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MILITANT DEMOCRACY AND HUMAN RIGHTS PRINCIPLES

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INTRODUCTION[1]

The European Court of Human Rights has occasionally made use of the language familiar from discussions of a "militant democracy" or a "democracy capable of defending itself" and scholars have used the term when discussing the Strasbourg jurisprudence.[2] This paper suggests that it is more appropriate to concentrate on the requirements of a deliberative and participatory democratic society, rather than the theme of militant democracy. This paper examines the Strasbourg jurisprudence that may fall under this heading, and finishes by highlighting considerations the ECtHR should keep to the forefront when dealing with these cases.

MILITANT DEMOCRACY

The term "militant democracy" is undoubtedly a jarring one. The term was coined in English by a German philosopher, Karl Loewenstein, who was exiled from Germany during the 1930s and worked at Yale. As with other European academics, he turned his mind to the trauma of the 1930s, and the threats of fascism and Nazism.[3] In 1937, he discussed the possibility of "Militant" democracies to arm themselves against the rise of fascists, and specifically against the possibility that fascists would use democratic rights of free association, free assembly, free expression and political rights in order to destroy democracy.[4] Loewenstein's militant democracies were an answer to Carl Schmitt's critique of representative democracy: a militant democracy is not an interminable talking shop,[5] and it is capable of identifying the political enemy that it has to combat.[6] That the enemies of democracy should not be allowed to use the rights and freedoms of democracy to undermine it might be seen as the lesson of the collapse of Weimar. The term Militant Democracy might cover a host of activities; this article considers the types of limitations on specifically political rights (voting, running for office, expression, association, etc) imposed on political parties and movements, or presumed adherent of such parties or movements, where it is alleged those parties, movements or individuals are using political rights to undermine democracy.

After the Second World War, national and international legal orders paid attention to the Weimar lesson. The 1949 German Basic Law most clearly demonstrates this.[7] The Federal Constitutional Court can order the forfeiture of rights if these are abused in order to undermine the "free democratic order" (Article 18). The German people have the right to resist anyone who seeks to destroy the constitutional order (Article 20(4)). The Federal Constitutional Court may order the dissolution of an unconstitutional party (Article 21(2)). The Basic Law declares certain fundamental principles

[1] I am grateful to colleagues in the Queens Human Rights Centre, students on the LLM module Human Rights and Governance, and the participants at the Utrecht Network Summer School held at Antwerp in July 2009 during academic year 2008-2009 for the opportunity to discuss these cases and issues. Responsibility for any faults is mine alone.

[2] The key piece here is P. Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) *European Law Review* 407-420. The Court itself has never used the term "militant democracy", except when referring to the submissions of the Turkish Government during the Chamber decision in the Welfare Party case: *Refah Paritisi v Turkey* (2002) 35 EHRR 56 at paragraph 62. All ECHR case law is available at www.echr.coe.int

[3] The contribution of the Frankfurt School to the struggle against Fascism has attracted considerable attention: William E. Scheuerman, *Between the norm and the exception: the Frankfurt school and the rule of law* (Cambridge, Mass.: MIT Press, 1994) and William E. Scheuerman, *The rule of law under siege : selected essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley: University of California Press, 1996).

[4] Loewenstein, K. "Militant Democracy and Fundamental Rights," (1937) 31 (3) *American Political Science Review* 417; Loewenstein, K. "Militant Democracy and Fundamental Rights, II" (1937) 31 (4) *American Political Science Review* 638-658; "Legislative Control of Political Extremism in European Democracies I" (1938) 38 *Columbia Law Review* 591. Other early advocates of militant democracy include another refugee from Nazism. Karl Mannheim warned that "the meaning of democratic tolerance is not to tolerate the intolerant": Mannheim, Karl *Diagnosis of our time* (London,: K. Paul, Trench, Trubner & co., 1943), 49. See also Lerner, Max *It is later than you think : the need for a militant democracy* (New Brunswick, N.J.: Transaction Publishers, 1989, [1943]). Judge Zupančič credits Karl Popper with the basic insight of militant democracy in the *Zdanoka* case: *Zdanoka* v. *Latvia* App. (2006) 45 EHRR 17.

[5] Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge: MIT Press, 1988, 1923).

[6] Carl Schmitt, *The Concept of the Political* (New Jersey: Rutgers UP, 1976).

[7] An official translation is available at <http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf> last accessed on 21 March 2009.

— federalism, and basic rights — to be unamendable (Article 79).[8] In addition, to avoid a paralysis of political leadership, the Basic Law provides that the Bundestag can only vote no confidence in the German Chancellor if the Bundestag has elected a successor (Article 67). Finally, the Basic Law provides several provisions dealing with emergencies (Articles 80A, 91, 115A-L), including a logjam in the legislative process (Article 81). Though the German Basic Law is the most elaborate on this point, there are also relevant provisions in the Italian Constitution of 1947, which prohibits the reorganisation of the fascist party and provides for limiting the political rights of fascist leaders.[9]

These concerns were not absent from the drafters of the Universal Declaration of Human Rights. Article 29 (2) provides that rights may not be used to undermine the purposes of the United Nations, and even more forcefully Article 30 prohibits the abuse of rights:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The Soviet delegates involved in the drafting of the Declaration wanted to go even further and make it clear that the rights of fascists could be limited.[10]

The European Convention on Human Rights, 1950, Article 17 provides for a similar abuse of rights doctrine:

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.

The European Convention of course also allows for proportionate restrictions on rights when necessary in a democratic society (e.g. Articles 8(2), 10(2), 11(2)), and permits special derogations during a time of emergency when the life of the nation is in peril (Article 15).

During the Cold War, several states took steps to limit the political rights of movements which challenged the state's constitutional order. The Federal Republic of Germany's Constitutional Court banned the successor to the Nazi Party and the Communist Party,[11] while Germany adopted laws regulating loyalty of public servants. During the Cold War, the European Court of Human Rights rejected challenges to these loyalty laws.[12] The Australian Parliament sought to ban the Communist Party, a ban invalidated by the High Court of Australia on federalism grounds.[13] The United States notoriously limited the freedom of communists.[14] In one corner of the United Kingdom, special powers were used to ban "republican clubs".[15] The 1990s saw a resurgent interest in the theory of militant democracy, with the military coup in Algeria in 1992 prompting serious academic discussion of "intolerant democracies".[16] The Council of Europe's Commission for Democracy through Law (Venice Commission) has seen fit to publish guidance on the sanction of party dissolution.[17]

EXAMPLES OF MILITANCY IN MODERN EUROPE

The European Court of Human Rights has long had to deal with issues of militant democracy, whether it be in relation to the persistence of racist and fascist parties, Germany's loyalty laws, or political violence in the UK and Ireland.[18] The theme has become more urgent though in the last fifteen years. The collapse of the Iron Curtain, and the expansion of the Council of Europe to the East has given rise to many issues

[8] G.J. Jacobsohn, "An unconstitutional constitution? A comparative perspective" (2006) 4 (3) *International Journal of Constitutional Law* 460; Rory O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms" (1999) 4 *Journal of Civil Liberties* 48-75.

[9] Article 12 of the Transitional Provisions, available in Italian at <http://www.quirinale.it/costituzione/costituzione.htm> last accessed on 22 March 2009.

[10] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting and intent* (Philadelphia: University of Pennsylvania Press, 2000) 23, 68-69.

[11] *Socialist Reich Party case* [1952] BVerfGE 2, 1, found in Kommers, *Constitutional Jurisprudence of the FRG*; *Communist Party case* [1956] BverfGE 5, 85, found in Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany.*

[12] Compare *Kosiek* v. *Germany* (1986) 9 EHRR 328 with *Vogt* v. *Germany* (1996) 21 EHRR 205. See Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) *European Law Review* 407, 413-414. Conor Gearty notes that the change in the Strasbourg Court's attitude coincided with the end of the Cold War: Conor Gearty, "Airy-Fairy: Human Rights and the End of Empire: Britain and the Genesis of the European Convention by A.W.B. Simpson." (2001) 23 *London Review of Books*, available at <http://www.lrb.co.uk/v23/n23/gear01_.html> last accessed on 22 March 2009.

[13] *Australian Communist Party* v. *Commonwealth* [1951] 83 Commonwealth Law Reports 1. David Dyzenhaus discusses this case as an example of a court relying on "common law constitutionalism": David Dyzenhaus, "Constituting the Enemy: A response to Carl Schmitt" in A. Sajó (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing, 2004).

[14] *Dennis* v. *U.S.* 341 U.S. 494 (1951).

[15] A ban upheld by the House of Lords in *McEldowney* v. *Ford* [1971] Appeal Cases 632,

[16] Gregory Fox and Georg Nolte, "Intolerant Democracies" (1995) 36 *Harvard International Law Journal* 1, reprinted in Gregory Fox and Brad Roth, *Democratic Governance and International Law* (Cambridge: CUP, 2000).

[17] European Commission for Democracy through Law, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* (Strasbourg: Council of Europe Pub., 2000).

[18] P. Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) *European Law Review* 407-420.

of transitional justice. The September 11th attacks underscored the threats posed by religious fundamentalism. The decision of Turkey to accept the possibility of individual petition to the Strasbourg Court was significant, given that country's relatively frequent use of the power to dissolve political parties.

A variety of different techniques of militant democracy have appeared in Strasbourg cases. Perhaps the most extreme have been the instances where a State has sought to remove from Parliament elected politicians once their party has been deemed unconstitutional.[19] Political parties have also been dissolved,[20] or have had their application to be registered refused.[21] In lustration cases, individuals may be prohibited from running for public office, or holding a varying range of offices in the public sector, or even in parts of the private sector.[22] Less drastic measures include restricting the free expression[23] or free association rights[24] of individuals, prohibiting the use of certain symbols,[25] or denying public financing to parties.[26] States may take steps to ensure the political neutrality and integrity of their public service.

A number of different reasons are generally given for the use of militant democracy type measures;[27] typically these include combating political violence; controlling racist and far-right parties; defending fundamental constitutional or human rights principles; securing the transition to democratic rule; or protecting the territorial integrity of the state. Other reasons may easily be imagined: some states may proscribe parties with an ethnic or religious focus,[28] while one scholar has proposed the use of militant democracy in relation to parties whose internal structure is undemocratic.[29]

The European Court of Human Rights has, on the whole, been exacting in its scrutiny of these measures. It has insisted that restrictions on rights satisfy the three part justification test of being for a legitimate purpose, prescribed by law and necessary in a democratic society. Nevertheless there have been occasions where the Court has upheld militant democracy type measures, sometimes with less than exacting scrutiny.

POLITICAL VIOLENCE

Political movements which engage in, advocate or are linked with political violence, are subject to restrictions in several European states. Both the UK and Ireland have imposed limitations on parties linked to paramilitary groups in Northern Ireland, limitations upheld both in domestic courts and in Strasbourg. In 2003, the Spanish Parliament passed a law on political parties in order to allow for the prohibition of *Batasuna*, a party associated with ETA violence. The Spanish Constitutional Tribunal upheld the validity of the law,[30] while *Batasuna* was dissolved in 2003.[31] Allegations that a political party advocated violence have figured frequently in the party dissolution cases from Turkey.[32]

The former Commission was generally accepting of state restrictions imposed on political parties due to their alleged involvement with political violence. The Commission rejected as inadmissible complaints relating to the laws in the UK and Ireland limiting the access of certain Northern Irish parties to the airwaves.[33] It is not clear that the modern Court would follow the Commission on this today. The Court has recently stressed that there must be actual evidence of a commitment to violence before an organisation's Conven-

[19] *Sadak and others* v. *Turkey* Applications Nos. 26149/95 to 26154/95, 25144/94, 27100/95 and 27101/95, 11 June 2002 (ECtHR).

[20] *Refah Paritisi (Welfare Party)* v. *Turkey* (2003) 37 EHRR 1.

[21] *Partidul Comunistilor (Nepeceristi)* v. *Romania* Application no. 46626/99, 5 February 2005 (ECtHR); *Linkov* v. *Czech Republic* Application no. 10504/03, 7 December 2006 (ECtHR).

[22] *Sidabras* v. *Lithuania* (2006) 42 EHRR 6.

[23] *Brind* v. *United Kingdom* (1994) 77 D&R 262. Issaacharoff gives the example of speech codes during elections in India: S. Issacharoff, "Fragile Democracies" (2007) 120 *Harvard Law Review* 1405, 1423.

[24] *Christian Democratic People's Party* v. *Moldova* (2006) 45 EHRR 13.

[25] The Hungarian law prohibiting the wearing of "totalitarian" symbols was considered in *Vajnaj* v *Hungary* application no. 33629/06, 8 July 2008 (ECtHR).

[26] *Parti Nationaliste Basque* v *France* Application no 71251/01, 7 June 2007 (ECtHR). Funding was denied to the French branch of the Basque Nationalist Party due to the fact it illegally received funds from abroad, i.e. the Spanish Basque party.

[27] Issaacharoff discusses the threats posed by insurrectionary, separatist and anti-dmeocratic parties: S. Issacharoff, "Fragile Democracies" (2007) 120 *Harvard Law Review* 1405, 1433-1447.

[28] M. Basedau, M. Bogaards, C. Hartmann and P. Niesen, "Ethnic Party Bans In Africa: A Research Agenda" (2007) 8 (6) *German Law Journal* 617-634.

[29] Yigal Mersel, "The dissolution of political parties: The problem of internal democracy" (2006) 4 *International Journal of Constitutional Law* 84. See also E. Brems, "Freedom of Political Association and the Question of Party Closures" in Wojciech Sadurski (ed.) *Political rights under stress in 21st century Europe* (Oxford ; New York: Oxford University Press, 2006), 161.

[30] *Basque Regional Government challenge to the Law on Political Parties* STC 48/2003, 12 March 2003; the decision is available in Spanish at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2003/STC2003-048.html> last accessed on 22 March 2009.

[31] The Batasuna case is discussed in Ian Cram, "Constitutional responses to extremist political associations -ETA, Batasuna and democratic norms" (2008) 28 (1) *Legal Studies- Society of Public Teachers of Law* 68-95; Victor Ferreres Comella, "The New Regulation of Political Parties in Spain and the Decision to Outlaw Batasuna" in A. Sajó (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing, 2004); L. Turano, "Spain: Banning political parties as a response to Basque terrorism" (2003) 1 (4) *International Journal of Constitutional Law* 730-740; K. A. Sawyer, "Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights" (2003) 52 (6) *American University Law Review* 1531-1581.

[32] This was one of the reasons offered in the Welfare Party case: *Refah Paritisi (Welfare Party)* v. *Turkey* (2003) 37 EHRR 1.

[33] *Purcell* v. *Ireland* Application no. 15404/89, 16 April 1991 (ECmHR); *Brind* v. *United Kingdom* (1994) 77 D&R 262.

tion rights might be limited; it is not enough that an organisation adopt a name likely to promote hostility,[34] nor that it describe itself as "revolutionary".[35] The Court has criticised Turkey for punishing a journalist who published interviews with a member of an illegal organisation: this by itself, without evidence of incitement to violence or hatred was insufficient to justify restricting free expression.[36]

This rigour in examining state restrictions allegedly based on the need to protect national security and public order is welcome. However the Strasbourg court will accept limitations on political rights of parties associated with political violence. This is made clear in *Herri Batasuna and Batasuna v Spain*.[37] By a 2002 law on political parties the Spanish Supreme Court ordered the dissolution of the two applicant parties because of their connections with the Basque separatist group ETA. The Spanish law only permitted dissolution if the party engaged in activities that were incompatible with democracy.[38] The Constitutional Tribunal, in separate proceedings, emphasised this element of the Law, noting that this was not a "militant democracy" type law which proscribed certain aims.[39] The political parties ultimately complained to the European Court of Human Rights. The Court found that there was an interference with Article 11.1 and proceeded to see if the measure could be justified under Article 11.2. The Court quickly concluded that the interference was prescribed by law and for a legitimate aim; the crucial question was whether the measure was necessary in a democratic society.

The Court stressed the importance of pluralism, which requires protection of ideas that offend, shock or disturb.[40] Interferences with Article 11 required strict justification and only in most serious circumstances should a party be dissolved.[41] The Court reiterated the position that parties were free to pursue any aim, as long as the aim was compatible with democracy and the means used were legal and democratic.[42] However the State must be able to act, and act before it is too late; such is compatible with the positive obligations inherent in the Convention.[43]

Having outlined these principles, the Court considered the specific case. It noted there were a large number of facts which indicated that the parties were encouraging a "climate of social confrontation" and were offering implicit support to ETA.[44] The Court also alluded to the idea that the *silence* of politicians could be invoked to gauge some idea of the party's intentions.[45] The Court placed the Spanish decision in the context of Council of Europe and European Union measures which condemn making apologies for terrorism.[46]

FAR RIGHT AND RACIST MOVEMENTS

European states have also limited the rights of racist and far-right parties. The Flemish party Vlaams Blok, was forced to reorganise itself following a judicial determination it was guilty of racism.[47]

The Strasbourg institutions have generally been accepting of limitations imposed on self-avowed racists.[48] The former Commission invoked Article 17 to declare complaints from a racist party[49] and from a former member of the SS,[50] inadmissible, while the modern Court has also ruled inadmissible a complaint by a Holocaust denier, again relying partly on Article 17.[51] The Court has also invoked Article 17 when a member of a far right political party was convicted of causing alarm with the aggravating factor that it was done for a racial purpose: the applicant had displayed

[34] *Association of Citizens Radko and Paunkovski* v *Former Yugoslav Republic of Macedonia* Application no. 74651/01, 20 January 2009 (ECtHR). "Radko" was the pseudonym of Ivan Mihajlov, who, according to the Macedonian Constitutional Court, denied the existence of Macedonian ethnicity.

[35] *Tsonev* v. *Bulgaria* (2008) 46 EHRR 8. However the Court has rejected challenge to a French law punishing persons for "condoning terrorism": *Leroy* v *France* application no. 36109/03, 2 October 2008 (ECtHR). The applicant had published a cartoon based on the September 11th attacks on the Twin Towers with the caption "We have all dreamed of it … Hamas has done it". The Court rejected the applicant's view that he was merely engaging in satire to critique American imperialism (paragraphs 43-46).

[36] *Kanat and Bozan v Turkey* no. 13799/04, 21 October 2008 (ECtHR) at paragraph 19.

[37] *Herri Batasuna v Spain* application nos. 25803/04 and 25817/04, 30 June 2009.

[38] Ibid at paragraph 12.

[39] Paragraph 20.

[40] Paragraph 76.

[41] Paragraph 78.

[42] Paragraph 79.

[43] Paragraph 82.

[44] Paragraph 85.

[45] Paragraph 88.

[46] Paragraph 90. For more on glorification of terrorism, see *Leroy v France* application no. 36109/03, 2 October 2008.

[47] The decision of the Court of Appeal of Ghent was upheld by the *Cour de Cassation*: *Vlaams Concentratie* v *Centre for Equal Opportunity and the fight Against Racism* Decision of 9 November 2008, available in French at <http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20041109-13> last accessed on 22 March 2009.

[48] For a critical analysis of the ECtHR jurisprudence see Eric Heinze, "Viewpoint Absolutism and Hate Speech" (2006) 69 (4) *Modern Law Review* 543-582.

[49] The Commission invoked Article 17 against a racist party seeking to rely on the right to free expression and the right to run for election: *Glimmerveen* v. *Netherlands* 8348/78 & 8406/78, 11 Oct 1979 (ECmHR).
This does not mean that extremist politicians, even those convicted of incitement to racial hatred, are not protected by defamation laws: *Lindon and others* v *France* application nos. 21279/02 and 36448/02, 22 October 2007 (ECtHR GC).

[50] *Van Wambeke* v. *Belgium* Application no. 16692/90, 12 April 1991.

[51] *Garaudy* v. *France* Application no. 65831/01, 24 June 2003 (ECtHR). That this is an area of the law where the Court is called upon to make very delicate decisions is clear from another French case where the Grand Chamber, over six dissents, found a prosecution for "public defence of war crimes" violated Article 10: *Lehideux* v. *France* (1998) 30 EHRR 665.

a poster which implied all Muslims were to blame for the 9/11 attacks on the US. The Court rejected his complaint as inadmissible.[52]

Even where expression is not so extreme as to come under the umbrella of Article 17, the Court has permitted the State to restrict expression under Article 10(2) in order to deal with incitement to hatred.[53] Further, the Court has recognised the right of a trade union to expel members of the union who also belonged to a far right political party.[54] Most recently in *Feret v Belgium*,[55] the Court considered the penalties imposed by a Belgian court on a sitting member of parliament. The parliamentarian had distributed material inciting to racial hatred; the court sentenced him to perform community service, pay symbolic compensation and declared him ineligible to be elected for a period of ten years. The Court of Human Rights , by a 4-3 majority, found there to be no violation of the Convention.

These cases demonstrate a court tolerant of restrictions on the political rights of the far right and racist movements. However the Court of Human Rights has also striven to ensure that restrictions on free expression due to incitement to hatred laws do not infringe on legitimate journalist investigations[56] or contributions to political[57] or religious debate.[58]

FUNDAMENTAL CONSTITUTIONAL OR HUMAN RIGHTS PRINCIPLES

That a political movement is opposed to fundamental constitutional or human rights principles is a motivation sometimes invoked to justify limiting political rights.[59] This was so in the Turkish Welfare Party case: the Welfare Party's supposed advocacy of *Sharia* and the introduction of personal laws, conflicting with the principle of secularism, was held to justify its dissolution.[60] What constitutes a fundamental constitutional principle is open to disagreement: one Bulgarian case concerned an effort to ban a pro-monarchy association,[61] while the Czech Republic sought to refuse registration of one political party because it seemed to challenge the principle of non-retrospectivity of criminal laws (in the context of advocating bringing to justice human rights violators from the previous regime).[62]

The most dramatic and controversial of all the ECtHR decisions on the theme of militant democracy was the decision in the Turkish *Welfare Party* case.[63] The Turkish Constitutional Court had ordered the dissolution of the Welfare Party on the primary ground that it was opposed to secularism. Most strikingly, the Welfare Party was actually in a coalition government at the time and was indeed the largest party represented in the Turkish Parliament. The Grand Chamber of the ECtHR held that there was no violation of the Convention in this case, finding that the dissolution could be justified for three reasons. The party had failed to distance itself sufficiently from advocacy of violence; the party desired to introduce a system of personal law for Turkish citizens (i.e. different legal systems depending on religion); and finally the party was in favour of introducing *Sharia* law. This was the only party dissolution case from Turkey where the Court of Human Rights upheld the Constitutional Court's decision. Despite this, the decision, and especially the reasoning and language of the Court have given rise to considerable controversy. The Grand Chamber relied on a surprisingly stereotypical view of both personal laws and *Sharia* in coming to its conclusions.[64] The strength of feeling that was provoked can be seen in the decision of Welfare's successor party, Virtue, to withdraw an application from the Strasbourg Court: the Virtue Party had also been dissolved by the Turkish Constitutional Court.[65] Citing the Welfare Party case, as well as decisions regarding the wearing of veils in educational settings,[66] Virtue issued a statement making clear its opinion that the

[52] *Norwood v United Kingdom* [2005] 40 European Human Rights Reports SE 11.

[53] *Soulas v France* Application no. 15948/03, October 7 2008 (ECtHR).

[54] *Associated Society of Locomotive engineers and Firemen (Aslef)* v. *United Kingdom* Application no. 11002/05, 27 February 2007 (ECtHR).

[55] *Feret v Belgium* application no. 15615/07, 16 July 2009.

[56] *Jersild* v. *Denmark* (1994) 19 EHRR 1.

[57] *Ergin* v. *Turkey* 49566/99 applications nos. 48944/99, 50691/99, 63733/00 and 63925/00, 16 June 2005 (ECtHR); *Falakaoglu* v. *Turkey* no. 11840/02, October 10 2006 (ECtHR).

[58] *Giniewski* v. *France* Application no. 64016/00, 31 January 2006 (ECtHR).

[59] The aim of protecting the principle of territorial integrity is one such constitutional principle. This aim has been invoked for instance in cases from Turkey (*United Communist Party of Turkey* v. *Turkey* (1998) 26 EHRR 121.), Russia (*Vatan* v. *Russia* Application no. 47978/99, 7 October 2004 (ECtHR).) and Bulgaria (*United Macedonian Organisation Ilinden — Pirin and others* v. *Bulgaria* Application no. 59489/00, 20 October 2005 (ECtHR)).

[60] *Refah Paritisi (Welfare Party)* v. *Turkey* (2003) 37 EHRR 1

[61] *Zhechev* v. *Bulgaria* Application no. 57045/00, 21 June 2007 (ECtHR).

[62] *Linkov* v. *Czech Republic* Application no. 10504/03, 7 December 2006 (ECtHR).

[63] *Refah Paritisi (Welfare Party)* v. *Turkey* (2003) 37 EHRR 1.

[64] C. Moe "Refah Revisited: Strasbourg's Construction of Islam" Conference paper for *Emerging Legal Issues for Islam in Europe*; Central European University, Budapest, Hungary; 3-4 June 2005. Available at <http://www.strasbourgconference.org/papers/Refah%20Revisited-%20Strasbourg%27s%20Construction%20of%20Islam.pdf> Last Accessed on 22 March 2009.

[65] *Fazilet Partisi et Kutan* v. *Turkey* Application no. 1444/02, 27 April 2006. I am grateful to Eva Brems for this citation: Eva Brems "Human Rights as a Framework for Negotiating/Protecting Cultural Differences? An Exploration in the Case-Law of the European Court of Human Rights" Seminar on 24 January 2008 at QUB Law School.

[66] Notably, *Leyla Sahin* v. *Turkey* Application no. 44774/98.

ECtHR was prejudiced against Muslims and was incapable of offering impartial justice.[67]

SECURING THE TRANSITION TO DEMOCRATIC RULE

The process of democratisation in Eastern Europe has given rise to a specific reason for limiting political rights: the perceived need to restrict the political rights of those associated with the previous undemocratic regime. Lustration laws impose restrictions on the political rights and or employment rights of persons who were involved with or collaborated with the Communist era security services.[68]

The European Court of Human Rights has also been accepting of militant democracy type arguments in several cases emanating from Eastern Europe. In the early case of *Rekvenyi* the Court of Human Rights stressed that the historical context that Eastern European states were emerging from more than four decades of one party rule was an important consideration to be born in mind.[69] In that case, the Court of Human Rights upheld a constitutional ban on police officers participating in politics. Despite the reference to the historical context, such regulations are not unique to Eastern Europe: the ECtHR had earlier upheld a UK restriction on selected public servants from canvassing at elections or running for election.[70] The most striking ECtHR decision from Eastern Europe is perhaps the Grand Chamber decision of *Zdanoka v Latvia*.[71] In January 1991, the Communist Party of Latvia launched a coup attempt against the nascent Latvian democracy, allegedly with the intent of inviting the Soviet army in to the country. The attempt quickly petered out; five lives were lost. The CPL later supported the anti-Gorbachev coup in Moscow. In 1991 the CPL was declared unconstitutional. By a 1995 law, persons actively involved with the CPL after January 13 1991 were ineligible for election to Parliament. The Grand Chamber held that a state has the right to take steps to protect itself and the democratic order.[72] The Grand Chamber noted that the right to stand for election could be subject to limitations, and that such limitations did not necessarily have to be based on an individualised consideration of an individual's conduct; as long as general rules were not arbitrary, then that is sufficient to justify the limitation.[73] Latvian law allowed an individual to challenge in court the determination that she belonged to the prohibited category, which provided important safeguards.[74] While finding that there was no violation, the ECtHR drew attention to the Latvian Constitutional Court's ruling that there should be a time limit on the restriction; thus laying down a marker that the ECtHR might revisit its conclusion at a later date.[75]

CONCLUSIONS

For the most part, the European Court of Human Rights has admirably struck the balance in favour of human rights in a democratic society when considering the problems posed by supposedly anti-democratic political movements. Despite the controversial reasoning in the Welfare Party case, and some other "militant democracy" type language in other cases, the recent case law of the Court indicates a generally conscientious effort to apply human rights principles. The Court examines restrictions to ensure that they are prescribed by law, or a legitimate aim and necessary in a democratic society (proportionate).

This last point is the most crucial, especially the "least restrictive means" element of the proportionality test.[76] There are many types of restrictions that can be imposed on political rights, and states should have to justify the use of the particular measure selected. One of the most disturbing aspects of the Welfare Party case was the selection of the very drastic measure of party dissolution. It is clear from other cases and national examples that less drastic measures are available: exclusion from Executive office is one possibility available in Northern Ireland for instance, while Israel offers the compromise measure of disqualifying a party from running for election, without actually

[67] *Fazilet Partisi et Kutan v Turkey* Application no. 1444/02, 27 April 2006.

[68] See the Polish law in *Matyjek* v. *Poland* Application no. 38184/03, 29 June 2006, (ECtHR); *Luboch* v. *Poland* Application no. 37469/05, 15 January 2008 (ECtHR); *Jałowiecki* v *Poland* Application no. 34030/07, 17 February 2009 (ECtHR); *Zickus v Lithuania* application no. 26652/02, 7 April 2009; *Adamsons* v *Latvia* Application no. 3669/03, 24 June 2008 (ECtHR).

[69] *Rekvenyi* v. *Hungary* (1999) 30 EHRR 519 at paragraphs 48-49.

[70] *Ahmed* v. *United Kingdom* (1998) 29 EHRR 1.

[71] *Zdanoka* v. *Latvia* (2006) 45 EHRR 17, reversing the earlier decision of a Chamber in *Zdanoka* v. *Latvia* (2005) 41 EHRR 659.

[72] *Zdanoka* v. *Latvia* (2006) 45 EHRR 17 at paragraph 100.

[73] *Zdanoka* v. *Latvia* (2006) 45 EHRR 17 at paragraph 115.

[74] *Zdanoka* v. *Latvia* (2006) 45 EHRR 17 at paragraph 127.

[75] *Zdanoka* v. *Latvia* (2006) 45 EHRR 17 at paragraph 135.

[76] This point is emphasised by both Eva Brems and Samual Isaacharoff: E. Brems, "Freedom of Political Association and the Question of Party Closures" in Wojciech Sadurski (ed.) *Political rights under stress in 21st century Europe* (Oxford ; New York: Oxford University Press, 2006) 141-151; S. Issacharoff, "Fragile Democracies" (2007) 120 *Harvard Law Review* 1405, 1457. Cram also stresses proportionality, arguing that the Spanish ban on Batasuna was not necessary, as less restrictive measures could have sufficed: Ian Cram, "Constitutional responses to extremist political associations -ETA, Batasuna and democratic norms" (2008) 28 (1) *Legal Studies-Society of Public Teachers of Law* 68, 94.

dissolving it.[77] The possibility of denying certain forms of public funding also suggests itself.

The importance of the proportionality test was asserted by the Strasbourg court itself in later cases from Turkey dealing with the decision to remove certain parliamentarians from Parliament because the Constitutional Court had dissolved the relevant party. The Court of Human Rights concluded that this was too drastic a step; such a step tended to abolish the very substance of the right to run for election and to represent the sovereign people once elected.[78] The Strasbourg Court was influenced by the fact that Turkey had itself since introduced a more proportionate system (removal from Parliament only of those Parliamentarians whose words or conduct were the reason for the dissolution of a political party).[79] Even more clearly, in cases dealing with the removal from Parliament of members of the Virtue Party (following that party's dissolution by the Constitutional Court), the Court of Human Rights referred, with a hint of approval, to reforms to the Turkish Constitution. These reforms allowed tightened up the requirements for dissolution of a political party and allowed the Constitutional Court to impose a less severe sanction (denial of public financing).[80]

Any restrictions on political rights must be necessary in a *democratic* society. The theory of militant democracy is that a democratic state is entitled to take preventive steps against a political movement which uses undemocratic means (violence) or pursues antidemocratic goals. The legitimacy of such measures is questionable if the state is not itself committed to democratic means and goals. As Harvey notes it is not necessarily the case that Council of Europe states are ideal liberal democracies[81] and sometimes even established democracies fall short of the ideal. For this reason it is imperative that courts apply the human rights principles rigorously.

[77] Discussed in S. Issacharoff, "Fragile Democracies" (2007) 120 *Harvard Law Review* 1405, 1447; Mordechai Kremnitzer, "Disqualification of Lists and Parties: The Israeli Case" in A. Sajó (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing, 2004).

[78] *Sadak and others* v. *Turkey* Applications nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95), 11 June 2002 (ECtHR) at paragraph 40.

[79] Ibid at paragraph 37.

[80] *Silay* v. *Turkey* Application no. 8691/02, 5 April 2007, (ECtHR) at paragraph 35.

[81] P. Harvey, "Militant democracy and the European Convention on Human Rights" (2004) 29 (3) *European Law Review* 407, 419.