD II* this option is not discussed by the BVerfG, also not when it comes to discussing less intrusive options than a full (nationwide) party ban, only mentioning cutting party subsidies as a less intrusive option and explicitly stating that, as the constitution stood at that time no less intrusive option than a full party ban was available (see BVerfG *NPD II*, §527 and 624-625; the possibility of cutting party subsidies was introduced in response by the German constitutional lawmaker, see Molier and Rijpkema 2018, pp. 405-408).

91 An overview of banned parties in Europe (1945-2015) can be found in Angela K. Bourne, ‘Militant Democracy and the Banning of Political Parties in Democratic States: Why Some Do and Some Don’t’, pp. 23-46 (26-29), in: Afshin Ellian and Bastiaan Rijpkema (eds.), *Militant Democracy – Political Science, Law and Philosophy*, Cham: Springer 2018.

the convention offers.⁹² This was the case, for instance, when the 1956 German Communist Party (KPD) ban reached the European Commission for Human Rights (the predecessor of the ECtHR), with the Commission deciding against the KPD on the basis of Article 17.⁹³

When examining party bans under Article 11(2) the supervision is strict (although the ECtHR does leave some leeway for national authorities),⁹⁴ as, for instance, the ECtHR affirmed in *United Communist Party of Turkey v. Turkey*.⁹⁵ To conduct its assessment, the ECtHR verifies whether the ban is ‘prescribed by law’ and whether the state has pursued one of the ‘legitimate aims’ listed in Article 11 (2) (*generally* both fairly straightforward checks),⁹⁶ but, most importantly, it assesses whether the ban was ‘necessary in a democratic society’, conducting three separate but *interrelated* tests. The three tests under the ‘necessary in a democratic society’ banner are the following:

1. **of a political party’s contents**

Are the contents – views and activities – of the party enough to constitute ‘a pressing social need’ to ban the party?

2. **of the risk the political party poses**

Is the risk the party poses great enough to constitute ‘a pressing social need’ to ban the party?

3. **of proportionality**

Was the ban a *proportionate means* to the end pursued?

92 See extensively Rijpkema 2018, pp. 146-153, and Christian Walter, ‘Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy’, pp. 79-95 (81-86), in: Ellian and Rijpkema 2018. There is also an argument to be made to see Art. 17 not so much as a ‘preliminary question’, but as a ‘principle of interpretation’; see William Schabas, *The European Convention on Human Rights: A Commentary*, Oxford: Oxford University Press 2015, pp. 614-615.

93 *European Commission of Human Rights* 20 July 1957, 250/57, *KPD v. Germany*, p. 5: ‘whereas recourse to a dictatorship for the establishment of a régime is incompatible with the Convention, inasmuch as it includes the destruction of many of the rights or freedoms enshrined therein; whereas the organisation and operation of the German Communist Party, in the circumstances of the case, constitute an activity within the meaning of Article 17; whereas it is clear from the foregoing that the application by the German Communist Party cannot rest upon any provision of the Convention, least of all on Articles 9, 10 and 11; that the said application should be declared inadmissible (...)’

94 See, for instance, ECtHR *United Communist Party of Turkey v. Turkey*, 30 January 1998, 133/1996/752/951, §47; ECtHR *ÖZDEP v. Turkey*, 8 December 1998, 23885/94, §39; ECtHR *Association of Citizens Radko & Paunovski v. The Former Yugoslav Republic of Macedonia*, 74651/01, §66; see on the margin of appreciation left to national authorities also: Thomas Ayres, ‘Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights’, *Boston College International and Comparative Law Review* 2004, vol. 27 no. 1, pp. 105-106.

95 ECtHR *United Communist Party of Turkey*, § 46: ‘In determining whether a necessity [for banning a party, BR] within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. [...]; such scrutiny is all the more necessary where an entire political party is dissolved and its leaders are banned from carrying on any similar activity in the future.’

96 See, for instance, in ECtHR *United Communist Party of Turkey*, § 38-41.

The *content* test is twofold and deals with *means* and *goals*. In *Refah*, the Court explained that if a party's means are 'legal and democratic' and its goals 'compatible with fundamental democratic principles' the party is entitled to ECtHR protection, ruling out state intervention.⁹⁷ The *risk* test is premised on a 'risk to democracy' rationale: the Court tries to assess whether the ban is actually needed to prevent damage to the democratic system.⁹⁸ The test is strict and asks whether the 'risk to democracy' was 'sufficiently and reasonably imminent' (in ECtHR *Batasuna*)⁹⁹ or 'sufficiently imminent' (in ECtHR *Refah*)¹⁰⁰ at the time of the ban. When applying this standard to the *Refah* party, the ECtHR showed how strict the standard was *exactly*, at least in that case, arguing that banning *Refah* while in government, but still bound by the government coalition it was in, was quite the right time to step in, neither too early nor too late.¹⁰¹ Then there is the *proportionality* test, of which the ECtHR consistently argues that a measure *so* intrusive as the 'dissolution of an entire political party, may only be taken in the most serious cases'.¹⁰² To this it added: '[T]hat is why the nature and severity of the interference is also a factor to be taken into account when assessing its proportionality'.¹⁰³

The full three-part test can be clearly seen in the ECtHR's most prominent party banning cases *Refah* and *Batasuna*.¹⁰⁴ A negative result in *one* of the tests suffices to deem a party ban incompatible with the ECHR.¹⁰⁵ The *three-part* character of the test is important for our undertaking here. In its *NPD II*-verdict the BVerfG pointed out that the ECtHR leaves open the possibility of less intrusive, and thereby more *proportionate*, measures for 'lighter' cases – instruments that were not available under the German

97 ECtHR *Refah Partisi v. Turkey*, 13 February 2003, 41340/98, 41342/98 and 41344/98, §98. Next to the 'traditional' anti-democratic parties, new categories of banned party cases have reached the ECtHR and are decided under this content test; see Bligh 2013, p. 1326, distinguishing as new categories in parties that incite 'hatred or discrimination', parties that support violence and those that 'challenge the identity of the state' (pp. 1337-1345); see also the typology in Olgun Akbulut, 'Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties', *Fordham International Law Journal* 2010, vol. 34 no. 1, pp. 46-77, distinguishing between pro-minority parties, anti-secular parties and parties with links to terrorism (pp. 40-70).

98 As opposed to a 'negative effects' rationale, see Molier and Rijpkema 2018, pp. 399 and 401.

99 ECtHR *Herri Batasuna*, §83.

100 ECtHR *Refah*, §104.

101 ECtHR *Refah*, §110, see also, more in general §102: 'In addition, the Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.'

102 ECtHR *Herri Batasuna*, §78, referring back to comparable statements in § 46 in ECtHR *United Communist Party of Turkey* (see also §61), and §45 in ECtHR *ÖZDEP*, and ECtHR *Refah* in general (but see §100 in particular).

103 ECtHR *Herri Batasuna*, §78; see also ECtHR *Refah*, §133.

104 ECtHR *Refah*, §106 and 135, and ECtHR *Herri Batasuna*, §84 and 94. For a different rendering, after *Refah*, but before *Batasuna*, of the Article 11 framework not clearly distinguishing these three tests under 'necessary in a democratic society', see Ayres 2004, pp. 103-108.

105 In, for instance, ECtHR *United Communist Party of Turkey* and ECtHR *ÖZDEP*.

constitution at that time, such as cutting party subsidies (introduced into the German constitution later that year).¹⁰⁶

The interplay within the three-part test is crucial to the space afforded by the ECtHR in this respect: *less intrusive* measures (in the third test) might be applied *earlier* (the second test) to *less strong* threats to democracy (the first test). These tests seem to function as interdependent ‘levers’ in the ECtHR’s assessment of party bans; even more so, as we have recently seen such a differentiated approach in other contexts concerning bans too.¹⁰⁷ While the measure of cutting party subsidies (in the third test) can lower the thresholds in the first and second test, this is likely to be the case too for the less intrusive measure of the *partial* banning of a party in specific regions. A supporting argument, specific to a local party ban, might be found in the fact that the Court in ECtHR *United Communist Party of Turkey*, ECtHR *Refah* and ECtHR *Batasuna* consistently speaks of the dissolving of an ‘*entire* political party’ as a very intrusive measure. Of course, one might not want to read *too much* into this one word, but it does suggest that the Court might consider a *partial*, instead of an *entire*, ban less intrusive (just as cutting party subsidies would be less intrusive than banning), thereby influencing the threshold in the *content* and, most importantly, the *risk* test: allowing for an earlier use of the instrument. Therefore, our examination of the ECtHR jurisprudence does give a strong indication that within its jurisprudence it might allow earlier interventions against regionally active parties, such as our NPD⁺, by means of a local party ban.

5 CONCLUSION

This contribution argued that normative militant democracy theory’s current lack of attention to the local level is unwarranted. It first discussed how the most important normative theories of militant democracy, since its inception in the 1930s, have paid very limited attention to subnational levels of democracy (§2). Although this is understandable for a field that has only recently seen a rapid growth – leaving many *other* topics for normative examination –, there are convincing reasons that can be put forth to divert at least some of that attention to the normative study of defending democracy at the local level (§3). The most prominent reasons are 1) the local impact of extremism, being hit ‘first’ and, at the same time, 2) the expectations of the local level

106 BVerfG NPD II, §527 and 624-625; see Molier and Rijpkema 2018, p. 406, with further references to the German debate on this point.

107 The Court, for instance, seems to apply a less strict *overall* assessment when an association is taken to be *less* political; see Afshin Ellian, Gelijs Molier and Bastiaan Rijpkema, ‘Weerbare democratie en het probleem van timing: de zaak tegen de NPD’ [‘Militant Democracy and the Problem of Timing: The Case Against the NPD’], *Nederlands Juristenblad* 2017, vol. 92 no. 24, pp. 1650-1660 (1659-1660), referring to ECtHR *Vona v. Hungary*, 6 July 2013, 35943/10, and ECtHR *Affaires les Authentiks Et Supras Auteuil 91 v. France*, 26 October 2016, 4696/11 and 4703/11.

in research, and of a very practical import, in actual government policy. The local level is on the front line *twice*.

The contribution then examined one of the possible implications of placing a stronger emphasis on the local level in normative militant democracy theory by exploring what it could mean for the most discussed militant democracy instrument: the party ban (§4). It was suggested that a local party ban – restricting the ban of a party only to the regions where its extremist impact is felt – might bridge the gap between a party's *local* impact and (implicit) requirements of *national* significance in different jurisdictions, such as Germany, but in any case, in the ECtHR case law. A probe of the relevant ECtHR jurisprudence in this respect then indicated that, contrary to a full ban, such a local (and partial) party ban, when applied to regional anti-democratic parties, is likely to be approved by the ECtHR under Article 11 ECHR.