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**RESTRICTION OF POLITICAL FREEDOMS BY
LEGISLATION AGAINST INCITEMENT OF HATRED:
MILITANT DEMOCRACY OR INTERFERENCE IN
POLITICAL PROCESS?**

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Abstract

This thesis will overview the concept of militant democracy and its actual implementation in Russia and United Kingdom. The analysis would focus on two elements of militant democracy – criminal legislation for incitement and additional instruments – i.e. all other measures by state actors. Incitement legislation and its implementation will be compared by looking at specific elements, while the systems of additional instruments would viewed as a whole. The author will argue that the concept of ‘militant democracy’ is a specific political-judicial concept, influenced by experience of totalitarian movements abusing democracy, deeply embedded into international and national legal framework. By looking into specific national aspects of implementing militant democracy, the author will highlight the similarities and differences in approaches between the two jurisdictions.

Introduction

The aim of this thesis is to establish how the judicial systems of Russian Federation and the United Kingdom react to the challenge of extremist politics and whether that reaction is a) politically biased; b) disproportionate. The jurisdictions are chosen because they are among the few in Europe, which haven't experienced either some form of domestic far right dictatorship or Nazi occupation of their full territory.

The concept of 'militant democracy' was developed by German political scientist Karl Loewenstein in his 1930s work *Militant Democracy and Fundamental Rights*¹. 'Our democracy has to become militant if it is to survive'² – echoed Karl Mannheim. Following the World War 2 the principle has been applied in various constitutional systems. The prime example in this respect is of course Germany, where it has been applied against both Neo-Nazis and the Far Left. Another interpretation of militant democracy has been developed in Eastern Europe with prime target being former Communists. Another case, deserving mention, is Turkey, where local constitutional system, established especially strong safeguards in order to thwart the rise of the political Islam and maintain the secular character of the state.

The concept has been subject of conflicting evaluations, especially in the light of general post 9-11 trend towards strengthening the state at the expense of the human rights at least at some aspects³. However, even generally skeptical scholars conclude that 'the idea that the prohibition of hate speech and hate crime is necessary to protect the further victimization of vulnerable minorities and to protect their equality rights is perhaps the most attractive justification for militant democracy'⁴

1 Loewenstein, Karl *Militant Democracy and Fundamental Rights*, I, The American Political Science Review, Vol. 31, No. 3 (Jun., 1937), pp. 417-432

2 Mannheim, Karl *Diagnosis of our time: wartime essays of a sociologist*, p.7

3 See e.g. Macklem, Patrick, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe* (August 17, 2010). Available at SSRN: <http://ssrn.com/abstract=1660649>, Sajo, Andras *From Militant Democracy to the Preventive State?* http://www.cardozolawreview.com/content/27-5/SAJO_WEBSITE.pdf Gomez J., Smith A. *September 11 and Political Freedom: Asian Perspectives* //Johannen U., Smith A., Gomez J. September 11 and Political Freedom: Asian Perspectives. Singapore: Select Publishing, 2003. P. XXXI. Gross O. Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional // Yale Law Journal. 2003. Vol. 112. Mouffe, Chantal *The Limits of Liberal Pluralism: Towards an Agonistic Multipolar World Order* // Sajo, Andras (ed.) *Militant Democracy*, 2004 Roach, Kent *Militant Democracy and Anti-Terrorism Legislation: Some Eastern and Western Comparisons* in A. Sajo ed. *Militant Democracy* (Amsterdam: Eleven International Publishing, 2004) at pp.171-207 and translated in Russian in *Konstitutionnoe Pravo* (Russian constitutional law journal) Tyul'kina, Svetlana *Militant democracy in Germany and Russia* Budapest : CEU, Budapest College, 2006; O'Connell, Rory *Militant Democracy and Human Rights Principles* Constitutional Law Review, 2008, #1, pp.84-89

4 Roach, *Supra*, p.183

Hence, the primary question is not whether it is needed, but how it should be shaped in order to be proportionate. The approaches taken by respective judicial systems would be analyzed by studying both the legislative framework and practice of the courts and law enforcement. The benchmark would be provided by the judgments of the European Court of Human Rights (ECHR), which employs the test of whether the violation is a) proscribed by law; b) necessary in democratic society; c) proportionate to the pursued aim. Indeed, the national legislation in question is currently being challenged in Strasbourg both in cases of Russia (*Samodurov and Vasilovskaya v. Russia*) and the UK (*Redfearn v. United Kingdom*), underscoring the timely nature of this work.

Based on the conducted research, I would conclude that while the general policy of ‘militant democracy’ can be deemed within the national ‘margin of appreciation’, some instances of its implementation clearly show signs of being disproportionate and some other instances can be seen as politically motivated, despite the difficulty in establishing the threshold.

My thesis is divided into four parts. In the first one I will review the history of ‘militant democracy’ both as a political and legal concept and as a constitutional principle. Then I’ll turn to the view of ‘militant democracy’, adopted in its judgments by the European Court of Human Rights⁵. I will argue that the Court, despite the strong restrictive Article in the European Convention on Human Rights never accepted that ‘militant democracy’ can go beyond carefully drawn limitations. In second chapter I will review the legislative framework, existing in Russia and the United Kingdom and the law enforcement. Third chapter would focus on the existing legislative framework, primarily concerning criminal legislation⁶, but also withdrawing certain civil rights from the ‘enemies of militant democracy’, e.g. barring them from standing in elections or denying them access to the civil service.

⁵ X. v. Italy, Glimerveen and Hagenbeek v. The Netherlands, Witzsch v. Germany, Norwood v. United Kingdom, Refah v. Turkey, Kosiek v. Federal Republic of Germany, Vogt v. Germany

⁶ Russian Criminal Code of 1996 with subsequent amendments, Federal law of 2002 on Prevention of Extremist Activities, UK Race Relations Acts of 1965 and 1976, Public Order Act of 1986

Chapter I. Concept of 'militant democracy' and its interpretation

The very concept of 'militant democracy' is derived from the seminal work of German political scientist Karl Loewenstein. He argued that

the lack of militancy of the Weimar Republic against subversive movements, even though clearly recognized as such, stands out in the post-war predicament of democracy both as an illustration and as a warning⁷

Loewenstein called for 'democracy has to be redefined'⁸ and established a total of 13 sets of measures, undertaken by contemporary European governments to counter the extremist threat⁹.

These ranged from open proscription of the organizations¹⁰ to the measures to protect the reputation of state institutions and politicians, including anti-incitement legislation¹¹. Loewenstein accepted that the new concept wasn't without complications, as

the border-line between unlawful slander and justified criticism as lawful exercise of political rights is exceedingly dim, and the courts of democratic states are called upon to decide on legal grounds what in fact is a political problem for which a new *ratio decidendi* is yet to be discovered¹².

The argument for 'militant democracy' was far from being universally accepted. E.g. Karl Jaspers explicitly challenged Loewenstein's rationale by emphasizing cultural aspects of Hitler's rise to power¹³. Jeremy Waldron argued that illiberal policy outcomes are inherent not only to democratic procedures, but to other procedures in a divided society¹⁴. On the other hand, Andras Sajo argues for such interpretation of militant democracy where courts as independent authorities¹⁵ would counterbalance what Loewenstein defined 'politics of emotion'¹⁶. He also pointed out to the possibility of 'cascade effect', whereby e.g. routinely unpunished instances of hate speech could

7 Loewenstein, p.426

8 Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, *The American Political Science Review*, Vol. 31, No. 4 (Aug., 1937), p.657

9 Ibid, pp.645-655

10 Ibid, p.646

11 Ibid, p.651

12 Ibid, pp.653-654

13 Karl Jaspers, *Wohin treibt die Bundesrepublik?* München, 1966

14 Jeremy Waldron, *Law and Disagreement*, Oxford, 2001

15 Which is a deviation from the original concept of Loewenstein, who seemed more concentrated on the role of legislature

16 Andras Sajo, *Militant Democracy and Transition towards Democracy* in Andras Sajo (ed.) *Militant Democracy*, p.213

trigger mass violence¹⁷. Such an argument would generally reinforce the case for anti-incitement legislation.

The concept of ‘militant democracy’ would seem direct opposite of the principle, established by the U.S. Supreme Court in *Brandenburg v. Ohio* – the hallmark of liberal concept of marketplace of ideas. As Steven Gey put it,

the First Amendment jurisprudence... creates a constitutional mandate that society must be open to all political ideas, including those that advocate destroying the very political structure that allows such ideas to be expressed¹⁸

The radical difference between U.S. and European approach is neatly summarized e.g. by Ruti Teitel:

In the United States, the values animating the "free speech" doctrine tend to draw from liberal philosophical values underlying the U.S. Constitution. Rights are often framed in a radically individualist fashion, along with a related commitment to keeping the public sphere free of regulation to the greatest extent possible. By contrast, in Europe, at both the regional (European Convention) and domestic levels, constitutional doctrine relating to freedom of expression has tended to be far more protective of other, non-speech-related communitarian values, such as preventing social unrest, or promoting societal inclusiveness and anti-discrimination values¹⁹

However, U.S. Supreme Court of the pre-*Brandenburg* era employed standards of ‘clear and present danger’, which was rather close to the post-war European standards of militant democracy.

While not universally accepted, the idea that democracy ought to have restrictions in order to protect itself from hostile forces gained widespread recognition in postwar world, both in international instruments and national constitutions.

The last article of the Universal Declaration of Human Rights mandated that

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 herein²⁰.

Article 5 of the International Covenant on Civil and Political Rights established that:

Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant²¹

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that:

¹⁷ Ibid, p.216

¹⁸ Steven G. Gey *The Brandenburg Paradigm and Other First Amendments*, 12 U. Pa. J. Const. L. 971

¹⁹ Rudi Teitel *Militating Democracy: Comparative Constitutional Perspectives*, 29 Mich. J. Int'l L. 49

²⁰ The Universal Declaration of Human Rights, URL: <http://www.un.org/en/documents/udhr/index.shtml>

²¹ International Covenant on Civil and Political Rights URL: <http://www2.ohchr.org/english/law/ccpr.htm>

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination²².

The provision was deemed too far-reaching by many Western states (e.g. Austria, Belgium, Ireland, Italy, Malta, France, United States), who declared their reservations to the Article to protect the principles of freedom of speech²³. United Kingdom was no exception, declaring that:

It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4²⁴.

Committee on the Elimination of Racial Discrimination (CERD), established under the auspices of the Convention, adopted a number of documents, concerning the implementation of Art.4 In General Recommendation VII of 1985, CERD

Recommends that those States parties whose legislation does not satisfy the provisions of article 4 (a) and (b) of the Convention take the necessary steps with a view to satisfying the mandatory requirements of that article²⁵

In subsequent General Comment XV, adopted in March 1993, CERD clarifies its position, by stating that:

1. When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.

22 International Convention on the Elimination of All Forms of Racial Discrimination, URL: <http://www2.ohchr.org/english/law/cerd.htm>

23 United Nations Treaty Collection URL: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-2&chapter=4&lang=en

24 Ibid

25 Committee on the Elimination of Racial Discrimination, General Recommendation 7, Measures to eradicate incitement to or acts of discrimination (Thirty-second, 1985), U.N. Doc. A/40/18 at 120 (1985), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 199 (2003).

2. The Committee recalls its General Recommendation VII in which it explained that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.

3. Article 4 (a) requires States parties to penalize four categories of misconduct:

- (i) dissemination of ideas based upon racial superiority or hatred;
- (ii) incitement to racial hatred;
- (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and
- (iv) incitement to such acts.

4. In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

5. Article 4 (a) also penalizes the financing of racist activities, which the Committee takes to include all the activities mentioned in paragraph 3 above, that is to say, activities deriving from ethnic as well as racial differences. The Committee calls upon States parties to investigate whether their national law and its implementation meet this requirement.

6. Some States have maintained that in their legal order it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination. The Committee is of the opinion that article 4 (b) places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment. These organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished²⁶.

1950 European Convention on protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) accepted the idea of militant democracy not only by including limiting clauses into Articles 10 (freedom of speech) and 11 (freedom of association), but also by including a specific Article 17, which read:

‘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’²⁷

The European Commission for Human Rights (hereinafter – the Commission) had the opportunity to test this provision early on. In 1957 decision *Communist Party (KPD) v. Federal Republic of Germany* it ruled the party goals on establishing the ‘communist social order by the means of proletarian revolution and the dictatorship of the proletariat’ to be contrary to the Convention²⁸. In

26 Committee on the Elimination of Racial Discrimination, General Comment 15, states parties shall condemn all propaganda and all organizations based on ideas of superiority / states parties undertake to adopt measures / states parties shall declare an offence punishable by law, U.N. Doc. 7A/48/18, p. 114-115; HRI/GEN/1/Rev.3, p. 108-109

27 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, URL: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

28 *Communist Party (KPD) v. the Federal Republic of Germany*, decision of 20 July 1957, cited in Weber A. Manual

1961, the European Court for Human Rights (hereinafter – the ECtHR) in *Lawless v. Ireland* ruled that

‘the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms’²⁹

In 1976 in *X. v. Italy* the Commission ruled a complaint by the person, charged with attempting to reconstitute Fascist party to the point of copying its emblem, to be manifestly ill-founded³⁰. The Commission ruled that the interference pursued a legitimate aim of ‘protecting democratic institutions’³¹. But perhaps the most significant of those early Commission cases on militant democracy was *Glimmerveen and Hagenbeek v. The Netherlands*. Here the Commission explicitly stated that

‘the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention’³²

However, subsequent decades challenged the ECtHR with deciding on proportionality of restrictive legislation in Turkey and Post-Communist countries, leading to clarification of principles, guarding the application of Articles 10, 11 and 17. A continuing trends in those decisions was the reading of Art. 11 in conjunction with Art.10 and establishment of a higher threshold for state interference, defined by ‘pressing social need’. In *Ždanoka v. Latvia*, the Court established a general framework for militant democracy, stating that:

‘Every time a State intends to rely on the principle of “a democracy capable of defending itself” in order to justify interference with individual rights, it must carefully evaluate the scope and consequences of the measure under consideration’³³ in order to ensure the balance ‘between the requirements of defending democratic society on the one hand and protecting individual rights on the other’³⁴

In *United Communist Party v. Turkey* the Court emphatically argued that:

‘democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it’³⁵

while

on hate speech, Strasbourg, 2009 p.24

29 *Lawless v. Ireland* (1961), application No.332/57, paragraph 7

30 *X. v. Italy* (1976), application No.6741/74

31 *Ibid*

32 *Glimmerveen and Hagenbeek v. The Netherlands* (1979), joint applications no.no.8348/78 & 8406/78

33 *Ždanoka v. Latvia* [Grand Chamber] (2006), application no. 58278/00, paragraph 100

34 *Ibid*

35 *United Communist Party of Turkey and Others v. Turkey* (1998), application no. no.19392/92, paragraph 45

‘political parties are a form of association essential to the proper functioning of democracy’³⁶

Hence contracting parties were afforded only limited margin of appreciation³⁷, while decisions on party bans had to be backed by ‘convincing and compelling reasons’³⁸. In *Socialist Party v. Turkey* the ECtHR held that

‘there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned’³⁹

Hence, the Court seemed to establish a higher threshold, whereby the adherence to democratic norms, without explicit proof to the contrary, would generally exclude the application of Art.17. In *Partidul Comunistilor (Nepeceresti) and Ungureanu v. Romania* the ECtHR, rejecting the government's that historical context may suffice the need for interference, observed ‘that context cannot by itself justify the need for the interference’⁴⁰ The general trend of the Court has been to reject ‘transitional’ concerns when dealing Art.11 rights, while generally allowing a wider margin of appreciation of Protocol 1, Art. 3 rights (to stand in the elections) while at the same time displaying genuine interest in progress of the transition⁴¹.

The standard for actual threshold of severity, concerning a ban on political organization has been established by the ECtHR in a seminal Grand Chamber judgment *Refah v. Turkey*. From the outset, the Court stated that

‘the freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions’⁴²

In reasoning, which echoes Chief Justice Vinson's definition of ‘clear and present danger’ in *Dennis v. United States*, the Court emphasizes:

‘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... where the presence of such a danger has been established... a State may “reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil

36 Ibid, paragraph 25

37 Ibid, paragraph 46

38 Ibid

39 *Socialist Party and Others v. Turkey* (1998), application no. 21237/93, paragraph 45

40 *Partidul Comunistilor (Nepeceresti) and Ungureanu v. Romania* (2006) application no. 46626/99, paragraph 58

41 Hamilton M., *Transition, Political Loyalties and the Order of the State*

42 *Refah Partisi v. Turkey* (Grand Chamber), applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, paragraph 96

peace and the country's democratic regime"⁴³

Such conduct would not only be proportionate, but even fulfilling a positive obligation under Art.1⁴⁴

For the actual definition of a threat to democratic society, the Court establishes a four-prong test:

(i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society"⁴⁵

The logic of militant democracy underpins a number of constitutional documents of both post-war and post-Communist period. Most characteristic of post-war period is the Basic Law of Germany, where militant democracy assumed a specific national face of 'democracy, able to defend itself' (streitbare Demokratie). 'Militant democracy' provisions within the Basic Law include:

Article 9, Section B

Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited⁴⁶.

Article 18

Whoever abuses the freedom of expression... in order to combat the free democratic basic order shall forfeit these basic rights⁴⁷

Article 21, Section 2

Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional⁴⁸.

Gunter Frankenberg argues that initial 'militant' approach towards extremism within German constitutional framework is giving way to two new ones – anti-National Socialist and civil society paradigm⁴⁹. While the former derives from the interpretation of National Socialist tragedy from the point of view of the 'learning sovereign'⁵⁰, the latter emphasizes the principle of reciprocal

⁴³ Ibid, paragraph 102-103

⁴⁴ Ibid

⁴⁵ Ibid, paragraph 104

⁴⁶ URL: <https://www.btg-bestellservice.de/pdf/80201000.pdf>

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Frankenberg, The learning sovereign // Sajo A, Op cit, pp.113-132

⁵⁰ Ibid, pp.128-129

recognition within the society⁵¹.

Most Post-Communist constitutions adopted in the wake of the wave of democratization of Central and Eastern Europe after 1989 maintain explicit anti-totalitarian and one party-state provisions, inspired partly by German model. Russian Constitution of 1993 is no exception. It contains two provisions explicitly aimed at countering the extremist threat. Art. 13 states that

'the creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited'⁵²

This provision is reinforced by Art. 29, establishing the constitutional framework for freedom of speech, which states that

'The propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed. The propaganda of social, racial, national, religious or linguistic supremacy shall be banned'⁵³

Since 2001, a generally lenient regulatory regime of political parties gave way to ever more stringent restrictions (e.g. explicitly banning regional and religious parties and setting membership criteria at 50 thousand citizens all over Russia with further regional thresholds), at the same time enhancing their role in the electoral process at the expense of civic organizations and independent candidates. A 2001 federal law on political parties, which paved the way for a more stringent regulatory regime, emphasized the need for 'a more clear regulatory framework for role and place of political parties among institutions of civil society'⁵⁴

All the principal restrictions were upheld by the Constitutional Court. A 2004 decision emphasized the differences between political parties and civic or religious organizations in the manner akin to the 1958 French Constitution. 'By consolidating political interests of citizens, they [political parties] help formulate the political will of the people'⁵⁵

In a 2007 decision, upholding an essentially punitive membership requirements for political parties,

51 Ibid, p.131

52 URL:<http://www.constitution.ru/en/10003000-02.htm>

53 URL:<http://www.constitution.ru/en/10003000-03.htm>

54 Poyasnitel'naya zapiska k proektu federalnogo zakona 'O politicheskikh partiyakh' (in Russian)
URL:<http://izbirkom.narod.ru/law/soprov.htm>

55 Decision #18-P of December 15, 2004

the Court went one step further, arguing that 'only big enough and well-structured parties'⁵⁶ can fulfill the aforementioned role, at least at 'the current stage of the development'⁵⁷. Finally, in 2005 decision, upholding a ban on regional parties, the Court emphasized the transitional paradigm even further, arguing that

'creation of regional and local political parties in every subject of Federation could lead ... to the emergence of multiple regional party systems, which threatens to turn the emerging party system into a factor, weakening the emerging Russian democracy'⁵⁸

The concept of militant democracy can't be easily summarized. Basically, it's centered about the premise that democracy can carry the seeds of its own destruction. Hence, it must have certain instruments that would ensure its 'immunity' from internal threats. However, in European context, due to vigilant position of the ECtHR, such instruments must generally be used as a matter of last resort, provided that a fair balance is struck between the interests of state and an individual. Criminal responsibility for incitement in this context can be viewed not only as a instrument of enforcing particular bans, but also as a statement of vigilance on the part of the state. However, such measures must also be clear and foreseeable, because otherwise they will have an opposite effect. Hence, when analyzing the systems of militant democracy in place in both of jurisdictions, attention will center on the effectiveness and clarity of general framework and proportionality of measures.

⁵⁶ Decision #11-P of July 16, 2007

⁵⁷ Ibid

⁵⁸ Decision #1-P of February 1, 2005

Chapter II. Criminal liability for incitement

2.1. Overview of criminal incitement legislation

Russian Criminal Code establishes criminal liability for 'Incitement of Hatred or Enmity, as well as Abasement of Human Dignity' (Art. 282)⁵⁹. It must be noted that the offense is included in the part of the Code, titled 'Crimes Against the Fundamentals of the Constitutional System and State Security' along with High Treason and Espionage⁶⁰, thus underscoring the perception of gravity of the crime by the legislator. The article was part of the code since its adoption in 1996. Initial version defined the crime as 'actions, inciting national, racial or ethnic hatred, abasement of national dignity, propagating exclusiveness or inferiority of citizens on the basis of religion, racial or ethnic origin'⁶¹. In order to secure the conviction, the prosecution had to prove that the crime has been committed intentionally, in public or by the means of mass media⁶². The crime is deemed as being of higher gravity, if committed: a) with the use of violence or with the threat of its use; b) by a person through his official position; c) by an organized group⁶³. The Article envisaged punishment of up to 4 years, or in case of an aggravated form, 5 years of jail⁶⁴. Thus it fell into the category of 'medium-gravity crime'⁶⁵. In 2003 the Art. 282 underwent significant revisions. The legislator widened the scope of the article to include not only race, religion or ethnicity, but also sex, language, origin, as well 'as affiliation to any social group'⁶⁶. At the same time, the amendments changed the maximum jail term in absence of aggravating circumstances from 4 to 2 years, thus putting the crime in the category of 'petty crimes' with practical consequences including that pre-trial detention can't be served by the court, absent some special circumstances. The amendments

59 URL: <http://legislationonline.org/documents/section/criminal-codes>

60 Ibid

61 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=43266;dst=101830>

62 Ibid

63 Ibid

64 Ibid

65 Ibid

66 Ibid

were introduced by a member of liberal Union of Right Forces party Aleksandr Barannikov and were based on the need to distinguish between violent and non-violent extremism⁶⁷. However, the particular need to broaden the scope of protected groups, let alone to include a particularly controversial category of ‘any social group’ isn’t clear from the legislative history. A 2007 revision of the Criminal Code introduced ‘committing a crime on the basis of political, ideological, racial, ethnic or religious enmity or hatred, enmity or hatred towards a certain social group’ as a general circumstance, aggravating a crime, as well as particular circumstance, entailing a heavier penalty for certain common crimes (Murder, Intentional Infliction of a Grave Injury, Intentional Infliction of Injury of Average Gravity Health, Intentional Infliction of Light Injury, Battery, Torture, Threat of Murder, Involvement of a Minor in the Commission of a Crime, Hooliganism, Vandalism, Outrages upon Bodies of the Deceased and Their Burial Places)⁶⁸. Two aspects of this revision must be taken into account. Firstly, it has an even wider scope than Art. 282. Secondly, now it’s hard to distinguish between ‘violent incitement’, covered by Art.282 and certain common crimes, motivated by extremism (e.g. Battery). The rapid rise of prosecutions under Art.282 since 2002 has lead to higher public scrutiny and intense discussions over its necessity. E.g. in March 2009 a notorious deputy chairman of State Duma Vladimir Zhirinovskiy introduced a draft law to abolish Art. 282. In his opinion, ‘it’s an Anti-Russian article, on the basis of which only Russians are sentenced to jail under the pretext that their words or actions incite ethnic hatred’⁶⁹ The government in its submission to the State Duma argued that the necessity of maintaining Art.282 was established by the need to enforce Articles 19, 13 and 29.2 of the Constitution⁷⁰. United Russia member of parliament Dmitry Vyatkin replied, echoing the arguments of Constitutional Court that ‘any violation of human dignity or incitement of ethnic hatred... is an assault on the fundamentals of the constitutional order’⁷¹ and ‘a direct open threat to the existence of the state... which is called of a country of imperial type,

67 URL: <http://www.memo.ru/hr/gosduma/60/22.htm>

68 Federal Law of July 24, 2007 #211-FZ URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=52146;fld=134;dst=100022>

69 URL: <http://transcript.duma.gov.ru/node/166/?full>

70 URL: [http://asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&work/dz.nsf/ByID&C333FAF33747F298C325758D00406B42](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&C333FAF33747F298C325758D00406B42)

71 URL: <http://transcript.duma.gov.ru/node/166/?full>

because it's one country for all'⁷² The representative of the Communist Party argued that while Art.282 is needed for hate crimes, its unacceptable that it makes criticizing the authorities a criminal offence⁷³. In the final vote, Zhirinovsky's draft was supported only by the members of his own party⁷⁴. In March 2011, in the wake of riots in the Moscow city center by the Far Right football fans, a group of United Russia parliament members proposed amending Art.282 to establish higher penalties for the acts of incitement, which are committed by an organized group or lead to significant harm, thus essentially attempting to apply the principles, established in *Brandenburg v. Ohio*⁷⁵.

United Kingdom Public Order Act of 1986 establishes criminal responsibility for incitement, which it describes as 'using threatening, abusive or insulting words' or behaviour, displaying and distributing written material, performing a play, broadcast or a visual recording⁷⁶. The act establishes a two-prong test for defining incitement, namely:

- a) the material in question must be 'threatening, abusive or insulting';
- b) a person intended to stir up racial hatred or it was likely to be stirred up, 'having regard to all the circumstances'⁷⁷ Unlike the Russian legislation, the British one has a much wider scope of operation and detailed concept of 'public space', stating 'it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling'⁷⁸ Also the Act includes an important caveat that any prosecution for the incitement must be authorized by the Attorney-General for England and Wales. On the one hand, it serves as a procedural safeguard, while on the other – creates potential of politicizing the process, since Attorney-General is a political official. The 1986 Act followed a number of instruments of 'military democracy', starting

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ URL:http://www.gazeta.ru/politics/2011/03/11_a_3552369.shtml

⁷⁶ URL:<http://www.legislation.gov.uk/ukpga/1986/64>

⁷⁷ Ibid

⁷⁸ URL: <http://www.legislation.gov.uk/ukpga/1986/64>

with 1936 Public Order Act, pushed by the need to tackle the conceived threat, posed by the British Union of Fascists. However, this Act dealt mainly with regulating public assemblies and banning paramilitary groups, while regulation of speech was limited to prohibition and punishment of words, likely to cause breach of peace (i.e. the regulation was similar to the U.S. ‘fighting words’ doctrine). A fundamental change happened in 1965, when Race Relations Act identified as an offence ‘to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins’⁷⁹ whether by written or uttered word⁸⁰. As the current legislation, the prosecution had to pass a two-prong test by proving that material in question threatening, abusive or insulting and the defendant intended to incite⁸¹. The introduction of incitement provision by the Labour government was opposed by Conservative opposition faced a hostile reaction from a number of right-wing MPs. Shadow Home Secretary Peter Thorneycroft argued that ‘free speech, throughout the history of this country, has consisted in allowing people whom the majority of their fellow citizens considered to be very evil, or, at any rate, very misguided, to say things which that majority thought were very wrong, or evil, or misguided’⁸², while ‘the history of the loss of freedom of speech throughout the West is studded with examples of Governments who have twisted their statute law to catch a wretched creature like Jordan’⁸³ (a leading British Neo-Nazi) A subject of heated discussion was whether to include the prohibition of incitement on religious grounds, with the government arguing that e.g. Jews would still be covered by the provisions of the Act, concerning nationality⁸⁴. Eventually, a specific bill, establishing penalties for religious incitement was passed only in 2006 (Racial and Religious Hatred Bill 2006). 1976 Race Relations Act dropped the burden of prosecution of proving intent of inciting hatred, changing it to a current provision that ‘hatred was likely to be stirred up’. Initially, the 1986 Act set the penalty for incitement at two years of jail. However, following the adoption of Anti-terrorism, Crime and Security Act 2001, the

79 URL: <http://hansard.millbanksystems.com/commons/1970/feb/17/race-relations-act-1965-amendment>

80 Ibid

81 Ibid

82 Hansard, 03.05.1965, vol.711, col.953

83 Ibid, col. 954

84 Ibid, col. 1053

maximum penalty has been increased to 7 years⁸⁵.

Comparing the criminal legislations in two jurisdictions, one has to note:

- a) a wider language in Russian legislation, covering not only express incitement, but also abasement of dignity and calls to discrimination;
- b) a wider scope of groups, which can be victims of incitement in the Russian legislation;
- c) lack of express requirement to prove intent in British legislation, unlike in the Russian one;
- d) a wider scope of public space in British legislation;
- e) an involvement of political official (Attorney-General) in the British procedure;
- f) tougher penalties in British legislation.

2.2. Enforcement of criminal incitement legislation

In its early years, the enforcement of Art.282 was rare and patchy. According to the statistics of the Interior Ministry, only 13 investigations pursuant to the Article have been launched during 1997-2000 with charges brought against 11 persons⁸⁶. However, the trends changed following the adoption of Federal Law on Combating Extremist Activities in 2002. E.g. in 2006 authorities launched 173 investigations pursuant to Art.282 with charges brought against 103 persons and 54 persons sentenced by the courts⁸⁷, while in the first half of 2008 alone 61 person was sentenced⁸⁸.

Most of those cases indeed concern Far Right and Islamic extremists. However, in certain instances, the application of the article raised grave doubts about its proportionality. One of the first of such cases involved the now Strasbourg applicants Samodurov and Vasilovskaya, who back in 2003 organized a controversial exposition 'Caution, religion!'. The exposition opened in January, 2003 in Sakharov center, was open to the public and admission was free⁸⁹. Exposition contained a number

85 URL: <http://www.legislation.gov.uk/ukpga/2001/24/section/40>

86 Gosudarstvo protiv radikal'nogo natsionalizma. Chto delat' I chto ne delat'

87 Statistika ugovolnykh del i prigovorov po st.st. 282, 282-1 I 282-2 UK RF URL: <http://www.sova-center.ru/racism-xenophobia/publications/2007/05/d10921/>

88 Ofitsialnyi otzyv Verkhovnogo suda RF URL: [http://asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&work/dz.nsf/ByID&677FEB5B915C95B1C325758D00405E0E](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&677FEB5B915C95B1C325758D00405E0E)

89 Decision on admissibility. Samodurov and Vasilovskaya v. Russia (Application no. 3007/06), p.2

of exhibits, highly sarcastic and critical of the Christian religion⁹⁰. Four days after the opening of the exposition was attacked by a an organised group of self-professed Orthodox believers, who broke into the exhibition hall and destroyed a significant number of exhibits⁹¹. Hooliganism charges were brought against the perpetrators, but later dropped, following the decision of the court, which found investigation unlawful on procedural grounds⁹². On the other hand, following a complaint by a member of State Duma, criminal charges under ‘aggravated part’ (‘use of official position’) of Art.282 were brought against the organizers of the exhibition⁹³. In March 2005 the court found the organizers guilty, concluding that ‘the defendants committed actions aimed at inciting hostility and undermining the dignity of a group of persons on the basis of their nationality and religious views’⁹⁴. The court’s based its reasoning on the assumption that ‘the display of the aforementioned exhibits ... aroused, in a large segment of the population mainly made up of Orthodox believers, hostility not only towards the defendants and participants in the exhibition, but also towards other persons who share their views... the majority of works related to the Russian Orthodox Church, most of whose followers are ethnic Russians. In many of its aspects, Russian culture emerged from the traditions and rites of the Russian Orthodox Church; hence, anything which defiles and denigrates images depicting Orthodox holy objects is perceived by believers as undermining their ethnic dignity’⁹⁵. This argument is, of course, pretty close to the one, made by the ECtHR in *Otto-Preminger* that ‘duties and responsibilities’ may include ‘in the context of religious opinions and beliefs ... an obligation to avoid as far as possible expressions that are gratuitously offensive to others’⁹⁶. However, if *Otto-Preminger* concerned only the ban of the event by the authorities, the case of Samodurov and Vasiolvsckaya concerns a criminal prosecution, which is a much more severe interference with a Convention-protected principle. Hence, the state has not only to defend the basis of interference, but also its proportionality. This can prove to be particularly difficult, as one can

90 Ibid

91 Ibid, p.3

92 Ibid, p.4

93 Ibid

94 Ibid, p.7

95 Decision on admissibility. Samodurov and Vasilovskaya v. Russia (Application no. 3007/06), p.9

96 *Otto-Preminger Institut v. Austria* (Application no.13470/87), p.14

find a provision, absolutely fit for purpose in the Russian Misdemeanor Code, where Art. 5.26, inter alia, establishes punishment for 'insulting the religious feelings of citizens or the desecration of venerated objects, signs and emblems of ideological symbolism'⁹⁷ Thus, the state probably has to prove the existence of 'threshold of severity', separating Art.282 from Art. 5.26

'Threshold of severity' also came to the fore in another highly publicized case under Art. 282. In July 2008, a court in Komi Republic capital city Syktyvkar found a local blogger Savva Terentyev guilty of inciting hatred towards policemen as a social group for leaving a comment in a blog, that called members of the police force 'the dumbest animals' and proposed to burn an 'infidel cop' twice a day on a central square of each Russian city in a special oven 'like in Auschwitz'⁹⁸ The blogger, according to the court, 'intended to instigate social strife, escalate conflict and differences in the society'⁹⁹ and for this purpose juxtaposed police and the people¹⁰⁰. Trial judge established that 'members of the police represent a rather big social group – a number of people, united by common activities'¹⁰¹ Terentyev's didn't totally contend this notion, merely arguing that his comment meant only 'antiheroes, who behave rudely, unlawfully imprison and use office for personal gain' and that the statement about Auschwitz was hyperbolic¹⁰²

The application of 'social group' in criminal incitement cases wasn't a singular occurrence. E.g. recently a similar prosecution has been launched in Mari El republic, where a local Internet user has been charged under Art.282 with creating in a popular social network *Vkontakte* entitled 'Kick the cops! Save Russia'¹⁰³ In April 2010 charges for inciting hatred towards police were brought against a newspaper editor in Tyumen region¹⁰⁴ and in July 2008 against the editors of leading independent newspaper in Dagestan¹⁰⁵. However, in same month a court in Moscow acquitted a prominent blogger of inciting hatred towards members of the police (whom he called 'an organized mob' and

97 Kodeks ob Administrativnykh Pravonarusheniyakh RF / Misdemeanor Code of the RF as of Feb.7, 2011 // Konsultant Plus

98 Verdict of Syktyvkar City Court on Case #1-396/08 of July 7, 2008 Accessible at URL:<http://mezak.livejournal.com/132168.html>

99 Ibid

100 Ibid

101 Ibid

102 Ibid

103 URL:<http://www.pravo.ru/news/view/49214/>

104 URL:<http://www.pravo.ru/news/view/30919/>

105 URL:<http://www.pravo.ru/news/view/12222/>

remarked that 'kicking anyone in police uniform is direct enough') and liberals (about whom he wrote 'kill the bastards... until we die ourselves')¹⁰⁶. Trial judge concluded that neither the former, nor the latter constitute a social group. In certain instances, the application of the concept assumes rather bizarre forms. E.g. in February 2011, four members of Antifa movement were found guilty by a court in St.Petersburg for assaulting people due to their belonging to the 'opposing social group' of 'Russian nationalists'¹⁰⁷. In other instances, the concept may assume political dimension. E.g. in January 2011, investigating authorities in Kirov region charged a political activist with inciting hatred towards members of parliament as a social group¹⁰⁸. In May 2010, a court in Voronezh region found a local nationalist politician guilty under Art.282 of, inter alia, inciting hatred towards political elite as a social group¹⁰⁹. Hence, we can note the problematical pattern of applying the concept of 'affiliation to any social group', underscoring its over breadth. One has to note that the Constitution in Articles 13 and 29 explicitly prohibits only 'social strife', which is a narrower concept. Neither the legislative history of Art.282, nor the government's submission on Zhirinovskiy's draft law point out that why a wider standard is needed.

Interestingly, the judge in Terentyev case mentioned Art. 10 of the European Convention, interpreting it as not covering the actions in question as they 'didn't represent critique – i.e. discussion, highlighting the disadvantages or judging something concrete'¹¹⁰. Such argument, although facially overbroad, may have some basis in ECHR jurisprudence, e.g. *Castells*, where although calling governments for 'restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media'¹¹¹, the Court left the open door, allowing the authorities 'to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith'¹¹²

However, once again one has to question proportionality of criminal punishment in this case,

106Verdict of Dorogomilovskiy District Court of Moscow City on Case #1-302/08 of June 26, 2008, Available at URL:<http://timur-kniazev.livejournal.com/927145.html>

107URL:<http://www.pravo.ru/news/view/48154/>

108URL:<http://www.pravo.ru/news/view/47347/>

109URL:<http://www.pravo.ru/news/view/30919/>

110Ibid

111Castells v. Spain

112Ibid

considering that the comment in question was probably read by no more than a dozen people with trial, resulting in a much wider publicity. Another questionable aspect of the case, repeated in other instances, is whether to interpret Internet as part of mass media, therefore applying the specific approach of Art.282. The defendant argued that his comment was addressed to the owner of the blog and he had no intention to address the public¹¹³. However, the judge took the contrary position, ruling that comment has been left at the website, access to which has remained unrestricted to the general public, remaining there for a month¹¹⁴. Thus, a dangerous precedent has been set, whereby bloggers and other creative Internet users may be subjected to the same level responsibility as journalists without corresponding legal safeguards. Finally, another controversial aspect of the case is the role of expert's testimony. Although, the verdict states that 'the text in question can't be subject of dubious interpretation, since it's comprehensible to any average Russian speaker...' ¹¹⁵ it relies heavily on expert linguistic and socio-humanitarian evidence. Use of such evidence has become a constant feature in cases under Art.282. Such a practice is mandated not by a specific provision of Criminal Procedure Code, but rather by 'methodological recommendations' of Prosecutor's General Office, issued back in June, 1999, which advise public prosecutors that 'for correct qualification of deeds, connected with incitement of ethnic, racial or religious hatred, it is suggested to use the services of experts, possessing specialist knowledge in the field of social psychology and linguistics'¹¹⁶ The stated goal is 'to avoid wrongful interpretation of a text'.¹¹⁷ However, if such use of expert evidence may be helpful in cases, involving specific religious or ethnic context (e.g. radical Islamism), it's often used, when language in question is indeed comprehensible to anyone. This can be showcased by a investigation into a mass fight in St.Petersburg, when a Kyrgyz teenager was attacked. Initially linguistic expert declared that some explicit words, directed at them victim weren't xenophobic and hence didn't constitute incitement, while other can be both xenophobic or not, since they were caused by personal conflict, had an 'ironic meaning', while a

113URL:<http://mezak.livejournal.com/132168.html>

114Ibid

115Ibid

116URL:<http://www.medialaw.ru/publications/zip/116/4.htm>

117Ibid

derogatory urge to kill was merely a call to fight¹¹⁸. However, the subsequent expert investigation has not only found words in question to be inciting to ethnic hatred, but also found them to constitute an attempt to overthrow the constitutional order of the state¹¹⁹.

Both the 'social group' and expert evidence problem were central to the case in Tatarstan, where a district court sentenced a leading journalist and former press secretary of the local president Irek Murtazin to 21 month of a minimum-security prison. The initial prosecution involved Murtazin erroneously stating that the local president Mintemir Shaymiev has died, which lead to his being charged with libel. However, the final verdict of the court also convicted Murtazin under Art.282 for his publishing a book about Shaymiev. The judge established that Murtazin, 'while aiming to incite hatred towards a social group... divided the society into two differing categories – the population and authorities of Tatarstan'¹²⁰ The concept of a social group was derived by the court from works of social functionalist Robert K.Merton. Trial judge used his definition of a social group as 'a number of people, interacting in a certain way, perceiving themselves and being perceived by others as the members of the group'¹²¹. According to the verdict, Murtazin 'propagated ideas, degrading human dignity, damaging trust and respect of the population towards the authorities, develops the conviction of social inequality of citizens and contributes towards inciting hatred towards the authorities'¹²². The means by which the defendant achieved his goal were described by the court as 'negative associative characteristics' and 'sarcasm', author associating himself with 'talented writers', while associating Shaymiev with Stalin and Brezhnev, while using means of 'open' and 'covert aggression'¹²³ The verdict further underscores that the author's conclusions were based solely on his personal judgement¹²⁴. Such conclusions were based on psycho-linguistic expert testimony, which was tasked with establishing 'semantic meaning' of the content¹²⁵ From the outset, one has to note that ECtHR in *Lindon & Otchakovsky-Laurens* stated that 'the reputation of a politician, even a

118URL:<http://www.nr2.ru/incidents/246723.html>

119URL:<http://www.openinform.ru/news/xeno/28.02.2011/23422>

120URL:<http://www.memo.ru/2009/12/29/2912091.htm>

121Ibid

122Ibid

123Ibid

124Ibid

125Ibid

controversial one, must benefit from the protection afforded by the Convention'¹²⁶, while in *Bladet Tromsø* it recognized that the duty of the media to impart information must be exercised ' in a manner consistent with its obligations and responsibilities'¹²⁷ and in *Radio France and Others* the Court ruled that 'a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued'¹²⁸ However, what clearly differentiates this case from *Lindon & Otchakovsky-Laurens* and *Radio France* is that here responsibility for defamation was established by stealth with criminal incitement serving as a vehicle for it. Hence, the use of 'affiliation to any social group' causes even more concern, than in Terentyev's case.

First instances of British subjects being subjected to criminal persecution for incitement can be traced to 18th century criminal of sedition. E.g. in 1732 a newspaper publisher was convicted for publishing defamatory statements about Jewish immigrants from Portugal¹²⁹. An interpretation of sedition adopted as precedent in 1886 included, inter alia, 'exciting feelings of ill will and hostility between different classes of her Majesty's subjects'¹³⁰ However, in 1936 an attempt to bring to convict an Anti-Semitic publisher Arnold Leese for sedition failed and he was convicted only for common mischief.

Despite the apparent toughness of Public Order Act 1936, it didn't cover any written word. It was shown with vigor in a 1947 case *R. v. Caunt* against a publisher of *Morecambe and Heysham Visitor* from North Lancashire, whose newspaper published an anti-Semitic statement with connection with guerrilla war in Palestine¹³¹. The trial ended in acquittal¹³². The anti-paramilitary provisions of the 1936 Act remained largely dormant. According to the Solicitor-General for England and Wales, the only instance of the provision being used was in 1963, when prominent Far Right leaders John Tyndall and Colin Jordan were convicted for setting up a paramilitary Neo-

¹²⁶*Lindon & Otchakovsky-Laurens v. France*, Paragraph 25

¹²⁷*Bladet Tromsø and Stensaas v. Norway*, paragraph 59

¹²⁸ *Case of Radio France and Others v. France* (application no.53984/00), Paragraph 40

¹²⁹ *R v Osborne* (1732) 2 Swanst. 503.// Lester, A., and Bindman, G., *Race and Law*, Penguin Books, 1972: pp.345-346.

¹³⁰ *R. v. Burns* (1886) 16 Cox C.C. 355 at 360 // Stephen's Digest of Criminal law

URL:<http://www.duhaime.org/LegalDictionary/S/Sedition.aspx>

¹³¹ *Liverpool Assizes*, 17.11.1947 // E.Wade "Seditious Libel and the Press", *Law Quarterly Review* 64 (1948) pp.203-205

¹³² *Ibid*

Nazi group Spearhead and sentenced to 6 and 9 months in prison respectively¹³³. The provisions of the aforesaid act, affecting conduct at public assemblies, were of a more common use. Interesting in this respect is the trial for events of 1962 at the Trafalgar square, where neo-Nazis, headed by John Tyndall, found themselves under attack by counter-demonstrators¹³⁴. The courts had to confront directly with the issue of 'hostile audience'. The appellate court acquitted the defendants on the grounds that in spite of the speech being insulting, it wouldn't cause a public disorder by a 'reasonable audience'¹³⁵ Otherwise, the judge concluded, the court would essentially enforce a kind of 'heckler's veto'¹³⁶ However, the High Court quashed that judgment, concluding that the speaker must view the audience 'as it is'¹³⁷ Perhaps, one of the most important judgments, resulting from the 1936 Act, was a result of an action, set in a rather unusual environment. A case of person, walking onto the tennis court during the Wimbledon tournament to protest Apartheid in South Africa, went all the way to the House of Lords, where Lord Reid observed that 'vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting'¹³⁸

The application of a new criminal legislation pursuant to the 1965 and subsequent Acts was rather patchy. On the one hand, the efficiency of involving Attorney-General as a procedural safeguard can be questioned. E.g. According to Attorney-General Lord Goldsmith, from 1987 through 2004, only thrice did they refuse to allow charges to proceed¹³⁹. On the other hand, the total number of charges during the aforementioned period (65¹⁴⁰) seems to speak against the argument that criminal incitement provisions were being misused.. However, in practice the standard of sentencing has been rather lenient. Turning back to evidence, submitted to the House of Lords by Lord Goldsmith, it can be established, that out of 44 convicted during 1987-2004, 17 persons were sentenced to non-

¹³³Hansard Commons Debate 03 May 1965 vol 711 c. 1039

¹³⁴Twomey A. *Laws Against Incitement to Racial Hatred in the United Kingdom* // URL:<http://www.austlii.edu.au/au/journals/AJHR/1994/15.html>

¹³⁵Ibid

¹³⁶Ibid

¹³⁷*Jordan v Burgoyne* [1963] 2 QB 744, 749.

¹³⁸ [1972] UKHL 6; [1973] AC 854, 862 in Twomey, *supra*

¹³⁹House of Lords Hansard Vol. №669 Part №31 Column WA5

¹⁴⁰Ibid

custodial punishments, while 16 were sentenced to prison terms not exceeding 6 months¹⁴¹. In first ever case pursuant to the 1965 Act, a 17-year old Christopher Britton was convicted for posting an anti-immigrant leaflet at the door of the House of Commons member Sidney Bidwell. However, the appellate judge Lord Parker quashed the conviction, finding that Britton's motivation was not to incite hatred, but to influence a member of parliament¹⁴². This was a sign of things to come as the enforcement of the criminal provisions of the Act has proven to be difficult. In 1967 the jury acquitted members of 'Race Protection Society', whose defense successfully argued that the leaflets of the association weren't meant to stir hatred, but merely to inform the public¹⁴³. The verdict was seen by the members of the association as the legitimization of their activities¹⁴⁴. In a 1969 case *R. v. Hancock*, the court found that the publications that argued for the Blacks being deported, were neither insulting, nor threatening¹⁴⁵. In *R. v. Read*, the lawyers of the defendant, the leader of British nationalist movement, successfully argued that the insulting words, directed at various racial groups, were more likely to cause sympathy to them, rather than hatred¹⁴⁶. In another case, involving Read, the judge ordered the prosecution to be dropped as he found no proof that the defendant intended to stir hatred among his followers, who were already racist¹⁴⁷. This instances contrasted with successful convictions of minority groups members pursuant to the incitement provisions of the 1965 Act – e.g. those of Black Power leader Michael X and of the four members of Universal association of colored peoples¹⁴⁸.

The difficulty of proving actual intent to incite has lead to the requirement being removed following the adoption of the 1976 Race Relations Act, despite the initial outrages of prominent experts – e.g. Lord Hailsham asserting that a dropping the requirement of proving intent, was a 'constitutional outrage and an undermining of our principles of the criminal law'¹⁴⁹ the Hence, the main challenge

141Ibid

142*R. v Britton* [1967] 2 QB 51

143Lester, A., and Bindman, G., *Race and Law*, Penguin Books, 1972: pp. 369-70

144Ibid

145*R v Hancock*, The Times 29 March 1969

146*The Times*, 7 January 1978

147Bindman, G., 'Incitement to Racial Hatred in the United Kingdom: Have We Got the Law we Need?' // Coliver, S. (ed.), *Striking a Balance*, University of Essex, 1992: p. 261.

148The Times, 9 November 1967; 29-30 November 1967

149 House of Lords Hansard, 15.11.1976, Vol. 377, col. 1092, cited in Twomey supra

to the courts was now to establish whether words or actions were threatening, abusive or insulting and whether the defendant meant them to be so. In 2001 case before the High Court, involving the conviction pursuant the 1986 Act for defacing of the American flag, the standard for compatibility with Art. 10 of the Convention was established as 'whether the accused's conduct went beyond legitimate protest and whether the behaviour had not formed part of an open expression of opinion on a matter of public interest, but had become disproportionate and unreasonable'¹⁵⁰. Applying the standard in case involving a BNP member, the same court ruled that if

'...an accused's conduct was insulting and that he intended it to be, or was aware that it might be so, it would in most cases follow that his conduct was objectively unreasonable, especially where, in the aggravated form, the prosecution have proved that his conduct was "motivated (wholly or partly) by hostility towards members of a religious group based on their membership of that group"¹⁵¹.

Following the adoption of the 1976 Act, a number of high-profile Neo-Nazis has been convicted for incitement. E.g. in November 1984 National Front leaders Joe Pearce and Ian Anderson were charged with 'conspiracy to distribute and publish literature likely to stir up racial hatred' in relation to party youth publication *Bulldog*¹⁵². A month earlier, similar prosecution has been initiated against the editor-in-chief of the party's main publication, *National Front News*, Martin Wingfield¹⁵³. Anderson was eventually found not guilty, while Pearce sentenced to one year in prison¹⁵⁴ and Wingfield was fined 1,300 pounds, which he didn't pay, resulting in 3 months of prison for contempt of the court.¹⁵⁵ In 1985 the incitement provisions allowed to imprison the most high-profile Neo-Nazi of the United Kingdom – John Tyndall¹⁵⁶. His imprisonment lead Tyndall to ponder the need for the Far Right to alter the discourse:

...one of the major causes of our being found guilty was an editorial in the May 1985 issue of *British Nationalist* dealing with the South African situation, in which certain races were referred to in terms of superiority and inferiority... we must therefore advise that the use of such terms as 'superior' and 'inferior' in description of different racial groups should in future be regarded as treading on thin ice... The second of the items used against me which must be considered as a possible cause of conviction was an article printed in the August 1984 issue... affirming the belief that there existed a global race war and that in that war there could be no neutrals... It would probably be not overstepping the bounds of 'legality' in the future to use the expression 'race war', or indeed to admit that such a thing is in progress...

¹⁵⁰*Percy v. DPP* [2001] EWHC 1125 (Admin)

¹⁵¹*Norwood v. DPP* [2003] EWHC 1564 (Admin)

¹⁵²*National Front News*, 1984, #61, p.1

¹⁵³*Ibid*

¹⁵⁴*National Front News*, 1986, #73, p.2

¹⁵⁵*National Front News*, 1985, #72, p.1

¹⁵⁶ <http://www.searchlightmagazine.com/index.php?link=template&story=343>

What would, on the other hand, not be prudent would be to suggest: (1) that the race war is the responsibility of any specific racial group and (2) that in such a war Whites should take up a position of defence of their own side... One other item is likely to have contributed to my own conviction... contained decidedly unfavourable references to the standards of morality achieved by certain racial groups. Quite clearly, such outright condemnation of the morality of any identified racial group must now be regarded as 'dangerous', although it still should be possible to say that standards of morality do differ between differing races and that is an argument against the proposition that they should be integrated together¹⁵⁷.

Subsequently, the discourse indeed changed as evidenced by the following caveat on the front pages of National Front News:

‘Our racialism is not derived from a negative hatred of other races, but from a positive love, pride and belief in the qualities, character and future of our own people... Not only are we opposed to racial hatred, we also condemn racial violence... Not only is racial violence morally indefensible, it's also counter-productive as it only serves to criminalize the racist cause¹⁵⁸

However, what if state prosecution of the Far Right was the blessing in disguise for them? That's the argument, which Lester and Bindman make, noting that one of the effects of the Race Relations Act was that racist propaganda was now couched in more moderate tones¹⁵⁹. They note that an unfortunate consequence is that this has led to a wider audience and a deeper effect upon public opinion, than insulting or abusive racist words¹⁶⁰. If this was evident in 1970s, the situation is even clearer nowadays. A showcase of it is the ideological evolution of the primer Far Right group in the UK – the British National Party, which switched its focus from being primarily a racist and anti-Semitic group to opposing Islam. As the BNP leader Nick Griffin explicitly said, ‘I used to think that they (riots in Northern English towns) were a racial problem and that made me a racist. During the past few years, I came to the conclusion that as West Indians, Sikhs and Hindus usually don't behave in this way, there must be another reason, which makes me a religionist...’¹⁶¹. The ideological shift also reflected a shift in personal fortunes of Mr.Griffin. In 1998 case *R. v. Griffin* the future leader of the British National Party was unanimously found guilty by jury on incitement charges due to his publication in *The Rune* magazine, denying Holocaust¹⁶². However, the subsequent high profile case, involving Mr.Griffin, turned out to be a failure for prosecution. A

157Spearhead, 1986, #214, pp.5-6

158National Front News, 1986, #74, p.2

159 Lester, A., and Bindman, G., *Race and Law*, Penguin Books, 1972: p. 374.

160 Ibid

161 Nick Griffin interview for Channel4, uncut version URL: http://www.youtube.com/watch?v=_Hzq7OHn9iI

162<http://www.vho.org/aaargh/engl/RvsGRIFFIN.html>

police investigation was opened following a BBC undercover investigation, aired in June 2004, which included Griffin calling Islam 'a wicked, vicious faith' at a BNP event. In December of that year charges were brought against five BNP members, including Griffin¹⁶³. In February 2006, the jury returned a verdict, finding Griffin not guilty on four out of eight charges with jury hung on four other charges¹⁶⁴. At a subsequent retrial in November 2006, Griffin was found not guilty¹⁶⁵. The verdict was faced with fierce reaction from top levels of political elite. E.g. Chancellor of the Exchequer Gordon Brown said that 'Any preaching of religious or racial hatred will offend mainstream opinion in this country. "We have got to do whatever we can to root it out from whatever quarter it comes. "And if that means we have got to look at the laws again, we will have to do so»¹⁶⁶ Indeed, the problem seems to be not the lack of laws, but the difficulty of enforcing them in the face of ever more sophisticated propaganda. However, the courts were seemingly ready to face the challenge. E.g. in *Norwood v. D.P.P.* the slogan 'Islam out of Britain' in front of burning Twin Towers in New York was found constituting incitement to racial hatred¹⁶⁷, while in *Kendall v. D.P.P.* the court upheld the conviction of a person for holding a poster, showing three black man and a slogan 'Illegal Immigrant Murder Scum'¹⁶⁸.

Despite the apparent similarity, the pattern of application of incitement provisions in Russia and the U.K. is markedly different. While Russia experienced a spike in number of prosecutions and convictions since 2002, in the U.K. the numbers have been lower, highlighting a more cautious approach by the authorities. Despite it, both in Russia and the U.K. the severity threshold is currently lacking, creating a possibility of abuse of legislation. Certain cases in Russia point out to the fact that this possibility has been used, helped by the vague provision on the 'affiliation to any social group'

¹⁶³BNP leader held by police over racist remarks // The Guardian, 15.12.2004

¹⁶⁴Retrial ordered after Griffin walks free // The Guardian, 03.02.2006

¹⁶⁵URL:http://news.bbc.co.uk/2/hi/uk_news/england/bradford/6135060.stm

¹⁶⁶URL:http://news.bbc.co.uk/2/hi/uk_news/politics/6137722.stm

¹⁶⁷ *Norwood v DPP* [2003] EWHC 1564 (Admin)

¹⁶⁸ *Kendall v DPP* [2008] EHC 1848 (Admin)

On the face of it, British incitement legislation would seem more problematic. It lacks a requirement for prosecution to establish criminal intent, establishes tougher penalties and operates in a wider concept of public space. On the contrary, the Russian incitement legislation in the form of Art.282 of the Criminal Code on the face of it looks like a genuine attempt to distinguish between violent and non-violent extremism. However, the problematic definition of ‘affiliation to any social group’ creates the potential for overbroad use, which is seized by law enforcement. In some instances the law is being used for purposes, which seem well outside of the ambit of the original legislative intent. This has the potential of unraveling the very legitimacy of anti-extremist legislation. In both Russian and British legislation the severity threshold is visibly lacking, being left at the discretion of the courts. A proposed introduction of additional clause to Art.282 for incitement to actual violence would be a welcome change.

Chapter III. Additional instruments of militant democracy

3.1. Overview of the system of the additional instruments of militant democracy in Russia

Perhaps, the most important event in the development of the system of additional instruments of militant democracy in Russia has been the adoption of Prevention Extremism Law of 2002. Before that the system essentially represented a sporadically enforced patchwork of regulation without clear definitions. E.g. the Federal Law of May 19, 1995 establishes as a policy goal of Russian Federation ‘to fight the instances of Fascism’¹⁶⁹ and obliges the authorities ‘to take all the necessary measures to prevent creation and activities of Fascist organization on the territory of the country’¹⁷⁰. On the other hand, presidential decree of March 23, 1995 asks the Russian Academy of Sciences to define what Fascism actually is¹⁷¹.

Prior to 2002, anti-extremist provisions existed in the following spheres of law: a) media law; b) civil society legislation; c) political parties and electoral legislation. The principal act in the area of Media Law – the Mass Media Law of 1991 prohibited media outlets from advocating:

...overthrow of the authorities, violent change of the constitutional order of the state or violation of territorial integrity, incitement of ethnic, class, social, religious intolerance and strife, promoting war¹⁷²

Consistent breach of an obligation to refrain from the abovementioned statements could’ve lead to the ban of an outlet by a court order with a power of preliminary suspension in the hands of federal media authority¹⁷³. Civic Organizations Federal Law of 1995 prohibited creation and activities of civic organizations, whose goals or actions were aimed at:

169 Federal Law of May 19, 1995 #80-FZ // Sobranie Zakonodatelstva Rossiiskoi Federatsii, 1995, #21, st.1928

170 Ibid

171 URL: <http://base.garant.ru/10102720/>

172 Gosudarstvo protiv radikal’nogo natsionalizma, p.78

173 Ibid, p.79

...violent change of the constitutional order and violation of the integrity of the Russian Federation, undermining state security, creation of armed groups, inciting social, racial, ethnic or religious strife¹⁷⁴

Violation of these terms could've lead to preliminary suspension or (in cases of persistent breach) liquidation of an organization, both of which required court orders¹⁷⁵. Political Parties Federal Law of 2001, proscribed creation and activities of political parties, whose goals or actions were aimed at:

...violent change of the constitutional order and violation of the integrity of the Russian Federation, undermining state security, creation of armed and paramilitary forces, inciting social, racial, ethnic or religious strife¹⁷⁶

Violation of these terms could've lead (following official warnings) to preliminary suspension or ban of either the party or its regional branch¹⁷⁷. In case of the party the ban had to be issued by the order of the Supreme Court of the Russian Federation¹⁷⁸. Both Civic Organizations and Political Parties Laws contained important caveats that 'advocating social justice didn't amount to incitement of social strife'¹⁷⁹ Finally, Electoral Law prohibited agitation, which contained:

...advocacy of violent seizure of power, violent change of constitutional order and violation of the integrity of the Russian Federation... incitement of social, racial, national, religious hatred and division¹⁸⁰

Violation of these terms could've lead to the withdrawal of registration of a candidate or a slate of candidates pursuant a court order¹⁸¹.

The case for the adoption of the Prevention of Extremism Law, introduced by the President in April 2002, was argued in terms of inadequacy of the existent legislation¹⁸². The law defined extremism as actions by civic and religious organizations, other associations, mass media or individuals, aimed at:

violent change of constitutional order and violation of the integrity of the Russian Federation;
undermining the security of the Russian Federation;
seizure or usurpation of authority;
creation of illegal armed formations;
terrorist activity;
incitement of racial, ethnic or religious hatred, and social hatred associated with violence or calls for violence;

174 Ibid

175 Ibid, p.80

176 Ibid, p.81

177 Ibid, pp.81-82

178 Ibid, p.82

179 Ibid, pp.79, 81

180 Ibid, p.84

181 Ibid

182 URL: http://www.akdi.ru/gd/PLEN_Z/2002/06/s06-06_d.htm

humiliation of national dignity;
 riots, hooliganism and vandalism motivated by ideological, political, ethnic, racial or religious hatred or enmity, as well as motivated by hatred or hostility towards any social group;
 propaganda of exclusivity, superiority or inferiority of citizens on grounds of their religious, social, racial, ethnic, religious or linguistic identity
 promotion and public display of Nazi symbols or insignia or those symbols, which resemble them to the point of being unrecognizable;
 incitement to commit the abovementioned actions;
 financing of the abovementioned actions...¹⁸³

In 2007 this list has been amended to include, inter alia,

obstruction of lawful activity of state authorities, local governments, electoral commissions, public and religious associations or other organizations connected to violence or the threat thereof;
 publicly accusing a public official of Russian Federation or subject of the Russian Federation of committing a crime during the performance of their duties, provided that the accusation is knowingly false¹⁸⁴;

Hence the law underwent a major shift towards regarding extremism not only as an action, aimed at obstructing civil rights and social cohesion, but also against authorities in a wider sense of the word. Defining extremism as ‘obstruction of lawful activities of the authorities’ can be challenged as being too vague. At the same time, protection of public authorities from libel doesn’t seem to fit the purpose of militant democracy. Crucially, the 2007 amendments may have influenced the modus operandi of law-enforcement and the courts, which assumed a wider interpretation of criminal incitement to social strife in order to protect authorities from perceived threats (see Terentyev and Murtazin cases above).

A crucial trait of the Prevention of Extremism Law is its interconnectedness with other legislation, uniting a previous patchwork of regulation into a single system of militant democracy, including criminal, media and electoral law. E.g. it established a connection between the acts, done by an individual in capacity as a head or a member of head body of an organization, and the organization being declared extremist. Pursuant to the law, if such a person makes an extremist statement, the organization has to rescind it within 5 days, otherwise it would be deemed evidence of extremist activities of the organization¹⁸⁵. This requirement can be viewed as compatible with the ECtHR position in *Refah* where it held that ‘...acts and speeches are imputable to a party unless it distances

183 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=37867;fld=134;dst=100017>

184 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=76617>

185 Ibid

itself from them'¹⁸⁶, although the timeframe may seem too short. The law empowers public prosecutors to initiate action in courts for the ban of an organization if it was twice within 12 months subjected to warnings for extremist activities¹⁸⁷ or if its activities constituted or threat to constitute:

violation of human or civic rights and freedoms, infliction of harm to individual citizens' health, environment, public order, public safety, property, legitimate economic interests of individuals and (or) legal persons, society and the state¹⁸⁸

While the latter provision can be interpreted as an attempt to establish a 'severity threshold', the wording seems too vague. The provision about two warnings within 12 months seemingly doesn't take into account the actual severity of infringements and whether can be judged as persistent breach of law beyond merely technical context. What makes provisions about the ban of organizations a subject of utmost importance is their connectedness with criminal law. New Article 282.2, introduced simultaneously with the Prevention of Extremism Law introduces criminal responsibility for violating a court ban of an extremist organization either by leading it or participating in it¹⁸⁹. Arts 282.2 contain a proviso to the effect that a person who voluntarily stops his participation in an extremist community shall be relieved of criminal liability unless a different corpus delicti is contained in his actions¹⁹⁰.

The workings of the system can be illustrated by two cases, concerning the bans of the National-Bolshevik Party (NBP) in 2007 and a Neo-Nazi 'Slavic Union' (SS) in 2010. The ban of NBP was effected by the decision of Moscow City Court on the grounds of 3 warnings, received by the organizations from the public prosecutors of three Russian regions in early 2007¹⁹¹. One of them concerned three suspected NBP members convicted under Art.282, while two others concerned criminal charges brought against suspected members of the organization¹⁹². The leader of NBP Eduard Limonov argued that in the first case the convicted members were actually his political

¹⁸⁶ Refah Partisi v. Turkey (Grand Chamber), paragraph 115

¹⁸⁷ URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=76617>

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ URL: <http://www.netadvocate.org/node/170>

¹⁹² Ibid

opponents within the NBP, while in the other two cases NBP members weren't yet convicted¹⁹³. The court dismissed the first argument on the basis that Limonov failed to disassociate himself and NBP from actions and statements of convicted members as required by the Prevention of Extremism Law¹⁹⁴. For the second argument the court held that 'existing legislation didn't set final conviction as a pre-requisite for a ban on organization'¹⁹⁵. In fact, one of the proceedings, which became grounds for the ban of NBP, ended in a pacific settlement¹⁹⁶. The court also stated that its actions were compatible with Art. 10 of the Convention¹⁹⁷. Following the 2007 decision, charges under Art. 282.2 have been brought against a number of former NBP members, who continued their political activities, despite them claiming that they did so as part of NBP reconstituted as new party 'Other Russia'¹⁹⁸.

In the case of SS, the grounds for effecting the ban were that activities of the organization constituted 'a real threat of personal harm, violation of public order, public security and the state'¹⁹⁹. The court substantiated this claim with 3 factors. First, 6 members of SS were convicted, *inter alia*, under Art.282 with verdict establishing their roles within the SS²⁰⁰. Second, criminal charges, including, *inter alia*, Art.282 have been brought against two SS members with prosecution establishing their connections with SS leader²⁰¹. Finally, SS website contained works by Adolf Hitler, emblems and insignia of NSDAP and Fascist Party of Italy which are deemed extremist by virtue of Prevention of Extremism Law itself²⁰². The SS case seems to represent an example of a more genuine risk assessment, although whether the risk was immediate as per Refah standard is questionable. Also it must be noted the use of evidence from an ongoing criminal trial as *prima facie* evidence in the ban proceedings seems rather questionable.

193 Ibid

194 Ibid

195 Ibid

196 See e.g. URL: <http://www.fontanka.ru/2007/11/28/123/>

197 URL:<http://www.netadvocate.org/node/170>

198 See e.g. URL:<http://www.sledcomspb.ru/node/2358>, URL: <http://nazbol.ru/rubr1/7675.html>

199 URL: http://www.supcourt.ru/stor_pdf.php?id=350612, p.3

200 Ibid, p.6-7

201 Ibid, p.8

202 Ibid, pp.9-10

Another key provision of the Prevention of Extremism Law allowed the authorities to declare ‘extremist’ print, audio and visual materials²⁰³. Subsequent dissemination of such materials would be subject to prosecution pursuant to the Misdemeanor Code²⁰⁴. The original version of the law allowed the court to issue such a declaration in case of:

- a) official materials of an extremist organization;
- b) materials, authored by those convicted for crimes against humanity;
- c) any other materials, containing elements of extremism as defined by the law²⁰⁵.

A 2007 revision of the law erased the explicit definition allowing the courts to declare extremist any materials either on request of public prosecutor or within the ambit of criminal, misdemeanor or civil process.²⁰⁶ This wide mandate seems allows to declare certain materials extremist, even if the investigating authorities have found no basis for instituting formal charges. E.g. in April 2009 a district court ruled that despite the investigation authorities dropping criminal charges, it could still declare materials extremist ‘in order to minimize their illegal informational and propaganda effect on Russian consumers’²⁰⁷

A 2007 amendment allowed instituting procedures for declaring materials extremist not only in the area, where publishing organization is situated, but also where they were found²⁰⁸. Firstly, decisions were often made by provincial courts, relying on experts with questionable knowledge of complex socio-political matters, key to understanding certain materials. E.g. in February 2008 a book by Imam Khomeini was declared extremist by a district court in Penza region²⁰⁹, the decision facing severe criticism from senior Muslim clerics²¹⁰. Secondly, in some cases district judges were unaware of far-reaching consequences of their decisions. E.g. in July 2010, a district court in Khabarovsk territory ruled to deny access all over Russia to Youtube (for displaying a previously banned video) and Web.Archive.Org (for containing copies of *Mein Kampf*)²¹¹. This ruling was later

203 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=62018;fld=134;dst=100082>

204 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=109326;dst=0;ts=312FD366E597296DB7D9486CBCC13CE6>

205 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=37867;fld=134;dst=100017>

206 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=76617>

207 URL: <http://www.netadvocate.org/taxonomy/term/246>

208 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=68273;fld=134;dst=100008>

209 URL: <http://www.minjust.ru/ru/activity/nko/fedspisok/>

210 See e.g. URL: http://religion.ng.ru/politic/2008-07-16/4_book.html

211 URL: <http://www.sova-center.ru/misuse/news/persecution/2010/07/d19426/>

modified by the territory court to be more specific²¹². Responsibility for disseminating extremist materials is not always foreseeable. E.g. in March 2011, public prosecutor office of Perm territory filed misdemeanor charges against Internet user for citing *Mein Kampf*, despite the fact that citations have been posted five years ago, while the statute of limitations for such a charge is 2 months²¹³.

Indeed, policing the Internet has from the outset become one of the most controversial aspects of the Prevention of Extremism Law. Initial legislative draft maintained a provision that read:

‘In case of posting of extremist materials in generally accessible information-telecommunication networks, public prosecutor’s office shall request the administrator (moderator) of a website in the Russian sector, or a provider in international sector to remove the aforesaid materials within 24 hours. In case of non-compliance, the website may be blocked by a court order...’²¹⁴

However, a final draft omitted this language and instead phrased the wording in a more vague language. It stated that there exists a general prohibition of using network for extremist activities with instruments of responsibility established by both Prevention of Extremism Law and communications legislation²¹⁵. Difficulties of policing extremism on the Web were highlighted by several cases, involving mass media. In two instances, state authorities attempted to prosecute internet media outlet for comments left on their websites. In one of those instances, the authorities blamed a regional news agency for allowing an extremist comment on their website, arguing that they ought to have instituted pre-moderation²¹⁶. However, the courts dismissed that argument and released the agency from responsibility, establishing that

‘the fact that readers’ comments may be submitted on a forum without pre-moderation, doesn’t contradict the law and can’t be by itself considered an extremist activity’²¹⁷

In other instance, the internet agency in question was able to reach an out-of-the-court settlement²¹⁸.

A 2010 resolution of the Supreme Court recognized the problem and established that editors of a website, registered as a media outlet, are to be freed from responsibility for ‘comments of readers

212 URL: <http://www.sova-center.ru/misuse/news/2010/09/d19719/>

213 URL: <http://www.sova-center.ru/misuse/news/persecution/2011/03/d21206/>

214 Gosudarstvo protiv radikal’nogo natsionalizma, p.89

215 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=76617>

216 URL: <http://www.sova-center.ru/racism-xenophobia/docs/2007/01/d9952/>

217 Opređenje Verhovnogo Suda R.F. 51-G06-21 ot 12.09.2006, accessible at URL: <http://www.sova-center.ru/racism-xenophobia/docs/2007/01/d9952/>

218 URL: <http://www.sova-center.ru/misuse/news/persecution/2008/08/d13943/>

are published without prior moderation (at readers' web-forum of such website)²¹⁹, and if a regulating authority claims that the comment in question is violating law, editing staff 'has the right to edit or delete'²²⁰ it. In subsequent litigation

'the courts should find out where there any claims from officials regarding this information on forum, as well as whether the editorial deleted or edited the comments that initiated the issue on bringing the editorial into account'²²¹

Another issue, concerning mass media and Prevention of Extremism Law is its specifically stated liability for publishing extremist materials or extremist activities. The law applies to the media outlets the same procedure as to the organizations – i.e. in case of either creating a specific risk receiving two warnings for extremist activities within 12 months a media outlet can be liquidated by a court order²²². In some instances the aforementioned warnings were received for content, which clearly falls within the standard established by the ECtHR in *Jersild* – i.e. that

punishment of a journalist for assisting in the dissemination of statements made by another person in an interview ... should not be envisaged unless there are particularly strong reasons for doing so²²³

E.g. in August 2008 a media regulator issued a warning to a regional newspaper for publishing fragments of a statement by a Far Right organization alongside a comment, calling for authorities to bring criminal charges against the organization²²⁴. The subsequent resolution of the Supreme Court however, recognizes the challenge and seems to incorporate principles of both *Jersild* and *Bladet Tromso* into national jurisprudence by stating the following:

When considering the question of abuse of the freedom of mass information, the court should consider not only the use in the article, TV or radio program of a word or expression (the wording) but also the context in which they were put (particularly the aim, genre and the style of the article, program or their specific part, if it is possible to view them as an opinion in the sphere of political discussion or a drawing of attention to the discussion of socially important matters, and what the attitude of the interviewer and/or the representatives of the editorial staff of the mass media towards the expressed opinions, judgments, statements is) ... The courts should take into consideration the fact that... Article 10 of the Convention... allows a greater scale of exaggeration and even provocation on condition that the society is not being misled...²²⁵

Electoral legislation is incorporated into the system of militant democracy by including two important provisions. First, bars from election those who are subject to a valid conviction for crimes

219 Resolution of the Plenum of the Supreme Court of the Russian Federation № 16 June 15, 2010 URL: http://vsrf.ru/vscourt_detale.php?id=6786

220 Ibid

221 Ibid

222 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=76617>

223 *Jersild v. Denmark* (1994), application no. 15890/89, paragraph 35

224 URL: <http://www.sova-center.ru/misuse/news/persecution/2008/08/d13940/>

225 Resolution of the Plenum of the Supreme Court of the Russian Federation № 16 June 15, 2010 URL: http://vsrf.ru/vscourt_detale.php?id=6786

of extremist thrust (e.g. Art.282) or even on misdemeanor charges of showing Nazi insignia or disseminating extremist materials²²⁶. Second, maintained from pre-2002 era, prohibits incitement in electoral campaigning²²⁷. It is the application of this provision, which raises questions, similar to the application of criminal law. Again, the concept of ‘inciting hatred towards a particular social group’ is problematic and its application seems disproportionate. E.g. in 2006 a slate of candidates in regional elections have been barred from standing for ‘inciting hatred towards a particular social group of civil servants’²²⁸. In the same year a candidate has been barred from standing in regional election for allegedly inciting social strife between ‘pessimists’ and ‘optimists’²²⁹. Finally, in 2010 a candidate at local election has been barred from standing for allegedly inciting social strife between ‘youth’ and ‘members of United Russia party’²³⁰.

My general conclusion is that Russian system of additional instruments of militant democracy is well developed, maintains connections between different spheres of law and is based on a specific legislative act – 2002 Federal Law on Prevention of Extremism. However, subsequent amendments to that law blurred the definition of extremism and shifted the focus towards activities against authorities contrary to the initially stated goal of protecting equality and civil rights. Provision on banning an organization doesn’t provide for a stringent risk assessment as per *Refah* standard, which is especially troublesome, concerning the possibility of criminal responsibility for violating the ban. Application of the law highlights problematic patterns in defining extremist materials and prohibition of incitement in pre-election campaigning.

3.2. Overview of the system of additional instruments of militant democracy in the United Kingdom

Unlike Russia, United Kingdom doesn’t seem to have a coherent system of additional instruments

226 URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=111952>

227 Ibid

228 *Opredelenie Verhovnogo Suda RF* ot 09.03.2006 #71-G06-8, URL: http://vsrf.ru/stor_pdf.php?id=138182

229 URL: <http://www.regnum.ru/news/717840.html>

230 URL: http://www.sova-center.ru/misuse/publications/2011/03/d21249/#_ftn2

of militant democracy. Perhaps the biggest omission is the lack of power to ban organizations and to enforce derivative measures from such bans. Successive governments declined to effect such measures beyond the specific context of Northern Ireland conflict. Davis contends that the approach in Britain is ‘not normally to ban named organizations’²³¹ His points out the following practical considerations – a ban is likely to have little practical effect on the activities of an organization or to deter people from joining; it’s difficult to identify the organization involved and to prevent it reconstituting itself under a different name; such a measure may also drive the organization ever deeper underground, making it harder to monitor and investigate its activities²³². Similar argument has been put forward by the British government to the Committee on the Elimination of Racial Discrimination, regarding Committee’s general recommendation XV of 17 March 1993. The government argued that not only banning racist groups, such as the British National Party, not only ‘would not be seen as in keeping with the long traditions of freedom of speech enjoyed in the United Kingdom’²³³, but also ‘almost certainly, be counterproductive’²³⁴ as ‘such action is likely to lead to greater publicity and support for the groups in question’²³⁵ The only two exceptions to the general rule are the wartime Defence Regulation 18B, which allowed the government to intern without trial active members of the British Union of Fascists and other German sympathizers and various proscriptions, concerning Northern Ireland (e.g. pursuant to Prevention of Terrorism (Temporary Provisions) Act 1974 and subsequent Acts). Both government interferences became subject of notable cases – *Liversidge v. Anderson* and *McEldowney v. Forde* respectively. *Liversidge* is notable for dissenting opinion of Lord Atkin, where doubted that the language of the Regulation gave the Secretary of State unconditional authority to detain, since the language ‘reasonable cause to believe’ didn’t provide such powers²³⁶. His famous argument was that ‘in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the

231 H.Davis Political freedom: associations, political purposes, and the law, p. 54

232 Ibid

233 thirteen periodic reports of States parties due in 1994 : United Kingdom of Great Britain and Northern Ireland. 05/12/1995. CERD/C/263/Add.7. (State Party Report) URL: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CERD.C.263.Add.7.En?Opendocument>

234 Ibid

235 Ibid

236 *Liversidge v. Anderson*, p.243

same language in war as in peace'²³⁷ One of other's Atkin's arguments, directly connected with our topic, was the doubt whether 'could he support an order against a subject who had been a member of an organization which the Home Secretary was satisfied was now within 18A (a) or (b) but had ceased to be for years and had genuinely disclaimed any sympathy with its present objects'²³⁸ Atkin's opinion, although a minority within the Judicial Committee, seems to influence the reasoning of the Privy Council in *Attorney-General v. Reynolds*. In this decision, the Council ruled that the emergency detention powers of a colonial governor must be 'reasonably justifiable and necessary'²³⁹ In *McEldowney* the appellant was persecuted for membership in 'a republican club', proscribed by the 1967 order of the minister of home affairs of Northern Ireland pursuant to the Civil Authorities (Special Powers) Act (Northern Ireland)²⁴⁰ and the House of Lords dismissed his appeal²⁴¹. Lord Hodson held the view that by proscribing 'republican clubs' the minister exercised his legitimate power to extend the list of 'admittedly unlawful organizations of a militant type', previously specified in the statute.²⁴² Lord Guest underscored the fact that the minister was acting pursuant to the Act of Parliament²⁴³. However, Lord Pearce in a dissenting opinion argued that the minister, had overstepped the bounds of the Act and that regulation in question was 'too vague and ambiguous'²⁴⁴, since 'the citizen ought to have been able to know whether he could or could not remain a member of his club without being subject to a criminal prosecution'²⁴⁵ Government later stated that

...powers of proscription as do exist in the United Kingdom are limited to organizations involved with terrorism connected with Northern Ireland. These are justified by the exceptional and violent nature of the threat²⁴⁶.

Another avenue of action by state against the Far Right, typical of post-1997 situation was the

237 Ibid, p.244

238 Ibid

239 *Attorney-General v. Reynolds*, p.656

240 *McEldowney v. Forde* [1971] A.C. 632, p.642

241 Ibid, p.665

242 Ibid, p.645

243 Ibid, p.650

244 Ibid, p.653

245 Ibid

246 Thirteenth periodic reports of States parties due in 1994 : United Kingdom of Great Britain and Northern Ireland. 05/12/1995. CERD/C/263/Add.7. (State Party Report) URL: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CERD.C.263.Add.7.En?Opendocument>

restriction of access to civil members to the members of the parties in question, despite the fact that they weren't banned or otherwise explicitly subjected to any restrictive state action. One of the reasons, prompting government action was the conclusion of inquiry by Judge McPherson into the murder of black teenager Stephen Lawrence and the subsequent police inaction. The McPherson inquiry report highlighted the problem of so called 'institutional racism', which contaminated the Metropolitan Police of London, other police services in the country, as well as the other state authorities²⁴⁷. The problem was described as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people²⁴⁸

The report called on the government that

‘the full force of the Race Relations legislation should apply to all police officers, and that Chief Officers of Police should be made vicariously liable for the acts and omissions of their officers relevant to that legislation’²⁴⁹

The government followed on this instructions by adopting Race Relations (Amendment) Act 2000, which declared ‘unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination’²⁵⁰ Previous Race Relations Acts of 1965 and 1976 excluded public authorities from their ambit. Civil servants were now obliged ‘to promote equality of opportunity and good relations between persons of different racial groups’²⁵¹. One of the subsequent effects of the Act has been a number of state agencies adopting regulations, which prohibited the employment of members of the Far Right organizations. First service to adopt such a practice has been the H.M. Prison Service. In August, 2001 Service director Martin Narey issued an instruction, which stated that ‘membership of any organization with racist philosophy, aims, principles or policies is prohibited’²⁵² Instruction was supplemented by a list of organizations,

247URL:<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-47.htm>

248 URL:<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.34>

249 URL:<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-47.htm>

250 URL:<http://www.legislation.gov.uk/ukpga/2000/34/section/1>

251 URL:<http://www.legislation.gov.uk/ukpga/2000/34/schedule/2>

252 Instruction 42/200URL:

psi.hmprisonservice.gov.uk/PSI_2001_042_staff_membership_of_racist_groups_and_organisations.doc

membership of which was prohibited for Prison Service members, which included the British National Party, National Front and Combat 18²⁵³. However, it was explicitly stated that the list ‘is not exhaustive’²⁵⁴ and ‘subject to regular review and amendment as necessary’²⁵⁵, which meant the possibility of including ‘any other group or organization promoting racism as defined in Stephen Lawrence inquiry’²⁵⁶. The document required current employees of the Prison Service to withdraw from racist organizations within a month and subsequently abstain from participating in their actions or face disciplinary procedures, while prospective employees had to submit a statement that they don’t belong to racist organizations²⁵⁷. The next public body to introduce staff policy, discriminating against Far Right, was the Police. In November 2003 the Association of Chief Police Officers (ACPO) issued a statement, declaring that ‘any membership of the British National Party is wholly unacceptable’²⁵⁸ and that ‘any police officer who becomes a member of the BNP will therefore render themselves subject of a misconduct investigation’²⁵⁹. In July 2004 the Chief Constables Council of the ACPO introduced a policy, whereby

‘no member of the police service, whether police officer or police staff, may be a member of an organisation whose constitution, aims, objectives or pronouncements contradict the general duty to promote race equality’²⁶⁰, which specifically included BNP²⁶¹.

Non-compliance with the policy was expected to result in a dismissal²⁶².

Finally, pursuant to a Statutory Instrument, issued under Art.50 of the Police Act 1996, the government directed policemen ‘not belong to any organisation specified or described in a determination of the Secretary of State’²⁶³, the motivation being ‘to root out police officers and recruits who may have racist views or may be perceived to have racist views’²⁶⁴. Secretary of State defined the list of proscribed organizations identically to the one adopted by the Prison Service²⁶⁵.

253 Ibid

254 Instruction 42/200URL:

psi.hmprisonservice.gov.uk/PSI_2001_042_staff_membership_of_racist_groups_and_organisations.doc

255 Ibid

256 Ibid

257 Ibid

258 URL:<http://web.archive.org/web/20031211003500/http://www.acpo.police.uk/news/2003/q4/BNP.html>

259 Ibid

260 URL: http://web.archive.org/web/20041220102902/http://www.acpo.police.uk/news/2004/q3/police_bnp.html

261 Ibid

262 Ibid

263 URL: <http://www.legislation.gov.uk/ukxi/2004/3216/regulation/2/made>

264 URL: http://www.legislation.gov.uk/ukxi/2004/3216/pdfs/ukxiem_20043216_en.pdf

265 Circular MRAI-6A3F8T

URL:<http://www.knowledgenetwork.gov.uk/HO/circular.nsf/WebPrintDoc/319A2EAC673EF7EC80256FB7003DC>

The next quasi-state body to take action against the Far Right has been the Church of England. In February, 2009 the General Synod of the Church adopted the resolution, declaring

‘that, whilst the police's general duty to promote race equality is underpinned by an Act of Parliament, the Church's general duty to promote race equality is underpinned by theology and scripture and rests ultimately on the Gospel’²⁶⁶ and requesting the House of Bishops to formulate and implement for the Church of England a policy comparable to that of ACPO²⁶⁷ On the other hand, the secretary-general of the Synod warned that

‘In relation to existing clergy the advice from the Legal Office is that a policy that was identical to that within the police service would not be enforceable under the Clergy Discipline Measure...Since the BNP is not a proscribed political party, it is lawful to be a member’²⁶⁸.

Requests for similar measures, having the effect of barring BNP members from certain professions, have been received by the government from certain public service unions. E.g. in March 2010 authorities turned a request to bar BNP members from teaching jobs as it would be a ‘political act’

²⁶⁹ However, measures denying employment to the members of Far Right aren’t limited to public agencies. The measure in question in one of the cases, outlined by me in the beginning of the work, was implemented by a private company. A transport company Serco Ltd. dismissed an employee – Arthurn Redfearn, who stood as a candidate for the BNP in the local election²⁷⁰. The dismissal was motivated both by concerns for health and safety of the passengers (who were mainly Asian) and the reputation of the company²⁷¹. Redfearn filed a complaint for race discrimination pursuant to the 1976 Race Relations Act, since he had no other legal avenues available and BNP at the time maintained a whites-only membership policy²⁷². He relied on so-called *Showboat* line of authority, since in *Showboat Entertainment Centre v. Owens*, it was established that the wording of the 1976 Act ‘on racial grounds’ may be interpreted to refer to the race of some other than the individual subjected to discriminatory treatment²⁷³. In February 2005 the employment tribunal dismissed the

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266 URL: <http://www.churchofengland.org/media/38960/gsmisc903a.pdf>

267 Ibid

268 URL: <http://www.churchofengland.org/media/38965/gsmisc903b.pdf>

269 Ministers rule out ban on BNP teachers // The Guardian, 12.03.2010

270 Serco Limited v. Arthur Redfearn [2006] EWCA Civ 659, p.2

271 Ibid

272 Ibid, p.3

273 *Showboat Entertainment Centre v. Owens* [1984] 1 WLR 384

complaint, establishing neither direct, nor indirect racial discrimination²⁷⁴ Employment appeals tribunal however remitted the case for rehearing due to lower tribunal ignoring the *Showboat* line of authority and failing to consider whether health and safety grounds were influenced by racial factor²⁷⁵. Serco appealed the case to the Court of Appeal, which held the application of *Showboat* in the case to be ‘too wide’²⁷⁶ and would turn ‘the policy of race relations upside down’²⁷⁷ as *Showboat* wasn’t intended to apply to the employer ‘who is not pursuing a policy of race discrimination or who is pursuing a policy of anti-race discrimination’²⁷⁸ The court accepted that that the decision to dismiss Mr. Redfearn ‘included racial considerations’²⁷⁹, however he ‘was treated less favourably not on the ground that he was white, but on the ground of a particular non-racial characteristic, shared by him with a tiny proportion of white population’²⁸⁰ Non-employment of BNP members was held as non-discriminatory in a few other cases. E.g. in *Baggs v. Fudge*, a BNP member challenged denial of a job interview on the grounds of religious discrimination, but the judge held that membership BNP doesn’t amount to either religion or a set of similar philosophical beliefs²⁸¹. In *H.M. Prison Service v. Potter*, the respondent attempted to challenge his denial of employment on the grounds of his BNP membership pursuant to the abovementioned Prison Service instruction²⁸². The basis of the challenge was the fact that the membership restriction applied only to white racist organizations and hence was racially discriminatory²⁸³. The appeals tribunal saw this conduct indeed as ‘direct discrimination’ in comparison with other racists, despite describing the prospects of being able to substantiate the claim as ‘very thin’²⁸⁴

The post-2000 of several British agencies, regarding the employment of members of Far Right organizations, raises a number of considerations. First, what is the basis for the inclusion of certain

274 *Serco Limited v. Arthur Redfearn* [2006] EWCA Civ 659, p.5-6

275 *Ibid*, p.6

276 *Ibid*, p.8

277 *Ibid*

278 *Ibid*

279 *Ibid*

280 *Ibid*, p.9

281 *Baggs v. Fudge*, Case #1400114/05 URL: <http://www.practicallaw.com/7-387-4217>

282 *HM Prison Service v Potter*, 2006 WL 4017712

283 *Ibid*

284 *Ibid*

organizations into the ‘black lists’ of Prison Service and the Police? While Combat 18 can be viewed as a criminal association both BNP and National Front, as stated by the Secretary-General of the Synod of Church of England, are legitimate political parties, freely taking part in elections. An argument, similar to the one made by Lord Pearce in *McEldowney*, can be advanced in favour of the opinion that inclusion of the BNP and National Front without sufficient justification is too vague of a policy. Also considered should be the decisions of ECtHR in *Glaserapp v. Germany*, *Vogt v. Germany* and *Kosiek v. Germany* all dealing with restriction of access to civil service as part of German interpretation of militant democracy. Both in *Glaserapp*²⁸⁵ and *Kosiek*²⁸⁶ the Court emphasized that there’s no free-standing right to access to the civil service and hence such interference is outside the competence of the court. However in *Vogt* a highly divided Chamber ruled that the situation is different, because it concerned dismissal from the civil service.²⁸⁷ The Court accepted in principle ‘that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded’²⁸⁸ However it argued that such a principle should be applied with flexibility, taking into the account the rank of civil servant²⁸⁹, actual security risks and conduct of the person, subjected to the interference²⁹⁰ Importantly, the Court also noted that a person in case was dismissed from civil service for the membership of the organization which wasn’t officially proscribed and operated legally²⁹¹. In a powerful dissent, 8 judges argued that despite being legal, the organization in question had programme which was incompatible with the constitutional order of the state²⁹². Hence, if *Vogt* is to be applied as a standard, it would raise two important considerations in respect of employment policy of both Prison Service and the Police: a) as to the basis of the restrictions, since neither of the organizations is officially proscribed; b) the proportionality of blanket ban, irrespective of the actual conduct of the person concerned. However,

285 *Glaserapp v. Germany* (1986), application no. 9228/80, paragraph 53.

286 *Kosiek v. Germany* (1986), application no. 9704/82, paragraph 39

287 *Vogt v. Germany* (1995), paragraph 44

288 *Ibid*, paragraph 59

289 *Ibid*

290 *Ibid*, paragraph 60

291 *Ibid*, paragraph 61

292 *Ibid*, Joint dissenting opinion of Judges Bernhardt, Golcuklu, Matscher, Loizou, Mifsud Bonnici, Gotchev, Jungwreit and Kuris

the government can make a strong argument, concerning the nature of the services, subjected to such a policy.

As stated from the outset, Britain lacks a coherent system of additional measures of militant democracy. Whether certain measures are indeed undertaken, they are of essentially of *ad hoc* nature and don't have a clear legislative mandate. Neither are they based on a particular judicial standard. *Liversidge*, *Reynolds* and *McEldowney* all dealt with deciding if a certain proscription is *ultra vires*, pointing out to the justifiability and necessity. However, no argument was made in such terms for singling out political parties BNP and NF along with essentially criminal Combat 18 in order to establish restrictions on access to civil service. Defense of such is even more complicated, if undertaken against the backdrop of ECtHR jurisprudence, *Vogt* in particular. This chapter deliberately omitted actions, undertaken by non-state actors (e.g. ASLEF or Equality and Human Rights Commission). However, what they illustrate is the lack of breadth in state action.

Hence, the Russian and British systems of militant democracy represent almost total opposites of each other. If a former is State-centered, the latter has insufficient state involvement.

Conclusion

The idea of militant democracy can be summarized as the need for democratic state to deny certain rights to the groups, aimed at destruction of democracy itself. While the concept of 'militant democracy' isn't universally accepted, it's widely used in both international instruments and national constitutions. Within the European context, the crucial document is Art. 17 of the European Convention for Protection of Basic Freedoms and Fundamental Rights. While initial jurisprudence of the European Commission and Court for Human Rights generally yielded to the member states' assessment of threat, more stringent standards have been developed by the Court in 1990s and 2000s in a number of cases from Turkey, Central and Eastern Europe. Crucially, in *Refah Partisi and Others v. Turkey*, the Court developed the standard for assessing the severity of threat to democracy.

Criminal legislation against incitement of hatred can be viewed as one the most important instruments of militant democracy. On the one hand, they are a potent weapon against violators. On the other, it underscores the state's vigilance in enforcing militant democracy. However, both for consistency with ECtHR jurisprudence and for the sake of its own legitimacy, incitement legislation must be proportionate to the goal pursued. Both British and Russian incitement legislation were drafted with the proportionality goal in mind. In British case evident is the intent of the legislator to connect the criminal liability with harm principle by following the judicial lead in adopting the standard of 'threatening, abusive or insulting' in relation to suspected incendiary words or materials. In Russian case the legislator attempted to distinguish between violent and non-violent incitement, instituting different sanctions for the former and the latter. However, subsequent legislative amendments blurred the difference between these and other anti-extremist provisions of the Criminal Code. Russian legislation proscribes a much wider sphere of conduct, proscribing not only racist and chauvinist incitement, but also sexist and, crucially, 'on the basis of affiliation to any social group'. Different from the language in the Constitution and of unclear legislative intent, this

provision has been in several instances used in the interests of protecting the state institutions and individual politicians. Such enforcement of the law damages not only the proportionality, but also the legitimacy of the legislation. In British case, the relation between incitement legislation and politics is different. While early incitement legislation proved generally ineffective in curbing racist speech, later it led to imprisonment of several leading Far Right politicians and led to modifications in the language of the latter.

State-centered approach is even more evident when reviewing the additional instruments of militant democracy in Russia. Amendments to principal anti-extremist law shifted the focus of legislation from protecting the equality and vulnerable minorities to protecting the state institutions and individual politicians. Similar problems to the enforcement criminal legislation are abundant in the implementation of additional instruments of militant democracy in Russia. The controversial concept of 'affiliation to any social group' leads to problematic instances especially in electoral law and definition of extremist materials. On a positive note, Russian legislation creates a coherent system, based on a specific law and connecting anti-extremist measures in different areas of law. It is this system, which is obviously lacking in the British case. Essentially, additional measures of militant democracy in the U.K. consist from a patchwork of individual measures by state and private actors without a solid basis either in legislation or judicial practice. Government's lack of desire to proscribe certain groups is contradicted by its singling out those groups for discriminatory treatment. While such treatment is hard to challenge via existing anti-discrimination legislation, it's doubtful whether it could be sustained under the ECtHR standard.

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